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Chapter 16 Tendencies and Problematical Aspects of Criminal Liability of a Legal Person in Lithuania

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Abstract This chapter deals with the tendencies of criminal liability of a legal person in Lithuania during the independence period (2002–2019) and certain problematical issues of criminal liability of a legal person related to the conditions of criminal liability, the release from criminal liability and sentencing rules. The analysis is based on the jurisprudence of the Constitutional Court of Lithuania and the Supreme Court of Lithuania, as well as on the doctrine of Lithuanian criminal law.

16.1 Introduction

Criminal liability of a legal person is quite a new institute in criminal law of Lithuania and other European countries. It should be noted that the opinion of European states on criminal liability of legal entities has changed substantially over the last 30 years. The legal systems of the UK (England and Wales, Scotland, North Ireland (Delmas-Marty and Vervaele 2000a, pp. 857–945, 947–988; Delmas-Marty and Vervaele 2000b, pp. 989–999) and Ireland (Fitzgerald 2011; Gobert 2011) established the criminal liability of legal entities a long time ago; the continental legal systems, however, did so only in recent years (Portugal—1984, Sweden—1986, France—1994, Finland—1995, Denmark—1996, Belgium—1999, Slovenia—1999, Hungary—2001, Estonia, Malta, Lithuania—2002, Croatia, Poland, Bulgaria—2003, Austria—2006) (Durdevic 2006, pp. 79–80; Mitgutsch 2011, p. 209).

Criminal liability of a legal person in Lithuania was introduced in 2002 for several crimes when the Lithuanian parliament ratified the Council of Europe's 27/01/1999 Criminal Law Convention on Corruption (Valstybės žinios, 2002, No. 23-851; 23-853). The prerequisites for criminal liability of legal persons stem directly from the aforementioned Convention (and, also, the European Union legal

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acts). It should be noted that the Constitutional Court of Lithuania by its decision of 8 June 2009 (CCL, 2009, No. 69-2798) has recognised that the criminal liability of legal persons does not expostulate with the Constitution of Lithuania. One of the main arguments on which the Court's conclusion was based was that there is no direct requirement in the Constitution that only a natural person may be a subject of criminal liability and that a legal person cannot be a subject of such liability.

It should be noted that case law statistics on criminal liability of a legal person shows interesting tendencies—the biggest number of suspected (accused) legal persons was just before the adoption of the Constitutional Court of Lithuania decision: in 2008—119 (sentenced—only 56), 2009—112 (67) and 2010—110 (56). Therefore, the lowest number of suspected (accused) legal persons was after the Constitutional Court of Lithuania decision: in 2014—33 (sentenced—30), 2015—35 (18) and 2016—29 (18). A large number of accused legal persons and a small number of sentenced legal persons allow us to assume that the interpretation of the conditions of criminal liability of a legal person is lacking a consistent and sufficiently united approach in prosecution and court practice.

Various aspects of the criminal liability of a legal person (such as grounds and conditions for the liability, criminal punishments and other penal measures applicable to a legal person, etc.) have been discussed in the doctrine of Lithuanian criminal law, but most of the publications were written a long time ago (for example, Drakšas (2003), Ligeikaitė (2003), Abramavičius et al. (2005), Prapiestis and Baranskaitė (2012), Sinkevičius (2003), Soloveičikas (2006), Švedas (2011), Zajanchauskienė (2013) and Abramavičius (2019), etc.). It may be noted that during the independence period of Lithuania, in both the doctrine of Lithuanian criminal law and case law, one of the conditions for criminal liability of a legal person—‘the commission of a criminal act for the benefit or in the interests of a legal person’—is still under discussion; the doctrine of Lithuanian criminal law and case law further developed and expanded the approach to the problem of guilt of a legal person and discussed the possibility for a legal person to apply institutes of release from criminal liability and to provide for special sentencing rules for a legal person etc. Recently, criminal liability of political parties has become a subject of debates. For example, a draft law, which additionally included political parties and religious communities in the list of legal persons that are not responsible for criminal acts, was proposed. Furthermore, the question of whether the reorganisation of a political party eliminates the criminal liability of the reorganised political party has been addressed in court practice (the Supreme Court of Lithuania (hereinafter also SCL), No. 2K-7-304-976/2016). All these aspects show that the institute of criminal liability of a legal person in Lithuania has not been fully formulated during the period of independence (2002–2019), and there is lack of consistent jurisprudence of the Supreme Court of Lithuania and lower court practice and lack of its detailed interpretation in the doctrine of Lithuanian criminal law.

This chapter, based on the jurisprudence of the Constitutional Court of Lithuania and the Supreme Court of Lithuania, also on the doctrine of Lithuanian criminal law, deals with the tendencies of criminal liability of a legal person in Lithuania during the independence period (2002–2019) and certain problematical issues of criminal

liability of a legal person related to the conditions of criminal liability of a legal person, the release of a legal person from criminal liability and sentencing rules.

16.2 General Provisions on the Criminal Liability of a Legal Person in Lithuania

There are two opposing views in the doctrine of Lithuanian criminal law concerning the essence of criminal liability of legal persons. Some authors claim that criminal liability of a legal person derives from individual criminal liability (Sinkevičius 2003, p. 141; Piesliakas 2006, p. 314). Other authors recognise that criminal liability of legal persons is a kind of self responsibility and a legal person is an independent subject of a crime (Soloveičikas 2006). Authors of this chapter assumed that the first opinion is more reasoned. Firstly, criminal law provisions make it possible to state that in the absence of a criminal act committed by a natural person, it is impossible to punish a legal person for the criminal act. Furthermore, a legal person cannot commit criminal acts on its own. This argument was confirmed by the Supreme Court of Lithuania, which in several cases, having found that the identified natural persons did not commit crimes, has concluded that the criminal liability of the legal persons could not be exercised either (SCL, No. 2K-87/2013, 2K-539/2013). Secondly, a natural person is the subject of all criminal acts provided in the Criminal Code of Lithuania (2000, No. 89-2741, hereinafter CC) and a legal person may be responsible only for some criminal acts committed by natural persons. Thirdly, by acknowledging that a legal person is an independent subject of a criminal act, the legislator has also recognised that legal regulation should also be in place for other institutes of criminal law associated with legal persons as subjects of a criminal act (for example, release from criminal liability or criminal punishment, sentencing rules, etc.) (Švedas 2011).

Such concept of criminal liability of a legal person may be also indirectly confirmed by the provisions of the Code of Criminal Procedure of Lithuania (2004, No. 37-1341, hereinafter CCP). For example, Art. 387 of the CCP provides that ‘if the proceedings for criminal acts were initiated separately for a legal person and a natural person, such criminal acts shall be investigated together’.

The Supreme Court of Lithuania has stated that the CC provides for the following conditions for the criminal liability of a legal person: (1) a legal person shall be held liable solely for the criminal acts the commission whereof is subject to the liability of a legal entity as provided for in the Special Part of the Criminal Code, (2) a criminal act was committed by a natural person who is legally related to the legal person, (3) the criminal act is committed for the benefit or in the interest of the legal person (SCL, No. 2K-7-8-788/2018, 2K-7-30-788/2017, 2K-7-28-303/2017).

16.2.1 *The Scope of Criminal Acts for Which Legal Persons May Be Held Liable Under the CC*

A legal person shall be held liable solely for the criminal acts the commission whereof is subject to the liability of a legal person as provided for in the Special Part of the CC. At the beginning, legal persons in Lithuania could have been punished only for several crimes related to corruption. The list of criminal acts for which legal persons may be punished has been enlarged by 60 criminal acts in the new CC in 2003. Between 2003 and 2013, the list of criminal acts subjecting legal persons to criminal liability was enlarged by 50 new criminal acts. There were up to 110 criminal acts provided in the CC for which legal persons may be punished in 2013. This list has been composed mostly as a result of the national implementation of the international treaties of Lithuania and EU secondary law requirements.

Currently (June 1, 2019), the Special Part of the CC consists of 32 chapters and 273 articles. These articles of the Special Part of the CC provide 453 *corpus delicti* of criminal acts. Meanwhile, the criminal liability of a legal person is provided in 135 articles of the Special Part of the CC for 242 *corpus delicti* of criminal acts. The criminal liability of a legal person provided in 101 articles of the Special Part of the CC is directly based on the requirements of international treaties of Lithuania and EU legal acts, thus the criminal liability of a legal person in 34 articles—the initiative of the national legislator. There are some articles of the CC that provide criminal liability for a legal person on the basis of both requirements of international treaties of Lithuania and EU legal acts in Lithuania, for example legalisation of property obtained by criminal means (Art. 216, CC), passive and active corruption (Art. 225 and 226, CC), trading in influence (Art. 226, CC), *criminal association* (Art. 249¹, CC), *etc.*

There is not a single article that provides criminal liability of a legal person in seven chapters of the Special Part of the CC (for example, Chapter 27, ‘Crimes and Misdemeanours Against a Person’s Social Rights’; Chapter 40, ‘Crimes and Misdemeanours Against Public Order’; Chapter 41, ‘Crimes and Misdemeanours Against the Activities of a Civil Servant or a Person Performing the Functions of Public Administration’; *etc.*). Four more chapters of the Special Part of the CC (for example, Chapter 16, ‘Crimes Against the Independence, Territorial Integrity and Constitutional Order of the State of Lithuania’; Chapter 39, ‘Crimes and Misdemeanours Against Traffic Safety’; *etc.*) provide one article (and one *corpus delicti* of criminal acts) from which criminal liability of a legal person may arise.

Most of the articles and *corpus delicti* of criminal acts (which established criminal liability of a legal person) are provided in Chapter 35, ‘Crimes Against Public Security’, 12 articles and 29 *corpora delicti* of criminal acts; Chapter 31, ‘Crimes and Misdemeanours Against the Economy and Business Order’—11 articles and 22 *corpora delicti* of criminal acts; Chapter 38, ‘Crimes and Misdemeanours Against Environment and Human Health’—14 articles and 21 *corpora delicti* of criminal acts; and Chapter 28, ‘Crimes and Misdemeanours Against Property, Property Rights and Property Interests’—12 articles and 25 *corpora delicti* of criminal acts.

Separately, Chapter 33, ‘Crimes and Misdemeanours Against Civil Service and Public Interest’, which provides only four articles with criminal liability of a legal person, could be mentioned. However, these articles cover even 16 *corpora delicti* of criminal acts.

The list of criminal acts (for commission of which criminal liability of a legal person may arise) includes negligent homicide (Art. 132, CC); severe health impairment caused through negligence (Art. 137, CC); threatening to murder or cause a severe health impairment to a person or terrorisation of a person (Art. 145, CC); trafficking in human beings (Art. 147, CC); exploitation for forced labour or services (Art. 147¹, CC); rape (Art. 149, CC); satisfaction of sexual desires by violating a minor’s freedom of sexual self-determination and (or) inviolability (Art. 151¹, CC); grooming of a person under the age of 16 years (Art. 152¹, CC); purchase or sale of a child (Art. 157, CC); exploitation of a child for pornography (Art. 162, CC); violation of inviolability of a person’s correspondence (Art. 166, CC); incitement against any national, racial, ethnic, religious or other group of persons (Art. 170, CC); forgery of an election or referendum document or use of a forged election or referendum document (Art. 173, CC); fraud (Art. 182, CC); misappropriation of property (Art. 183, CC); acquisition or handling of property obtained by criminal means (Art. 189, CC); illegal enrichment (Art. 189¹, CC); destruction or alteration of information about the management of author’s rights or related rights (Art. 193, CC); unlawful interception and use of electronic data (Art. 198, CC); smuggling (Art. 199, CC), deceit of customs (Art. 199¹, CC), unlawful possession of goods subject to excise duties (Art. 199², CC), unlawful failure to bring goods or products outside of the Republic of Lithuania (Art. 200, CC); unauthorised engagement in economic, commercial, financial or professional activities (Art. 202, CC); unlawful activities of a legal entity (Art. 203, CC); use of another’s trademark or service mark (Art. 204, CC); production, storage or handling of counterfeit currency or securities (Art. 213, CC); unlawful use of an electronic means of payment or data thereof (Art. 215, CC); legalisation of property obtained by criminal means (Art. 216, CC); fraudulent management of accounts (Art. 222, CC); trading in influence (Art. 226, CC); abuse of office (Art. 228, CC); influence on a witness, victim, expert, specialist or translator (Art. 233); criminal association (Art. 249, CC); recruitment for terrorism (Art. 250², CC); *etc.*

It should be noted that this list of criminal acts is constantly expanding. It is true that such expansion in principle is based on the implementation of international law or EU legislation. For example, since the beginning of 2019, CC amendments have entered into force, allowing a legal person to be prosecuted for theft and robbery (Criminal Code Amendment Law, 2018, No. 20234). These amendments were based on the implementation of the requirements of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

On the other hand, currently, the criteria by which the legislator has identified, on its own initiative, criminal acts for which criminal liability of a legal person has been provided are unclear (or even unjustified). So the authors of this chapter would like

to propose a discussion concerning the abolition of the list of criminal acts for which a legal person is responsible and concerning establishing the rule that a legal person may be responsible for the commission of any criminal act provided in the CC. It should be noted that the majority of judges and scientists during a survey in 2017 agreed with such proposal (Švedas et al. 2017, p. 137).

16.2.2 *The Grounds of Criminal Liability of a Legal Person*

The CC provides two grounds for the criminal liability of a legal person—mandatory and discretionary. A legal person shall be held mandatorily liable for the criminal acts committed by a natural person solely where a criminal act was committed for the benefit or in the interests of the legal person by a natural person acting independently or on behalf of the legal person, provided that he/she, while occupying a managing position in the legal person, was entitled (1) to represent the legal person or (2) to take decisions on behalf of the legal person or (3) to control the activities of the legal person.

There is still one problematic issue related to the mandatory ground of criminal liability of a legal person. As it was mentioned, a criminal act must be committed by a natural person while occupying a managing position in a legal person. The managing position in a legal person is determined by the management structure of the legal person, the competence of management bodies, the peculiarities of management, etc. However, there are legal situations where a legal person is legally led by one person and in fact by another person. In this case, such duties must be established not only according to the legal status of the person in the legal person but also according to the functions actually performed by the person. This means that if the criminal act is committed by the actual head of a legal person, even without any legal status in the legal person, this does not in itself exclude the criminal liability of the legal person.

The discretionary ground for the criminal liability of a legal person may be realised in two instances. First, a legal person may be held liable for criminal acts also where they have been committed by an employee or authorised representative of the legal person as a result of insufficient supervision or control by the person occupying a managing position in the legal person. Second, a legal person also may be held liable for the criminal act committed by another legal person representing him/her or being under control when a criminal act was committed for the benefit of the above-mentioned legal person as a result of an order or permission, or insufficient supervision or control by the person occupying a managing position in the legal person. In these cases, a legal person may be prosecuted only when it is held that such liability is reasonable. The prosecutor and the court, when ascertaining whether it is possible to prosecute, should take into account the person's organisational culture, the management principles applicable for the prevention of criminal acts, acceptance of the consequences of the criminal act, the relationship between the legal person and the employee who has committed the

criminal act indicating whether the criminal act and the consequences may be associated with the legal person, etc.

16.2.3 *The Content of the Condition That 'Criminal Act Was Committed for the Benefit or in the Interests of the Legal Person'*

The jurisprudence of the Supreme Court of Lithuania has focused on the interpretation of the conditions of criminal liability of a legal person—the commission of a criminal act for the benefit or in the interest of a legal person and related problematic aspects. The Supreme Court of Lithuania has clarified the difference between 'benefits' and 'interest', the content of material and immaterial benefits, how to assess the situation when a legal person receives a certain asset benefit (for example, avoiding taxes) due to the criminal act of the head of this legal person, etc.

First of all, the Supreme Court of Lithuania stressed that the condition that the act was committed for the benefit or in the interest of the legal person should not be formally established—it must be based on a detailed examination of the circumstances of the case as a whole (SCL, No. 2K-277/2014).

Second, the Supreme Court of Lithuania has found that the wording 'for the benefit of a legal person' means that the criminal act of a natural person must be aimed at the material benefit of a legal person. In addition, it is irrelevant whether such a legal person has received a real benefit from the criminal act. Meanwhile, 'interests' usually mean pursuing the other aspirations (not necessarily material) of a legal person. Thus, the concept of 'interest' is broader than the concept of 'benefit' and may include the latter. When establishing this legal person's criminal liability condition, it must be proved that the legal person has benefited (will benefit) from the criminal act of the natural person and that the benefit is recognised by him/her (for example, illegally withdrawn money is used for the interests of the legal person, etc.) or that the legal person has an interest in the commission of the criminal act and its consequences (for example, the commission of a criminal act has a real benefit to the legal person's business prospects and its competitiveness or the image of the legal person, increased the legal person's market advantage (SCL, No. 2K-7-28-303/2017), gave the legal person some advantages over other companies competing in public procurement tenders (SCL, No. 2K-620-677/2015 and 2K-P-95/2012), etc.). In addition, the Supreme Court of Lithuania has concluded that a legal person may both obtain 'benefits' from and have 'interests' in the same criminal act committed by a head of the legal person. For example, it was found that material benefit was obtained by receiving additional funds by avoiding or reducing tax payments, and by the immaterial benefit (interest) of the legal person against other honest (taxpaying) companies (SCL, No. 2K-345/2011).

Third, the Supreme Court of Lithuania has solved the question of the fact that due to the criminal act of a head of a legal person, which may be regarded as acting for

the benefit of the legal person, since certain material benefits are also received by the legal person. It was established that the head of the legal person embezzled company assets for personal purposes, and it did some damage to the legal person (442 226 LTL). Objectively, the legal person, by committing a criminal act, also benefited since it avoided VAT and other taxes amounting to 83,122 LTL. The Supreme Court of Lithuania stated that all these criminal acts should be assessed not separately but in conjunction with each other; also, the fact must be taken into account that after a natural person has committed all criminal acts, the final result of all of these criminal acts (including those from which the legal person has objectively benefited) may be pecuniary damage to the legal person. In this case, such criminal acts, even if they have been objectively and profitably received by the legal person, may not be considered acts for interests of the legal person within the meaning of the CC (SCL, No. 2K-P-95/2012).

Furthermore, case law has dealt with factual situations where a legal person is used as a cover for criminal activity. A question may arise as to whether it is possible to impose criminal liability on the legal person in this case since it may be assessed that there is no condition for the criminal liability of a legal person—a natural person acts for the benefit of a legal person. However, having established that a legal person acts as a cover for criminal activity, without which this activity could not have been carried out, it was also found that the legal person has obtained a specific economic advantage, such as the financial turnover of the company through the proceeds of a crime (SCL, No. 2K-7-30-788/2017).

16.3 Peculiarities of Criminal Liability of a Legal Person

16.3.1 *The Guilt of a Legal Person*

The jurisprudence of the Constitutional Court of Lithuania and the Supreme Court of Lithuania (SCL, No. 2K-582/2010) has recognised that the criminal liability of a legal person derives from the liability of a natural person. Moreover, the Constitutional Court of Lithuania has stated that while establishing the criminal liability of a legal person, the legislature must also take into account the specificity of a legal person as a subject of legal relations, which, *inter alia*, means that the legal person shall be held liable only when the corresponding natural person commits a crime for the benefit or in the interests (or only for its benefit) of the legal person.

The CC does not directly specify the guilt of a legal person as a condition for the liability of a legal person. On the other hand, when interpreting the provisions on the liability of a legal person, the provisions, *inter alia*, of Art. 2 of the CC shall be taken into account. This article provides that a person shall be liable under criminal law only if he or she is guilty of committing a criminal act. Thus, when interpreting the legal regulation established in Art. 20 of the CC, along with the regulation established in Art. 2 of the CC, it can be concluded that a legal person is liable for

a criminal act committed by a natural person only in the case of guilt of that legal person.

The specificity of a legal person, as a subject of legal relations and a subject of liability, also determines the fact that the activity of a legal person is inseparable from the activity of a natural person, which acts on behalf of that legal person; therefore, the guilt of the legal person is also linked to the criminal act of the natural person who acts on behalf of and for the benefit or in the interests of the legal person. Furthermore, the specificity of a legal person as a subject of a criminal act, i.e. the fact that it is an independent subject of legal relations having legal capacity and capability, independent name and organisational integrity or that its property is separated from the property of its participants but that it is a participant of legal relations through the natural persons who act on its behalf, also implies the specificity of its guilt. The guilt of the legal person should be linked to the guilt of the natural person who acts for the benefit or in the interests of the legal person. Thus, the legal regulation established in the CC does not create preconditions for the legal person's liability without guilt, also does not mean that the guilt of the legal person should not be proved according to the procedure established by law and recognised by an effective court judgment.

It should be noted that the Constitutional Court of Lithuania has stressed that, although a legal person's guilt is closely related to the individual's guilt, they are not identical and it cannot be automatically transferred to the legal person. It must be concluded that the guilt of a natural person who has committed a criminal act is only a presumption of the guilt of the legal person. Therefore, it is acceptable, according to the jurisprudence of the Supreme Court of Lithuania, that the proven guilt of a natural person who has committed a criminal act is only a prerequisite for establishing the guilt of a legal person (SCL, No. 2K-269/2010 and 2K-582/2010).

When deciding whether a legal person is guilty within the meaning of criminal law, the relationship between the offender—a natural person—and the criminal act committed by him and a legal person must be taken into account. Legal acts regulating the activities of a legal person, organisational structure, the formation and implementation of activities, etc. can disclose a legally significant relationship between a criminal act committed by a natural person and a legal person.

It is important to determine whether the owner(s) of the legal person has(have) ensured effective control over the activity of the natural person or has(have) tolerated his/her activity etc. In determining the relationship between a criminal act committed by a natural person and a legal person, it is necessary to assess whether the criminal act committed by the natural person and the consequences thereof were of interest to the owner(s) of the legal person. The fact that the owner(s) of the legal person did not know, did not encourage or created conditions for the unlawful actions of a natural person is one of the circumstances in which the liability of a legal person is determined. Thus, the legal person's owner or the main shareholders of a legal person must understand and promote or perceive and tolerate the criminal acts of a natural person. Such a reciprocal relationship between the perpetrator—a natural person—and a prosecuted legal person must be established. The absence of such a relationship may mean that the natural person acted independently and arbitrarily in

committing the criminal act. In such a case, the prosecution of a legal person would imply an objective prosecution (i.e. criminal liability in the absence of its guilt). The Supreme Court of Lithuania has stated that the mere commission of a criminal act for the benefit or interest of a legal person in the absence of a relationship between that legal person and such a criminal act and the natural person who committed it cannot be regarded as a sufficient basis for the criminal liability of a legal person (SCL, No. 2K-P-95/2012). In the doctrine of Lithuanian criminal law, a similar position has also been expressed, according to which in order to hold a legal person guilty, two elements should be present: (1) there must be a relationship between the criminal act of the head of the legal person and the legal person's business strategy (for example, all appropriated money was used for unreported payments etc.), and (2) the legal person's owner, who is responsible for strategy formulation and compliance with the duty of care, should promote the illegal conduct, be aware of or at least tolerate such behaviour (for example, recognising crime results *ex post facto* etc.) (Švedas 2011, p. 100). The jurisprudence of the Supreme Court of Lithuania and the doctrine of the Lithuanian criminal law have led to some discussion when Lithuania's accession to the Organisation for Economic Co-operation and Development (OECD) and, at the same time, accession to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions were under consideration. Experts have argued that it was not necessary to establish the guilt of a legal person for the purposes of this Convention when determining the criminal liability of a legal person.

It should be noted that the doctrine of a legal person's guilt in the jurisprudence of the Supreme Court of Lithuania during the last years was developed in the direction of its liberalisation. The Supreme Court of Lithuania has stated that the lack of interest of the shareholders in the activities of the director of the company does not in itself mean that the natural person acted independently and arbitrarily and that there is no connection between the natural person (offender) and the prosecuted legal person. The Supreme Court of Lithuania concluded that such non-interest of the shareholders of the company in or their indifference to the activity of the director contradicts both the rights and obligations of the shareholders of the company and creates conditions for unjustifiable tolerance of the actions of such leading natural person and at the same time does not eliminate the guilt of the legal person for the commission of the criminal act (SCL, No. 2K-7-28-303/2017).

16.3.2 *Principle of Non Bis in Idem and Criminal Liability of a Legal Person*

Constitutional jurisprudence and the doctrine of Lithuanian criminal law make it possible to conclude that the criminal liability of a legal person and natural persons exists only for one and the same criminal act committed by a natural person (Švedas 2011, p. 98). This situation might lead to a violation of the constitutional and

criminal law principle of *non bis in idem*, which prohibits being punished twice for the same criminal act, however, only in the case when the natural person and the legal person are one and the same venture. The principle of *non bis in idem* prohibits the punishment of the same person for the same criminal act for the second time, but this principle does not deny the possibility of a criminal liability for different subjects of a criminal act—natural person and legal person. In each case, the assessment of whether there has been a breach of the *non bis in idem* principle must be assessed in the light of the whole relevant facts of the case (SCL, No. 2K-7-183-648/2017).

First of all, the criminal liability of a legal person eventually creates property damages for its shareholders, but those damages, according to the jurisprudence of the Supreme Court of Lithuania, cannot be recognised as a criminal punishment provided under criminal law; therefore, there is no legal basis to conclude that in this situation, the principle of *non bis in idem* was infringed (SCL, No. 2K-269/2010).

Second, if a natural person commits a criminal act for the benefit of a legal person of limited civil liability, the natural and legal person's criminal liability for the same criminal act normally does not infringe the principle of *non bis in idem*. In this case, the imposed sanctions relate to two different legal persons, as the property of the joint-stock company for their shareholders and even a single shareholder are alien (SCL, No. 2K-596/2012). The case law deals with the situation differently when a legal person is of unlimited civil liability. The Supreme Court of Lithuania has concluded that the imposition of a fine on an individual company (legal person of unlimited civil liability) under the Law on Tax Administration of Lithuania (2004, No. 63-2243) and a criminal punishment on the owner of this company for the commission of a criminal act constitute a violation of the principle of *non bis in idem* since the tax and criminal liability arose from the same material facts, the tax process was completed by a final decision, the fine imposed was paid, the essence of an infringement of the the tax law, the nature and severity of the penalty (fine) were not taken into consideration and the tax process involving the individual company was equivalent to a criminal procedure (SCL, No. 2K-7-183-648/2017). It should be noted that the Finnish Supreme Court refused to uphold the conviction of the legal person in a similar case because 'the legal person and individual person was identical in financial terms and financial obligations' (Tolvanen 2009, p. 352).

Thus, even a small jurisprudence of the Supreme Court of Lithuania points to a conclusion that courts have to pay particular attention to a possible violation of the principle of *non bis in idem* when criminal liability is imposed on a legal person for the criminal act committed by a natural person.

16.4 Punishments and Measures Applicable to a Legal Person for the Commission of a Criminal Act, Sentencing Rules and Release of a Legal Person from Criminal Liability

Under Art. 43 of the CC, the following criminal punishments may be imposed upon a legal person for the commission of a criminal act: (1) a fine, (2) restriction of the operation of the legal person or (3) liquidation of the legal person. Upon imposing a criminal punishment upon a legal person, a court may also decide to announce this judgement to the media.

According to Art. 47 of the CC, the amount of fine to be imposed on a legal person shall be from 200 up to 100,000 basic amounts of punishment and penalty (BAPP). The concrete amount of a fine for a committed criminal act shall be specified by the court when imposing criminal punishment.

Restriction of the operation of a legal person is one of the medium stringency criminal punishment, which may be imposed on a legal person for a period of 1 year to 5 years. Article 52 of the CC provides that ‘when imposing the restriction of operation of a legal person, a court shall prohibit the legal person from engaging in certain activities or order it to close a certain division of the legal person’. The doctrine of the Lithuanian criminal law has emphasised that restriction of the operation of a legal person may not be applicable to the inner division of a legal person that is designated to serve the legal person (for example, finance or personal management department etc.) (Abramavičius et al. 2004, p. 300).

The liquidation of a legal person is the most severe criminal punishment imposable upon a legal person. The doctrine of Lithuanian criminal law has emphasised that this punishment should be imposed in exceptional cases, for example where a legal person acts as a cover for criminal activity (Abramavičius et al. 2004, p. 301). Article 53 of the CC provides that ‘when imposing the liquidation of a legal person, a court shall order the legal person to terminate, within the time limit laid down by the court, the entire economic, commercial, financial or professional activity and to close all divisions of the legal person’.

It should be noted that the doctrine of Lithuanian criminal law (Švedas 2014, p. 166) has rightly pointed out that the CC must be supplemented with new kinds of criminal punishments recommended by EU legal acts for legal persons, such as (a) exclusion of the legal person from entitlement to public benefit or aid and (b) placing the legal person under judicial supervision, which meets the principle of proportionality and the requirements of EU legal acts to impose effective, proportionate and dissuasive punishments (measures) on legal persons for criminal acts committed.

Furthermore, according to the CC, a legal person may also be subject to penal measures—confiscation of property or extended confiscation of property. Since the beginning of July of 2019, the CC amendments have entered into force, allowing a legal person to be sentenced additionally to one more penal measure—payment of

contribution in the amount of 100 up to 2000 BAPPs to the fund for crime victims. This penal measure may be imposed only together with the punishment of restriction of the operation of a legal person (Criminal Code amendment law, 2019, No. 2019-11177). On the other hand, such an amendment to the CC is not sufficiently substantiated and complete since a penal measure of the same kind—compensation for or elimination of property damage—cannot be imposed on a legal person.

Meanwhile, neither Art. 43 of the CC, which provides for the types of punishment imposed on a legal person, nor Art. 47 of the CC, which regulates the imposition of a fine, nor Arts. 52 and 53 of the CC, which respectively establish the essence of the punishments of restriction of the activity of a legal person and liquidation of the legal person and the rules for their application, provide any criteria on the basis of which a certain criminal punishment must be imposed on a legal person and according to which the size (if it is a fine) or the term and extent (if restriction of activity is imposed) of the criminal punishment must be established. The Constitutional Court of Lithuania, having evaluated this legal situation, has stated: ‘however, it does not mean that the legal regulation established in the said articles of the CC may be construed that the court, while imposing a punishment on the legal person, may not follow other norms of the CC and the principles consolidated therein, *inter alia*, the basic principles of sentencing (to take into account the degree of dangerousness of the criminal act, the reasons and objectives of the criminal act, etc.) which are provided in Art. 54 of the CC. Therefore, by the legal regulation consolidated in Art. 43 of the CC, one does not prohibit the court from taking into account the basic requirements of imposition of criminal punishments, *inter alia*, the rules of individualisation of criminal punishments, the rules of summation of criminal punishments, etc.’ (CCL, 2009, No. 69–2798).

On the other hand, basic requirements for the imposition of criminal punishments, rules for the individualisation of criminal punishments and special sentencing rules mostly are oriented towards the imposition of the criminal punishment on a natural person. Taking into account the ruling of the Constitutional Court of Lithuania that ‘the legislature, while regulating the relations linked to the criminal liability of a legal person, must establish such legal regulation so that the court, while deciding on the question of criminal liability of a legal person, *inter alia*, the question of sentencing, could take into account all the circumstances, *inter alia*, the circumstances which increase or decrease the dangerousness of the criminal act committed by the legal person’ (CCL, 2009, No. 69–2798), it should be considered whether the CC could provide special rules concerning the imposition of the criminal punishment on a legal person.

It is true that currently the jurisprudence of the Supreme Court of Lithuania fills some gaps and clarifies the possibilities of applying special sentencing rules and institutes of release from criminal liability in the case of legal persons. For example, the Supreme Court of Lithuania has confirmed the possibility of applying a special sentencing rule that allows to reduce an imposed criminal punishment by 1/3 when a legal person has acknowledged its guilt. According to the Supreme Court of Lithuania, the appellate court did not violate the provisions of the CC in this case because it assessed the totality of the circumstances relevant for the sentencing of a legal

person and the individualisation of the criminal punishment imposed on such person. The appellate court has taken into account the fact that the legal person was sentenced for the first time, the established damages were fully compensated and the legal person fully acknowledged the guilt (it allowed to perform a shortened court investigation of evidence and expeditiously complete the process). In addition, the appellate court, reasonably applying Art. 64¹ of the CC, reduced the criminal punishment imposed on the legal person by 1/3 (SCL, No. 2K-164-895/2018).

Moreover, Chapter VI, 'Release from Criminal Liability', provides for seven kinds of release from criminal liability. Some of them (according to their essence and the conditions of application) are directly provided only for a natural person, for example release from criminal liability on bail (Art. 40, CC) etc. Meanwhile, other kinds of release from criminal liability (for example, release from criminal liability due to minor relevance of a crime (Art. 37, CC), release from criminal liability upon reconciliation between the offender and the victim (Art. 38, CC), etc.) may be applicable to a legal person too (even though the text of the above-mentioned articles of the CC did not directly provide for such possibility). For example, Art. 36 of the CC provides two independent grounds for release from criminal liability: (1) a person's act due to a change in circumstances has lost its danger, or (2) a person who committed a criminal act due to a change in circumstances has lost its danger. In both cases, such changes must affect person's conduct or personal features of the perpetrator, so that they allow the court to acknowledge that the person's act or the person that had committed the criminal act lost its danger. The application of Art. 36 of the CC is a discretionary right of the court, and therefore it may, on the basis of the circumstances of a particular case, release a person from criminal liability or refuse to apply the provisions of this article (SCL, No. 2K-92/2012). The Supreme Court of Lithuania has decided that a legal person may be released from criminal liability in accordance with Art. 36 of the CC (SCL, No. 2K-7-84/2012).

In 2017, several amendments to the CC concerning the conditions of criminal liability of a legal person were adopted. One of them provided that release from criminal liability of a legal person did not release from criminal liability a natural person who has committed, organised, instigated or assisted in the commission of the criminal act, as well as that a natural person shall be released from criminal liability or not be held liable for any other reason. In the authors' opinion in this chapter, this rule could not be interpreted so widely as to deny other necessary conditions of criminal liability (for example, the statute of limitations of a judgment of conviction (Art. 95, CC), since the Supreme Court of Lithuania has explained that the statute of limitations of a judgment of conviction is also applicable to a legal person and its term depends on the category of the crime committed by a natural person (SCL, No. 2K-489/2010). On the other hand, such provisions would allow to bring a legal person to justice in case the natural person (who has committed a crime for the benefit or in the interest of a legal person) dies during the criminal procedure before the adoption of the judgment.

16.5 Conclusions

Briefly summarising the chapter, the following main conclusions can be drawn:

1. The jurisprudence of the Supreme Court of Lithuania and the doctrine of Lithuanian criminal law show that the courts are experiencing the greatest difficulties in interpreting the conditions for a legal persons' criminal liability—whether the 'criminal act was committed for the benefit or in the interests of the legal person'—and in establishing the guilt of the legal person.
2. In the authors' opinion, consideration should be given to whether the list of criminal acts for which a legal person is responsible should be abolished, and the rule should be established that a legal person may be responsible for the commission of any criminal act provided in the Criminal Code.
3. The courts must pay particular attention to a possible violation of the *non bis in idem* principle when criminal liability is imposed on a legal person for the criminal act committed by a natural person.
4. Although the courts are sufficiently successful in filling the gaps related to the imposition of criminal punishment on a legal person or the release from criminal liability of a legal person, it is nevertheless advisable to consider whether the Criminal Code should contain specific rules on the imposition of criminal punishment on a legal person and a separate type of release from criminal liability of a legal person.

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