

Corporate Criminal Liability and Due Diligence Defence Rule

By Vladimir Hrle, LL.M

In Serbia, Corporate Criminal Liability means that a Company is responsible for acts or omissions of their officers as long as:

- 1) They act in *capacity* of their engagement. To act within the scope of the engagement, the officer must have an actual or apparent authority to engage in a particular act. If a nexus exists between an officer's criminal behaviour and his corporate duties, the Company will be criminally liable for the officer's conduct;
- 2) If the officer acted, for the *benefit* of the Company. This requirement consists of two elements. First, the officer has to act with intent to benefit the Company; second, the officer acts for his or her own personal gain, and the Company ends up benefiting from the conduct.

The Company shall be also held responsible if due to the lack of supervision or control of the officer, an employee commits a crime for the *benefit* of the Company.

The Company can mitigate the responsibility by proving that it took all reasonable measures to prevent the wrongdoing act of its officer - the so-called *Due diligence Defence rule*. Having Company criminally liable does not exclude the responsibility of natural persons; it only means that in addition to individual liability of officers, there exists a complementary Company liability. This is particularly important in cases of insolvency. When Company is insolvent, it is highly improbable that financial penalty imposed by the Court could be in practice enforceable, thus the justice is served eventually by imposing sanctions on individuals. Therefore, the prosecuting authority always has a wide discretion to prosecute individuals, Companies, or both. Some theorists such as Otto von Gierke argued that it is only possible to prosecute companies or individuals, never both. In practice, that can be decided on a case to case basis, depending on the circumstances of the case, and the Public Prosecuting Authority has a discretion to decide on this.

Some critics of Corporate Criminal Liability often say that it does not meet basic requirements of Criminal Law, namely that an entity can be responsible only for its own actions, not actions of others, however analogy can be drawn to Command Responsibility which is accepted notion in Military Criminal Law. A Commander shall be held responsible for actions of his subordinates even in cases when he did not commit a crime. By analogy, same can be said for Companies, as Company can be held criminally responsible for acts of its officers.

Furthermore, the critics of Corporate Criminal Liability argue that imposing it may come to the detriment of ones who are not responsible, the shareholders, creditors, the officers and even consumers who will eventually pay higher prices. This argument cannot be accepted because in class action cases Companies often pay high amounts of money so in the end there is no practical difference in civil and criminal procedures, when it comes to the money to be paid by the shareholders as the residual claimholders.

Some argued that in the US Corporate Criminal Liability is present for almost 100 years, and yet it was not able to sustain the raise of corporate scandals at the beginning of the century, but

here is no empirical evidence to support that. Moreover, it might even be argued that if there was no Corporate Criminal Liability, there might be even more corporate scandals in the US. Nevertheless, in recent years, there has been a lot of pressure from academics and practitioners to change the current system of Corporate Criminal Liability in the US, mostly related to the role of *Due Diligence defence rule*.

On the other hand, the traditional feature of Criminal Law such as general deterrence can be very fruitful when it comes to Companies. Imposing criminal sanctions does in fact deter others in the future to commit corporate crimes - convicted Companies are *stigmatized*, and will be prejudiced in transactions their potential business partners. Every time the Company tries to engage in a business transaction, it will bear the burden of the past conviction. This can be a good thing; it can motivate the Company to be more efficient than prior to the conviction, as it would be much harder bearing the *stigma* to gain confidence among business partners.

Finally, mandatory disclosure of financial statements is strengthened with the Corporate Criminal Liability, as the board members bear responsibility for the correctness of these corporate governance statements. The recent financial crisis has resulted in an extreme broadening of board power and responsibilities and non-executive directors are required to control the business in a growing number of areas. Likewise, not only are the executive members subject to external control, they are also subject to the enhanced internal control by the non-executive/supervisory directors, or the special control organ of the Company.

Member of the board who made a false statement where a statement is required under the law (i.e. financial statement) shall be criminally liable, which shall further trigger the liability of the Company itself, due to the identification doctrine, as accepted legal concept in Serbia.

Because of the *Due Diligence Defence rule*, the non-executive/supervisory directors must claim that they made a comprehensive inquiry of the matter at hand and had reasonable grounds to believe that the statement was true. Therefore, if there is a danger that the Company can be found criminally liable due to the wrongdoings of its subordinates, than there is an additional motive for the non-executive directors to monitor the executives in order to ensure that such acts are not committed.

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The High level Group was given a mandate by the European Commission to make recommendations on a regulatory framework in the EU for Company Law, EC Internal Market, http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf

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Vladimir has worked with international and domestic clients, advising them on various procedural law matters. Vladimir advised clients in economic and corporate criminal law cases and provided representation in such matters. He also counselled and represented clients before courts and arbitration proceedings in Serbia and abroad.

Prior to establishing Hrle Attorneys, Vladimir worked with the law firms Schoenherr and Karanovic-Nikolic, and was actively involved in two high profile cases (case no. *IT-05-88 and IT-00-39-A*) before the UN court (ICTY) in The Hague. Vladimir started his career with Dragoslav Cetkovic, an esteemed defence attorney in 2005.

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