

# Questions of Interpretation of Certain Preconditions for Criminal Sanctions Against Legal Persons

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*ABSTRACT* In this study, the author analyses the conditions for the application of criminal law measures against legal persons. Despite the fact that legal persons are often involved in criminal activities, relatively few legal persons are actually prosecuted. One possible reason for this, according to the author, is that Act CIV of 2001 on criminal measures against legal persons (CMALP Act) sets out a wide range of conditions for a legal person to be subject to criminal measures. In the present study, the author provides a practical analysis of each of these conditions, covering the scope of the CMALP Act and the conditions explicitly mentioned in the CMALP Act.

*KEYWORDS* criminal sanctions against legal persons, Act CIV of 2001 on criminal measures against legal persons, the preconditions for criminal measures against a legal person, the interface between civil law and criminal law

## 1. Introduction

According to the statistical data of the Hungarian Central Statistical Office (or HCSO) for the year 2021, there were 1,856,859 registered enterprises in Hungary, of which 1,021,565 enterprises were explicitly designated as operating by the HCSO.<sup>1</sup> And if we add to all these figures other organisations, whether incorporated or not, that operate essentially on a not-for-profit basis, the number exceeds two million.<sup>2</sup> There is no doubt that legal persons - be they business companies or non-profit organisations - play a decisive role in everyday life, as they can be subject to legal relations just like natural persons, since civil law - more specifically Act V of 2013 on the Civil Code (hereinafter referred to as the Civil Code) - confers legal capacity on them.<sup>3</sup> With regard to legal persons, the Civil Code also stipulates that their legal capacity extends to

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<sup>1</sup> "Summary data," HCSO, [https://www.ksh.hu/stadat\\_files/gsz/hu/gsz0001.html](https://www.ksh.hu/stadat_files/gsz/hu/gsz0001.html).

<sup>2</sup> "Number of registered enterprises by type of enterprise - GFO'14," HCSO, [https://www.ksh.hu/stadat\\_files/gsz/hu/gsz0002.html](https://www.ksh.hu/stadat_files/gsz/hu/gsz0002.html)

<sup>3</sup> See Paragraph (1) of Section 3:1 of the Civil Code.

all rights and obligations which, by their nature, are not limited to a person as a natural person.<sup>4</sup> In other words, it is generally accepted, purely on the basis of the regulatory concept of civil law, that legal persons may enter into civil law relationships and acquire rights and incur obligations which are recognised by civil law and which cannot be attributed exclusively to a natural person.

However, if we move away from civil law thinking and a specific legal regime, we no longer get such a clear picture of the legal status or even the (legal) subjectivity of legal persons regulated by other branches or areas of law. This is particularly true in relation to the criminal law treatment of legal persons and, more specifically, the criminal sanctions that can be applied to legal persons, which is the subject of this article. Looking at the most basic substantive law of the criminal law regime, Act C of 2012 on the Criminal Code (hereinafter referred to as the Criminal Code), it can be concluded that, in contradistinction to the civil status of legal persons, legal persons cannot commit criminal offences and, consequently, legal persons cannot be subject to criminal liability.<sup>5</sup> Paragraph (1) of Section 4 of the Criminal Code, containing the definition of ‘crime’ (or ‘criminal offence’), confirms this: “*A criminal offence is an act committed intentionally or, where this Act provides for the punishment of negligent acts, negligently, which is dangerous to society and for which this Act provides for the imposition of a penalty.*” It can be clearly seen that the central element of the legal concept of crime is the act, which can only be performed by a human being, since it presupposes physical and psychological elements that are realised in the external world in a way that is perceptible to others.<sup>6</sup> If we compare the views in the literature and the legal concept of crime, we can conclude that a legal person is not capable of committing an act and therefore a crime. This is confirmed not only by criminal law, but also by civil law through its own system of concepts, which can also help to interpret the concept of criminal law. The Civil Code only grants the capacity to act to a natural person, i.e. the capacity to make a legal declaration in one's own name, which then entitles or obliges the same or another person to act accordingly.<sup>7</sup> Since civil law reserves the capacity to act, and thus the possibility to perform acts having legal effect, exclusively to natural persons, legal persons need natural persons to represent them, i.e. to act in their place and on their behalf, to

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<sup>4</sup> See Paragraph (2) of Section 3:1 of the Civil Code.

<sup>5</sup> Ágnes Balogh, and Mihály Tóth, eds., *Magyar Büntetőjog Általános Rész* (Budapest: Osiris Kiadó, 2015), 110.

<sup>6</sup> Cf. Erika Csemáné Váradi, Ilona Görgényi, József Gula, Tibor Horváth, Judit Jacsó, Miklós Lévay, and Ferenc Sántha, *Magyar büntetőjog – általános rész* (Budapest: Wolters Kluwer Kft., 2017), part 3, chap. 1.; József Földvári, *A büntetés tana* (Budapest: Közgazdasági és Jogi Kiadó, 1970), 60–73.; Balogh, and Tóth, *Magyar Büntetőjog Általános Rész*, 102.

<sup>7</sup> See Paragraph (1) and Paragraph (2) of Section 2:8 of the Civil Code.

make legal declarations and thereby to acquire rights and assume obligations for the legal person.<sup>8</sup>

As we have seen, legal persons cannot be held criminally liable, but it is not excluded that legal persons may, within certain limits, be subject to criminal “liability” and thus to criminal sanctions.<sup>9</sup> This is the purpose of Act CIV of 2001 on criminal measures against legal persons (hereinafter referred to as the CMALP Act), which is also the subject of this article and which, in addition to specifying the criminal measures that may be taken against legal persons, also sets out the conditions that must be met in order to be eligible for measures under the CMALP Act.

The aim of this article, and thus its central element, is to present the conditions for the application of criminal law measures against legal persons, with particular attention to the analysis and approach of each of these conditions from a practical point of view, since, outside the commentary literature, there is a rather limited amount of legal literature that focuses specifically on the conditions for the application of measures, and this is particularly true for the approach from the side of law enforcement. It should be noted that the focus of this article is not on the analysis of legal theory or doctrine, but where appropriate the analysis has included the posing and brief interpretation of such questions. For reasons of scope, the present article does not undertake to formulate *de lege ferenda* proposals, although it is noted that there are provisions in the prerequisites of the measures which should be considered for revision by the legislator, especially from a practical point of view.

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<sup>8</sup> This is also reflected in Paragraph (1) of Section 3:29 of the Civil Code, which states that “*The legal representation of a legal person shall be provided by the executive officer.*” Section 3:22 of the Civil Code deals with the requirements and grounds for disqualification of the chief executive officer. According to Paragraph (1) of Section 3:22 of the Civil Code, “*An executive officer may be a person of legal age whose capacity to act is not restricted with respect to the extent necessary for the performance of his/her activity.*” In other words, the Civil Code states *expressis verbis* that an executive officer may be a natural person who fulfils certain statutory requirements. Of course, civil law does not preclude a legal person from acting as manager of another legal person. However, Paragraph (2) of Section 3:22 of the Civil Code still requires a legal person with a legal person as its executive officer to appoint a natural person to perform the duties of executive officer. Ultimately, therefore, in order for the legal person to be able to carry out acts with a civil law effect - to make legal declarations - it is essential that at the very end of the chain there is a person, a human being whose legal declarations ultimately lead to the acquisition of rights or the assumption of obligations for the legal person represented.

<sup>9</sup> This is also indicated by Point i) of Paragraph (1) of Section 63 of the Criminal Code, which includes criminal measures against legal persons in the system of criminal sanctions.

## 2. On the conditions for the applicability of criminal law measures against legal persons

The CMALP Act lays down certain conditions for the application of criminal measures against a legal person. If we compare certain specific provisions of the CMALP Act, we can find that the conditions for the application of the measures are not exclusively set out in Section 2 of the CMALP Act, but can also be found in other sections, and we therefore wish to present them in a complex manner.

### 2.1 The scope of the CMALP Act

Although Section 1 of the CMALP Act is an interpretative provision on what constitutes a legal person and a benefit for the purposes of the Act, this section also defines the scope of the CMALP Act and the entities that are excluded from its scope. In other words, in order for criminal measures to be applied to an entity, it must be subject to the CMALP Act, which is the first and most basic condition for the application of the measures. The concept of legal person in the CMALP Act is to some extent aligned with the civil law definition, but it also departs from it.<sup>10</sup> Point 1 of Paragraph (1) of Section 1 of the CMALP Act contains the definition of a legal person, two elements of which are worth examining, as these two elements may, at first sight, require more interpretation than the general scope of entities that have legal personality under civil law.

The CMALP Act extends the concept of legal person to include organisational units of legal persons recognised under civil law with autonomous rights of representation. The Civil Code sets out four cumulative conditions for the organisational unit of a legal person to be declared an independent legal person: the deed of foundation provides for it; the Civil Code allows it; the organisational unit has an organisation that can be separated from the founders and the legal person; and it has assets that can be separated from the founders and the legal person.<sup>11</sup>

If we look at the Civil Code, we can find two legal persons where the law expressly allows the creation of organisational units with separate legal personality: the association and the foundation.<sup>12</sup> In other words, it can be concluded that the Civil Code does not broadly allow certain types of legal persons to create organisational units with separate legal personality. It is nevertheless noteworthy that the CMALP Act itself, drawing on the conceptual

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<sup>10</sup> Csemáné Váradi, Görgényi, Gula, Horváth, Jacsó, Lévay, and Sántha, “Magyar büntetőjog - általános rész”, part 3 chap. 5 and László Köhalmi, “A jogi személlyel szemben alkalmazható büntetőjogi intézkedések,” *JURA*, no. 1 (2006): 52–62.

<sup>11</sup> See Paragraph (1) of Section 3:32 of the Civil Code.

<sup>12</sup> See Paragraph (5) of Section 3:63 of the Civil Code and Paragraph (3) of Section 3:391 of the Civil Code.

scope of civil law, explicitly includes such organisational units within the scope of the legal interpretation of legal persons.

The CMALP Act also defines the term "legal person" to include entities that may have separate legal personality in civil law relations and have assets separate from their members.<sup>13</sup> That is, if this conceptual element is understood, this category includes civil law entities without legal personality which have assets separate from their members. Thus, for example, a civil law partnership, which may meet the criterion of being subject to a civil law relationship,<sup>14</sup> but which does not have assets separate from its "members", is not covered by the CMALP Act.<sup>15</sup> The sole proprietorship, on the other hand, meets the legal requirements. Act CXV of 2009 on Individual Entrepreneurs and Sole Proprietorships (hereinafter referred to as the IESP Act) defines the sole proprietorship as follows: sole proprietorship is a legal entity without legal personality established by a natural person registered as an individual entrepreneur and it is created by registration in the Commercial Register.<sup>16</sup> The legal capacity of a sole proprietorship is enshrined in the IESP Act itself, as it states that a sole proprietorship has the legal capacity to acquire rights and incur obligations under its business name.<sup>17</sup> And if we examine the provisions of the IESP Act on the assets of the sole proprietorship, we can conclude that the sole proprietorship has assets separate from those of its member, and that sole proprietorships are therefore covered by the CMALP Act.<sup>18</sup>

However, the CMALP Act contains not only a positive definition of which organisations are covered, but also a negative definition of which organisations are excluded. The elements of this list have in common that they refer to States, local authorities and, more specifically, to their public authority and administrative activities, but the CMALP Act also refers to certain international organisations established by international treaty as excluded entities.<sup>19</sup>

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<sup>13</sup> See Point 1 of Paragraph (1) of Section 1 of CMALP Act.

<sup>14</sup> Cf. Paragraph (1) of Section 6:498 of the Civil Code. It is worth noting here, however, that in the case of a contractual relationship in which one of the parties is a civil law partnership, the obligation is not in fact created with this "*societas*" but with its members, creating a specific multi-subject obligation. Cf. eds. József Benke, and Tibor Nochta, *Magyar polgári jog. Kötelmi Jog II.* (Budapest–Pécs: Dialóg Campus Kiadó, 2018), 360–368.

<sup>15</sup> Paragraph (1) of Section 6:500 of the Civil Code states that "*As regards the assets contributed, the ones that can not be consumed will be used collectively, and the ones that can be consumed will be owned jointly.*" In other words, if we interpret the quoted provision of the Civil Code logically, if a civil law partnership is created by the parties, the members create contractual and even property-law relationships over the "services" that are the subject of the contributions for themselves and not for the civil law partnership.

<sup>16</sup> Cf. Paragraph (1) of Section 20 of the IESP Act.

<sup>17</sup> See Paragraph (2) of Section 20 of the IESP Act.

<sup>18</sup> See Sections 26-29 of the IESP Act.

<sup>19</sup> Cf. Paragraph (2) of Section 1 of the CMALP Act.

## **2. 2 Certain specified conditions for the application of the measures**

Section 2 of the CMALP Act expresses the conditions under which the possibility of applying criminal law measures against legal persons may arise in the first place. If we take a broad view of the conditions, we can see that the legislator uses both conjunctive and alternative conditions, which we will describe in detail below.

### **2. 2. 1 Intentional commission of a criminal offence**

As a general condition, the CMALP Act stipulates that the measures can only be applied in cases of intentional offences.<sup>20</sup> It is clear that the CMALP does not limit the list of intentional offences for which measures may be taken against a legal person. In this context, Tamás Sárközy notes - and we agree - that this may be a cause for concern, as even in the case of intentional offences of minor material gravity (e.g. failure to provide economic data in violation of Section 409 of the Criminal Code), the legal person concerned may be threatened with the possibility of the application of the measure envisaged by the CMALP Act.<sup>21</sup> In our opinion, even if it is not the presumed intention of the legislator to provide for the possibility of applying measures against legal persons in the case of economic crimes of genuinely low social danger, the court has the possibility to do so without further ado, in the absence of any legal restriction, if all the conditions are met.

### **2. 2. 2 The question of purpose, result or use**

As a further conjunctive condition, Paragraph (1) of Section 2 of the CMALP Act states the following:

- a) the natural person who commits the intentional criminal offence has the aim of obtaining an advantage for the benefit of the legal person by committing the offence; or
- b) the offender does not have the intention of obtaining an advantage, but the commission of the criminal offence results in it; or
- c) the offender intentionally commits the criminal offence by using the legal person.

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<sup>20</sup> See Paragraph (1) of Section (2) of CMALP Act. It should be noted that, in accordance with Paragraph (1) of Section 2 of the Criminal Code, the legislator has made a distinction according to when the offence was committed. In this context, the Criminal Code applies to (criminal) acts committed after the entry into force of the new Criminal Code, i.e. after 1 July 2013, while Act IV of 1978 on the Criminal Code applies to (criminal) acts committed before that date.

<sup>21</sup> Tamás Sárközy, "Büntetőjogi intézkedések a jogi személyekkel szemben?," *Magyar Jog*, no. 8 (2002), 449–456.

Thus, the CMALP Act "secondly" imposes alternative conditions so that there is a possibility of applying the measure if any of the above cases arise. The following is an attempt to interpret each of the alternative conditions.

In the first case, the offender's aim is to gain an advantage for the benefit of the legal person. In this case, it would therefore appear that the legislator intended to assess the subjective elements of the offence, including the possible element of purpose. The purpose is nothing other than "*the aim of the offender as set out in the statutory instrument.*"<sup>22</sup> If we consider purpose as a purpose formulated in the statutory elements of offences in the Criminal Code, we can conclude that there is no criminal offence in the Criminal Code that explicitly formulates the purpose of obtaining an advantage for the benefit of a legal person as an element of the offence. Thus, in our opinion, the CMALP Act did not intend to refer to a purpose as it is used in the conceptual system of the Criminal Code (and the relevant legal literature), but introduced a quasi-specific and therefore very narrowly interpretable definition of the purpose in the prerequisites for measures against legal persons. That is to say, the offender has the intention, whether probable or actual, to commit an offence, combined with the 'purpose' of benefiting the legal person by committing the offence. To give a practical example, the prospect of criminal measures against legal persons can easily be raised by the offence of marketing a poor-quality product, as provided for in Paragraph (1) of Section 415 of the Criminal Code: "*Whoever markets a product of inferior quality as a product of superior quality shall be punished by imprisonment for a term of up to three years.*" If we want to evaluate the quoted legal provision in a way that is relevant from the present point of view, we can conclude that the Criminal Code does not evaluate the purpose on the subjective side of the offence. In other words, if a person markets a poor-quality product as a good quality product, he commits the cited offence, regardless of the purpose otherwise pursued. It is not unreasonable to assume that the offender does this by placing the product on the market through a company with a view to obtaining a benefit for that company. For example, he may obtain a benefit by placing the product on the market as a high-quality product at a lower cost of purchase or production, thereby generating a higher profit for the legal entity. Thus, the "purpose" of the perpetrator (to benefit the legal person) is not assessed in the statutory facts, but the possibility of applying the measure under the CMALP Act against the legal person may still arise. In our view, it is therefore justified that the CMALP Act considers a specific purpose as a precondition, which does not, or does not necessarily, appear in the statutory elements of the offence, and therefore the definition or assessment of the phrase "the purpose was to benefit the legal person" as a purpose is worth considering. In the second case, the CMALP Act does not formulate the acquisition of an advantage as an objective, but explicitly as a result. In other words, the legislator wants to define the material aspect of the offence, including the frequent element of the material aspect, the result of the act.<sup>23</sup> Thus, in order to

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<sup>22</sup> Balogh, and Tóth, *Magyar Büntetőjog Általános Rész*, 120.

<sup>23</sup> Balogh, and Tóth, *Magyar Büntetőjog Általános Rész*, 101.

fulfil this condition, it is not necessary for the perpetrator to have the intention that the legal person will benefit from the commission of the offence; it is sufficient that the benefit as a result occurs on the side of the legal person.<sup>24</sup> By analogy, as we have already done in the context of purpose, it is necessary to note here that the possibility of applying measures against legal persons in this case does not depend on the fact that the statutory definition of the offence committed considers the result as a possible object of the offence. For the condition to be met, it is sufficient that the commission of the offence results in some benefit to the legal person. At this point, we think it is necessary to briefly examine what is meant by the concept of benefit in the CMALP Act: “*Benefit shall be understood to include any thing, right, claim, advantage, whether or not registered under the Accounting Act, as well as the exemption of a legal person from an obligation arising from a law or a contract or from an expense required by the rules of sound management.*”<sup>25</sup> The current concept of benefit, as used in the CMALP Act, was established by Act XXVI of 2008, the explanatory memorandum to which states that “[...] *in addition to the pecuniary benefit, the other benefit obtained or to be obtained by the legal person also justifies the application of the measure. This is important because, particularly in the case of offences against the purity of public life, the benefit obtained or sought is not always of a pecuniary nature.*”<sup>26</sup> In other words, the CMALP Act treats benefit as a *sui generis* concept, thus allowing for a much wider margin of judicial discretion.<sup>27</sup>

In the third category, the CMALP Act establishes as an alternative condition that the offender commits the intentional offence by using the legal person. This twist was introduced into Paragraph (1) of Section 2 of the CMALP Act by Act CCXXIII of 2012 and, in our view, serves as a kind of subsidiary condition compared to the alternative conditions examined in the previous two cases. As explained in the explanatory memorandum to Act CCXXIII of 2012, there may be situations where the commission of the offence is not intended to benefit the legal person or does not result in any benefit to the legal person, but the commission of the offence nevertheless creates a link with the legal person concerned, namely, the offender uses it to commit the offence. The explanatory memorandum gives the example of terrorist financing.<sup>28</sup> In this case, the legal person is not involved in the commission of the offence as a beneficiary, but as an instrument or an intermediary used by the offender to commit the offence. The inclusion of this condition in the CMALP Act may make it easier for the prosecution to prove its case. In other words, if the prosecution cannot prove

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<sup>24</sup> Cf. Sárközy, “Büntetőjogi intézkedések a jogi személyekkel szemben?,” 449–456.

<sup>25</sup> Point 2 of Paragraph (1) of Section 1 of the CMALP Act.

<sup>26</sup> Explanatory memorandum to Bill T/5651 on the amendment of Act CIV of 2001 on criminal measures against legal persons.

<sup>27</sup> Sárközy, “Büntetőjogi intézkedések a jogi személyekkel szemben?,” 449–456.

<sup>28</sup> See Explanatory Memorandum to Bill T/9246 on the transitional provisions relating to the entry into force of Act C of 2012 on the Criminal Code and on the amendment of certain Acts.



beyond reasonable doubt that the offender intended to benefit the legal person by committing the offence, or that the legal person benefited from the commission of the offence in question within the meaning of Point 2 of Paragraph (1) of Section 1 of the CMALP Act, it will be able to submit to the court, on the basis of the available evidence, its conclusion that there is a link between the commission of the offence and the legal person which may justify the application of the measures. Thus, in our view, the use of a legal person to commit a crime is easier to prove, by means of material evidence, such as contracts, invoices, bank statements, lists of bank transactions, other accounting documents, than the perpetrator's objective of obtaining a financial benefit for the legal person, which remains in the subjective world of thought and is not always clearly visible to the outside world,. This is particularly the case where the perpetrator's efforts are unsuccessful and the legal person does not actually benefit from the offence.

### **2. 2. 3 The perpetrator's identit**

Paragraphs (1) and (2) of Section 2 of the CMALP Act also provide that the intentional offence must be committed by natural persons in a certain capacity or position. In practice, the law divides these persons into three categories:

- a) the first group includes the chief executive officer or member authorised to represent the legal entity, its employee or officer, the company director, the member of the supervisory board or their delegate;
- b) the second category includes the member or employee of the legal person;
- c) the third category may include practically any natural person.<sup>29</sup>

The CMALP Act sets out additional criteria for each category of the perpetrator. In the first case, the persons listed in point a) must commit the offence in the course of the legal person's activities. What the law means by the scope of activities is not interpreted by the legislator, so in our opinion the scope of activities includes all activities that can be carried out by the legal person according to its articles of association. In any case, from a practical point of view, it may be questionable whether the legislator intended the scope of activities in this case to cover only activities lawfully carried out by a legal person or also those carried out unlawfully, but it seems reasonable to interpret the scope of activities broadly, i.e. to cover all activities, whether lawful or unlawful. Indeed, the mere fact that a legal person carries out an activity unlawfully could in itself give rise to a suspicion that a criminal offence has been committed, which could ultimately lead to the possibility of taking action against that legal person. The common feature of the listed persons is that they

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<sup>29</sup> Cf. Point a) and Point b) of Paragraph (1) and Paragraph (2) of Section 2 of the CMALP Act. In addition, cf. Nikoletta Kovács, "A jogi személy büntetőjogi felelősségének hazai viszonyai" (Publication, Jogi Fórum, Miskolc, 2021), 12. <https://www.jogiforum.hu/publikacio/2023/04/24/a-jogi-szemely-buntetojogi-felelossegenek-hazai-viszonyai/>

can exercise a decisive influence on the legal person, its operation and legal relations, as they can represent the legal person. As Sárközy also points out, the member of the supervisory board of the legal person may be an "odd one out" as a possible perpetrator, since the members of the supervisory board have neither the duty nor the right to represent the legal person.<sup>30</sup> This statement is somewhat nuanced by the functioning of the executive supervisory board, which is governed by Section 3:123 of the Civil Code, as the executive supervisory board is already responsible for deciding or approving certain matters within the competence of the supreme body or management.<sup>31</sup> In such a case, the Civil Code provides that the provisions applicable to the persons entitled to decide on the matter in question under the Civil Code shall apply to the members of the supervisory board with respect to their decision-making activities.<sup>32</sup> Presumably, the legislator did not intend to regulate in such detail the cases in which a member of the supervisory board may be a potential perpetrator, so the provision applies to both executive and non-executive supervisory board members.

The second group includes only persons who do not consider themselves to be representatives of the legal person and, in the case of an employee, the possibility of taking decisions on behalf of the legal person is also lacking. Here, too, the law lays down as a further condition that an offence committed by such persons may give rise to the "liability" of the legal person if "[...] *the performance of the management or control duties of the chief executive officer, company director or supervisory board could have prevented the commission of the offence.*"<sup>33</sup> If we try to interpret this condition correctly, we can see that the offence committed by the member and employee is attributable to the legal person if the management commits an omission. In other words, if the persons listed in Point b) of Paragraph (1) of Section 2 of the CMALP Act were objectively capable of exercising control, but failed to do so either intentionally, recklessly or in a manner that did not amount to negligence, the liability of the legal person can be established for the offence committed by the member or employee.<sup>34</sup> In practice, the legislator has thus limited the exemption from liability to the case where the offence could not have been prevented even if the duty of exercising control had been fulfilled. It may be questionable whether this possibility could arise in practice if a check did not reveal that the member or employee intended to commit an offence. In our view, if such persons carry out their duty of control with the competence expected of them, they must at least be negligent in failing to detect the possibility of an offence being committed. In fact, the CMALP Act does not even allow for an exemption from the duty to supervise, since if supervision is not carried out by the chief executive officer,

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<sup>30</sup> Sárközy, "Büntetőjogi intézkedések a jogi személyekkel szemben?," 449–456.

<sup>31</sup> See Paragraph (1) of Section 3:123 of the Civil Code.

<sup>32</sup> Cf. Paragraph (3) of Section 3:123 of the Civil Code.

<sup>33</sup> Point b) of Paragraph (1) of Section 2 of the CMALP Act.

<sup>34</sup> István Kónya, ed., *Magyar Büntetőjog I-IV. Kommentár a gyakorlat számára* (Budapest: ORAC Kiadó, 2022).

the director or the supervisory board, this condition is fulfilled in itself, and if it is carried out and the activity of the member or employee in question does not become apparent or at least suspicious to them, then in our view there is a slight omission, even in the form of negligence.

The third group includes any person who cannot be classified in the first or second group. In this case, two further conjunctive conditions are imposed by the CMALP Act for establishing the liability of a legal person: “[...] *the offence was committed for the benefit of the legal person, or the offence was committed using the legal person, and the chief executive officer or member authorised to represent the legal person, employee or officer, company director or member of the supervisory board of the legal person knew that the offence had been committed.*”<sup>35</sup> With regard to the first conjunctive condition, the CMALP Act regulates alternatively the acquisition of a benefit and the use of the legal entity. In our view, the latter condition needs to be interpreted and examined in any case, as it is not dealt with in the commentary literature we have reviewed.<sup>36</sup> In practice, it is not inconceivable that a person with only an external link to the legal person could commit an offence through the legal person, using the legal person, without any benefit to the legal person. This could be the case with the financing of terrorism, as mentioned above, or even with fraud under Paragraph (1) of Section 373 of the Criminal Code, where the objective of the unlawful gain is the objective of the natural person outside the legal person, but the legal person is “interposed” to achieve it. Of course, it is not sufficient for the condition to be fulfilled that the outsider - *extraneus* - merely uses the legal person; certain persons, i.e. the chief executive officer, the member or employee authorised to represent the company, the officer, the company director or the member of the supervisory board, must know that the offence has been committed.<sup>37</sup>

### **2. 3 Criminal conviction or lack of conviction of the offender**

Having reviewed the legal provisions explicitly mentioned by the CMALP Act as conditions for the application of measures, we must also briefly consider the criteria that Section 3 of the CMALP Act requires in order for measures to be applied, namely, that the offender be punished or that certain measures be applied or not be applied in certain cases.

The law clearly stipulates that the court must impose a penalty on the offender. If no penalty is imposed, a reprimand, probation, confiscation or forfeiture of property must be imposed in order to allow the application of measures against the legal person. These measures are: the dissolution of the legal person, the

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<sup>35</sup> Paragraph (2) of Section 2 of the CMALP Act.

<sup>36</sup> In the context of the analysis of the other conditions cf. Kónya, “Magyar Büntetőjog I-IV. Kommentár a gyakorlat számára”.

<sup>37</sup> On the situation of uninvolved perpetrators, see also Zoltán András Nagy, “A jogi személy büntetőjogi felelősségét megállapító törvényről,” *JURA*, no. 1 (2009): 94–100.

restriction of the activities of the legal person or the imposition of a fine.<sup>38</sup> Although the scope of the measures is limited in the CMALP Act, it is clear that the CMALP Act does not contain such a limitation for the imposition of penalties. Thus, the imposition of one of the penalties provided for in Paragraph (1) of Section 33 of the Criminal Code on the perpetrator of the offence already constitutes grounds for the criminal "prosecution" of the legal person, provided that the numerous preconditions are met. Thus, the fulfilment of this precondition requires almost no discretion on the part of the applier of law, but its fulfilment is undoubtedly necessary for the court to impose criminal sanctions on the legal person. Although it is not the purpose of this paper to take a position on this issue, it may be debatable whether it is necessary from a criminal policy point of view to define the criminal liability of offenders in such a broad way. It certainly makes little practical sense to take action against the legal person concerned in cases of triviality, but it is possible to do so without further ado on the basis of the legal rules.<sup>39</sup>

Under the current CMALP Act, it is already possible to take action against a legal person even if the perpetrator is not held criminally liable for a specific reason. These grounds are set out in Points a) to h) of Paragraph (2) of Section 3 of the CMALP Act, which this article will not attempt to describe in detail, particularly for reasons of length.<sup>40</sup> However, it should be noted that the CMALP Act allows a legal person to be held liable for a number of reasons in this area, even if the perpetrator is not held liable. Of course, this presupposes – in accordance with Paragraph (1) of Section 2 of the CMALP Act – that the offence is committed with the purpose or effect of obtaining an advantage for the legal person or that the offence is committed by using the legal person. These criteria have already been discussed in detail above and will not be repeated here. In our view, the cited provision of the CMALP Act certainly warrants further practical and even theoretical examination. Without providing an exhaustive list, the case of Section 3 (2) (c) of the CMALP Act may be mentioned as an example. Here the Act stipulates that the perpetrator will not be held liable because “[...] *the investigating authority or the public prosecutor has discontinued the proceedings because the suspect did not commit the offence.*” In other words, during the criminal proceedings it was established that a criminal offence had been committed and that this offence was linked to the legal person, but the identity of the actual perpetrator could not be established. This is noteworthy because Points a) and b) of Paragraph (1) of Section 2 of the CMALP Act explicitly require the perpetrator to act in a certain capacity, while Paragraph (2) of Section 2 of the CMALP Act does not require the capacity of the perpetrator, but requires that the management of the legal person be aware of the commission of the offence. Thus, if in the course of criminal proceedings it is established that the suspect, whatever his or her capacity, did not commit

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<sup>38</sup> See Paragraph (1) of Section 3 of the CMALP Act.

<sup>39</sup> Zsanett Fantoly, “A jogi személy büntetőjogi felelőssége európai kitekintéssel” (PhD diss., Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2007), 154–155.

<sup>40</sup> See Paragraph (2) of Section 3 of CMALP Act.

the offence, the court and the investigating authority will not have a perpetrator who could be identified, for example, as the chief executive officer or company director of the legal person, i.e. it will not be possible to determine whether the conditions of Paragraph (1) of Section 2 of the CMALP Act are fully met, and if they are not met, there will be no possibility of applying the measures. Paragraph 2 of Section 3 of the CMALP Act does not state that the conditions of Section 2 of the CMALP Act do not apply in the cases referred to in Points a) to h) of Paragraph (2) of Section 3 of the CMALP Act, but that the measures set out in Paragraph (1) of Section 3 of the CMALP Act also apply in this case. In our view, the same conclusion can be drawn in the case of the category of offenders covered by Section 2 (2) of the CMALP Act. It is not inconceivable, but in practice we see little chance that the prosecution will be able to prove that the management of the legal person knew about the commission of the offence, but the prosecution or the police could not identify the perpetrator.

In our opinion, if the legislator's aim with the provision of Paragraph (2) of Section 3 of the CMALP Act is to “override” the conditions of Paragraph (1) of Section 2 of the CMALP Act and to establish the criminal liability of a legal person even if the identity of the actual perpetrator could not be established or if this person is not the same as the suspect, then it would be necessary to clarify Paragraph (2) of Section 3 of the CMALP Act. The explanatory memorandum for the 2012 amendment to the CMALP Act seems to confirm this ambition: *“Another major problem identified by international studies is the legal requirement that, in order to establish the criminal liability of a legal person, the criminal liability of the natural person who committed the offence (chief executive officer, member with power of representation, etc.) must be established. However, the latter cannot be established in all cases. In order to solve this problem, the legislator has considerably extended the cases in which action can be taken against a legal person even if the criminal liability of the natural person who committed the offence cannot be established, although it is clear that an offence has been committed. [...] In each of the above cases, the application of the measure depends on the existence of one of the two logical links (benefit or commission by using the legal person) between the legal person and the offence.”*<sup>41</sup> Although the discrepancy between the provisions of the CMALP Act presented here may seem theoretical, the perceived inconsistency of the legislation makes the work of law enforcement more difficult.

### 3. Summary thoughts

As we have seen, the CMALP Act lays down a rather complex set of conditions for the measures that can be taken against legal persons. This is undoubtedly justified by the fact that, from a criminal law point of view, it is a question of sanctioning a specific “subject”. It should also be borne in mind that the

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<sup>41</sup> See Explanatory memorandum to Bill No. T/9246 on the transitional provisions relating to the entry into force of Act C of 2012 on the Criminal Code and amending certain Acts.

interpretation of these legal conditions is not always black and white, so the legislator requires a great deal of practical experience from those applying the law, which goes beyond the scope of criminal law. In our view, the rapidly changing social, legal and, above all, economic circumstances pose a challenge to both the legislator and the practitioner in the application of the CMALP Act, in particular, because of the relatively small number of Court Decisions referring to and interpreting certain provisions of the CMALP Act.<sup>42</sup> Nonetheless, this would be explicitly justified by the legislation. In our view, a correct interpretation of the set of preconditions described is essential for the courts to be able to apply measures against legal persons in a justified manner, and further practice-oriented research into the preconditions is therefore warranted. In our opinion, the legislator's aim of establishing conditions for criminal sanctions against legal persons, both from the material and the immaterial side of the offence, is the right one, but, as explained, it is not possible to avoid “fine-tuning” the legal provisions in the future, especially on the basis of practical experience. This may lead to further questions: are the strict conditions the reason why so few measures are taken against legal persons? What can the legislator do to ensure that the criminalisation of legal persons achieves its practical objective? Is there a need for specific legislation in this area? Can the conditions described be simplified to ensure more effective application of the law?

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<sup>42</sup> See Zsolt Szomora, “A jogi személlyel szembeni büntetőjogi intézkedés ügyészség általi indítványozásának eljárási határidejét értelmezte a Kúria,” <https://jogaszegylet.hu/jogelet/a-jogi-szemellyel-szembeni-buntetojogi-intezkedes-ugyvezsegi-altali-inditvanyozasanak-eljarasi-hataridejet-ertelmezte-a-kuria/>