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Division of a Company as Means of Corporate Rescue?

On Criminal Liability in the Context of Company Division[*1]

1. Introduction

A new era in Estonia's penal law began in 2002 when Soviet criminal law was replaced by contemporary penal law enriched with European influences. One of the most revolutionary aspects of the new Penal Code was the new concept of criminal liability of legal entities, replacing the vaguer notion of liability of legal entities (hereinafter also 'corporate criminal liability') as developed in previous case law. Criminal liability of legal entities, as well as the very concept of a legal entity, is unarguably the prodigy of legal theory, and those notions are treated rather differently in various legal cultures. For instance, the school of thought in Soviet criminal law—first and foremost, the criminal law dogmatics of the Russian Federation—holds a firm view that the criminal liability of legal entities is a notion belonging to a fantasy world, because the legal entity cannot know and understand its actions nor independently direct those actions: only physical persons can be responsible for committing a crime.[*2]

Whereas in the context of criminal liability of physical persons it is clearly deducible from the principle of guilt that the liability for the crime committed lies with the person who actually committed the act (and only said person and not, for example, his or her children and grandchildren in consequence of affiliation), the situation is less than clear in the context of legal entities, because, differently from physical persons, legal entities may be divided, merged, and reorganised. From the perspective of criminal liability, mergers and reorganisations of legal entities do not cause difficulties (the entity created as a result of merger or reorganisation shall be subject to liability), but with regard to division of legal entities the situation is more complex, as there are several potential entities that may be subject to liability. This article concentrates on issues arising in connection with division of a legal entity that is subject to criminal proceedings. Upon division of a legal entity, should both entities be liable or only the entity that is divided? What are the dangers arising from division of

[1] This article is based on the Estonian-language article published in 2009 in the collection of articles dedicated to the jubilee of Professor Jaan Sootak. Full reference of the article: M. Kairjak. R. Rask. Kriminaalvastutus juriidilise isiku jagunemisel (Criminal Liability upon Division of Legal Entity). – Tractatus terribles. Collection of articles dedicated to the 60th jubilee of Professor Jaan Sootak. Tallinn 2009, pp. 37–49 (in Estonian).

[2] В. Н. Кудрявчева, В. В. Лунеева, А. В. Наумова (Ред). Уголовное право России общая часть. Москва 2004, Chapter 4, § 19.

a legal entity that is subject to criminal proceedings in the course of such proceedings? How can we combat such risks and dangers? As the case law and legal theory in Estonia have not yet clearly tackled these issues, this article should be deemed an introduction to the topic, which one hopes will be followed by opinions of other experts in the field as well as case law.

2. Regulation of division under civil law

According to § 434 (1) of the Commercial Code[*3], division of a legal entity takes place without liquidation proceedings by way of division by acquisition or division by separation. In division by acquisition, the company to be divided transfers its assets to the recipient companies, which may be either existing companies or companies that are yet to be established, and the shareholders of the company subject to division shall become the shareholders of the recipient company. Upon division by acquisition, the company to be divided shall be deemed terminated. In division by separation, the company subject to division shall transfer its assets to one or more recipient companies while the company subject to division remains in existence. Consequently, the shareholders of the recipient company may either be the shareholders of the company subject to division or be the shareholders of the divided company itself.

The characteristic feature of both manners of division is the total or partial transfer of the rights and obligations of the company subject to division to the recipient company/companies. For the purposes of this article, the question of most importance is whether the procedural position of a suspect, the accused, or the convict may be deemed to be part of 'assets' as a combination of rights and obligations of the company subject to division within the meaning of § 434 of the Commercial Code and, consequently, whether such a procedural position could be subject to transfer in the course of division to the recipient company or companies. Or should the procedural position of a suspect, the accused, or the convict be deemed a combination of rights and obligations that is inseparably attached to a specific entity and therefore cannot be transferred to a recipient company in the course of division? With the latter thesis taken as a starting point, it should be impossible to hold recipient companies criminally liable for the acts previously committed by the entity that was subject to division. In other words, division would cause the criminal proceedings to be ended with regard to the company that was subject to division and its successors.

Should the procedural position be treated as a transferable 'property', then, according to § 435 (1) 6) of the Commercial Code, the representatives of the companies that participate in the division procedure should be able to agree among themselves in the division agreement who will bear the rights and obligations associated with criminal proceedings.[*4] In essence, this means that in a situation where a legal entity has become a suspect in criminal proceedings, the liability of that legal entity may be transferred to a third party by way of an agreement among the parties involved. However, § 447 (1) of the Commercial Code is of 'assistance' here, stating that the companies participating in the division (i.e., the recipient companies as well as the company that is being divided) are subject to joint liability for the obligations of the company being divided if such obligations have arisen prior to entry of the division in the Commercial Registry. Accordingly, the regulation set out in the division agreement is relevant only with regard to the relations among the parties involved in the division procedure and all entities involved in the division procedure are jointly liable under private law before third parties.

In search for an answer to the question of whether the status of person subject to criminal proceedings is transferable, the civil-law approach could in principle be utilised by which a legal entity is a combination of assets with a certain purpose.[*5] This, in turn, may lead to a further conclusion that, considering a legal entity to be merely a combination of assets, one would naturally hold that upon transfer of such assets to a third party the procedural position in criminal proceedings should accompany it. In other words, a legal entity lacks the sphere of 'personality', which would tie certain rights and obligations inextricably to a subject. In the context of criminal law, this thesis runs counter to the principle of guilt, according to which the basis for punishing a person is the guilt of the same person who committed the crime. Estonian penal law is based on act-oriented (in German: *Tatstrafrecht*) penal law according to which the act committed by the person is the measure for punishment. We would not imagine that physical persons could inherit along with other assets also the procedural position of a suspect, the accused, or the convict in criminal proceedings.[*6] The essence of the principles of

[3] Äriseadustik. – RT I 1995, 26–28, 355; 2008, 27, 177 (in Estonian).

[4] Clause 435 (1) 6) of the Commercial Code provides that the division agreement shall state 'the list of assets transferrable to each recipient company and division of obligations which form part of the assets between the companies which participate in the division'.

[5] The basis for that is the concept of legal entity as a purposeful combination of assets by A. R. v. Brinz from the 19th century. Along with the fiction and other civil law theories which today may be deemed as classic civil law theories from the 19th century, the aforementioned legal theory is no longer relevant or prevailing today. See also K. Rebmann, F. J. Säcker, R. Rixecker. Münchener Kommentar zum BGB. Ergänzungsband zur 4. 3. Aufl. Lief. ausgegeben im Februar 2006. München 2006, preceding § 21, margin No. 1–10.

[6] The topic of succession of persons subject to criminal proceedings (i.e., not limited to the positions of the suspect, the accused and the convict, but also the positions of the victim and civil law plaintiff and claimant) has essentially not yet been tackled in the legislation or in legal theory.

guilt and act-oriented penal law is to create an inseparable link between the person having committed the crime and the person being punished. That same link is directly reflected in the very nomenclature for the field of law itself—'penal law' (an act is subject to penalty). However, criminal liability is not an end in itself but, rather, is directed at achieving several aims of penal theory (special prevention and general prevention, etc.). The important question is whether those aims should also be applied to legal entities. With that purpose in mind, we will hereinafter attempt to dissect the concept of criminal liability of legal entities.

3. The aims with criminal liability of legal entities

3.1. The aims of punishments applicable to legal entities

In the context of corporate criminal liability, Estonian law has adopted the view that, because physical persons and legal entities are separate subjects of law, legal entities may also commit crimes.[*7] The Penal Code[*8] (hereinafter 'PC') prescribes monetary punishment (PC, in § 44 (8))[*9] or compulsory liquidation (§ 46) as the main punishments applicable to legal entities, with, as supplementary punishments, prohibition from processing state secrets and classified information of foreign states and deprivation of the right to keep animals (§ 55^1). By comparison, in Finland, for example, only monetary punishments apply to legal entities.[*10]

According to the principle of guilt, a person's guilt is the basis for his or her punishment. Following the normative concept of guilt, one may define guilt as reproach for the person having failed to act lawfully despite having the option of doing so. Thus it is reproach for violating 'normatively prescribed' regulations.[*11] In general, the punishment imposed for a crime is aimed at achieving two main goals: (a) compensating for the damages caused by violation of certain legal rights and (b) preventive goals.[*12]

In legal literature, the topic of goals of punishments imposed on legal entities boils down to the question of whether the aim of punishment is only deprivation of economic gains received in the violation (positive general prevention, negative special prevention, and general prevention) or to establish reproach of the specific legal entity that committed the crime (positive special and general prevention).

Definition of special preventive goals of punishment applicable to legal entities is somewhat vague as it remains unclear how a legal entity as a legal abstraction should be subject to special prevention.[*13] This is all the more true when one considers that, according to the Supreme Court, the person who committed the crime should be taken into account if the special preventive aims of the punishment are to be met.[*14] One possible solution would be to apply the special preventive goals of punishment first and foremost to persons listed in PC in § 14 (1), which would be reflected in the obligation to refrain from actions causing liability on the part of the legal entity (for instance, prohibition from holding certain official positions, etc.). However, this conclusion is problematic in the light of amendments to the Penal Code that took effect on 28 July 2008 and that were motivated by the need to harmonise Estonian legal regulations with the requirements of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[*15] Namely, with the 28 July 2010 amendments, § 14 (1) of the Penal Code was amended so that, instead of the previous

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7 CLCSCd 3-1-1-7-04, paragraph 10.

8 Karistusseadustik. – RT I 2001, 61, 364; 2010, 29, 151 (in Estonian).

9 According to the amendment of the Penal Code which took effect from 27 February 2010, the court may, if so provided in the special part of the Penal Code, punish the legal entity with a monetary punishment the amount of which is calculated as a percentage from the turnover of the legal entity from the year immediately preceding to the year when criminal proceedings were initiated, or if the entity has been in existence for less than a year, then the turnover of the year when criminal proceedings were initiated (PC § 44 (9)). The upper limit of the applicable monetary punishment may not exceed the general maximum limit of monetary punishment applicable to legal entities which is 250,000,000 Estonian kroons. Such option is prescribed in case of competitive crimes (PC § 400).

10 R. Lahti. Die jüngsten Entwicklungen im finnischen Strafcrecht. – Die Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 2003 (115), p. 142.

11 J. Sootak. Karistusõiguse alused (Basics of Penal Law). Tallinn 2003, pp. 100 *ff.* (in Estonian); P. Pikamäe. Kes on juriidilise isiku pädev esindaja karistusseadustiku § 14 mõttes? (Who is the Competent Representative of the Legal Entity within the Meaning of § 14 of the Penal Code?). – Juridica 2010/1, p. 8 (in Estonian).

12 J. Sootak (Note 11), pp. 141 *ff.*

13 G. Eidam. Unternehmen und Strafe. Vorsorge- und Krisenmanagement. 3. Aufl. Köln 2008, p. 222; M. Kremnitzer, K. Ghanayim. Die Strafbarkeit von Unternehmen. – ZStW 2001 (113), pp. 551–553; W. Mitsch. Recht der Ordnungswidrigkeiten. 2. Aufl. Berlin 2005, pp. 167–168.

14 CLCSCd 3-1-1-40-04; CLCSCd 3-1-1-99-06.

15 According to the explanatory report of the draft law, the amendments were referred to in the report prepared as a result of the first phase of assessment by the Working Group on Bribery which is one of the committees of the OECD. See also the explanatory report to the draft law on amending the Penal Code and the Criminal Procedure Code (239 SE, *Riigikogu* 11th composition). 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&mnsensk=239+SE&fd=.

wording 'act committed by the organ or leading employee in the interests of the legal entity', the liability of the legal entity may be based on the act of the organ, its member, a leading employee, or another competent representative if that act was committed in the interests of the legal entity. Whereas most of the amendments are of a technical nature, the notion 'other competent representative' may raise questions. Firstly, this is a rather ambiguous concept; in accordance with the examples brought forth in the explanatory report on the draft law, such a person could be an employee of the legal entity or possess representation rights on some other grounds (for example, those of an attorney-at-law).*[16] Problems arise in connection with the issue that formerly the essence of the reproach applied to the legal entity was the violation by a person who represented the legal entity on a daily basis (member of the organ of the legal entity or a leading employee) and such a person was in any case responsible for forming the will of said legal entity as an abstraction. Imputation of the guilt of other competent representatives may be difficult from a dogmatic perspective, because imputation to a legal entity of any violation by an employee who plays a minor role in the organisation may excessively widen the area of liability.*[17] A possible solution to this problem could be to impute to the legal entity the crime of only such a representative or employee as has certain decision-making powers, provided that the crime pertains to the respective area of decision-making, or with regard to each violation to refer to the violation by a certain member of the body or organ of the legal entity (insufficient supervision by the supervising organ responsible for the respective field of activity).

The general preventive aim in criminal punishment of legal entities is to show to the society that the legal entity that has committed the crime will be properly punished for it (positive general prevention). Division of a legal entity subject to criminal proceedings undoubtedly obstructs reaching of that goal. From the viewpoint of theories according to which punishment of legal entities bears only pragmatic relevance, mainly aimed at deprivation of unlawfully gained profits (the basis for that thesis being the previously described understanding of a legal entity as a faceless combination of assets that lacks any personal type of rights), division of the company subject to criminal proceedings would not particularly affect reaching of the aims of punishment, because it would not matter whether the former or a new legal entity is punished—the goal is reached if the financial status of at least one entity participating in the division process is negatively affected.

3.2. The goal of deprivation of economic gain

Theories aimed at deprivation of economic gain are associated with views that legitimise corporate criminal liability as something complementary to the liability of natural persons. For instance, corporate criminal liability allows application of statutory penal powers in a situation where the physical person who committed the crime remains unidentified.*[18] According to the above-mentioned theory, the core of punishment of legal entities lies in application of monetary punishment in order to deprive the legal entity of the gains received as a result of the crime—i.e., as a result of behaviour that was profit-oriented and performed with full awareness of the costs.*[19]

The theory directed at deprivation of profits is an attempt to avoid formation of any dogmatic discussion of the legitimacy of punishing legal entities. In search of an easier way out, legal dogmatic arguments have been discarded and economic reasoning applied instead. Views are taken that the risk of the legal entity in connection with criminal liability for a crime is a potential that is fundamentally associated with the economic activity of the company.*[20] The idea operates on the basis of a negative general prevention formula grounded in the simple so-called criminal-economic theory: with profit as a stimulus for committing the crime, punishment in the form of deprivation of that profit works as a stimulus to refrain from crimes. Accordingly, a person who weighs the costs and the gains is aware that committing a crime in the interests of the legal entity may cause application of punishments that are far greater than are the potential gains from the crime.*[21]

The above conclusion is supported by the content of § 44 (8) of the Penal Code, which allows applying monetary punishment as complementary punishment alongside compulsory liquidation. The clause has been interpreted in Estonian legal literature to be applicable in situations where a legal entity has committed an intentional

[16] P. Pikamäe (Note 11), pp. 4–7.

[17] *Ibid*., pp. 7–9.

[18] P. Šamal. Strafrechtliche Haftung von juristischen Personen de lege lata und de lege ferenda in der Stschechischen republik. – Zeitschrift für Wirtschaft und Recht in Osteuropa 2003/3, p. 71.

[19] H. Többens. Die Bekämpfung der Wirtschaftskriminalität durch die Troika der § § 9, 130 und 30 des gesetes über die Ordnungswidrigkeiten. – Neue Zeitschrift für Strafrecht (NStZ) 1999/1; C. Wegner. Die Systematik der Zumessung unternehmerbezoener Geldbussen. Fankfurt (M) 2000, pp. 54–55.

[20] C. Wegner (Note 19), p. 94.

[21] The theory has been applied in drug trafficking cases where application of extensive monetary penalties has visibly changed the market structure which is reflected in the price rises of narcotics. See in more detail G. Kaiser. Gewinnabschöpfung als kriminologisches Problem. – H.-H. Jescheck (Hrsg.). Festschrift für Herbert Tröndle. Berlin 1989, pp. 685–704.

crime with the aim of profiting from that crime.*[22] Thus in Estonian literature it has clearly been conceded that in certain cases (in the form of applying monetary punishment as complementary punishment) penalty applied to legal entities is aimed at depriving them of their profits. This is further supported by § 44 (9) of the Penal Code, which entered into force on 27 February 2010 and according to which the amount of monetary punishment may in certain cases be tied to a percentage of the turnover of the legal entity (see Note 10).

However, reducing the aim of the monetary punishment applicable to legal entities to **merely** deprivation of profits is still questionable.

Firstly, deprivation of the profits as a goal of punishment cannot justify another type of punishment applicable to legal entities that is prescribed in the Penal Code—compulsory liquidation. The latter is clearly meant to reflect reproach for the legal entity that committed the crime. On the assumption that compulsory liquidation with the aim of deprivation of profits is probably not a separate type of punishment, the question arises of whether monetary punishment always bears the goal of profit-deprivation or monetary punishment is sometimes also meant to function as reproach of the legal entity. From the content of § 44 (8) of the Penal Code, it may be concluded that if monetary punishment is applied as a complementary punishment alongside compulsory liquidation, then the main aim of the monetary punishment is to deprive the relevant entity of profits. At the same time, the concept of monetary punishment as a mere tool for taking away the gains from the crime is questionable in a situation where the court is not willing to or cannot apply compulsory liquidation as the main punishment and applies monetary punishment as the main punishment. From this perspective, monetary punishment may possess just as wide-reaching goals and be deemed reproach falling under general prevention.

Secondly, the system of sanctions in the Penal Code is structured such that the institution of law aimed at deprivation of profits received from crime is confiscation. Namely, § 83^1 (1) of the Penal Code allows confiscation of assets received from intentional crime. In addition, § 83^2 of the Penal Code allows one to apply extended confiscation of assets gained from the crime (although the sanction referred to may be applied to physical persons only, while application to legal entities on the grounds of § 83^2 (2) 1) of the Penal Code is rather hypothetical).

Thirdly, the above-referenced theory is mainly characteristic of German law. However, the German legal system offers no concept of liability of legal entities similar to that prescribed in the Penal Code. According to the Code of Order Violations (or 'OWiG'), § 30, the only punishment applicable to legal entities is the monetary penalty if the crime has been committed by the physical person in the interests of and for the benefit of the legal entity.*[23] The above cannot be deemed a separate concept of the legal entity's liability; rather, it is a complementary option, for punishment of the legal entity in a manner complementing the general system of the law—neither the OWiG nor the penal code of Germany expressly provides for the criminal liability of a legal entity. However, even in those states where criminal liability of legal entities is accepted and the concept of deprivation of profits is supported, the only criminal sanction applicable to legal entities is monetary penalty (one such state is Finland).*[24]

Therefore, considering that Estonian penal law prescribes other punishments (compulsory liquidation and restrictions on activity) applicable to legal entities aside from deprivation of profits, one may conclude that in Estonian penal law holding legal entities criminally liable has broader goals than only deprivation of profits received as a result of the crime.

3.3. Punishment as reproach of the legal entity that committed the crime

Despite the fact that criminal liability of legal entities under the Penal Code is regulated as derivative liability and in addition criminal liability must be set out in the composition of a particular criminal offence in the special part of the Penal Code (by the principle of speciality)*[25], legal entities are deemed to be separate and individual subjects under criminal law (at least from the perspective of addressees of punishment) similarly

[22] J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne (The Penal Code. The commentary). Tallinn 2004, § 45 commentaries 5.2, 6 (in Estonian).

[23] About the continuing discussion about the need to regulate the liability of legal entities in German law and about the meaning of OwiG § 30, see C. Roxin. Allgemeiner Teil. Bd 1. 4. Aufl. Beck 2006, § 8C; L. Senge (Hrsg.). Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten. 3. Aufl. München 2006, § 30, margin No. 1–14.

[24] It is important to note that the penal code of Finland provides very detailed regulations on the manner of calculation of the amount of monetary penalties applicable to legal entities. The following aspects must be taken into account: (1) extent of the violation; (2) the extent of involvement of leading employees; (3) the economic status of the company. See in more detail Penal Code of Finland, Chapter 9, § 6. Available at http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf. See also H. Jaatinen. Oikeushenkilön rankaistusvastuu. Helsinki: Kaupakaari OYJ 2000, pp. 131–134.

[25] E. Elkind, J. Sootak. Juriidilise isiku vastutus: uued arengusuunad Eesti kohtupraktikas (Liability of Legal Entities: New Directions in the Estonian Case Law). – Juridica 2005/10, pp. 673–676 (in Estonian).

to in civil law.[*26] Consequently, the same punishment policy goals should apply to legal entities and to physical persons.

This conclusion is supported by the final conclusion reached in the previous section of this article, according to which corporate criminal liability in Estonian criminal law is not limited to the goal of depriving the company of the gains achieved as a result of the crime, as well as by the case law of the Supreme Court of Estonia. The Supreme Court in its judgment No. 3-1-1-7-04 has conceded the following: "It is true that punishment of a legal entity may affect negatively the shareholders or members of such a legal entity, its employees, or even its creditors. However, such negative effects **cannot be deemed punishment** but rather damages arising from economic risks", because a "legal entity [is] a **separate subject of law**, which cannot be equated with the physical persons who are the shareholders, members, or leading employees of the company. As a legal entity may be subject to legal obligations, **it** may, by ignoring such obligations, commit legal offences, including crimes" (emphasis added). Attention must be paid to the manner in which the criminal chamber uses its concepts: the chamber clearly distinguishes between punishment and negative consequences associated with it. In view of the above, deprivation of profits received as a result of crimes is rather a collateral negative effect associated with the punishment and the punishment itself must amount to something more—a reproach. The criminal chamber has emphasised that the **penal** character of the reaction to the crime committed by the legal entity is important.

On the basis of the above conclusion, the Penal Code deems legal entities equivalent to physical persons; accordingly, the punishments applicable to legal entities should be deemed to reflect reproach for the legal entity that committed the crime. This conclusion is compatible with the sociological argument used to legitimise criminal liability of legal entities in German legal literature, according to which in everyday social interaction legal entities and physical persons should be considered essentially equal.[*27]

To sum up, the goal of criminal liability of legal entities and the punishments that come with it cannot be merely limited to deprivation of profits. Similarly to how physical persons are addressed, the general preventive aims of the liability and punishment of legal entities should be recognised—to show the society that a legal entity that committed a crime is held liable for the damage caused to society. The reproach must be handed down for the person liable for committing the act. This leads us to the issue that in cases of division of the legal entity it might be difficult to establish to which person exactly the reproach should be made—i.e., to whom criminal liability shall be applied.

4. Criminal liability of legal entities upon division

4.1. Corporate identity

Upon division, a new company or several new companies are established. The Commercial Code prescribes a simple solution with regard to liability for obligations that came about prior to division, providing that all entities involved in the division shall remain jointly liable for the obligations that came about prior to division (§ 447 (1) of the Commercial Code). From the perspective of criminal liability (first and foremost with regard to monetary obligations arising from monetary punishment), it may be concluded that, in principle, the body conducting proceedings may elect at its sole discretion the entity or person to which to apply criminal liability. However, this would contradict the view that the goal of criminal liability and punishment of legal entities amounts to something more than just financial liability or liability for the gains received from the crime—it should also include the element of general prevention, which is reflected in the reproach of the specific legal entity that committed the crime. The element of general prevention becomes unavoidable in the context of compulsory liquidation. Therefore, certain parameters should be determined on whose basis the decision is made as to which of the entities involved in the division process should bear criminal liability for the crimes committed by the company that was subject to division.

Proceeding from the assumption that reproach for the legal entity for the crime committed is the goal of punishment, one finds it necessary, further, to define the concept of the legal entity as a unit that may be subject to criminal liability. The present article does not even attempt to provide such definition. However, to allow answering this question, a very basic distinction can be utilised: the entity that is formally identical (possessing the same registration code) or essentially identical to the entity that committed the crime should bear liability. In the former case, the company that is subject to division would always be liable; in the latter case,

[26] E.g., see CLCSCd 3-1-1-13-06.

[27] P. Šamal (Note 18), p. 71; G. Eidam. Die Verbandsgelbusse des § 30 Abs 4 OwiG – eine Bestandsaufnahme. – Wistra 2003/12, pp. 448–449; L. Senge (Hrsg.). Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten. 3. Aufl. München 2006, § 30, margin No. 10; T. van Jeger. Geldbusse gegen jurstische Personen und Personenvereinigungen. Fankfurt (M) 2002, pp. 55–58.

that of essential identity, the company that is factually—i.e., in terms of economic activities—identical to the company that committed the crime should be liable.

The concept of essential identity is based on the theory of corporate identity, the concept of *Gesellschafts-identität* as developed in German criminal law. According to the latter theory, upon division, the company that from an 'economic perspective' is identical to (i.e., shares economic identity—in German, *wirtschaftliche Identität*—with) the company that committed the crime should be liable.[*28] Economic identity can be verified on a case-by-case basis, and, therefore, the body conducting proceedings must deliver a reasoned decision, exercising its discretionary powers in each individual case—indicating why specifically this legal entity, or those legal entities involved in the division process, have been declared suspect or accused.[*29] Economic identity is not affected by formal criteria such as change of business name or circle of shareholders.[*30]

This interpretation has been set equal with the economic interpretation rules applied in the context of tax law—the aim of such interpretation is not to follow the legal essence of circumstances but, rather, to focus on their economic content. As a result, the actual economic content of actions is revealed, particularly if the aim of such actions is to exclude application of certain legal norms[*31] (for instance, criminal liability).

Application of the above suggestion presumes that certain concrete notions are defined. The notions 'economically similar' and 'attribution of economic meaning' are too vague and therefore may contradict the principle of specificity of criminal law (as set forth in § 23 of the Constitution).

The authors are of the opinion that the concept of economic identity of the company, as previously described, is largely compatible with the notion of enterprise as provided in § 180 (2) of the Law of Obligations Act (on transfer of enterprise) along with § 5 (1) of the Commercial Code. According to the above-mentioned clause of the Law of Obligations Act, an enterprise is a combination of assets, rights, and obligations associated with the economic activities of the it including contracts connected to the activities of the company. According to § 5 (1) of the Commercial Code, an enterprise is an economic unit via which the undertaking carries out its economic activities. An enterprise consists of assets, rights, and obligations that are intended, or in essence should be intended, for carrying out the economic activities of the enterprise. Generally, a legal entity carries out its activities via a single enterprise, yet it is possible for the same legal entity to comprise several identifiable enterprises (dealing with several fields of activity). The concept of enterprise is directed at emphasising the entity's integrity: all rights and obligations that are economically associated with the enterprise are part of that enterprise.[*32]

The Supreme Court has provided a rather extensive interpretation of the notion of the enterprise. According to the opinion of the Civil Chamber of the Supreme Court, it is possible to apply § 5 of the Commercial Code by analogy to transfer of enterprise from one local government unit to another despite the fact that associated legal regulation in public law concerning that issue is lacking.[*33] By the same line of reasoning, the corporate criminal liability in the context of division could be tied to the notion of the enterprise and thereby a specific concept of criminal liability of an enterprise could be created. This presumes that upon commission of a crime by a legal entity, it is possible to identify clearly which enterprise was the most involved with the crime (that is, in the interests of which enterprise the crime was committed).

Taking corporate identity (either based on the notion of enterprise or stemming from other criteria) as a starting point may ensure that the goals of punishment are achieved. Yet it might be problematic to apply the notion of the enterprise as a basis if, as a result of division, the economic activities that were previously pursued cease altogether. For instance, a company that was involved in sales at several locations might decide to cease its previous economic activities, to be divided into two separate companies, with both companies after division concentrating on transferring from the previous sales points in order to pursue other economic activities for the funds received. Neither of the companies that were created in the course of division are economically identical or even similar to the company that was subject to division. Nor is this a case of transfer of enterprise within the meaning of criminal law, because the former enterprise as an integral unit ceased to exist. Taking only the theory of corporate identity as a starting point, one may conclude that no criminal liability follows, despite universal succession.[*34]

It remains unclear which criteria should be applied by the body conducting proceedings—does the body conducting proceedings have discretionary rights? This approach is questionable. In above-described situations,

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[28] L. Senge (Note 27), § 3, margin No. 48.

[29] Judgment of the Federal Court of Justice of Germany BGH 11.03.1986. – Wistra 1986/5, pp. 221–222; Judgment of the Federal Court of Justice of Germany BGH 13.11.2004. – NJW 2005/19, pp. 1381–1382.

[30] L. Senge (Note 27), § 30, margin No. 45.

[31] OLG Frankfurt 06.07.1984. – Wistra 1985/1, pp. 39–40.

[32] P. Varul *et al*. Võlaõigusseadus. Kommenteeritud väljaanne (Law of Obligations Act. Commented edition). Tallinn 2006, § 180, commentary 4.5 (in Estonian); CLCSCd 3-2-1-7-00.

[33] CLCSCd 3-2-1-98-07.

[34] E. Göhler, H. Buddendiek. Gesetz über das Ordnunsgwidrigkeitrecht. 12. Aufl. München 1998, § 30, margin No. 38c; OLG Frankfurt 06.07.1984. – Wistra 1985/1, pp. 39–40.

formal identity (specifically, in the case of division by separation—the company subject to division is liable) could be considered as a starting point or an attempt could be made to determine which of the new companies is the most similar to the company that was subject to division (in the case of division by acquisition).

In situations where the transfer of an economic unit (for instance, an enterprise) is obvious, it would still be appropriate to consider liability of the company acting as the receiver of the economic unit. Therefore, application of corporate identity theory in the future practice of implementation of the Penal Code could still be considered, despite the fact that it is a concept derived from the German legal system and that, on account of the specifics of criminal liability, that theory cannot be applied in full in Estonia. According to the views expressed in the German legal literature, the theory may also be applied in the context of reorganisations—the company coming into existence as a result of reorganisation shall be liable only if it is identical to the previous company.*[35] From the perspective of future implementation practice, it should be carefully considered whether the formula accepted in the German case law regarding division of liability between companies should also be identically carried over to Estonian practice. For example, in order to verify the liability of the recipient company or a company that has been established as a result of division, the following formula of checks has been developed:

- universal succession has occurred (division has taken place),
- the assets of the company that committed the crime have been transferred in identical or similar composition to the new company,
- the transferred assets are clearly identifiable, and
- the transferred assets constitute a significant part of the full body of assets owned by the new company.*[36]

It is important to note that the last presumption is directly aimed at achieving a goal of general prevention. Namely, it is questionable whether punishing the recipient company is appropriate in a situation where the enterprise involved in the crime has been transferred but, in view of the total turnover of the recipient company, that enterprise provides only a minor proportion of turnover.

4.2. Liability in case of division by separation

Upon division by separation, the key issue from the perspective of criminal law is whether the company that was subject to division or the recipient company should bear liability. As mentioned above, from a civil-law perspective there is no difference in division of liability: the two entities remain jointly liable, and in terms of relations between these entities themselves, the division of liability is regulated in the division agreement. Consequently, from the standpoint of civil law, it is possible to apply monetary punishment with regard to both legal entities.

The issue of compulsory liquidation poses more problems. As mentioned above, compulsory liquidation is a sanction of general prevention aimed at reproach directed at the legal entity that committed the crime (see Subsection 2.3, above). Differently from monetary punishment, compulsory liquidation cannot be reduced to a claim under civil law (the state acting as the creditor). In the application of compulsory liquidation, it might be useful to utilise the theory of corporate identity and to apply compulsory liquidation to the legal entity that is the most similar from an economic point of view to the company that committed the crime.

4.3. Liability in case of division by acquisition

The need for a scheme based on corporate identity or another concept is far more acute in cases of division by acquisition, where the company subject to division will cease to exist. There are no problems if there is just one recipient company involved in the division process. In the latter case, the recipient company will also take over the procedural position in criminal proceedings of the company that is subject to division.

The situation is more complex when there are two or more recipient companies. In contrast to division by separation, the context of division by acquisition involves unavoidable transfer of the procedural position of the company that is being divided to one of the recipient companies. If in the course of division the enterprise is divided among several recipient companies, all such recipient companies should become involved in criminal proceedings. At the same time, the extent to which the enterprise was transferred to a particular recipient company should be assessed. If the majority of the enterprise was transferred to one recipient company, then only that recipient company should be included in the criminal proceedings. In the latter case, the principle

[35] G. Eidam. Unternehmen und Strafe. Vorsorge- und Krisenmanagement. 3. Aufl. Köln 2008, p. 225.

[36] G. Eidam. Die Verbandsgelbusse des § 30 Abs 4 OWiG – eine Bestandsaufnahme. – Wistra 2003/12, p. 450; BGH 11.03.1986. – Wistra 1986/5, pp. 221–222; BGH 13.11.2004. – NJW 2005/19, pp. 1381–1382.

of economic identity should be applied, so that the recipient company that is the most similar to the company subject to division shall bear the liability.

If the company has been divided into tens or hundreds of entities and it becomes almost impossible for the body conducting proceedings to determine which companies to include as suspects or accused parties in the criminal proceedings after the division is carried out as successors of the divided company, then division in this form may lead to avoidance of criminal proceedings altogether. In cases such as this, it may have become impossible, or excessively difficult from a procedural standpoint, to verify economic identity.

5. Conclusions

In the previous section of the paper, we reached the conclusion that it is necessary to establish criteria on the basis of which the criminal liability of the company subject to division would be transferred. Enterprise could be used as such a criterion; i.e., criminal liability could be associated with the enterprise. At the same time, the body conducting proceedings must exercise its discretionary powers in each individual case wherein the suspect or the accused is being divided, in order to establish which entities to include in the criminal proceedings. As a company may be divided without limitations, the company that is the suspect or the accused may be scattered into so many fractions during the criminal proceedings that the main problem of the criminal proceedings becomes establishment of the identity of the person or entity that is subject to proceedings. This raises questions regarding the measures available for securing criminal proceedings.

Today, Chapter 4 of the Criminal Procedure Code[*37] (hereinafter 'CPC') does not clearly prescribe measures that would allow prohibition of the division of the suspect or accused legal entity during criminal proceedings. Arrest of assets may be considered (CPC, § 142, while § 308 of PC prescribes liability for violation of storage measures applicable to arrested assets), which would preclude transfer of the assets of the legal entity; however, the success of such measure is still questionable.

In civil-court procedure, division may be obstructed by using the measure for securing the claim as provided in § 378 (1) 3) of the Civil Court Procedure Code[*38], which allows the court to prohibit certain acts and transactions of the plaintiff, including division.

The Criminal Procedure Code does not allow applying the measures for securing the claim as prescribed under the Civil Court Procedure Code in criminal proceedings. The Supreme Court has opined that, in principle, the measures for securing the claim as prescribed in the context of civil-court procedure may also be applied in criminal proceedings, with the specifics of the latter taken into account.[*39] However, this is not a complete and comprehensive solution, and it fails to provide securing measures with regard to criminal cases in the context of which no civil-law claims have been submitted.

Criminal proceedings wherein the suspect or the accused is a legal entity require certain specific regulations. Therefore, an option that should be considered is to exceptionally allow application of the measures for securing the claim as prescribed in the Civil Court Procedure Code in criminal proceedings where the suspect or the accused is a legal entity, or to resolutely amend Chapter 4 of the Criminal Procedure Code and the catalogue of measures for securing criminal proceedings included therein.

If division has already taken place during criminal proceedings, it is necessary to obstruct any further division and to identify the entity that bears liability, as soon as possible, taking into account the changed circumstances. The authors are of the opinion that the principle of corporate identity could be used for that purpose in order to ensure that also the wider aims of criminal punishment of legal entities are reached.

To sum up, the primary aim with this article is to open a discussion of the goals of punishment applicable to legal entities. The authors are convinced that the concept of criminal liability of legal entities as set out in Estonian penal law is not limited to mere deprivation of profits received from the crime but also includes the reproach of the legal entity that committed the crime. Upon division of a legal entity, the identity of said company is partly or entirely transferred to the new recipient companies. Therefore, the question must be answered as to which element for establishing the identity of the company bears the most relevance in the context of the goals of criminal proceedings (punishing the person that committed the crime). The authors believe that essential criteria—namely, criteria related to economic activities—should be preferred over formal criteria. Consequently, the authors propose the solution according to which criminal liability should follow the company that takes over (or that continues to possess) the enterprise of the company subject to division in which interests the crime was committed.

[37] Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2010, 19, 101 (in Estonian).

[38] Tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197; 2010, 26, 128 (in Estonian).

[39] CLCSCd 3-1-1-3-10.