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Project to strengthen anti-corruption and anti-money laundering systems in the Czech Republic

Training Handbook on:
Liability of Legal Persons for Czech Law Enforcement Agencies

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1 EXECUTIVE SUMMARY

On 27 October 2011 the Czech Republic adopted a specific law on the corporate criminal liability, the Czech Act on Criminal Liability of the Legal Persons and Proceedings against them, n. 418/2011, hereinafter CLLPPT, which entered into force as of 1 January 2012. However, there has been little progress in the practical application of this law.

This training handbook provides an analysis of the general principle of the corporate liability, considering that it has been implemented in the national system in different ways, according to the national tradition, and in particularly to look into the Czech legal instrument. The goal of the handbook is to provide the practitioners with some tools to solve concrete situations that they could face in the implementation of the law.

The first part of the document provides an analysis of the basic principles of criminal liability of legal persons, a concept that in the centuries has always clashed with another basic principle of criminal law, "societas delinquere non potest". It goes through advantages and disadvantages in designing criminal corporate liability and acknowledges the different ways it has been built at national level, ranging from hybrid systems of administrative liability linked to the commission of a crime by a natural person, to systems of "pure" corporate liability.

The second part is a specific analysis of the Czech legislation and in particular of the above-mentioned CLLPPT.

After the analysis of the compatibility of the principle of corporate liability with the **legality principle** and **subsidiarity principle** in the Czech Republic, the provisions on the **imputability of the action** to the legal person, on the **territoriality** and on the **exclusion of liability** are considered.

The **offences** giving rise to corporate liability in the Czech Republic are listed in appendix 1.

The section continues with the analyses of the problem of **transferring the criminal liability** to a new company in case of dissolution of the responsible for the offence. This situation is a clear derogation to the general principles of criminal law for natural persons, but on the other hand easy way to escape the criminal liability for legal persons simply by closing the company and opening a new one have to be avoided.

A vast part of section 2 is devoted to **sanctions**. They are analysed with a division between financial and non-financial sanctions.

The final part is devoted to the **procedural rules** of the proceedings involving the liability of legal persons, with a specific focus on the **"ne bis in idem**" principle and on the **representation** of the legal person during the investigation and in trial.

The analysis of the rules on international cooperation concludes this chapter. This part of the law has been recently modified by the Act 104/2013 which entered into force on 1 January 2014.

This section of the manual is inspired by concrete cases drawn from the case-law of Courts.

In particular, several cases are taken from the Italian Supreme Court case-law, as Italy is one of the countries that have particularly developed case-law on corporate criminal liability, as a specific law has been established since 2001.

The issues concern cases where the corporate criminal liability does not occur in case of criminal offence committed by a natural person, cases where it occurs irrespective by the attribution of the criminal offence to a specific natural persons, the meaning of "criminal offence committed in the

interest of the legal person", even in case of group of companies, the issue of confiscation, of representation in trial, time limitation for the application of sanctions. The ECHR case-law is also analysed. In particular it involves cases where legal persons, convicted in the Member States on criminal offences, alleged violations of the fundamental rights enshrined in the Convention.

2 INTRODUCTION

The criminal liability of legal person is increasingly becoming an issue in the legal systems of the modern States. The involvement of legal persons in the economy has created an urgent need of facing and finding a solution to the potential problems, especially in case of damages created by the commission of infringements that in some cases can amount to criminal offences.

Several issues have been considered over the past recent years. Can a legal person be really criminally liable? Are the general principles of criminal law (for instance, the mens rea) applicable also to legal persons? Under which criteria can a criminal offence be attributed to a legal person? What kind of sanctions is applicable to them?

So far, each State has answered to such questions according to its national legal traditions. The international framework, developed by international organisations, has put forward common models of corporate liability and very often such international instruments have inspired national laws, but some divergences remain. The corporate liability model is not uniform in the world.

The Czech Republic has adopted a specific law on corporate liability in 2011; in such way they have joined the majority of other Member States of the Union and of the Council of Europe that had already adopted specific legislation on the issue.

The present manual intends analysing the Czech legislation in the framework of the international legal instruments, with a specific section devoted to the national legislation. It is mainly prepared for the use of practitioners, those who are called to the first application of the law in concrete cases and have to face possible unclear issues.

3 PART I - GENERAL PRINCIPLES

Objective:
The purpose of this part is to:
- ***Familiarise the reader (trainee) with the general principles of the liability of legal persons, the reader would by the end of this session have an understanding of the basic notions of the issue and to assess why the liability of legal persons is important***
- ***Present an overview of the international legal instruments establishing the liability of legal persons***

3.1 The importance of corporate liability[1]

Criminal liability of natural persons has existed for thousands of years. The concept of criminal liability of legal persons, in comparison, has only been recognized since the 19th century. Until that time the traditional principle "societas delinquere non potest" prevented the national legal systems from providing it. With the emergence of legal persons, it soon became clear that liability of natural persons alone was not sufficient and that liability for legal persons would also require regulation.
Moreover, it is necessary to underline that this concept has been differently developed in the national systems according to the local legal traditions. It ranges from Countries that foresee a real criminal liability of the legal persons (the Netherlands, for example)[2] to Countries that have built the liability of the legal persons as an administrative one deriving from the commission of a criminal offence (Italy[3] and Germany).

3.1.1 Pros and cons

The main arguments for the necessity of complementing the criminal liability of natural persons with the liability of legal persons are:

- Corporations are often involved in criminal offences either deliberately, or they tolerate an illicit culture; as such, they should be liable by the simple reason that **justice** requires so.
- Large corporations are decentralised; it is therefore hard, if not **impossible**, to find an individual responsible for a decision to commit an offence.
- It may be **unfair** to apportion blame to one specific individual when a complex, diffuse decision-making structure is involved.
- Several offences as social phenomena cannot be **prevented** if they are not tackled at one of their sources: corporate profit corrupting the state.
- Prevention at a corporation-level can be more **effective**: they tend to think more rationally about the economic risks of an offence than individuals do. Such risks can be considerable: American firms facing bribery-enforcement action lose on average 9% of their market value.6
- Corporate liability provides an **incentive** for legal persons to install measures to prevent the commission of offences.
- Corporations are frequent **vehicles** for the commission of offences such as payment of bribes, and are readily adaptable to the purpose. The use of elaborate financial structures and

[1] See the document *"Liability of legal persons for corruption offence"*, Training manual and reference source, CoE, 2014, prepared within the framework of the Eastern Partnership-Council of Europe Facility Project on "Good Governance and Fight against Corruption".

[2] J.A.E.VERVAELE, The criminal liability of legal persons and inside legal persons in the Netherlands, in the volume "Liability of the legal persons for fraud against the EU financial interests and cybercrime" - acts of the V seminar organised by the Union of European Lawyers and the Centro Studi di Diritto Penale Europeo; held in Milan on 29-31 January 2009", Bruylant, Bruxelles, 2009

[3] The debate on the kind of liability of legal persons in Italy is very wide; see the article by G. De Simone, The corporate criminal liability: legal nature and (objective) criteria of attribution ["La responsabilità da reato degli enti: natura giuridica e criteri (oggettivi) di imputazione"], in Contemporary penal law [Diritto penale contemporaneo].

accounting techniques to conceal the nature of transactions is common place; they thus need to be targeted.

- **Confiscation** of proceeds from corruption and other offences is facilitated if one includes corporate liability.
- Liability of legal persons can generate substantial amounts of money for the public **budget**; the general public, which in the end is the victim of corruption, thus receives some redress for the offence.
- In case of corruption, as bribes are not tax-deductible, the liability of a legal person for a bribe will regularly entail additional **tax** revenue for the state following a bribery investigation.
- **Civil liability** for the damages would not be enough. There is often **no plaintiff,** no cause or not enough evidence to make a civil claim for the overall economic damage done by the bribery. A competitor would have to prove that without the bribe he would have won the contract and the state that awarded the contract to the bribing company would have to prove that it would have awarded the contract to another bidder if it had not been for the bribe. The situation is even more complicated when competitors colluded with the bribing company in order to benefit from subcontracts with the bribing company.
- **Evidence** investigated for liability of legal persons is often useful for establishing liability of natural persons; often such evidence would not be available had there not been a proceeding against the legal person.

Civil liability of corporations such as for torts exists in all jurisdictions in the world. Administrative liability of enterprises for failure to fulfil their obligations towards State and municipalities is also relatively well known, especially in Central and Eastern European countries. Often it is this type of liability of legal entities for administrative offense based on the principal of strict liability. By contrast, **criminal** liability of legal persons is a fairly new concept and is not yet accepted in several Council of Europe or OECD member states. The most common arguments used against criminal liability of legal persons are the following:

- Only a **natural person** can be criminally liable because the connection between an offence and an abstract legal fiction cannot exist in terms of culpability ("nulla poena sine culpa"). This notion is also strong in ex-communist, non-capitalist countries with legal systems that did not recognize legal persons (apart from state corporations and organs).
- The **criminal justice** system is designed around a human being (safeguards around pre-trial detention, DNA-tests, etc.).
- The leading sanction of criminal law, **imprisonment**, could not apply to a legal person.
- The legal person and its honest owners and shareholders are also often a **victim** of the offence; an offence committed by the actions of a few within the company can damage the company's reputation and shareholder value.
- Prosecuting legal persons may be easier than natural persons, which in turn may lead to **neglecting** the prosecution of natural persons.

However, each of the above arguments can be countered:

1) If a legal person can be civilly and/or **administratively culpable** for safety or environmental violations, it follows that they ought to have enough "personality" to also be found criminally liable.
2) There are no known legal systems where the **constitution** or decisions by a **supreme court** or constitutional court would preclude the introduction of criminal liability of legal persons. Mechanisms of the **criminal justice** system that could only apply to human beings concerning their body do not naturally apply to legal persons (guarantees concerning pre-trial detention, DNA-tests, etc.) and do not need to do so, whereas all other mechanisms still would apply (right to remain silent, procedural rights, etc.).
3) There is no need for imprisonment; a monetary **fine**, for example, is a suitable and effective sanction for a legal person.
4) The legal person and the owners/shareholders would **profit** from corruption if it remained uncovered. Furthermore, they can take precautions against liability by installing effective prevention

measures. If they choose not to do so, then it is reasonable that the law ensures that there are repercussions should there still be relevant corruption.
5) Criminal liability of legal persons does not stand in the way of prosecuting natural persons involved. In fact, without the liability of legal persons, in many cases **nobody** would be necessarily held liable.

3.2 Liability of the head of business and of the legal persons: International framework

The general concept of criminal liability of legal persons had been known before, but the recent idea originates in particular in the area of the protection of the EU financial interests.

This sector (the so called "PFI sector") has always been essential to the existence of the Union and for the accomplishment of its purposes. Without effective protection of its own finances, the Union might not have the necessary funds not only to manage its administration, but also to grant them to the States or other beneficiaries. Indeed this is necessary for the realization of the great goals the Union intends to achieve – sometimes with mixed success – in Europe and worldwide; goals such as social cohesion and economic development, the progress of scientific research, environmental protection, the fight against poverty in third countries[4] etc.

Therefore, the protection of its resources has always been a priority for the Union, and since the conducts affecting such interest may constitute both irregularities at the administrative level, and criminal offenses, the relevant legislation at European level has always unfolded in between the so called First and Third Pillar in the European institutional framework after the Maastricht Treaty. In simple words, the First Pillar covered interventions in the Union's own policies that did not concern the criminal law; the Third Pillar, on the contrary, was just about facilitating the judicial cooperation in criminal law[5].

In the framework of the Third Pillar, a specific legal instrument for the harmonization of criminal law in this area was conceived and approved in 1995; it is the Convention on protection of the financial interests of the Union (PFI Convention).

The introduction of the 1995 PFI Convention recalls that offences covered by the PFI convention are often committed by legal persons; legal persons can be held liable if the offence can be referred to the decision-makers on the basis of the principle that *societas delinquere non potest*; in order to make the decision-makers also personally liable in homogeneous way across the EU, a specific provision at EU level is necessary

Also the Delmas-Marty report of 1992/93, a preliminary study for the PFI Convention, provided for the concept of liability of legal persons.

However, the way it has been introduced in the Member States of the Union shows different solution. An analysis of the national legal systems reveals a further need for harmonisation.
This is exactly what the European Commission remarked in its two reports on the implementation of the PFI Convention in 2004 and 2008.

It is also important noting that the PFI Convention, but also other international legal instruments, develop the concept of liability of legal entities in two directions:

[4] For a general picture on the extension and importance of the area of the EU financial interests, see the latest Annual Report from the Commission to the European Parliament and the Council on the protection of the EU financial interests – Fight against fraud 2014, COM(2015)386 final, of 31.7.2015

[5] *"The impact of the EU law on the Italian criminal procedure law in investigations on EU fraud"*, available http://free-group.eu, 2015

- Criminal liability of head of businesses
- Liability of legal persons

The criminal liability of head of businesses in fact concerns natural persons, but it completes the framework of the liability of legal persons, as the verification of the liability of a head of business can provide with more solid basis for finding the legal person guilty, although the two kinds of liability are separate and one is not necessarily the consequence of the other.
However, as the international instruments on the liability of head of businesses made reference to the general principles of national laws, most of the EU Member States did not implement such provision, but continued to apply the general rules on the liability of natural persons. So, head of businesses are in principle not subject to strict liability, but their liability is based at least on negligence (nullum crimen, nulla poena sine culpa).

The PFI Convention provides only the principle of liability of head of businesses.

Criminal liability of heads of businesses

1995 PFI Convention

Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud affecting the European Community's financial interests, as referred to in Article 1, by a person under their authority acting on behalf of the business.

A specific provision on the liability of legal persons, on the contrary, has to be found in the so called 2nd protocol to the PFI Convention, dated 1997. The protocol aims at harmonizing the criminal legislations in particular on the definition of money laundering, a criminal offence that is equally detrimental to the EU financial interests because it hampers the recovery of the proceeds of crime.

Liability of the legal persons

2nd Protocol to the PFI Convention - Article 3 Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering 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, or

- an authority to take decisions on behalf of the legal person, or

- an authority to exercise control within the legal person,

as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

Other international instruments provide for definitions both of the liability of head of businesses and of the liability of legal persons.

The liability of head of business is also foreseen in the 1997 EU Convention against corruption, when not affecting the EU financial interests:

Article 6 - Criminal liability of heads of businesses

Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of corruption, as referred to in Article 3, by a person under their authority acting on behalf of the business.

It was also foreseen in the study called Corpus Iuris, an academic project of the last '90s, coordinated by the French professor Ms. Delmas Marty, which was the first attempt to establish a set of homogeneous rules applicable in the Union on the protection of the EU financial interests. It was also in a nutshell the first attempt to implement the idea of the Union as a common space of justice.
The project resulted in drafting some provisions both in substantive criminal law and in procedure criminal law, aiming at establishing common rules for a more effective fight against crimes affecting the EU financial interests. One of such provisions involved the liability of head of businesses.

Article 13 para 2

It is a criminal offence if the head of a business or any other person with powers of decision and control within the business knowingly omits to exercise the necessary supervision provided that a person subject to their control commits an offence under the article 1-8 and that the omission to exercise the necessary supervision facilitated the commission of the offence

However, as mentioned earlier, unfortunately the idea of providing a specific liability of head of business was not very successful in the EU Member States, that continued to regulate the matter on the basis of the general rules on commission and participation to a criminal offence[6].

In the two reports on the implementation of the PFI Convention the Commission noted that the Member States have shown a certain reluctance to scrutinise their national systems with regard to the concept of criminal liability of heads of businesses[7].

On the side of the liability of legal persons, the concept was developed in other international instruments in addition to the 2nd Protocol to the PFI Convention.

A specific provision on corporate liability is included in the Council of Europe Criminal Law Convention on Corruption

[6] See L. KUHL, *L'OLAF et la responsabilitè des entreprises*, in the collection of the interventions at the V seminar on the protection of the EU financial interests "The legal persons liability for fraud against the EU financial interests and cybercrime" organised by the Union of European Lawyers and the Centro Studi di Diritto Penale Europeo, held in Milan on 29-31 January 2009"

[7] Commission's report on PFI Convention's implementation COM(2004)709 and COM(2008)77

Article 18 – Corporate liability

> *1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural 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; or*
>
> *– an authority to take decisions on behalf of the legal person; or*
>
> *– an authority to exercise control within the legal person;*
>
> *as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.*
>
> *2 Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.*
>
> *3 Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.*

The same as for the 2003 UNCAC Convention - Article 26

> *Each State party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention*

It is left to the States to decide whether providing criminal, civil or administrative liability. A similar wording is also found in the article 10 of the UN Convention on Transnational Organised crime (the so called "Palermo Convention" signed in 2000)

In the EU, just before and immediately after the Lisbon Treaty, the liability of legal persons has become a usual provision in all the new legal instruments adopted under the new competences in criminal law.

Most of the framework decisions adopted in the then Third Pillar in the area of criminal cooperation, contained the following standard provision on the liability of legal persons.

> *1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Title ... committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on:*
> *(a) a power of representation of the legal person;*
> *(b) an authority to take decisions on behalf of the legal person; or*
> *(c) an authority to exercise control within the legal person.*

2. Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, of any of the criminal offences referred to in Title ... for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators of the criminal offences referred to in Title ... or criminally liable under Article ....

4. For the purpose of this Directive, 'legal person' shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

Such wording has been confirmed even in the most recent instruments proposed in the new EU legal framework under the Lisbon Treaty.

For instance, it appears in the article 6 of the proposal of directive for a protection of the EU financial interests through criminal law (the so called PFI Directive), adopted in July 2012 and aiming at repealing the 1995 PFI Convention, whose negotiations are still ongoing in the Council and European Parliament.

Then, the concept of liability of legal person goes beyond the above-mentioned criminal offences and the EU financial interests. It may also involve violation of human rights. The fragmentation of the legal framework outside the EU makes sometimes difficult to recognise the liability of the legal persons involved and to reach the stage of convictions at criminal level[8].

3.3 The criminal liability of legal persons in the EU legal framework on judicial cooperation[9]

The principle of liability of legal persons is part of the development of a new legal framework in the EU in criminal law after the Maastricht Treaty. Whilst national security remains the responsibility of each Member State, judicial cooperation in criminal matters across Europe has become an essential element in ensuring the effective operation of each Member State's criminal justice system. Based on the principle of mutual recognition of judgements and judicial decisions by EU countries, this was introduced by the Maastricht Treaty in 1992. Because legal and judicial systems vary from one EU country to another, the establishment of cooperation between the different countries' authorities has been a key feature of the EU legal landscape over the past decade or so. The **Convention on Mutual Assistance in Criminal Matters between Member States of the European Union**[10], dating from May 2000, which strengthened cooperation between judicial, police and customs authorities, is particularly relevant to this end. The first instrument to be adopted on the basis of the principle of mutual recognition of judicial decisions was the European Arrest Warrant ("EAW") which came into operation in January 2004 and which has become a key tool in the fight against cross-border crime. An EAW may be issued by a national judicial authority if the person whose return is sought is accused of an offence for which the maximum period of the penalty is at least one year in prison or if he or she has been sentenced to a prison term of at least four months.

In 2014 the directive on the European Investigation Order (EIO) has been approved. It must be implemented in the national systems by 2017. Based on this instrument, the mutual recognition becomes the general principle for obtaining evidence in a Member State of the Union other than that

[8] For a clear overview of corporate liability in violations of human rights, see Dr. Jennifer Zerk, *Corporate liability for gross human rights abuses*. A report prepared for the Office of the UN High Commissioner for Human Rights, in www.ohchr.org

[9] See also *Corporate liability in Europe* on www.cliffordchance.com

[10] Full text of the *convention* available at: http://eur-lex.europa.eu

where the investigation is ongoing. It will certainly be an important and effective investigative instrument in the fight on criminal offences that may involve the liability of legal persons.

With the introduction of the Lisbon Treaty, which came into effect on 1 December 2009, the role of the EU in criminal law is likely to increase. In particular, the Lisbon Treaty provides for a new legal framework for criminal legislation concerning, for example, minimum rules regarding the definition of criminal offences for so-called 'Euro crimes', which include offences such as terrorism, money laundering, corruption, computer crime and organised crime; common minimum rules on the definition of criminal offences and sanctions if they are essential for ensuring the effectiveness of a harmonised EU policy; and minimum criminal sanctions for insider dealing and market manipulations. In this latter area, current sanction regimes do not always use the same definitions which are considered to detract from the effectiveness of policing what is often a cross-border offence.

There is currently a Directive which requires Member States to take the necessary measures to ensure that the criminal offences of insider dealing and market manipulation are subject to effective, proportionate and dissuasive criminal sanctions. Significantly in the context of corporate liability, the Directive suggests the application of criminal sanctions to natural and legal persons (in other words, to corporate entities as well as to individuals). However, it is not foreseen that liability would attach to legal persons in circumstances where they had in place effective arrangements to ensure that no person in possession of inside information relevant to the transaction could have transmitted that information.

3.4 Imputation, Elements of Liability, Sanctions

Regarding the principle of imputation of the offence to the legal person, the elements of the liability and sanctions, reference can be done to the above mentioned Council of Europe document "Liability of legal persons for corruption offence", Training manual and reference source, dated 2014, prepared within the framework of the Eastern Partnership-Council of Europe Facility Project on "Good Governance and Fight against Corruption" and with the funding provided by the European Union, which provides an overview of such principles.

Although it is focused on the liability of legal persons from corruption, it carries out a general analysis of such principles that can be applied to any document on the general issue of the liability of legal persons, irrespective of the predicate offence. For the sake of not duplicating a very recent document on the same subject in the general part of the present work, it can be taken as a matter of reference.

However, to the extent of this document, such principles can be summarized very briefly as follows:
On the imputation, there are two different approaches for drawing a line from the natural person author of the offence to the legal person: either the natural person is seen as the "alter ego" of the company; or the company is seen as the master which is responsible for the acts of the servant (the natural person).

The necessary elements of the liability then consist of the following ones:
1. Legal person (definition, applicability also to the single-owned companies)
2. A natural person connected to the legal person
3. An offence committed by the connected natural person
4. A relation of the offence to the legal person, in the sense that the offence has been committed for the benefit, or on behalf or in the interest of the legal person
5. Fault by the legal person (lack of organization, lack of supervision, strict liability with caution)[11]

[11] See also *Liability ex crimine of legal entities in Member States*, by A. Fiorella, with the cooperation of N. Selvaggi, A. Valenzano, E. Villani, editor Jovene, 2012

Regarding the sanctions, the analysis of the international legislation shows that they are not necessarily criminal sanctions, in light of the particular application to a legal person, but also civil and administrative. In the international and national legal instruments they are usually divided in two main groups: financial and non-financial sanctions. Fines, forfeitures and compensation for damages are among the first ones. Exclusions from funding, disqualifications, bans, prohibitions are among the second ones. In some legal systems, the criminal liability can be excluded, with the condition that the company may give evidence to have done its best to prevent crimes, far from facilitating the offence committed[12].

In particular, the company will have to prove:

i. the effective and real adoption of compliance programs just before the offence, aimed at avoiding fraudulent behaviours of people acting on behalf of the company;
ii. the setting up of a Vigilance Authority, provided with independent powers, and carrying out tasks of checking the adoption and effective compliance of the compliance program;
iii. the fraudulent infringement of the compliance program by perpetrators of the crimes;
iv. the exact fulfilment by the Vigilance Authority of the tasks charged with.

3.5 Procedural issues

It is necessary mentioning that very often the introduction in the national legal systems of the principle of the liability of legal persons is accompanied by the introduction of specific procedural rules for verifying such liability and applying the sanctions.

In Italy, for example, the specific legal instrument on the matter, the Presidential decree n. 231 of 2001, provides for detailed procedural rules to this regard.
In particular, a specific part of the law (articles 34-82) is devoted to the investigative procedure to verify the liability of the entity and to the rules on the indictment or dismissal of the case. It has to be underlined that in the Italian law the liability of the entities is verified in the same criminal proceedings involving the natural person, by the same prosecutor and the same judge, so the procedural rules are necessarily connected with those of the Criminal Procedure Code. For this reason the law 231 of 2001 recalls the principle that the general rules of the Criminal Procedure Code are applicable, with some specificity due to the particular kind of subject under investigation. It is up to the judge to assess how and in which terms the general rules area applicable if the law 231 does not contain a specific provision. This is the case, for instance, of the possibility for the injured party to participate to the trial as "civil party" for the compensation of damages. As this is a general principle in the Italian system in the proceedings involving natural person, no specific provision is contained in the law 231, and the issue is matter of discussion at academic level.
The law foresees specific rules on the entity's representation, incompatibility in evidence, precautionary measures.
Other rules are on the hearing to confirm the indictment, or on the dismissal, on the trial and the appeal.

In this framework, considering that, as mentioned above, the application of non-criminal sanctions on the legal persons following behaviours of natural persons can derive from criminal proceedings involving the individuals, it is important to avoid any violation of the "ne bis in idem" principle, internationally recognized by the ECHR case-law.

[12] See Responsabilità Dell'ente e *Compliance* Aziendali: Un'indagine Statistica - [Corporate liability and business compliance: a statistical survey] by prof. M. Catenacci, Italian part of the research *Compliance Programs for the prevention of economic crimes, coordinated in 2011 by the Waseda University, Tokio*

3.6 Investigations at international level

Finally, it is still worthwhile recalling that proceedings leading to liability of legal persons can be triggered also by investigations conducted at international level.

As the area of the protection of the EU financial interests is involved, the Anti-Fraud Office of the European Union, OLAF, can certainly play a role originating a national procedure that can bring to the verification of the liability of the legal person involved. Indeed OLAF carries out administrative investigations on allegations that can amount to criminal offences where economic operators are involved. Such economic operators are very often legal persons, as they are beneficiaries of EU funds (expenditures fraud), or are dealing with customs or VAT operations (revenue fraud).

Should the OLAF investigation disclose criminal offences, and not only irregularities, cases are referred to the national prosecutor for the possible initiation of criminal proceedings, where the liability of the legal person involved could be at stake.

4 PART II - ANALYSIS OF THE CZECH LEGISLATION

Objective:
The purpose of part II is to:
- Provide the reader with the necessary information on the Czech law on liability of legal persons; this knowledge will be tested at the end through the practical cases.
- Introduction of some common situations in the proceedings on liability of legal persons, such as the conditions for applying the Czech law in cross-border cases; the exclusions of some legal entities from the scope of the law, familiarising with the criminal offences that give rise to the liability of legal persons and facing the problem of shutting down or extinction of a legal entity when the consequences of its behaviour are not completely over yet.

4.1 Introduction

The Czech Act on Criminal Liability of the Legal Persons and Proceedings against them, n. 418/2011 of 27 October 2011, hereinafter CLLPPT, which entered into force as of 1 January 2012 (article 48 of Act 418/2011), is the specific legal instrument adopted by the Czech Republic to regulate the matter.

It includes almost 50 articles to establish the founding principles of the liability and the sanctions.
From its wording, the law seems to have adopted an hybrid system of criminal liability of legal persons: the legal person is referred to as the perpetrator of the offence, as if it was a "true" criminal liability model, but other elements of the liability, such as the culpability or the intention, are referred to the natural person, so that either the criminal liability of the entity runs the risk of amounting to a case of strict liability or it is not a case of criminal liability.

If it was a case of criminal liability based on the principle of strict liability, the issue could raise some problems of consistency with the basic principles of criminal law. Then, ideas about a submission of the constitutional complaint against some of the conviction of the legal entity could be found in Czech Republic as well. The argumentation should in these cases that the structure of liability for legal entity in Czech Republic is indeed based on the strict liability principle and not on the subjective culpability. However, there has been no constitutional complaint like that yet.

4.1.1 Legality or opportunity principle

The Czech Criminal Procedure Code stipulates the rule of legality principle as a decisive one. Under the provisions of article 2, para 3 of the Criminal Procedure Code the public prosecutor is obliged to prosecute all criminal offences he is aware of, if the law does not stipulate in other way. The opposite to this rule is the opportunity principle, under which the public prosecutor does not have the obligation to investigate and prosecute all criminal offences for which all legal conditions are fulfilled, if there is no particular interest to do that.

There are a lot of derogations from the rule of legality but they do not change the fact that the rule of legality is the basic one.

The criminal prosecution is in some cases inadmissible (for example: diplomatic immunity or privilege, parliamentary immunity, the age of the offender of the criminal offence, the injured person does not give a permission for prosecuting in some sort of criminal offences, international agreement that excludes prosecution, etc.)

On the other hand, particular situations, such as the criminal liability of legal persons that are just "shell-companies" have to be addressed. The question is whether the issue can be solved on the basis of the principle of subsidiarity of criminal repression which is stipulated under article 12, para 2 of the Criminal Code. The criminal prosecution of a legal person, called "shell-company", is likely to be ineffective. So, a reflection could be raised whether this should be an exception from the principle of

legality (applicable in this case only for legal persons), with no need for introducing the principle of opportunity into the Czech legal system for these cases.

In other cases the decision to prosecute or not to prosecute is taken by the public prosecutor. The public prosecutor can issue a ruling suspending the case before the commencing of the prosecution under article 159a, para. 3 of the Criminal Procedure Code or he can maintain the criminal proceedings under article 172, para. 2 of the Criminal Procedure Code: such cases could be the optional stand-by of the criminal proceedings or the suspension of the case due to the proceedings for another serious criminal offence, where the punishment for the latter is sufficient, but also reasons of special procedure opportunity known by the Czech Criminal Procedure Code, for example to allow the offender to compensate the damage or remove other harmful consequences of the offence, depending on the importance and the rate of violation or threat of protected interest.

Also the diversion, namely the possibility of postponement of criminal prosecution in the sense of article 160, para 1 of the Criminal Procedure Code, could be applied if it is necessary clarifying if the criminal activity was committed in favour of criminal organizations or placing the offender(s) under arrest. In fact the temporary diversion allows not prosecuting natural or even legal persons as accused when all conditions for commencing the criminal prosecution against them are fulfilled. It is based on the assumption and evidence that a criminal offence was committed and it was committed by particular person. In this case the criminal prosecution is conditionally stayed or the prosecution is stayed when the legal settlement is approved or when it is conditionally withdrawn back out of criminal prosecution.

However such approach does not look efficient when it is for example possible to undertake measures in the area of civil law which can lead to liquidation of legal person. Such approach would be useful mainly for legal persons that are so called "shell companies" that were just used for committing of criminal offence. These companies have no property and after committing of the criminal offence there are no other activities.

In practice the cancellation of such legal person can be hard sometimes. Under article 32, para 2 of the Act CLLPPT the legal person against which the criminal prosecution is performed cannot be liquidated until the time of its termination. The company cannot be either transitioned. The only exception is when the consequences would be inadequate to the nature of the committed criminal offence. If the criminal proceedings against legal person would be commenced, it is not possible to achieve its liquidation or decline in civil proceeding (there are some exceptions from that rule). When the criminal proceeding has not been commenced yet or if the preliminary summary of proceeding is performed, then the liquidation or decline of the legal person in other type of proceeding than the criminal one would be possible. In that case the public prosecutor (or police bodies) could postpone the prosecution, but only if the legal person "shell company" would be liquidate. This is the approach of the abovementioned methodology.

A good example of a case when one could argue that the criminal prosecution against legal person should not be performed even when the commencing of the prosecution would be unavoidable are cases of evasion of tax, social security insurance fee and similar compulsory payment stipulated under article 241 of the Criminal Code.

In those cases the legal person does not pay the obligatory payments because of unfavourable economic situation caused by low-grade of leadership work. The punishment of the legal person under criminal law mostly in the form of pecuniary penalty could complicate the try to make the inner situation within the legal person better. In that case the unpleasant economic situation would be made even worse or it could even lead to liquidation of the legal person when it would not be necessary.

The criminal liability for the criminal offence of tax evasion, social security insurance and similar compulsory payment (article 241 of the Criminal Code) decline if the offender fulfils his duty additionally before the court of first instance judgment. The criminal activity of evading the payments

could be result of bad management of the legal person (even when it is always a consequence of particular natural person's acting for example: executive managers). The criminal prosecution could, in a certain way, complicate the situation. Especially in the case when is prosecuted also the legal person then it is not possible to use the institute of effective regret that means pay the funds additionally. When only natural persons are being prosecuted and not the legal person this risk eliminated. The legal person is still function and there can be hope that her management will get better.

However, it is important to underline that the choice between the legality and opportunity principle is written in the law, and it must be applied accordingly. In a system based on the legality principle, the question on prosecuting or not the legal person for the criminal offence is not allowed when the legal conditions for drawing the criminal liability of the legal person are fulfilled.

4.1.2 Principle of subsidiarity

Another issue that could be raised in the Czech Republic on the liability of legal persons regards the fact that it could be seen as a sort of subsidiary criminal liability with respect to that of natural persons. It means that the criminal liability of the legal person could be inferred only when the criminal liability of natural person could not be established or when a prosecution of particular natural person is not possible. However, this interpretation does not seem correct. One of the reasons for this conclusion is that the law does not stipulate such relation between the proceedings against the natural person and the entity. Moreover, the possibility to prosecute also the legal person (in addition to the natural person) could be more fruitful. For example, seizure of proceeds of crime for the purpose of compensation of harm or confiscation can be more beneficial for that goal in criminal proceedings when the combination of both types of criminal liability occurs.

Therefore, the criminal liability of legal persons must not be understood just as an option of subsidiary kind only in situations when there is no possibility to prosecute the natural person for the criminal offence. This interpretation is not in compliance with the law.

In the Czech theory of law is also stipulated the conception of legal person under the theory of fiction an under the theory of reality. The theory of fiction is a mainstream but some parts of theory of reality are visible. The legal person is an artificial organization made by human beings and used for their interests (the theory of fiction). In some cases a law can recognize specific subject as a legal person (influence of theory of reality). In any case, it has to be considered that for recognition of legal persons a legal provision, more than the case-law, is essential.

4.2 The commission of a criminal offence

The law does not contain any definition of “legal person”. The new Civil Code in its article 20 stipulates that a legal entity is an organised body whose legal personality is provided or recognised by a statute. A legal person may, without regard to the scope of its activities have the rights and obligations consistent with its legal nature.

However the law outlines the grounds of the liability of legal persons in article 8 that contains the definition of “criminal offence committed by a legal person” in the following terms[13]:

[13] A possible amendment of such provision is under discussion in the Parliament. According to this proposal, the criminal liability of legal persons in certain cases could be excluded. It would be stipulated that, for example: the legal person is not liable for the criminal offence if it is proved that all efforts were made to preclude the committing of the criminal offence. Another proposal is based on the assumption that criminal liability of legal person is not possible when the statutory body or member of statutory body or other person, that is allowed to act on behalf the legal person, act exclusively for their own benefit or exclusively for benefit of third persons or when the criminal offence was not possible to avoid. However, such amendments have not been approved yet.

Article 8

(1) Criminal act committed by a legal person is an unlawful act committed in its name or in its interest or within its activity, if committed by

a) statutory body or member of the statutory body or other person entitled to act on behalf of or for the legal person,

b) a person performing managerial or controlling activity within the legal person, even if he/she is not a person as mentioned in Letter a),

c) a person with a decisive authority on management of this legal person, if his/her act was at least one of the conditions leading to a consequence establishing criminal liability of a legal person, or

d) employee or a person with similar status (thereinafter "employee") while fulfilling his/her duties/tasks, even if he/she is not a person as mentioned in Letters a) to c),

given that the act can be attributed to the legal person in accordance with Paragraph 2.

(2) Commitment of a criminal act as specified in Section 7 can be attributed to a legal person, if committed by

a) action of bodies or persons mentioned in Paragraph 1 letters a) to c), or

b) an employee mentioned in Paragraph 1 Letter d) on the grounds of a decision, approval or guidance of bodies of the legal person or persons mentioned in Paragraph 1 Letters a) to c), or because the bodies of the legal person or persons mentioned in Paragraph 1 Letters a) to c) did not take measures required by other legal regulation or that can be justly required, namely that they did not perform obligatory or necessary control (supervision) over the activities of employees or other persons, they are superiors to, or they did not take necessary measures to prevent or stave off the consequences of a committed criminal act.

It can be noted that the attribution of the offence to the legal person always requires the material commission by a natural person, for the obvious reason that the legal person itself cannot take materially an action. Such natural person must have a role in the legal person, either a managerial one (member of the statutory body, person exercising controlling activity or person with a decision making power) but also an operational one, when the employee has been entrusted to carry out a certain task.

To this regard, it is a general principle in several Member States that the entrustment should be effective, given to a person with specific skills to carry it out. Otherwise it would be too easy for the managers to escape their personal criminal liability simply by appointing an employee to take a certain action. However, such situation would not exclude the liability of the legal person in any case.
Under the same provision, the offence is committed by the legal person when the action has been carried out in its name or in its interest or within its activity. A relation between the behaviour of the natural person and the legal person is therefore necessary.

The liability of the legal person can also arise from an omission by the managerial level for lack of control or lack of prevention, in violation of specific provisions or not.

The Czech doctrine about the application of the criteria of imputability of natural persons to legal persons lies on the idea that legal persons do not have any own will. In other terms, legal persons cannot act according to their will and show their intentions externally. That is why the legal code stipulates that own acting of legal persons is performed through expression of will by bodies or representatives as natural persons on behalf of the legal persons. The legal consequences connected to this expression of will (as a legal action or as an unlawful action) are then attributed directly to the legal person as to the subject of law.

In the Czech legal system where the criminal liability is based on principle of culpability (nullum crimen sine culpa) it is necessary to preserve this principle also in case of criminal liability of legal

persons. Therefore any interpretation tending to introduce the principle of strict liability in the area of criminal law should be regarded as dangerous. The culpability of the legal person in relation to some of the criminal acts listed in article 7 of the Act CLLPPT is then inferred from culpability of natural person. The natural person committed the crime on behalf of legal person or in its interest or in scope of its activity under article 8, para 1 of the Act CLLPPT.

The basis of criminal liability as stipulated in article 8, para.2, (a) and (b) of the Act CLLPPT consists of two types of attribution of the offence to the legal person, and is subject to particular manifestation of the legal person externally. At the same time the managing and inner controlling activities should be also considered as a part of legal person's activity to the end of recognising its criminal liability. Therefore it should be understood that inner control cannot be limited only to provisions required from the controlling or managing bodies from law. It is also necessary to apply other provisions and principles usually used for natural persons as well to controlling or managing bodies. These provisions (preventing or averting consequences) could be justly claimed due to general principles of performance of managing or controlling activity of the legal person.

In conclusion, in the Czech law the criminal liability of legal persons is a special kind of subjective liability, which follows the culpability of natural persons. But this liability is in principle different from the definition of guilt (culpability) of natural persons.

However, the liability of the legal person is not subject to the judicial verification of liability of the legal person, author of the illicit conduct: under article 8, para. 3 of the Act CLLPPT the criminal liability of legal person is not excluded when it is not possible to detect the particular natural person that acted in the way stipulated in para.1 and 2 founding the criminal liability of the legal person, for example if the natural person author of the crime is unknown.

4.3 Territoriality

The law applies to the criminal offences committed in the Czech Republic or having a specific link with the Czech Republic.

Under article 2 and 3, the Czech Republic law applies when the act that gives rise to liability has been committed

- on the territory of the Czech Republic
- by a legal person which has a) a registered office or b) its establishment or branch or c) at least conducts its activities or owns property in the Czech Republic
- outside the Czech Republic, but by a legal person with a registered office in the Czech Republic

An act is considered committed in the Czech Republic when it takes place:

a) wholly or partly on the territory of the Czech Republic, even if the violation of, or threat to, an interest protected under Criminal Code resulted, or was to result, completely or partly abroad; or
b) abroad, if the violation of, or threat to, an interest protected under Criminal Code occurred or had to occur, even if only in part, on the territory of the Czech Republic.

Article 2

(1) Liability to punishment of an act committed on the territory of the Czech Republic by a legal person which has a registered office in the Czech Republic or its establishment or branch is placed on the territory of Czech Republic or at least conducts its activities here or owns property here, shall always be considered under the law of the Czech Republic.
(2) A criminal act shall be considered as having been committed on the territory of the Czech Republic, if a legal person acted:

a) wholly or partly on the territory of the Czech Republic, even if the violation of, or threat to, an interest protected under Criminal Code resulted, or was to result, completely or partly abroad; or

b) abroad, if the violation of, or threat to, an interest protected under Criminal Code occurred or had to occur, even if only in part, on the territory of the Czech Republic.

(3) As for complicity/participation Section 4 Paragraph 3 and 4 of the Criminal Code shall similarly apply.

Article 3

Liability to punishment of an act committed abroad by a legal person with registered office in the Czech Republic shall also be considered under the law of the Czech Republic.

Moreover, under article 4, the Czech law is applicable also to specific situations when the act is entirely committed abroad and the legal person does not have any registered office in the Czech Republic.

Such situations are: the commission of specific criminal offences of particular interest for the State's sovereignty such as forgery or illegal production of currency and terrorism, or when the act has been committed not by, but in the interest of the legal person with registered office in the Czech Republic

Article 4

(1) The law of the Czech Republic shall apply when determining the liability to punishment of Forgery and Alteration of Money (Section 233 of the Criminal Code), Uttering Counterfeited and Altered Money (Section 235 of the Criminal Code), Manufacturing and Possession of Forgery Tools (Section 236 of the Criminal Code), Unauthorized Production of Money (Section 237 of the Criminal Code) and Terrorism (Section 311 of the Criminal Code) even if such criminal act has been committed abroad by a legal person with no registered office in the Czech Republic.

(2) The law of the Czech Republic shall also apply when determining the liability to punishment for a criminal act committed abroad by a legal person with no registered office in the Czech Republic, if the criminal act has been committed for the benefit of a legal person with registered office in the Czech Republic.

The law seems therefore adopting the principle of universality to define the territoriality, because provide for a very wide definition of "act committed in the Czech Republic" and moreover it extends its applicability, under certain circumstances, even to acts wholly committed abroad.

4.4 Exclusion of liability

As is the case in legislations of several EU and not EU member States, some categories of legal persons are not subject to the law and to the principle of liability. Under article 6 of the law, this is the case for the Czech State and for local authorities.

Article 6

Exclusion of Liability to Punishment of Certain Legal Persons

(1) Following legal persons are not criminally liable according to this Act:

a) Czech Republic,

b) local self-governing entities while exercising public authority.

(2) Share of legal persons stipulated in Paragraph 1 in (another) legal person does not preclude criminal liability of such legal person under this Act.

From such provisions, it is firstly understood that the State is not a criminal liable entity. State bodies even if they act as legal entity on the field of public law do not seem to be criminally liable as well. The reason of such exclusion is the monopoly of public power and the power of coercion of the state. In the case of a state the criminal liability would be imposed on the state by the state.

Secondly, the bodies of the region are not criminal liable only if they exercise public power. The public power should be understood as any power that is authoritatively deciding about rights and obligations of subjects directly or vicariously. The subject whose right and obligations are the matter of deciding process is not in equal position with the body of public power and the decision content does not depend on the will of the subject. Municipalities and regions (together with the capital city of Prague) are not liable in the situations of their separate powers of community and delegated powers of community (while performing state administration function). On the contrary, whereas the municipalities and regions perform in the position of private subject within private relations they must be held criminally liable.

4.5 Offences giving rise to criminal liability

Article 7 lists 83 categories of criminal offences of the Criminal Code that give rise to corporate liability; it is a wide number of offences, ranging from economic crimes such as bribery, fraud to environmental crimes and crimes against the human beings. A detailed list can be found in appendix 1

4.6 Transfer of liability

Article 10 deals with the problem of the transfer of liability in case of succession, for any reason, of another legal person to the concerned one. The general principle is that criminal liability descends to all legal successors of the legal person concerned. They may be subject to the punitive or preventive measures that would have been applied to it, on the basis of a Court assessment on their concrete benefit obtained from the criminal offence. This might lead to believe that their liability is not linked to their role in the commission of the offence, as I that case they would not be only successors, but participants in the commission of the crime. Rather, the possibility to be subject to punishment or other measures depends on the advantage they gained from the crime, so that, in case of no benefit, one could conclude that they should not suffer from any consequence deriving from the crime.

Such provision clearly shows the special kind of liability of the legal persons, as the same principle is certainly not applicable to the natural persons on the basis of the assumption that the criminal liability is absolutely personal, unlike the civil one. Despite the classification as "criminal liability" it is therefore necessary acknowledging that the corporate liability presents some special features that make it something unique.

The provision of article 10, para.1 of the CLLPPT seems a contradiction of the principle of personal liability of the perpetrator of a criminal offence, applicable to the natural persons in the Czech legal system so far.

The key of this problem is it the fact that before the Act CLLPPT the idea of transferring the criminal liability to another person was universally not accepted. There are cases where a person can be considered criminally liable in connection with an act committed by another person; this is the case of parents that are criminal liable for negligence of mandatory supervision of their own children, although this does not mean that the liability of the children is transferred on the parents. On the contrary, under article 10 para. 1 of the Act CLLPPT the criminal liability of the legal person is transited on all successors in title. In this case, the successor in title has not committed any criminal

offence. It is a legal construction whose purpose is to prevent the effort to escape from criminal liability simply by creating a new legal person (or more legal persons).

With respect to natural persons, the death of the perpetrator of the crime extinguishes the consequences of the act at criminal level, in particular the application of punishment.

Therefore, without a specific provision on the continuity of the consequences of a crime at criminal level, one of the most common ways for the legal person to try avoiding consequences of criminal liability could be the transfer of material and intangible parts of business activity to other subjects. This transfer can be done by several legal transactions as for example: more or less complex transfer of assets. The typical example can be sale of company as a legal transaction that is covered under certain provisions of Commercial Code or purchase of company – a legal transaction defined in new Civil Code that came into force on 1st of January 2014 (Section 2175 and following of the New Civil Code).

There were a few disputes in practice discussing if the successor under article 10 of the Act CLLPPT could be only a "universal successor" of the concerned legal person, or if it is possible to consider as a successor also a legal person in case of "singular succession". Within the universal succession the successor takes over all rights and obligations of former subject (for example as stipulated in the Act No. 125/2008 Coll., On Transformations of Commercial Companies and Cooperatives), while within singular succession the successor subject overtakes just a part (although it could be a really important part) of rights, obligations and assets usually in a form of sale and purchase of company (within this transaction the scope of rights and assets are usually specified closer).

The question arises whether succession as stipulated in article 10, para. 1 of the Act CLLPPT could be applied only in cases of change of legal person and similar changes in form of universal succession or if it could be applied also in case of common private law relations (singular succession).

Before solving this problem, it is firstly necessary to answer the basic question about the reason why the legislation on criminal liability of legal persons includes provisions related to succession of this liability.

The purpose is not only to prevent the offender from avoiding the consequences of punishment, but the legislator also wanted to prevent the possibility that assets of the criminal liable legal person be removed and subtracted to justice. Certainly, article 10 of the Act CLLPPT refers to cases of universal succession. At the same time, there is no relevant reason to exclude some kinds of singular succession from the scope of the provision, especially in cases where, in essence, the whole scope of mutual rights and obligations is transferred. The purpose of article 10 of the Act CLLPPT is to create a legal basis to pursue legal actions against the successor under the criminal law. It is therefore necessary to examine the scope of rights and obligations that are entered by the successor. It is obvious that some kinds of singular succession, especially when a part or a whole company is being sold, means basically transfer of the activity of the company to another subject and they fulfil the terms of universal succession with their actual consequences.

It is important to say that some legal opinions express doubts concerning the possibility of including a company sale under the scope of article 10 of the Act CLLPPT. Actually this approach seems to neglect the goal of preventing the offender from eliminating or removing the assets of the criminal liable legal person. Economic profit is the aim of the criminal activity in most cases. The interpretation restricting the transfer of criminal liability of legal person only to cases of universal succession seems not in compliance with the legislator‘s aim and purpose. It would allow a simple and obvious way for offenders to avoid the consequences of their own criminal activity simply by transferring material, staff and assets of the company to another subject. The legislator wanted to create conditions for effective and actual application of the criminal liability and punishment of offenders when legal persons; this can be achieved through the establishment of effective instruments for avoiding the offender to conceal the proceeds of crime.

Therefore it is concluded that the term of succession in title under article 10 of the Act CLLPPT involves not only cases of universal succession but also affects some cases of singular succession including company sale or its part as an asset component of legal person expressing its property, because successor in title enters into the whole scope of rights and obligations. This approach does not include under the term of succession all forms of possible singular succession such as, for instance, acting connected to partial or individual transfer of each obligations, financial claims, etc., because it would not correspond with the aim and purpose of the legislator if the interpretation would be so wide. The acts of transfer of property and their nature from the succession in title point of view have to be always assessed considering the character of legal person, transferred rights, their nature and scope and circumstances of these law acts.

In accordance to other opinions it should be proceed from totally opposite interpretation. This approach is based on the idea that provision in article 10, para 1, of the Act CLLPPT is aiming with its content only at cases of universal succession. It means those cases when successor in title enters into all rights and obligations or its assemblage.

No principal authoritative court ruling has been given on this issue yet.

Article 10
Criminal Liability of a Legal Successor of a Legal Person

(1) Criminal liability of legal person descends to all its legal successors.
(2) If the criminal liability has descended in line with Paragraph 1 to more legal successors of the legal person, the court while deciding on type and terms of punishment or protective measure considers also the size of proceeds, benefits and other advantages of the committed criminal act that have been transferred to every each of them, eventually also in which extent whichever of these continues in the activity related to commitment of the criminal act.
(3) The provisions of the Criminal Code will similarly apply to imposition of accumulative, multiple and joint punishment to a legal successor; if such procedure is not possible due to nature of legal succession or due to other reasons, the court imposes a separate punishment.
(4) The Court will proceed similarly according to Paragraphs 1 to 3 in cases of dissolution of the legal person after the final conclusion of the criminal proceeding.

4.7 Effective regret

The liability of legal persons can be extinct if the company shows an effective regret that must lead to concrete actions such as the spontaneous interruption of the illicit behaviour or eliminating the negative consequences of it.

As said, the law requires that the interruption of the commission of the crime must take place "voluntarily", therefore without any constriction by external forces, such as the police; however, if the knowledge of a police investigation brings the company to interrupt spontaneously the commission of the offence, before any intervention by the police itself, this should permit the legal person to benefit from the extinction of the liability, according to the law.

Another positive behaviour that can lead to the liability extinction is the elimination of the harm caused by the commission of the offence or of the danger to it. Reporting to the police is certainly one of such actions as it demonstrates the intention to trigger the initiation of an investigation.

Only with respect to a few criminal offences the mechanism of extinction of the liability does not apply; they are bribery and trading in influence. It has to be assumed that this is due to the highly negative consideration from the legislator on such crimes, as expression of a zero-tolerance policy

towards corruption. The commission or the attempt to commit one of these crimes entails negative consequences for the perpetrator that cannot be eliminated by a spontaneous behaviour from his side.

Article 11
Effective Regret

(1) Criminal liability of the legal person becomes extinct, if the legal person voluntarily refrains from further unlawful activity and
a) eliminates the danger that appeared to an interest protected through the Criminal Code, or precludes such harmful effect or remedies such harmful effect, or
b) reports the criminal act to public prosecutor or police authority at the time when the danger to an interest protected through the Criminal Code could be eliminated or the harmful effect of the criminal act could be precluded.
(2) Criminal liability of a legal person does not become extinct in accordance with Paragraph 1 if Passive Bribery (Section 331 of the Criminal Code), Active Bribery (Section 332 of the Criminal Code) or Trading in Influence (Section 333 of the Criminal Code) have been committed.

4.8 Time limitation

Article 12 and 13 involve the time limitation for the prosecution of the legal person following its involvement in the commission of a crime.
As a general principle, article 12 makes reference to the general provision of the Criminal Code (article 34); no special regime is therefore foreseen for the liability of legal persons.

There is only one derogation to this principle and it is about the offence of terrorist attack when due to the concrete circumstances it can be qualified as act of war crime or crime against humanity.

It has to be pointed out that time limitation this provision refers to is the time frame to investigate and prosecute the criminal offence committed by the legal person. Other thing is the time limitation to execute the punishment after the conviction. Specific provisions (article 24 – 27) regulate the matter.

Article 12
Statute of Limitation of Criminal Liability
As for the limitation of criminal liability of legal persons Section 34 of the Criminal Code will similarly apply.

Article 13
Exemption from the Statute of Limitation
Expiration of the limitation period shall not terminate criminal liability for criminal act of Terrorist Attack (Section 311 of the Criminal Code), if these were committed under such circumstances which qualify them as war crimes or crimes against humanity in line with rules of public international law.

4.9 Sanctions

4.9.1 Choice of sanctions

The Czech Law does not include any special provision dealing with question of criminal liability of legal persons from the view of subsidiarity of criminal repression as “ultima ratio” or based on the harmfulness of the act. That is why the general conclusions applicable for natural persons have to be used also for inferring criminal liability for this special kind of offenders.

Based on article 39, para. 2 of the Criminal Code, the nature and seriousness of the criminal offence are determined by the importance of the protected interest affected by the act, by the method of

committing the criminal offence and its consequences, the circumstances under which the offence was committed, by personal conditions of the offender himself, the extent of his culpability and motives, intentions or objectives. This principle is also applied under article 1, para. 2 of the Act CLLPPT in criminal proceeding against legal entities. It is also important to include the criterion of how harmful the act committed by the legal person was.

According to article 14, para. 1 and 3 of the Act CLLPPT the court shall take into consideration the nature and seriousness of the criminal act while determining the type and extent of punishment. Situation and circumstances of the legal person, including actual activities and property owned, shall be taken into account, as well as the nature and seriousness of the committed crime, In doing so the court will consider whether the legal person conducts activity in public interest, having strategic or hardly replaceable significance for national economy, defense or security. Furthermore the court consider the activities of the legal person following the commitment of the criminal act, above all its effective effort to restore damage or eliminate other harmful efforts of the criminal act. Impacts and effects of the punishment that can be anticipated to future activity of the legal person are to be taken into account as well. While imposing criminal sanctions the court will also consider implications: in particular, if this imposition might influence third parties, namely, legally protected interests of injured parties and creditors whose claims towards criminal liable legal person have occurred in good faith and do no originate or are not connected with criminal act of the legal person.

This question of close connection to expediency of the criminal proceeding against legal person has been already inferred in few cases.

Public prosecutors have often to face situations where they abolish the records about commencing an investigation or resolution about commencing an investigation in connection with expediency of criminal proceeding. This decision was based on opinion that when realization of criminal proceeding is not expedient, then commencing the investigation could not be in compliance with the law's spirit.

This issue is, one more time, linked to the problem of "Shell company" and the principle of legality and opportunity. Criminal prosecution if always performed in case of accused natural persons, apart from the exceptions stipulated in law. The question of expediency is not a key issue for performing the criminal prosecution for natural persons. On the contrary, for legal persons, the deducing of another "condition" for undertaking the proceedings on criminal liability is sometimes used in practice; this is the effectiveness of prosecution. This "condition" is understood in a very wide range. The risk is turning the application of such principle into an affirmation "de facto" of the principle of opportunity, which is it not present in the Czech Criminal Procedure Code. The issue could be solved by change of the legislation that would create in case of criminal prosecution of legal persons another exception from the principle of legality, by providing that criminal prosecution of legal persons can be commenced only when it is likely to be effective. In the same time this does not mean that the Czech legislation does not insist on economy and speed of criminal proceeding (economy of criminal repression) in general for natural and legal persons. It means that "effectiveness" is not a legal feature for performing of criminal prosecution for criminal offence. In case of records about commencing of acts of criminal proceeding that is a specific procedural institute of Czech criminal Procedure Code (this is a commencing of criminal proceeding on its own) it is relevant as well. The commencing of criminal proceedings prevents and conditions the commencing of criminal prosecution for particular criminal offences against particular persons. Stipulated principles should be applied for both natural and legal persons. The current procedure provision does not allow making differences between them. And in some cases as for example "shell companies" the criminal proceeding could seem as ineffective.

We cannot exclude the possibility of no realization of criminal proceeding (criminal prosecution) against legal person because of expediency or the subsidiary character of criminal law. But the records about commencing a criminal proceedings or resolution about commencing a criminal prosecution cannot be abolished (and so make impossible the realization of criminal proceeding in the case of suspicion of committing of crime by the legal person or even realization of criminal

prosecution against legal person in the position of the accused. The criminal proceeding should be opened only in the situation when it is possible to fulfil the purpose based on the principle of subsidiarity of criminal repression. So in cases when the achievement of the above mentioned purposes are impossible for example in cases of "shell companies" connected maximally with "white mules" or in cases of visibly (economically) inactive and indebted business corporations that do not need criminal proceedings for their "assisted liquidation" (under Section 105 of the Act No. 304/2013 Coll., on Public Registers of Legal Entities and individuals) or also in the cases of economically weaker companies that are personally connected only with one person who is subject of criminal prosecution assuming that punishment of this particular natural person will mean also a punishment for the legal person he owns.

The imposition of sanction at the end of the criminal procedure to verify the legal person's liability is certainly one of the most sensitive issues of the whole matter. A sanction can have very heavy consequences on the life and activity of a legal person.
Therefore the first provision of the law on this part, article 14, is about the principle of proportionality. Sanctions must be proportionate to the concrete circumstances of the offence.

It is interesting to note that with respect to this, the law contains a detailed list of elements that the Court has to take into account before deciding the fair sanction.

In particular, they involve the situation of the legal person at the time of the judgement, including its actual activities and property owned. The law also requires the court to consider whether the legal person conducts activity in public interest, having strategic or hardly replaceable significance for national economy, defence or security.

At first sight, the latter concept can evidently path the way to very different interpretations that could bring to a certain degree of uncertainty in the law's application.

Finally the court must also consider the activities of the legal person following the commitment of the criminal act, with specific reference to the effective effort to restore damage or eliminate other harmful effects of the criminal act. Impacts and effects of the punishment that can be anticipated to future activity of the legal person are to be taken into account as well.

While imposing criminal sanctions the court will also consider implications on third parties, in particular, legally protected interests of injured parties and creditors whose claims towards criminally liable legal person have occurred in good faith and do not originate or are not connected with the criminal act of the legal person,

The courts are therefore given wide discretion to decide the sanction to be imposed, within the detailed provisions of the law.

4.9.2 Types of sanctions

The law makes a distinction between sanctions and protective measures (article15).
Sanctions are the punishment imposed as a consequence of the commission of the offence.
Protective measures are those imposed during the procedure to verify the legal person liability, in view of the effectiveness of the sanction. For example, a temporary seizure allows securing assets in view of the possible final confiscation at the end of the trial. Based on the principle of legality only sanctions stipulated in the law can be imposed on the legal entity.

The Czech law is in line with the general tradition that divides sanctions in two categories: monetary or financial sanctions and sanctions consisting in an interdiction or prohibition.
The first ones are the following:
- confiscation of property,
- monetary punishment,

- forfeiture of a thing or other asset value.

Those belonging to the second group are:
- prohibition of activity,
- prohibition to perform public contracts, debarment from concession procedure or public procurement,
- prohibition to receive endowments (grants) and subsidies.

On the top of it, the Czech law also provide a very heavy sanction, applicable only in the most serious cases, which is the dissolution of the legal person.

Finally, the publication of the judgement is another general sanction.

The protective measures provided in the law are seizure of a thing or other asset value.

4.9.3 Dissolution of the legal person

The dissolution of the legal person is provided for in article 16. It is a very special measure that does not fall into any of the above-mentioned categories. It leads to the closure of the legal person and the end of its activity. Therefore, the law stipulates that it must be adopted only as "extrema ratio" in presence of specific conditions and when any other measure would be ineffective.

Article 16
Dissolution of a Legal Person

> *(1) The court may impose the punishment of dissolution of a legal person to a legal person with a registered office in the Czech Republic if its activities, wholly or mainly, consisted in committing criminal act or criminal acts. The punishment of dissolution of a legal person cannot be imposed if it is excluded by nature of the legal person.*
> *(2) If the legal person is a bank, the court may impose the punishment of dissolution of a legal person after an opinion of Czech National Bank on possibilities and consequences of its imposition has been delivered; the court considers such opinion. The first sentence will similarly apply to insurance company, reinsurance company, pension fund, investment company, investment fund, securities dealer, savings and credit co-operative (bank), central securities depositary, electronic money institution, payment institution, operator of a settlement system and operator of markets in investment instruments (vehicles).*
> *(3) If the legal person is a commodity exchange, the court may impose the punishment of dissolution of a legal person after an opinion of the respective body of state administration, which issues state licenses for operating of an exchange according to other legal regulation, on possibilities and consequences of its imposition has been delivered; the court considers such opinion.*
> *(4) With the legal effect of the decision that imposes the punishment of dissolution of a legal person, the liquidation procedure of the legal person commences.*
> *(5) The property/assets of a legal person, upon which the punishment of dissolution of a legal person has been imposed, may be used to satisfy claims of creditors if the property/assets in question is not excluded due to its nature or kind or nature of the committed criminal act.*

The main condition the law requires for such measure is that the whole or main activity of the legal persons *consisted in committing criminal act or criminal acts*.
That should mean that the criminal activity was the main business of the company; it was established for illicit purposes, with the intention of carrying out breaches of the criminal law.
At first thought, just to make an example in the economic crimes area, one could think of the so called "shell companies" or missing traders, that play an essential role in the VAT carousel fraud cases

where they are established with the only purpose of illicit interposition between the seller and the actual buyer.

As the dissolution can have significant impact on third persons, when the measure concerns particular legal persons such as banks, insurances, pension funds, investment companies, or companies dealing with commodities exchange, it can be adopted only after an opinion respectively by the Czech national bank and the national body releasing licenses for financial deals, that must assess the economic consequences of such decision.
After the dissolution, a liquidation procedure is opened, in which the first concern is safeguarding the creditors by using the properties and assets of the legal person.

The procedure for the execution and practicalities to make the measure effective are regulated in article 38, among the procedural provisions of the law.
Firstly, the legal person is winded up at the date when the judgment punishing the legal person with dissolution became effective.

In principle, a legal person registered in the commercial register or any other legally appointed register, database or registry is dissolved upon deletion from such register, database or registry.
Secondly, a liquidator is appointed by the Court.

If the legal person subject to the dissolution order was already under winding up procedure, a possible procedural conflict arises. In such case, the law state that, in principle, the execution of the punishment of dissolution follows other legal regulations concerning winding-up order.

4.9.4 Confiscation

Under the article 17 paragraph 1 of the law, confiscation on a legal person can be imposed only when it is convicted of an extremely serious criminal act, by means of which the legal person acquired or tried to acquire property benefit for itself or for another.

Confiscation is therefore directly linked to obtaining previous illicit benefit. The law does not state in this paragraph what can be confiscated, namely the same property illicitly acquired through the unlawful activity or properties of the same value. This problem has given rise to a huge debate in the criminal systems of the Member States. In article 19 on forfeiture the possibility to forfeit "substitute value" is clearly stated. A possible interpretation is therefore that the same principle applies to confiscation. Otherwise, under another possible interpretation, without a specific provision, it has to be concluded that the general provisions of the Criminal Code and Criminal Procedural Code have to be followed.

This is what the law stipulates also for cases of confiscation other than those provided in paragraph 1.

Confiscation of Property

(1) The court may impose the punishment of confiscation of property, if the legal person is convicted of an extremely serious criminal act, by means of which the legal person acquired or tried to acquire property benefit for itself or for another.

(2) Without conditions according to Paragraph 1 the court may impose the punishment of confiscation of property only in cases where the Criminal Code allows imposition of such a punishment for a committed criminal act.

(3) Confiscation of property affects the whole property of a legal person or the part designated by the court.

(4) If the legal person is a bank or foreign bank which branch operates on the territory of the Czech Republic on behalf of a banking license granted by the Czech National bank or on the basis of joint (unified) banking license (European Banking License) according to other regulation, the court may impose the punishment of confiscation of property after an opinion

of Czech National Bank on possibilities and consequences of its imposition has been delivered; the court considers such opinion. The first sentence will similarly apply to insurance company, branch of an insurance company, reinsurance company, branch of a reinsurance company, pension fund, investment company, investment fund, securities dealer, branch of a securities dealer, savings and credit co-operative (bank), central securities depositary, electronic money institution, branch of electronic money payment institution, payment institution, operator of a settlement system and operator of markets in investment instruments (vehicles).

4.9.5 Fines and forfeitures

Fines can be imposed if the legal person is convicted of a criminal act committed intentionally or by negligence. Their amount is referred to daily rates, ranging from 1.000 to 2.000.000 CZK.
In the systems of other EU Member States, the amount of fines is based on other parameters.
In Italy, for example, is it referred to company's shares.

Forfeiture is another possible monetary sanction. It was mentioned previously that regarding this measure the law expressly recalls the possibility to forfeit assets of the same value, according to the general provision of the criminal code.

Article 18
Monetary Punishment

(1) The court may impose a monetary punishment to a legal person, if the legal person is convinced of intentional criminal act or a criminal act committed by negligence. Imposition of the monetary punishment cannot affect the rights of the injured person.
(2) Daily rate is at least 1.000,-CZK and at the most 2.000.000,-CZK. While determining the amount of a daily rate, the court considers property owned by the legal person.
(3) The provision of Section 17 Paragraph 4 will similarly apply.

Article 19
Forfeiture of a Thing or Other Asset Value

The court may impose the punishment of forfeiture of a thing or other asset value, including forfeiture of substitute value, under conditions stipulated by the Criminal Code.

4.9.6 Non-financial sanctions

Articles 20 – 22 provide for other kinds of punishment that do not consist in a direct apprehension of assets or proprieties of the legal person, but have a severe impact on its activity.

The prohibition of activity is based on the same requirements of the dissolution and it can be so long (up to 20 years) that may constitute in essence the same. In certain cases, even the minimum amount of this sanction (one year) can be of vital importance for the company's life and can exclude it from the competition on the market and cause it closure. Therefore this measure should be applied very carefully and only as “extrema ratio” with a strict assessment of the conditions to apply it.

The prohibition to perform public contracts and the debarment from concession procedure or public procurement consists in the prohibition for a legal person to make contracts to perform public procurement, to take part in public tenders on public contracts, concession procedure or public procurement according to other legal regulations (article 21).

It may be imposed for a period from 1 to 20 years if the legal person has committed the criminal act in connection to contracting to perform public contracts or performing of these contracts, participation in public tender, concession procedure or public procurement.

The difference with respect to the previous measure of prohibition of activity is that this measure has a narrower scope, as it is linked to infringements committed in connection to the specific area of

public contracts, tenders and procurement. Even the content of the sanction consists in prohibitions and debarment in the same area, as stated above.

The seriousness of this measure is highlighted in the law, when it states that it can be ordered only when other measures would not have the same effect.

Actually, this measure also can determine the end of a company. It is well known that the turn-over of some companies is mainly, if not exclusively, based on the adjudication of public contracts. The exclusion from these competitions, even only for a few years, means the death of the enterprise. Therefore the measure must be applied very cautiously, in accordance with the principle of proportionality.

The measure consisting in the prohibition to receive subsidies or grants (article 22) is subject to similar comments. It relates to offences committed in connection with applying or receiving amounts of money and consists in the impossibility to receive them in future, for a range of time from 1 up to 20 years. It seems clearly applicable to one of the most common criminal offences that can be committed by legal person, in particular in the area of the protection of the EU financial interests, namely fraud in receiving EU funds such as structural funds or agriculture funds.

4.9.7 Publication of judgment

The publication of judgment is a sort of additional sanction that may be ordered when specific reasons occur that justify the public awareness of the case, when it ends up in a conviction. In case of acquittal, no similar provision exists; if the acquitted defendant wants to make the public opinion aware of the trial's conclusion in order to protect his own reputation, he has to provide on his own expenses.

Article 23 identifies the reasons for the publication of the conviction decision in the nature and seriousness of the offence, and in the interest to protect people's safety and property. The Court decides also the kind of media where to publish the sentence and the time limit for it.

The publication is at the convicted legal person's expenses. Persona data or people other than the convicted legal person are also protected by ensuring the anonymity.

If the legal person does not implement such order, the chair of the panel of judges decides on disciplinary fine of up to 500.000,-CZK. Such a disciplinary fine may be ordered repeatedly until the ordered duty is fulfilled (article 41).

Once the decision has become final, the chair of the panel of judges calls upon the legal person to publish the conviction decision in a given time limit and extent on its own expenses and in the assigned type of public media.

Article 23
Publication of the Judgment

(1) The court may impose publication of the judgment if it is deemed necessary to make the general public aware of the judgment of conviction, mainly due to the nature and seriousness of the criminal act, and/or if the interest in protection of safety of people or property, eventually the society, requires so. In doing so the court assigns the type of public media, where the judgment shall be published, the extent of publication and the time limit for the legal person to publish the judgment.

(2) The punishment to publish the judgment means that the convicted legal person publishes to its expenses the final judgment of conviction or its determined parts in a public media as assigned by the court, including identification data of the company or name of the legal person and its seat. Identification data of a natural or legal person that are different from the

convicted legal person brought forward in the judicial dictum or its reasoning must be anonymised prior to publication.

Article 41

Execution of the Punishment of Publication of the Judgment

(1) As soon as the judgment punishing with publication of the judgment becomes effective, the chair of the panel of judges calls upon the legal person to publish it in a given time limit and extent on its own expenses and in the assigned type of public media.

(2) If the legal person does not publish the judgment as specified in Paragraph 1, the chair of the panel of judges decides on disciplinary fine of up to 500.000,-CZK. Such a disciplinary fine may be ordered repeatedly until the ordered duty is fulfilled.

(3) A complaint against the decision according to Paragraph 2 is admissible; such complaint has suspensory effect.

4.9.8 Time limitation for the punishment implementation

In line with most of the EU systems, the punishment execution is subject to time limitation after a certain number of years; the background is that when significant time has gone without execution of the decision, there is no more interest from the State to implement it. However, most of the terms are so long, that it is pretty difficult to imagine the expiration of the time limitation. Moreover, as the law has entered into force in 2012, there are certainly no practical cases about this matter.
The law's wording must be intended that time starts to run from the moment the decision has become final and can be executed.
The time limitation depends essentially on the concrete amount of the ordered punishment.

Only in one case the law provides that the punishment execution is not subject to time limitation (article 25). It involves the execution of a punishment imposed for a terrorist attack (article 311 of the Criminal Code), if committed under such circumstance that create a war crime or a crime against humanity according to rules of public international law.

Article 24

Expiration of Limitation Period

A punishment imposed to a legal person may not be executed after expiration of the period of limitation, which is

a) thirty years, in cases of conviction to monetary punishment of at least 560 daily rates, or to punishment of prohibition of activity, prohibition to perform public contracts, debarment from concession procedure or public procurement, prohibition to receive endowments (grants) and subsidies for a time period of at least 15 years,

b) twenty years, in cases of conviction to monetary punishment of at least 380 daily rates, or to punishment of prohibition of activity, prohibition to perform public contracts, debarment from concession procedure or public procurement, prohibition to receive endowments (grants) and subsidies for a time period of at least 10 years,

c) ten years, in cases of conviction to monetary punishment of at least 200 daily rates, or to punishment of prohibition of activity, prohibition to perform public contracts, debarment from concession procedure or public procurement, prohibition to receive endowments (grants) and subsidies for a time period of at least 5 years,

d) five years in cases of conviction to another punishment.

It has to be noted, that according to article 27 the convicted legal person is deemed not to be convicted if the time period after a final convicting judgment as set in Section 24 has expired.

It seems therefore that in case of non-implementation of the punishment within the time frames set up in article 24, not only the possibility to execute the sanction is extinct, but also the conviction itself. The expiration of the time limitation in the punishment execution has therefore a very broad effect.

4.10 Procedural rules

4.10.1 Ne bis in idem

Article 28 regulates the relation between the criminal and administrative procedure when the behaviour of the legal person constitutes both an administrative infringement and a criminal offence.

The most traditional theories in the legal doctrines of several EU Member States were in favour of the principle of full autonomy of both proceedings, so that they could be carried out at the same time in parallel. Even the different kind of sanctions, at the respective level, could have been ordered by the respective authorities in parallel.

On the contrary, the law seems already inspired on this matter by the most recent opinions according to which the same act cannot be sanctioned twice, both at administrative and criminal level, under certain conditions.

It is in particular the case law of the European Court of Human Rights that has put forward such idea, as a consequence of the interpretation of the concept of "administrative sanction" developed by the Court in the past years.

The Court assumes that some sanctions, formally classified as "administrative", are so heavy and intrusive that have the same effect of criminal sanction. The Court set out some criteria to qualify an administrative sanction as "criminal" starting from the "Engel case[14]". The principle is that such sanctions have to be considered according to their essence and not their formal qualification. A heavy administrative fine can have more impact on a company than a criminal sanction such as, for example, a light ban to participate to a public procurement.

Therefore, the ECHR has stated in several recent decisions (see amongst the others the Grande Stevens case[15]) that when, in a specific case, a person has already been sanctioned at administrative level with a heavy sanction, that constitutes in essence a criminal sanction, he cannot be prosecuted and sanctioned for the same act a second time at criminal level.

The Czech law recalls such idea when in article 28 paragraph 2 it states that

> *Criminal proceeding against a legal person cannot be opened, and if opened it cannot continue and must be discontinued in cases where a previous proceeding on the same act against the same legal person ended up with a final decision on an administrative offence and such decision has not been revoked.*

Article 28 paragraph 1 goes even beyond this principle, as it states that administrative proceedings cannot be opened not only if the legal person has already been sanctioned at criminal level, but even in the case of mere opening of criminal proceedings on the same act.

4.10.2 Other procedural rules

Articles from 30 to 41 deal with the procedural rules of the proceedings to verify the liability of the legal person and the punishment execution, in case it is found guilty. These are specific procedural rules that apply in addition to the general ones of the Criminal Procedure Code.

The notice of opening and closing the criminal proceedings against a legal person is notified to the authority keeping the register where it is recorded or supervising the legal person or granting licenses to it.

[14] ECHR, Engel vs. The Netherlands, judgment of 32.11.1976

[15] ECHR, Grande Stevens and others Vs Italy, judgment of 14.2.2014

The law foresees the possibility to carry out joint proceedings against the accused legal person and accused natural person if their criminal acts are mutually related unless there are important reasons for the prohibition thereof.

Joint proceeding is conducted by a Regional Court, provided it is competent to conduct proceeding on at least one of the criminal acts. In cases where the offenders of the most serious criminal act or most serious criminal acts are accused natural person and accused legal person, the joint proceeding is conducted by a court which is competent to conduct a proceeding against the accused natural person.

However, criminal liability of the legal person and natural person is assessed independently throughout the joint proceeding.

Article 31 paragraph 3 also states that in cases where throughout the joint criminal proceeding against natural and legal person acts of criminal proceeding related to both these persons shall be conducted, such acts shall be first conducted in relation to the natural person as a rule.

Article 32 regulates the relation between the possible act of termination and dissolution of the legal person during the ongoing investigation or trial.

It provides for very detailed rules. The general principle is that if a legal person is going towards its dissolution, termination or change (to the end of this provision "change" means operations of merger, consolidation or division of the legal person, transfer of assets to a partner, change of legal form of the legal person or displacement of the legal person abroad) it has to inform in writing the prosecutor in the course of the investigation or the court during the trial. In principle, the operation cannot take place until the closing of the proceedings, unless the judicial authority authorises it.

In any case, the legal person may also be requested to deposit a guarantee for the payment of the possible sanction and trial expenses.

The legal person stands in trial through its representative that can be one of the managers or a representative duly appointed by a power of attorney; if one of the managers is also accused as a natural person in the same trial, he cannot represent the legal person.
The Act CLLPPT stipulates in its article 34 that the person entitled to act for a legal person during a court hearing according to Civil Law Procedure Code, exercises the same power during the criminal proceedings. In most cases, this is the statutory body. However, the legal person may choose a representative. If the person representing the entity becomes an accused, aggrieved of witness during the preceding he cannot keep exercising such a role. In these cases the legal person is requested to appoint another person for acting during the criminal proceedings. If such a person is not designated within a time period or if the legal person does not have a person legally capable to act in proceeding or if it is not possible to delivery documents to that person, the Court appoints a guardian. At the same time each person acting on behalf of legal person can choose a lawyer under article 35 of the Act CLLPPT because the right of defence is not being affected (with exception of necessary defence that is not applied against legal person).

Article 34
Acts of the Legal Person

(1) The person entitled to act for a legal person during a court hearing according to Civil Law Procedure Code acts for the legal person during the proceeding. Such person must prove its authority to act for the legal person.
(2) The legal person may choose a representative. The authorization to represent is proved upon a letter of attorney. Power of attorney can be granted orally to the judicial record. During the proceedings the legal person may have only one representative.
(3) During the proceedings only one person may act for the legal person simultaneously.

(4) A person that is the accused, damaged person or witness in the same case cannot make acts during the proceeding. If throughout the proceeding such fact arises, the chair of the panel of judges or the prosecutor during the pre-trial proceeding calls upon the legal person to appoint another person for the purpose of acting during the further proceeding; for such appointment time limit of 7 days is set as a rule.

(5) If a person according to Paragraph 4 is not appointed in time or the legal person does not have any such person capable to act during the proceeding, eventually documents cannot be verifiably served to the legal person or its representative, the chair of the panel of judges and during the pre-trial proceeding the judge appoints a guardian to the legal person. The guardian may be appointed upon his/her consent only. A person cannot be appointed guardian if reasonable doubt arises that such person has interests on the outcome of the proceeding which would reasonably doubt his/her readiness to duly defend the interests of the legal person. The decision of appointment of the guardian is served to the person appointed a guardian and also to the legal person if possible.

(6) The person according to Paragraph 1, representative and guardian have during the proceedings same rights and duties as the person against which the proceeding is conducted.

(7) If the person according to Paragraph 1, eventually the representative of the accused legal person or guardian do not appear at the trial without due excuse, the court may commence in their absence if the indictment has been dully served to the accused legal person, the legal person has been dully summoned for the trial, the provision on opening of criminal proceeding has been duly obeyed and the legal person was notified of the possibility to study the file and make proposals to supplement the investigation.

(8) If the legal person is represented or a guardian has been appointed and the Criminal Procedure Code does not state otherwise, documents intended for the legal person are served only to such representative or guardian.

Regarding the technical representation, it is interesting to note that while article 35 ensures the right of defence, still the general rules of the Criminal Procedure Code on the necessary defence do not apply.

Articles 36 and 37 concern some procedural issues relating to the fair course of the trial and its conclusion.

Article 36

Summons, Presentation and Disciplinary Fine

(1) If a person acting for the legal person according to Section 34, who was dully summoned, fails to appear without sufficient excuse, such person may be presented.

(2) If a person acting for the legal person according to Section 34 Paragraphs 1, 2 or 4 despite previous warning disturbs the hearing/proceeding or who behaves offensively to the court, prosecutor or police authority, or without sufficient excuse disobeys the order, or does not grant the request which was made according the Criminal Procedure Code or this Act, the legal person for which he/she is acting may be punished by the chair of the panel of judges and during the pre-trial proceeding the public prosecutor or the police authority with a disciplinary fine of up to 500 000 CZK. Should the guardian commit the conduct described in the first sentence, he/she may be punished with a disciplinary fine of up to 50 000 CZK.

(3) A complaint against the decision according to Paragraph 2 is admissible; such complaint has suspensory effect. For the decision over the complaint Section 146a of the Criminal Procedure Code is similarly applied.

Article 37

Interrogation and Closing Speech at the Trial and Public Hearing

(1) In cases of joint proceeding against a legal person and a natural person, the natural person is interrogated at the trial and public hearing prior to the representative of the legal person.

(2) After the public prosecutor's closing speech, the victim shall speak, followed by the parties involved, eventually their representatives, and the defense counsel of the legal person, then followed by the representative of the legal person, defense counsel of the natural person and the natural person itself. The last word is delivered first by the representative of the legal person and then by the natural person.

Finally, the provisions 38 – 41 regulate the execution of the different kind of punishments; some of them have already been scrutinized in the section about the relative sanction.

4.10.3 Conditions under which the diversion can be used against the accused legal person (conditional discontinuation of criminal prosecution)

It is a general rule that diversion is possible even in criminal prosecution against accused legal person. Therefore it is not linked exclusively on criminal prosecution against natural persons. The conditions stipulated in the Criminal Procedure Code for the use of diversion have to be fulfilled anyway. This is the only example when the Supreme Court of the Czech Republic ruled in relation to the issue of criminal liability of legal persons. It is a Decision of 17th of September 2014, file No. 5 Tz 41/2014.

The Supreme Court decided that applying of institution of conditional discontinuation of criminal prosecution under section 307 of the Criminal Procedure Code is not excluded either within proceeding against legal persons. The reason for this is that there is no provision about holding an alternative way of proceeding stipulated in the Act CLLPPT (something like a provision stipulated in Section 1, para. 2 of the Act No. 418/2011 Coll.,)

Confession asked under Section 307, para. 1(a) of the Criminal Procedure Code will be in proceeding conducted against natural person as well as against legal person on whose behalf should the accused natural person commit the offence fulfilled just by confession of the accused natural person (Section 8, para. 1 of the Act CLLPPT). The approval of conditional discontinuation of criminal prosecution of such a legal person cannot be expressed by accused natural person (Section 34, para. 4 Of the Act CLLPPT) but it should be expressed by person allowed to act in criminal proceedings conducted against legal person under Section 34, para. 1, 2 or para. 5 of the Act CLLPPT or under Section 21, para. 1, 2 or 3 of the Civil Procedure Code.

4.11 International cooperation

Although the Czech competence under the law is very broad, on the basis of the principle of the universality, it cannot be excluded that authorities of another State carry out an investigation on a legal person with a registered office, or only with assets, in the Czech Republic. In this case, there might also be the need for executing a decision in Czech Republic.

For this reasons, provisions on the judicial cooperation are necessary. The final part of the law (articles 42 – 47) was devoted to this issue. The law made a distinction between relations with other EU Member States and foreign authorities, intended as authorities of a non-EU Member State. The distinction is appropriate, as the European Union has developed over the years a specific legal framework in the area of criminal cooperation, so that the relations among EU Member States cannot be assimilated to those with other States outside the Union.

However, this section of the law has been recently repealed by a new legal instrument, the Act 104/2013 which entered into force on 1 January 2014, and regulated the whole judicial cooperation in criminal matters in the Czech Republic, by implementing also a certain number of EU framework decisions.
The new law reiterates the distinction between the cooperation with foreign States and other EU Member States (part V).

The basic principles of the judicial cooperation in the EU such as the mutual recognition, the exemption of double criminality under certain conditions and the communication between judicial authorities are applicable.
A specific chapter (chapter III of part V), of particular relevance in the proceedings involving legal persons, is devoted to the transfer of freezing and confiscation orders in the EU. Articles 229 – 236 stipulate that once the judicial authority of a Member State has issued a freezing order of assets, it is sent to the judicial authorities of the requested Member State. The double criminality condition is not necessary in certain cases. If there are no grounds to refuse the execution, the order is implemented in the requested Member State.

Articles 278 – 297 stipulate, on the basis of the same principles, the confiscation and forfeiture orders.

Articles 261 – 277 regard another issue of interest for the proceedings involving legal persons, namely the conditions for recognition and the execution of the decision on monetary sanctions and other monetary performances with Member States of the EU.

Other common provisions of the law are applicable also to proceedings involving legal persons, such as the articles on the role and competence of the Czech National Member in Eurojust and special kinds of judicial cooperation in the Union like the use of Joint Investigative Teams.

On the contrary, the cooperation outside the Union is regulated in the law on the basis of the traditional principle of mutual assistance with foreign authorities.

5 PART III - SPECIFIC ISSUES AND CASE STUDIES

After the general comment on the Czech legislation, in this third part some specific concrete issues are analysed with the help of the case law of the Supreme Court of other member States, with a specific focus on Italy where the liability of legal persons exists since 2001 and where a significant jurisprudence has been developed.

I. *Cases where no liability of the legal person can be inferred due to the fact that the action of the natural person for different reasons cannot be attributed to the legal person*

a) The supplier of a legal person, an assembler of car devices, receives a stolen GPS and sells it to company X. The employees of the legal person manipulated the stolen device after the supplier worked on it to conceal the origin. The technical manipulation consisted in incorporating the stolen GPS into the vehicle. The employees acted in their functions connected to the business of the legal person. The latter was also charged with the offence of money laundering.

Question:
The question is whether the legal person should be prosecuted for the criminal offence of money laundering under Section 216, para. 1 (a) and para. 2 (a),(b) of the Criminal Code.

b) A lady worked as a shop assistant in a store with furniture and she kept a client's deposit on the ordered furniture for her own usage. She was charged with the criminal offence of embezzlement under article 206, para. 1 and 3 of The Criminal Code.

Question:
In such case, are there the conditions to prosecute the legal person, namely the employer of the perpetrator?

c) In the course of usual business transaction an executive director of a company realises that by mistake the bank had transferred the amount of 1,060 € instead of 1,060 CZK which was due to him. He took the money anyway and used the excess amount for personal purposes

Question:
Can the legal person he works for be held liable of such behaviour?

II. *Cases where the liability of the legal person occurs, irrespective of the identification of the natural person author of the conduct*

a) Unknown staff of a legal person used a Mercedes Benz truck with high volume container belonging to the legal company to place on paved asphalt surface on the edge of arable soil big amount of building rubble, plasterboards, isolation, lining, carpets and other municipal waste. This waste also consist of petroleum substances that leak out from damaged barrels and polluted soil surface around 150 square meters and into a depth of 1.2 meters. In addition it also polluted the paved surface parking area of 150 square meters by used motor oil which is due to its toxicity and carcinogenicity classified as dangerous waste under the Act No. 185/2001 Coll. on Waste. The City of Prague identified a harm of 909.794 CZK. This amount is equivalent to costs on remediation of illegal dump.

Question:

Can the legal person be held liable for such conduct, provided that there is no evidence that it was an individual initiative by the staff, the legal person was unaware of?

b) An unidentified natural person made unauthorized encroachment into the measuring system of electric meter within a building of a particular legal person. The company providing services in the area of electricity was misled and the harm for this company reached amount of 24.812.766 CZK. The natural person that performed the unauthorized manipulation with the electric meter was not identified. It seemed the offender was one of the employees of the mentioned joint-stock company who was allowed to entrance the company area where the electric meter was placed. But this employee denied any manipulation with the electric meter. Finally it could be considered that the joint-stock company unlawfully took more electricity than they paid.

Question:

Can the legal person be prosecuted?

III. *Meaning of "interest of the legal person"*

It is a general principle of the legislations on the liability of legal person that the criminal offence is attributed to the entity when the act or the omission is committed "in its interest". Also the Czech system foresees such principle in article 8 of the Act 418/2011, as mentioned in part II. The question is clarifying when an offence can be considered as committed in the interest of the legal person.

In some Member States of the European Union, one of the categories of offences giving rise to the liability is that concerning the infringements of the legislation on workers protection on the workplaces. In this area, infringements are very often committed by negligence and not intentionally; therefore, in practical cases, the question whether an offence committed unintentionally can be considered as committed in the interest of the legal person was raised.

This kind of criminal offences does not appear among those that under the Czech law 418/2011 give rise to liability of the legal person in the Czech Republic; however, the same law provides for other offences committed by negligence, so the problem can be easily transposed from the area of the violation of rules on workers protection to the area of every unintentional crime.

The Italian Supreme Court, even very recently, has reaffirmed a principle already expressed in 2014 in the Thyssen case, a very well-known case in Italy (Supreme Court, Grand Chamber, 24.4.2014):

Case: in a factory of the company, several workers die in a fire due to the lack of devices and security measures to prevent accidents.

Question:

Can an unintentional offence be committed in the interest of the legal person?

IV. *The notion of "interest" in a group of companies*

Case: the natural person, perpetrator of the offence of market abuse, formally works for a company, which is controlled by a mother-company, head of the holding. The mother-company has been sanctioned as well, as the judicial authority that carried out the investigations held that the offence was committed also in the interest of the mother-company.

The latter appeals the decision to the Supreme Court.

Question:

In case of holding company, can a criminal offence be committed also in the interest of the holding company, despite the fact that the natural person is not directly employed in the holding company?

V. *Commission of the offence in the interest of the company and profit subject to confiscation*

Case: a company adjudicates a public procurement funded with public funds in the sector of alternative energies. The money is not used at all for the purposes of the project, but misappropriated by the administrator of the company. Only a little part of it is found in the company bank account. The judicial authority seizes assets for an amount corresponding to the whole amount of the project; the company objects that only the amount found in the company bank account should have been confiscated, as the manager misappropriated the other part on personal basis

Question:

In such case, should the whole amount be seized, or just the amount found in the company's bank account?

VI. *Profit and confiscation in case of tax offences attributed to the legal person*

Case: the representative of a legal person is charged with tax offences (omission in paying the VAT) committed in the interest of the latter. The Court orders the seizure, for the purpose of confiscation, of a property of the representative for the same value of the profit of the crime. The natural person appeals the decision assuming that first the direct profit of the crime (the amount not deposited to the State, and still in the company bank account) should have been seized.

The legislation allows seizure and confiscation for tax offences, but they are not in the list of criminal offences giving rise to the liability of the legal persons.

Question:

In case of criminal tax offence committed by a manager and attributed to the legal person, is the seizure and confiscation of assets of equivalent value admissible on the natural person, or just the seizure of the direct profit, only when it is in the availability of the legal person itself?

VII. *Principle of legality and liability of the legal person*

Case: a legal person is subject to investigation on allegations of criminal offence of market abuse; such offence is in the list of offences giving rise to the liability of legal persons. On this basis, a significant amount of money belonging to the company is seized by the judicial authority.
During the investigation, the company goes into bankruptcy; the accusation is therefore turned into illicit bankruptcy, a criminal offence which is not in the above mentioned list.

Question:

Once the criminal charge turns into an offence not giving rise to liability of legal persons, can the ordered seizure of money be held?

VIII. *Criminal confiscation and protection of the company's creditors*

Case : the company A, a big company working in the renewable energies sector, is charged with corruption involving foreign officials. The judicial authorities issue a preventive seizure order to

prevent the company from making the assets disappear. A few months later the company goes into bankruptcy due to a deep crisis of the market.

Therefore two needs are in apparent conflict: the need to protect the creditors in the liquidation procedure, but also the need to protect the injured party of the criminal offence-

The issue has been analysed, amongst other, in the Focarelli case by the Italian Supreme Court (Grand Chamber, decision n. 29951 of 24/05/2004).

Question:
Is the preventive seizure for the purpose of confiscation of proceeds of crime belonging to a legal person admissible, if the same legal person in the meantime has gone into bankruptcy and has been placed under the responsibility of a liquidator with the task of paying the debts according to the principle of equal treatment of all creditors?

IX. *Cases on the representation of the legal person in the criminal proceedings*

a) Case: the executive director of a company involved in a police investigation is the only person allowed to act on its behalf. He is heard as a witness in the enquiry.

Question:
Can such executive director represent the legal person in trial or taking decisions on its behalf?

b) Case: in another case the police issued a warrant on commencing a criminal prosecution of accused legal person and three accused natural persons. After the criminal prosecution began, one of the three natural persons involved, a recently appointed executive director of the company, granted a power of attorney to a defense lawyer to assist the accused legal person.

Question:
Did the executive director, in that position, have the power to appoint a lawyer for the company?

X. *Time limitation for imposing sanctions to the legal person*

In some systems (for instance, in the Italian one), time limitation for imposing sanctions to the legal persons is suspended until the conclusion of the criminal trial against the natural person author of the criminal offence and it starts running from the moment the decision on the natural person has become final.

Case: the legal person was indicted in 2006 together with the natural person. At the end of the trial involving the latter, the legal person was convicted to a monetary sanction; the legal person appealed the decision and in 2013 objected that more than 5 years had gone, so the time limitation would have brought to overturn the first instance decision.

Question:
Can the sanction be imposed?

XI. *Application of the precautionary interim measure of ban to enter into contracts with the Public Administration and resignation of the managers*

Case: a legal person is accused with its managers of fraud; they had obtained significant amounts of public funds to carry out innovative research projects but when the police went on the spot for a control found a completely different situation; the company looked like a traditional company trying to carry out its ordinary work with several problems, with no prospect of innovation.

The judicial authority applies the interim measure of ban to enter into contracts with the Public Administration for the future.

The companies managers resign and the legal person appeal the decision to the Supreme Court; it assumes that the resignation of the managers, the authors of the criminal offence, makes not necessary the measure anymore, as no danger or repeating the same behaviour occurs.

Question: Is the resignation of the natural person with managerial position in the legal person enough to say that the conditions for the application of the measure of ban to contract with the Public Administration do not occur any longer?

XII. *Meaning of "profit" of the crime for the purpose of confiscation in case of contract with mutual obligations*

Case: A legal person commits a fraud in the framework of an ordinary contract with mutual obligation; on one hand it conceals an essential element in the execution of the contract that would have brought to a reduction of the price but on the other hand the main service is provided according to the deal.

Question: Should the benefits produced by the legal person to the counterpart in the lawful execution of the deal be considered in determining the amount of the profit of the offence?

XIII. *Freedom of expression and liability of the legal persons*

Case: the Spanish Parliament passes a law suppressing two political parties considered endangering the main constitutional values of the State and the basic principles of democracy. The two parties file a legal action towards the Court assuming that such law violates their right of expression and freedom of association, which has to be recognised to the legal persons as well[16]

Question: in case of propaganda by a legal person supporting the terrorism or a kind of society that is not based on the democratic principle, is there a kind of liability of the legal person and can it be dissolved, or is such measure contrary to the rights of freedom of expression and association?

XIV. *Applicability of the fair trial principle also to legal persons*

Case: a legal person is accused of tax evasion or in any case of bookkeeping not in compliance with the law, and subject to several tax control proceedings; however, during the control, it is neither given sufficient time to examine the outcomes nor to present counter-arguments by producing documents. In the end, it is fined with high sanctions and seizure of assets[17]

[16] The example is inspired by the case Herri Batasuna and Batasuna vs Spain, ECHR Judgement of 30 June 2009

[17] The example is inspired by the ECHR, Judgment of 12 November 2002, Fortum Oil and Gas Oy v. Finland, Appl. 32559/96, par. 1, 2 ; for an overview of the rights of legal persons in the ECtHR case-law see the above-mentioned Van

Question:

Is the principle of fair trial (article 6 ECHR) applicable also to legal persons, such as to natural persons?

Kempen; for an overview on the applicability of article 6 ECHR in the ECtHR case-law, including to the legal persons, see Guide on article 6 – Fair trial – CoE/ECtHR, 2013, in www.echr.coe.int/documents/guide_art.6

6 APPENDIX 1 – OFFENCES GIVING RISE TO CRIMINAL LIABILITY

Offences giving rise to criminal liability as listed in Article 7 of the CC

1. Trafficking in Human Beings (Section 168 of the Criminal Code),
2. Fostering a Child to other Person's Power (Section 169 of the Criminal Code),
3. Extortion (Section 175 of the Criminal Code),
4. Breach of Secrecy of Transmitted Messages (Section 182 of the Criminal Code),
5. Sexual Duress (Section 186 of the Criminal Code),
6. Sexual Abuse (Section 187 of the Criminal Code),
7. Pandering (Section 189 of the Criminal Code),
8. Production and Other Disposal with Child Pornography (Section 192 of the Criminal Code),
9. Abuse of a Child for Pornography Production (Section 193 of the Criminal Code),
10. Corrupting the Morals of Children (Section 201 of the Criminal Code),
11. Seduction to Sexual Intercourse (Section 202 of the Criminal Code),
12. Fraud (Section 209 of the Criminal Code),
13. Insurance Fraud (Section 210 of the Criminal Code),
14. Credit Fraud (Section 211 of the Criminal Code),
15. Grant Fraud (Section 212 of the Criminal Code),
16. Operating False Games and Betting (Section 213 of the Criminal Code),
17. Participation (Section 214 of the Criminal Code),
18. Negligent Participation (Section 215 of the Criminal Code),
19. Legalization of Proceeds of Crime (Section 216 of the Criminal Code),
20. Legalization of Proceeds of Crime by Negligence (Section 217 of the Criminal Code),
21. Unlawful Access to Computer System and Data Carrier (Section 230 of the Criminal Code),
22. Procurement and Secretion of Access Equipment and Password of a Computer System and other such Data (Section 231 of the Criminal Code),
23. Damage of a Record in Computer System and on a Data Carrier and Interference of Computer Equipment by Negligence (Section 232 of the Criminal Code),
24. Forgery and Alteration of Money (Section 233 of the Criminal Code even under conditions set in Section 238 of the Criminal Code),
25. Unlawful Acquisition, Forgery and Alteration of Medium of Payment (Section 234 of the Criminal Code even under conditions set in Section 238 of the Criminal Code),
26. Uttering Counterfeited and Altered Money (Section 235 of the Criminal Code even under conditions set in Section 238 of the Criminal Code),
27. Manufacturing and Possession of Forgery Tools (Section 236 of the Criminal Code even under conditions set in Section 238 of the Criminal Code),
28. Unlawful Production of Money (Section 237 of the Criminal Code even under conditions set in Section 238 of the Criminal Code),
29. Retrenchment of Tax, Duty or any Other Similar Mandatory Payment (Section 240 of the Criminal Code),
30. Evasion of Tax, Social Security Insurance and any Other Similar Mandatory Payment (Section 241of the Criminal Code),
31. Non-fulfilment of Reporting Obligation in Tax Proceedings (Section 243 of the Criminal Code),
32. Breach of Regulations on Stickers and Other Objects for Marking of Goods (Section 244 of the Criminal Code),

33. Forgery and Alteration of Devices for Marking of Goods for Tax Purposes and Objects Proving Fulfilment of Fee Obligation (Section 245 of the Criminal Code),
34. Distortion of Data on the State of Management and Property (Section 254 of the Criminal Code),
35. Abuse of Information and Status in Business Relations (Section 255 of the Criminal Code)
36. Arranging Advantage in Commission of Public Contract, Public Tender and Public Auction (Section 256 of the Criminal Code),
37. Scheming in Commission of Public Contract and Public Tender (Section 257 of the Criminal Code),
38. Scheming in Public Auction (Section 258 of the Criminal Code),
39. Issuing False Certificate or Statement (Section 259 of the Criminal Code),
40. Damaging the Financial Interests of European Union (Section 260 of the Criminal Code), Breach of Copyright, Rights Related to Copyright and Rights to a Database (Section 270 of the Criminal Code),
41. Unlawful Acquisition and Possession of Firearms (Section 279 of the Criminal Code), Development, Production and Possession of Prohibited Combat Devices (Section 280 of the Criminal Code),
42. Unlawful Production and Possession of Radioactive Substance and Highly Dangerous Substance (Section 281 of the Criminal Code),
43. Unlawful Production and Possession of Radioactive Material and Special Fissionable Material (Section 282 of the Criminal Code),
44. Unlawful Production and Other Disposal with Narcotic and Psychotropic Substances and Poisons (Section 283 of the Criminal Code),
45. Possession of Narcotic and Psychotropic Substance or Poison (Section 284 of the Criminal Code),
46. Unlawful Cultivation of Plants Containing Narcotic or Psychotropic Substances (Section 285 of the Criminal Code),
47. Damage and Endangering of the Environment (Section 293 of the Criminal Code),
48. Damage and Endangering of the Environment by Negligence (Section 294 of the Criminal Code),
49. Damage of Forest (Section 295 of the Criminal Code),
50. Unlawful Discharge of Pollutants (Section 297 of the Criminal Code),
51. Unlawful Disposal With Waste (Section 298 of the Criminal Code),
52. Unauthorized Production and other Disposal with Substances Damaging the Ozone Layer (Section 298a of the Criminal Code)
53. Unlawful Disposal with Protected Wild Living Animals and Wild Flora (Section 299 of the Criminal Code),
54. Unlawful Disposal with Protected Wild Living Animals and Wild Flora by Negligence (Section 300 of the Criminal Code),
55. Dispossession or Destruction of Animals and Plants (Section 301 of the Criminal Code), Terrorist Attack (Section 311 of the Criminal Code),
56. Threatening with the Aim to Affect Public Authority (Section 324 of the Criminal Code),
57. Threatening with the Aim to Affect a Public Official (Section 326 of the Criminal Code),
58. Passive Bribery (Section 331 of the Criminal Code),
59. Active Bribery (Section 332 of the Criminal Code),
60. Trading in Influence (Section 333 of the Criminal Code),
61. Perverting the Course of Justice (Section 335 of the Criminal Code),

62. Obstructing the Execution of an Official Decision and Expulsion (Section 337 of the Criminal Code),
63. Organization and Facilitation of Unlawful Crossing of the Border of the State (Section 340 of the Criminal Code),
64. Aiding to Unlawful Residence on the Territory of the Republic (Section 341 of the Criminal Code),
65. Unlawful Employment of Foreigners (Section 342 of the Criminal Code),
66. False Testimony and False Expert Opinion (Section 346 of the Criminal Code),
67. Forgery and Alteration of an Official Document (Section 348 of the Criminal Code),
68. Unlawful Production and Possession of a Sealing-Stick, Seal and Official Stamp (Section 349 of the Criminal Code),
69. Violence Against a Group of Persons and Against an Individual (Section 352 of the Criminal Code),
70. Defamation of Nation, Race, Ethnical or Other Group of Persons (Section 355 of the Criminal Code),
71. Incitement of Hatred Towards a Group of Persons or to Limitation of Their Rights and Freedoms (Section 356 of the Criminal Code),
72. Participation in an Organized Criminal Group (Section 361 of the Criminal Code),
73. Incitement to Commit a Criminal Act (Section 364 of the Criminal Code),
74. Abetting (Section 366 of the Criminal Code),
75. Expressing Sympathies for a Movement Aimed at Suppressing Human Rights and Freedoms (Section 404 of the Criminal Code)
76. Denial, Questioning, Approval and Justification of Genocide (Section 405 of the Criminal Code).
77. Rape (Section 185 of the Criminal Code)
78. Attending a Pronographis Perfomrance (Section 193a of the Criminal Code)
79. Engaging in Forbidden Contacts with a Child (Section 193b of the Criminal Code)
80. Usury (Section 218 of the Criminal Code)

7 APPENDIX 2 - ANSWERS TO THE QUESTIONS PROPOSED IN THE PART ON PRACTICAL CASES

Case I a)

The employees of the accused legal person themselves did not legalize the assets from criminal activity. The supplier of the legal person was the one accused for this criminal activity. In this particular case it was necessary to deal with the qualification of acting only of natural persons under article 214 or article 215 of the Criminal Code (participation or negligent participation) because of further knowledge indicating their culpability. The criminal liability of the legal person could not be considered.

Case I b)

In this case it was not possible to prosecute the legal person even when the deposit was stolen by its employee. The acting of the employee was a visible excess from her work obligations and no circumstances that could add the acting of the offender to the liability of the legal person were detected. The lady who committed the crime was prosecuted only as a natural person.

Case I c)

The law conditions for imputability of liability of legal person were not met, because the offence was not committed on behalf of, in interest or within an activity of the legal person. It was not possible to prosecute the legal person for the criminal offence of fraud (under Section 209, para.1 of the Criminal Code) in this case either.

Case II a)

The investigation could not identify the personal data of the material perpetrators of the crime. However, the legal person was prosecuted, accused and then convicted for the criminal offence of unauthorized waste disposal under article 298, para. 2 and 4 (b) of the Criminal Code. This happened despite the fact that the particular natural person that committed the abovementioned criminal offence was not detected.

Case II b)

It was not proved that a body or member of body of the legal person manipulated with the electric meter or issued an instruction of doing so. The Act CLLPPT stipulates that the legal person can be made liable even if the particular natural person acting, in the way stipulated in article 8, para. 1 and 2, was not identified. This act also stipulates the conditions that have to be fulfilled for adding the committing of the criminal offence to the legal person. The criminal prosecution of the legal person is conditioned not only by presence of acting that fulfil the elements of a crime but also by proving that abovementioned illicit acting was performed by special subject stipulated in the law, that means statutory authority, person performing leading or controlling function, person performing decision making influence or employee on behalf of instructions provided by one of previously mentioned person. If it is proved that the acting was performed by such a special subject then in most cases it is proved which natural person was the special acting subject. This provision of the Act CLLPPT could be also applied on cases when it would be proved that acting that fulfil elements of crime was performed by statutory body that is collective (for example board of directors) but in the same time it would be impossible to prove which members of the statutory body vote for such acting (records from the session of board of directors include just general numbers of votes for or against).

Case III

It is a consolidated principle that the interest and/or the benefit of the legal person can also consist in saving money thanks to the lack of investments on workers' safety or in the growth of productivity thanks to the lack of compliance with detailed rules aiming at the workers' protection.

In other terms, in the criminal offences committed by negligence the interest/benefit of the legal person is linked to the saving of money due to the non-compliance with the legislation on the safety of the workplace, that would require either expenses for the adoption of protective measures or a slower development of the working process.

Therefore, also an offence by negligence is committed in the interest/benefit of the legal person because the omitted protection that caused the unwilling offence avoids financial commitments of the legal person (all unofficial translations)

In other decisions the Italian Supreme Court has repeatedly specified that the interest of the legal person is not necessarily the main one, but the offence can be attributed to it even if the offence is committed also in its interest

Supreme Court, n. 29512/15; n. 10265/13; n. 40380/12:
In order to attribute to the legal person the liability from a criminal offence, the behavior of the perpetrator may have as a concrete and objective goal "also" the interest of the legal person itself

In addition and alternatively to the commission of the offence "in the interest" of the legal person, some legislations foresee also that the offence must have been committed "for the benefit" of the legal person.

The Czech law 418/2011 in article 8 does not provide for such difference, although in practical terms the issue could be raised because a lawyer could invoke the acquittal of a legal person simply because the offence was not committed in "its interest" although it has obtained "a benefit".

Thus, it is important to have at least a sort of guiding principle to recognize when the first situation occurs, and when the second.

The Italian Supreme Court had drawn the difference between "interest" and "benefit"

Supreme Court, case n. 29512/15

Interest and benefit are concurrent criteria, but alternatives. Interest is meant as the goal of the action to be assessed "ex ante"; on the contrary, "benefit" is the potential and actual advantage, not necessarily patrimonial, to be assessed through an "ex post" evaluation.

Case IV

The Court (decisions n. 4324 of 2012, n.24583 of 2011) says that it is enough for the liability of the legal person that the natural person, perpetrator of the offence, has acted in the interest of the company he works for.

Moreover, such kind of liability can be recognized also inside a group of companies. In this case, the mother-company can be held liable for a criminal offence committed in the activity of one of the controlled companies, if the perpetrator has acted also in the interest of the mother-company and not only of the company he works for.

Case V

The Supreme Court decision n. 29512/15 says that the whole amount is to be considered as a "profit", considering that the manager's behaviour was committed in the interest of the company

It is proved that the subsidy was used for purposes other than those it was granted for; in other words, not a single coin was used for the project of energy production from renewable sources. It is clear, therefore, that the whole received amount must be considered as a "profit" of the offence and nothing can be deducted.

Regarding the objection that the only amount that should be subject to seizure is that found in the bank account and not that misappropriated by the managers: this request is based on the wrong assumption that the position of the perpetrator and of the company have to be kept separated. On the contrary, once it was verified that the offence was committed by the perpetrator in the interest of the company, the whole amount has to be considered a profit of the offence and subject to seizure.

Case VI

The Italian Supreme Court in its highest composition (Grand Chamber) in the Gubert case n. 10561/2014, has stated that seizure and confiscation against the legal person of the direct profit of the criminal tax offence is allowed when such profit is directly available to the legal person.
On the contrary, as tax offences are not among those giving rise to the liability of the legal persons, seizure and confiscation of assets of equivalent value against the legal person for tax offences is not allowed when the seizure of the direct profit is possible.

Case VII

The Supreme Court holds that the seizure cannot be maintained as the charge has changes and the new charge does not allow the legal person to be criminally liable.

Supreme Court, Grand Chamber, n. 11170/15

In order to affirm the liability of the legal person, the behaviour of the perpetrator must be provided as a criminal offence in a law that entered into force before the action or omission was held. Moreover, such criminal offence must have been inserted in the list of the offences giving rise to the liability of the legal persons before it was put in place.

Unlike other legal systems in the EU, in Italy the liability of legal person can derive only from the commission of one of the criminal offences specifically provided for by the law, and cannot derive by the extension of the scope of the liability of the natural persons.

Case VIII

On this matter, different solutions had been adopted in previous decisions of the Supreme Court and the Grand Chamber had the task to solve such conflict.
The Grand Chamber stated that when a preventive seizure is conflicting with a bankruptcy procedure, opposite interests are at stake. Those of the criminal procedure to prevent the perpetrator of the crime to get some benefit from it, and those of the liquidation procedure to ensure the same equal treatment to the creditors. It is up to the judge to solve the conflict between this apparently conflicting interests, but the criminal seizure is not forbidden in itself, even in case of ongoing bankruptcy proceedings.

In another more recent decision, the Grand Chamber has come back on the issue (Supreme Court, Grand Chamber, decision n. 11170/15)

Seizure and confiscation must be ordered when the conditions occur, as they are criminal sanctions with respect to the legal persons, but they are not incompatible with the protection of the creditors of the company in a bankruptcy procedure; on the contrary, they assist the procedure run by the liquidator, in which the State becomes a creditor like the others at the conclusion of it, after the execution of the seizure and confiscation.

Case IX a)

Due to the fact that the executive director was heard as a witness and criminal prosecution of other accused persons (natural persons) began, the law enforcement authorities came to conclusion that this one particular executive director cannot act in the proceeding on behalf of legal person under Section 34, para. 4 of the Act CLLPPT. The police authority of the district court suggested an appointment of the guardian.

The court asked for evidence of the fact that the person is the only person allowed on behalf of the legal person, before appointing a guardian, and also for evidence that the person was heard and the accused legal person was in accordance with Section 34, para. 4 of the Act CLLPPT appealed to stipulate another person to act on behalf of the legal person. Subsequently the court appointed the guardian under the Section 34, para. 5 of the Act CLLPPT. In this context it is useful to note that the person was really the only executive director of the accused legal person. The only partner of the accused legal person was in that case another business company (corporation). Before the guardian was appointed the district court did not asked if the appeal of stipulation of other person under Section 34, para 4 second sentence of the Act CLLPPT was directed towards the partner of the accused legal person.

Case IX b)

The law enforcement authorities acting in the pre-trial proceeding did not accept this power of attorney because the executive director was in the same case in the position of accused – it means a person who, under Section 34, para 5 of the Act CLLPPT, is excluded from acting on behalf of legal person. The district court appointed a guardian to the accused legal person and the guardian did not file a complaint on commence a criminal prosecution. This conclusion has to be considered as totally clear in the way that lawyer to the accused legal person cannot be stipulated by the excluded statutory body in accordance to Section 35, para. 1 of the Act CLLPPT.

Case X

The Supreme Court said that:

The legal position of the legal entities is not comparable to that of natural persons. The legal persons are not owners of inviolable rights and cannot invoke the constitutional protection provided for by article 2 of the Constitution on the rights of persons.
Such disparity is not contrary to the equality principle enshrined in article 3 of the Constitution.

Case XI

According to the Supreme Court (decision n. 46369 of 2013) the only fact that the accused natural persons, perpetrators of the crime, resigned, without being replaced, is not enough to conclude that the conditions for the commission of the crime do not occur any longer.
One of the conditions of application of interim measures to prevent the commission of other offences is a subjective condition involving the nature of the legal entity, its "personality", its internal organization, its policies, the previous commission of other offences.

In this sense, the replacement of the managerial board of the company can mark discontinuity with previous conducts only if it represents the intention to change the legal person's previous policies and organization towards the policy of prevention of other offences.

In the specific case, this does not appear, so that the mere resignation of the previous board does not have any specific meaning in the sense of avoiding in the future the commission of further crimes.

Case XII

When in the execution of a contract, the legal persons performance produces economic benefit to the counterpart, even if the conclusion of the contract amounts to the criminal offence of fraud, the benefit obtained by the victim has to be taken into account and deducted from the sum constituting "profit" of the crime and subject to confiscation. (Supreme Court of Italy decision. n. 45054 of 2011)

Case XIII

The European Court of Human Rights ruled that the decision of dissolving such entities has been taken in the framework of actions aiming at repressing terrorism propaganda. Such decision is in compliance with some international legal instruments on the fight against terrorism such as the framework decision of 13 June 2002 and the Council of Europe Convention to prevent terrorism, which entered into force on 1 June 2007. The latter provides for the liability of legal persons participating to terrorism acts and the criminalisation of such conduct.
Therefore the decision of the Spanish Supreme Court to confirm the suppression of the two parties is lawful.

Case XIV

The European Court of Human Rights found a violation of article 6 of the Convention, on the basis of the principle that, even in case of corporate liability, still some principles of the Convention are applicable also to legal persons.