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Criminal Liability of Legal Persons in Estonia

1. General remarks

Estonia introduced criminal liability of legal persons with the adoption of the new Penal Code of 2002.¹ The Estonian courts and public prosecutors have applied the provisions extensively, but so far the topic has attracted the attention of only a few legal scholars.²

According to § 14 of the Penal Code, “in the cases provided by law, a legal person shall be held responsible for an act which is committed by a body, a member of a body, a senior official, or a competent representative in the interest of the legal person. Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. The provisions of this act do not apply to the state, local governments, or legal persons in public law”. Section 37 asserts that “legal persons with passive legal capacity are capable of guilt”. Before the introduction of the new Penal Code, legal persons were liable only for administrative offences.

1.1. Liability only for listed crimes

In Estonia, legal persons can be held criminally responsible only for those acts for which there exists a special provision in the Special Part of the Penal Code laying down that they are punishable when performed by legal persons. The number of crimes for which criminal liability is imposed on legal persons has increased since 2002 and today there are 133 such crimes in the Special Part of the Penal Code. The list includes crimes — such as pollution of the environment, abuse of inside information, tax evasion, fraud, giving bribes, and trading in pirated works — that have been commonly associated with the idea of criminal liability of legal persons. However, there are a number of crimes that are quite remote from the usual activities of legal persons, such as war propaganda, the sale or purchase of children, and acts of terrorism, that also form part of the list. Everyday street crimes like assault and theft are excluded from the list, as are murder and manslaughter. It is not very clear why for certain crimes legal persons are liable and for others they are not. Nevertheless, it is practical to limit the number of crimes for which legal persons can be held liable because in Estonia, according to the legality principle, criminal proceedings are initiated whenever information exists that a crime may have been committed. In addition, criminal proceedings may be terminated only on the grounds listed in the Code of

¹ Karistusseadustik. – RT I 2001, 61, 364; 2008, 54, 305. Estonian text available at <https://www.riigiteataja.ee/ert/act.jsp?id=13094249> (28.07.2009). English translation available at <http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X30068K7.htm&query=karistusseadustik&tyyp=X&ptyyp=RT&pg=1&fr=no> (28.07.2009).

² J. Sootak, E. Elkind. Juriidilise isiku vastutus: uued arengusuunad Eesti kohtupraktikas (Liability of a Legal Person: New Trends in Estonian Court Practice). – *Juridica* 2005/10, p. 671 (in Estonian); J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne (Penal Code. Commented Edition). Tallinn 2004, § 14, comment 5.1.1. p. 66 (in Estonian).

Criminal Procedure.^{*3} Without such limitation, there would be an inquiry in every criminal case as to whether a legal person should be held responsible for the crime.

1.2. Sanctions

There are only two sanctions in the Penal Code that can be employed to punish legal persons — pecuniary punishment^{*4} and compulsory dissolution of the legal person.^{*5} In the case of a legal person, the court may impose a pecuniary punishment of 50,000 to 250 million kroons — i.e., a fine of about 3,000 to 16,000,000 euros — on the legal person. A pecuniary punishment may be imposed on a legal person also as a supplementary punishment in combination with compulsory dissolution. A court may impose compulsory dissolution on a legal person that has committed a criminal offence only if the commission of the criminal offence has become part of the activities of the legal person.

1.3. Who can be held liable?

In Estonia, a legal person can be held responsible only if the entity is a legal person according to § 6 of the Estonian General Part of the Civil Code Act.^{*6} An entity that does not act in its own name, such as a group of natural persons acting in agreement, and with no registration or capacity to have legal rights, cannot be held criminally liable. The state, local governments, and legal persons in public law cannot be held criminally responsible either. The reason for the exclusion of the state is fairly self-evident, since criminal responsibility is enforced by the same state. However, the reasons for excluding local governments and legal persons in public law are less obvious. It has been suggested that they are excluded because they act in the public interest, their functions are established by public legal acts, and it is not possible to apply compulsory dissolution to them.^{*7}

1.4. Liability for intentional crimes and crimes of negligence

According to the Estonian Penal Code, a legal person may be responsible for both intentional and negligent acts. Although the literal text of § 14 of the Penal Code states that legal persons are liable only for acts committed in the interests of the legal person and given that it is not completely clear whether it is possible to be negligent in the interests of a legal person, the Special Part of the Estonian Penal Code explicitly specifies that legal persons are liable for several concrete crimes of negligence as well. Therefore, the text of § 14 (1) stating that a legal person is responsible only for an act that is committed “in the interest of the legal person” should be interpreted to mean that the legal person is responsible for negligent acts that have been committed while the controlling body or senior official of the legal person was acting in the interests of that legal person.

2. Rules of imputation

The text of § 14 states that only acts committed by a body, a member of a body, a senior official, or a competent representative of a legal person can be imputed to the legal person. The code is silent about which bodies' acts can be imputed. The most well-acknowledged opinion is that the acts of all the bodies listed in the statutes of the legal person, including the general meeting, the management board, the supervisory board, and the bodies that can act in the name of the legal person, can be imputed to the legal person.^{*8} Still there remains a question as to whether additional corporate organs such as audit committees qualify as well.^{*9} The wording of § 14 is somewhat

³ Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2008, 52, 288. Estonian text available at <https://www.riigiteataja.ee/ert/act.jsp?id=13088645> (28.07.2009). English translation available at <http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X60027K4.htm&query=kriminaalmenetluse&tyyp=X&ptyyp=RT&pg=1&fr=no> (28.07.2009).

⁴ Section 44 of the Estonian Penal Code.

⁵ Section 46 of the Estonian Penal Code.

⁶ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2008, 59, 330. Estonian text available at <https://www.riigiteataja.ee/ert/act.jsp?id=13111425> (28.07.2009). English translation available at <http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X0015.htm&query=%FCldosa%20seadus&tyyp=X&ptyyp=RT&pg=1&fr=no> (28.07.2009).

⁷ J. Sootak, E. Elkind (Note 2), p. 671.

⁸ J. Sootak, P. Pikamäe (Note 2), § 14, comment 5.1.1. p. 66.

⁹ Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions. ESTONIA: PHASE 2. Working Group on Bribery in International Business Transactions OECD, 2008, p. 40. Available at <http://www.oecd.org/dataoecd/60/57/40953976.pdf> (28.07.2009).

strict in listing the actors whose acts can be imputed to a legal person, and the English translation of the text is even stricter. The Estonian term 'juhtivtöötaja' has been translated into English as 'senior official'. The Estonian term 'juhtivtöötaja' can be understood as referring to an employee having some administrative functions in an organisation, but the term 'senior official' refers to some higher level of administration. Estonian court practice has applied a broad interpretation of the concept of *juhtivtöötaja*. The Estonian Supreme Court has asserted in several cases that "as in big companies top-level executives do not handle everyday business and in concrete spheres they delegate their powers to lower-standing executives, the term 'juhtivtöötaja' includes middle-ranking executives having independent decision-making power in certain fields and therefore being able to direct the will of the legal person".¹⁰ The Supreme Court has indicated that a legal person may be responsible even if the criminal act to be imputed to that legal person was committed not by an executive but merely by an employee of the legal person, provided that the act was ordered or at least approved by an executive official or a body.¹¹

Until 28 July 2008, the Estonian penal law denied the opportunity to impute actions of its contracted agents to a legal person. In this respect, the Supreme Court did not agree to broaden the definition and decided that if the criminal act — for example, presenting false information to customs authorities — was committed not by a senior official or a body of the legal person but by a contracted agent, the legal person is not liable.¹² The situation was criticised by scholars¹³ and international bodies.¹⁴ The Estonian Parliament, *Riigikogu*, reacted and adopted amendments to the Estonian Penal Code adding "competent representative" to the list of persons whose acts can be imputed to a legal person. The term 'competent representative' is not defined in Estonian jurisprudence. In the explanatory memorandum to the draft amendment, it was explained that the term was designed to refer to a broad spectrum of persons but that there is expectation of some concrete authority to represent the legal person as, e.g., a commercial agent or marketing specialist. The explanatory memorandum adds that a competent representative does not have necessarily to have an employment contract with the legal person, and at the same time that not all employees of a legal person can be regarded as competent representatives and that the acts of a competent representative in excess of said representative's authority cannot be imputed to the legal person.¹⁵

The Estonian Penal Code is most probably still too narrow in specifying those natural persons whose acts can be imputed to a legal person. It does not include employees of those legal persons who are not senior officials or members of a body or competent representative but who have committed criminal acts in the interests of the legal person due to lack of supervision by the management of the legal person.

Estonia has ratified the Council of Europe Criminal Law Convention on Corruption.¹⁶ Article 18.2 of the convention requires taking "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"¹⁷. Unfortunately, Estonia still has not been able to fulfil its obligations under this convention.

The Estonian Supreme Court has indicated that for some criminal act to be imputed to a legal person one or more natural persons have to fulfil all the material elements of a crime and the act should be unlawful and the person culpable. The court has indicated that in some cases it may be impossible to determine exactly which natural persons committed a criminal act on behalf of the legal person. Such a case might be a secret ballot in the governing body of a legal person where it may be impossible to determine who exactly the members of the governing body were who voted for the criminal decision. The natural person does not have to be convicted for the legal person to be convicted. Even if the specific natural person is known, the criminal proceedings against the natural person may be terminated.¹⁸

¹⁰ CLCSCd, 23.03.2005, 3-1-1-9-05. – RT III 2005, 12, 118. Available at <http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-82-04&print=1> (28.07.2009) (in Estonian).

¹¹ CLCSCd, 10.02.2006, 3-1-1-145-05. – RT III 2006, 7. Available at <http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-145-05&print=1> (28.07.2009) (in Estonian).

¹² CLCSCd, 19.10.2004, 3-1-1-70-04. – RT III 2004, 27, 292. Available at <http://www.nc.ee/?id=11&indeks=0%2C1%2C69%2C639%2C2180&tekst=222475582&print=1> (28.07.2009) (in Estonian).

¹³ J. Ginter. Criminal Liability of Legal Persons in Estonia — A Working System Still subject to Improvement. – Corporate Criminal Liability in Europe. La Chartre 2008, p. 151.

¹⁴ Report (Note 9), p. 40.

¹⁵ Karistusseadustiku ja kriminaalmenetluse seadustiku muutmise seaduse eelnõu seletuskiri (The Explanatory Memorandum to the Draft Amendment to the Penal Code and the Code of Criminal Procedure). Available at [http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=280345&file_name=karistusseadustiku%20ja%20seletuskiri%20\(242\).doc&file_size=51712](http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=280345&file_name=karistusseadustiku%20ja%20seletuskiri%20(242).doc&file_size=51712) (28.07.2009) (in Estonian).

¹⁶ RT II 2001, 28, 140. Available at <https://www.riigiteataja.ee/ert/act.jsp?id=979019> (28.07.2009).

¹⁷ Criminal Law Convention on Corruption. Available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm> (28.07.2009).

¹⁸ CLCSCd, 28.09.2004, 3-1-1-82-04. – RT III 2004, 24, 263. Available at <http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-82-04&print=1> (28.07.2009) (in Estonian).

The Supreme Court has decided that in the case of omission it should be ascertained which specific natural person (senior official of the legal person) had the obligation to act and failed to perform that legal obligation.^{*19}

The Supreme Court has not had an opportunity to render a judgment in a case where the governing body of a legal person committed a crime through omission and where said omission was decided upon in a secret ballot. In this case, it could happen that it is not possible to find out who voted in a secret ballot against some legal decision whereby the legal person was obliged to perform some activities and, following the governing body's decision, the legal person failed to act. The Supreme Court has suggested that the situation where the legal person is responsible for an omission by a body of the legal person is not analogous to the situation where a legal person is responsible for a decision made by one of its bodies in a secret ballot to act in violation of criminal law. In the case of omission, the Supreme Court has found that it is possible and necessary to identify the person(s) who, according to the division of responsibilities within the legal person, was (were) obliged to perform the action that the legal person failed to perform. If there has been no division of responsibilities, all members of the legal person's body may be liable.^{*20} The author of this paper still favours the opposing view that cases of omission should be treated equivalently to other cases and that it should be recognised that in some cases it may be impossible to single out which members of a body of a legal person voted in a secret ballot against taking action (when the legal person was legally obliged to act). It would also be unjust to hold responsible the members of the body who in the secret ballot voted to take the mandatory action (i.e., those who did everything they could have been required to do to fulfil the obligation) but were simply outnumbered in the secret ballot.

The Supreme Court has analysed in several judgments how to decide that a senior official or a body of a legal person has acted in the interests of the legal person. The court has decided that it is not only acts that offer pecuniary benefits to the legal person that can be regarded as acts committed in the interests of that legal person. To be considered an act committed in the interests of a legal person, the act should be connected to the legal person. The act should be committed in the sphere of activities of the legal person or in a sphere connected to it. Of course, not all acts of senior officials or bodies of a legal person are committed in the interests of the legal person. The acts of senior officials committed exclusively in their personal interests cannot be imputed to the legal person. However, the interests of a legal person are broader than only financial benefit and may concern spheres that lie far afield of the main spheres of activities of the legal person (as recorded, for example, in the trade register). Therefore, the issue of whether an act has been committed in the interests of a legal person has to be decided in every case independently, in accordance with the circumstances ascertained as pertaining to that concrete case.^{*21}

In another case, the Supreme Court decided that there was no need to conduct empirical research or extensive analysis to determine the extent of financial benefits in relation to the issue of whether playing music (without the authors' permission) in a store was conducted in the interests of the store. The court decided that, since the playing of music was inextricably connected to the store's main activities and was not done in the exclusive interests of a senior official or a body of the legal person, it was sufficient to consider this act to have been committed in the interests of the legal person.^{*22}

The court has not had an opportunity to rule on the application of the *nulla crime sine culpa* principle in the case of criminal responsibility of a legal person. But some Estonian legal scholars have proposed that, although the criminal liability of legal persons is derivative liability, this should not mean that if an individual (a senior official or member of a body of a legal person) who has committed criminal acts in the interests of a legal person is legally incapable of guilt, the legal person's criminal liability should be excluded. Their argument is that if the legal person is not capable of exerting sufficient supervision of its senior officials and members of bodies to ensure that they are at least legally capable of guilt, the existence of the legal person is not of such value that it should be tolerated if its senior officials or members of its bodies commit criminal acts.^{*23} The author of this paper holds a different opinion. The criminal liability of legal persons should not serve to erode the general principles of criminal law, and therefore the *nulla crime sine culpa* principle should be considered in respect of the criminal acts of legal persons as well. For those unlikely situations wherein senior officials or members of bodies of a legal person who commit criminal acts are legally incapable of guilt, legal tools outside criminal law should be employed.

¹⁹ CLCSCd, 27.03.2006, 3-1-1-4-06. – RT III 2006, 11, 100. Available at <http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-4-06&print=1> (28.07.2009) (in Estonian).

²⁰ CLCSCd, 6.05.2005, 3-1-1-137-04. – RT III 2005, 18, 184. Available at <http://www.nc.ee/?id=11&tekst=222479341&print=1> (28.07.2009) (in Estonian).

²¹ CLCSCd, 3-1-1-9-05.

²² CLCSCd, 3-1-1-137-04.

²³ J. Sootak, E. Elkind (Note 2), p. 671.

3. The *ne bis in idem* principle not precluding simultaneous liability of a natural person

In Estonia, prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. Some courts of first instance have been of the opinion that the *ne bis in idem* principle precludes liability of the natural person if the legal person has already been convicted. Some courts have insisted that the act of the natural person and the act of the legal person should be assessed as complicity. The Supreme Court has ruled that, since the liability of a legal person is a derivative liability, the two separate persons have two separate liabilities for the same act and the *ne bis in idem* principle and the rules of complicity do not apply. Even in the case of a single-shareholder company, where the single shareholder is the only official and the sole member of the body of the company, the court decided that both the natural person (the shareholder) and the legal person should be held responsible.^{*24}

The Supreme Court has ruled that the text of the code, “[p]rosecution of a legal person does not preclude prosecution of the natural person who committed the offence”, does not refer to prosecutorial discretion in decision of whether or not to prosecute the natural person. The court decided that the standard procedure should be that both the legal and the natural person(s) are held responsible because it was not the purpose of the criminalisation of the acts of legal persons to exculpate natural persons who have committed criminal acts and the intent was instead to exclude the possibility of utilising legal persons for the commission of crimes. Only if there are grounds to terminate criminal proceedings against the natural or legal person should one (or both) sets of proceedings be terminated. In the stage of initiating a criminal procedure, the legality principle takes precedence and the principle of opportunity becomes available only if there are certain grounds for termination of the proceedings. But the court does not insist that the conviction of a legal person necessarily requires the earlier or subsequent conviction of the natural person. The proceedings against the natural person may be terminated, for example, on grounds of a lack of public interest in prosecution. The court refers also to another possible situation, of convicting only a legal person. It is possible for the legal person to be held responsible for an act committed by a body of the legal person that made a particular decision by secret ballot. In this situation, the *in dubio pro reo* principle excludes the responsibility of natural persons, but there are no grounds for excluding responsibility of the legal person. Still, the court mentions in the judgment that decision-making in a secret ballot does not in itself preclude interrogation of the members of the body of the legal person.^{*25} However, the court understands that it is not very likely that sufficiently reliable evidence can be obtained from such interrogations to decide how votes were cast and by whom in a secret ballot.

4. Is the Estonian Penal Code in accordance with EU law?

An analysis of the Estonian Penal Code and court practice does not provide a concrete answer to the question of whether Estonian criminal law is in full accordance with EU law. There is no doubt that the types of acts of legal persons that should be criminalised according to EU law are criminalised in Estonia. Article 3 of the Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests requires criminalisation of fraud, active corruption, and money-laundering committed by a legal person^{*26}, and Article 2 of Council Framework Decision 2003/568/JHA on combating corruption in the private sector requires criminalisation of active and passive corruption committed by legal persons in the private sector.^{*27} All of these acts are also crimes according to Estonian criminal law if committed by legal persons, and these acts are punishable at least by fines as required in the relevant EU acts. The problem is in defining the persons whose acts can be imputed to a legal person. Both of the acts mentioned above require all Member States to ensure that a legal person can be held liable where lack of supervision or control by a person with a leading position in that legal person has made it possible for fraud, an act of active corruption, money-laundering, or active or passive corruption to be committed in the private sector for the benefit of that legal person by a person under its authority.

The text of the Estonian Penal Code is silent about this situation. The Supreme Court has in some cases referred to the possibility that a legal person may be responsible if the criminal act to be imputed to that legal person

²⁴ CLCSCd, 3-1-1-7-04.

²⁵ CLCSCd, 3-1-1-137-04.

²⁶ OJ C 221, 19.07.1997, p. 0011–0011. Available at [http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997A0719\(02\)&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997A0719(02)&model=guichett) (28.07.2009).

²⁷ OJ L 192, 31.07.2003, pp. 0054–0056. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003F0568:EN:HTML> (28.07.2009).

was committed by an employee whose act was ordered or at least approved by an executive official or a body of the legal person.^{*28} However, the Supreme Court has not broadened the definition to encompass other persons acting under the authority of the legal person where the lack of supervision or control by a person with a leading position in that legal person has made it possible for these other persons to commit crimes. The court examined a case involving a contracted agent a few years before the amendment of the Penal Code explicitly introduced imputation of acts committed by competent representatives to the legal person. In that case, the court decided that if the criminal act was committed not by a senior official or body of the legal person but by a contracted agent, the legal person is not liable.^{*29} In that case, the court did not examine whether or not the contracted agent acted under the authority of the legal person. The author of this paper believes that the text of the Estonian Penal Code needs amendment to criminalise explicitly the legal person for criminal acts committed for its benefit by a person under its authority in the case where the legal person had not exercised due supervision or control. As long as the text of the code remains as it is, the only hope is that if the Supreme Court has to rule on a case where lack of supervision or control by a person with a leading position in a legal person has made it possible for fraud, an act of active corruption, money-laundering, or active or passive corruption to be committed in the private sector for the benefit of that legal person by a person under its authority, the court will be ready to interpret the Estonian Penal Code in accordance with the EU acts. This would not be easy for the court, given the above-mentioned case wherein the court denied the criminal liability of a legal person for acts committed by a contracted agent. No attention was paid to whether the contracted agent acted under the authority of the legal person and whether the legal person had an obligation to supervise or control the activities of the agent. When speaking plainly about the judgment, one should mention that the court did not even analyse whether it would matter if the senior officials or body of the legal person had given direct orders to present false information to the tax authorities.

The unclear situation surrounding the criminalisation of acts committed by legal persons as a result of a lack of supervision or control drew the attention of the team that evaluated Estonian criminal law on behalf of GRECO. Their report concluded that “[i]t is not entirely clear that a legal person can be held responsible for the crime committed by a natural person under its authority, where the lack of supervision or control by a leading official or a body has made the commission of the offence possible”.^{*30}

The Criminal Policy Department of the Estonian Ministry of Justice responded to the team by saying that it was planning to further examine § 14 of the Penal Code in 2007 in the light of Article 18.2 of the Criminal Law Convention on Corruption — namely, examine the issue of lack of supervision or control by a natural person. So far, the text of the Penal Code has not been changed in this respect.

5. Conclusions

In conclusion, it may be asserted that Estonian criminal law plays an active role in providing opportunities to penalise legal persons for wrongdoing. A substantial number of legal persons have been convicted in court, and the Supreme Court has done well to harmonise the efforts of the lower courts. Still, there are several aspects of this area of legal practice that need further judicial and/or legislative clarification. Of particular importance here is the criminal responsibility of legal persons for criminal acts committed by persons under their authority that result from a lack of supervision or control by natural persons with a leading position in the legal person.

²⁸ CLCSCd, 3-1-1-145-05.

²⁹ CLCSCd, 3-1-1-70-04.

³⁰ Compliance Report on Estonia. Second Evaluation Round, Adopted by GRECO at its 30th Plenary Meeting (Strasbourg, 9–13 October 2006). Available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2006\)3_Estonia_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2006)3_Estonia_EN.pdf) (28.07.2009).