Kristīne Strada-Rozenberga[*]
Jānis Rozenbergs[**]

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CRIMINAL LIABILITY OF LEGAL ENTITIES IN LATVIA – GENERAL INSIGHT, PECULIARITIES AND TOPICALITIES

Abstract

The path that the Latvian normative regulation in criminal law and the Latvian criminal law doctrine took to arrive at the possibility of turning against legal entities by criminal law measures was neither fast nor simple. The initial position was that regulation like this would be incompatible with the basic principles of Latvian criminal law since, historically, psychological understanding of guilt has been characteristic in the Latvian criminal law, guilt is identified with a person's mental attitude towards the criminal offence, and guilt also is one of the grounds for criminal liability. It was not clear how this understanding of guilt could be compatible with punishing such "legal fiction" as a legal person in the framework of criminal law. Ways, in which Latvia could adjust its legal regulation to various international normative documents that Latvia had acceded to, at the same time leaving the dominant basic institutions of the Latvian criminal law theory unaffected, were sought rather reluctantly. Discussions that lasted for years resulted in the inclusion into the Criminal Law coercive measures, existing outside the system of criminal penalties, applicable to legal persons, likewise, several criteria were defined as the grounds for applying these coercive measures to legal persons, the central of which was a criminal offence, committed by a natural person who was connected to the legal person, in the interests of the legal person or as the result of insufficient control by this legal person. Accordingly, criminal procedural regulation was created, which to a large extent equalled a legal person to an accused natural person in criminal proceedings. Although the criminal law and criminal law regulation, which provides for the possibility to apply criminal law coercive measures to legal persons in the framework of criminal proceedings has existed in Latvia for already 16 years, these criminal law instruments have started taking their place in the practice of applying law only in recent years, simultaneously also revealing deficiencies in the legal regulation, already now providing sufficient material for analysis to be used for improving these legal norms.

Keywords: *criminal law, criminal procedure, liability of legal entities.*

[*] Dr. iur., Professor, Dean of the Faculty of Law, University of Latvia, Latvia, e-mail: *strada@lu.lv*

[**] Dr. iur., lecturer, Faculty of Law, University of Latvia, Chairman of the Latvian Council of Sworn Advocates, Latvia, e-mail: *janis.rozenbergs@advokatura.lv*

1. Introduction – On the Genesis of Legal Regulation

Since regaining its independence in 1990, when Latvia set on its course to join the European Union, NATO, and other international organisations, harmonisation of the Latvian national law with various international legal acts and requirements set by various international organisations has been one of the priorities for the Latvian legislator. Respecting the strict or less strict requirements of various international normative acts, amendments have affected both the area of criminal law and criminal procedure, as well as the related normative acts. In this respect, already since the end of the 1990s, a discussion has been ongoing among the Latvian experts and scholars of criminal law regarding the need and the possibility of expanding the circle of subjects of criminal liability, including in it also legal entities.

Basically, the introduction of criminal liability of legal entities in Latvia was not linked to any practical problems in applying law, the majority of legal community did not see any practical need to add the institution of legal person's liability to the Criminal Law. At that time, the discussion regarding legal persons' liability in criminal law was rather linked to meeting the international commitments undertaken by Latvia, harmonising the Latvian Criminal Law with such international legal acts as the UN Convention against Transnational Organised Crime (UNODC, 2000), the Council of Europe Criminal Law Convention on Corruption (CETS, 2000), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS, 1990), the Convention on the Protection of the European Communities' Financial Interests (PIF Convention) (1995), the Resolution of the Council of 28 May 1999 on increasing protection by penal sanctions against counterfeiting in connection with the introduction of the euro, the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, as well as Recommendations of the Council of Europe Financial Action Task Force (FATF) (2012).

Search for the possible solutions took several years. On the first occasion, at the beginning of the 2000s, the idea of legal persons' criminal liability did not go beyond discussions at the Ministry of Justice because it did not gain support in the legal community. At the second attempt, the Cabinet returned the draft law to the Ministry of Justice. The draft law on establishing criminal liability of legal entities was supported by the Cabinet's decision only on 8 March 2004 (Krastiņš, 2004, p. 9). This draft law envisaged making legal persons directly criminally liable in the cases envisaged in the Special Part of the Criminal Law. In the second reading in the *Saeima* [the Parliament] (on 11 November 2004) this draft law was radically transformed, providing that coercive measures instead of criminal penalties could be applied to legal persons for all criminal offences provided for in the Special Part of the Criminal Law if these had been committed in the interests of the legal person. These provisions were formulated like this thanks to the conceptual variant for the solution of the problem, offered by Dr. habil. iur. U. Krastiņš, Head of the Criminal Law Department of the Faculty of Law, the University of Latvia. I.e., the discussions that had lasted several years on whether a legal person can be made criminally liable had ended

with a clear conclusion that a legal person did not and could not have a subjective attitude towards the committed criminal offence, thus, in such a case, guilt could not be spoken of (Gratkovska, 2005, p. 5). And since the psychological understanding of guilt has become enshrined in the Latvian criminal law and guilt is part of the grounds for applying criminal liability and criminal penalty, a conclusion was made that a legal person as an independent subject of criminal liability would not fit into the Latvian system of criminal law. The approach recognised as acceptable at the same time was that, within the framework of criminal proceedings, a legal entity could be subjected to coercive measures, which were not criminal penalties and did not belong to the system of sentences. It seems that all those, who once have been interested in this problem and were engaged in discussions, are satisfied with the solution chosen in Latvia for impacting legal entities in the framework of criminal law. I.e., on the one hand, Latvia has honoured its international commitments, envisaging the possibility for our State to create adverse consequences for legal entities also in the framework of criminal law. On the other hand, several basic institutions that are essential for the Latvian criminal law have been kept intact, such as the subject of criminal liability, guilt and the total constitutive elements of a criminal offence. This "compromise" solution is based on the finding that, within the framework of criminal law, apart from applying a criminal penalty, it is possible to apply also other coercive measures, which should not be regarded as a criminal sentence.

No substantial amendments were made to this draft law during the third reading in the *Saeima* (on 5 May 2005), and these amendments to the Criminal Law were promulgated on 25 May 2005 and entered into force on 1 October 2005.

At this point, the possibility to bring proceedings against a legal entity by applying coercive measures to them has existed for sixteen years already. It could be considered as being a sufficiently long period, allowing to assess the practical need, applicability and workability of these legal provisions. During the first five years after these provisions entered into force, there were almost no criminal proceedings in Latvia, in the framework of which these norms had been applied, apparently, officials at the investigative institutions and the prosecution office lacked understanding of the application of these forms. The first few proceedings regarding the application of coercive measures to legal entities were initiated only in 2011-2012.

The regulation of both the criminal law and criminal procedure law pertaining to the proceedings on the application of coercive measures to legal entities could be assessed as initially incomplete. In 2012 and 2013, the existing legal regulation was assessed at the Ministry of Justice, leading to the conclusion that this regulation was ineffective and was not applied in practice. As the result, the next amendments to the Criminal Law were drafted, correcting and specifying the provisions regarding the coercive measures applicable to legal persons. Pronouncedly incomplete in the initial version, improved in 2013 and 2016, and yet, still problematic – this is how the Latvian criminal procedural legal model for the procedure of applying coercive measures to a legal entity could be described.

It can be noted that, over time, a trend of an increasing number of such criminal proceedings can be observed. Thus, in 2017, 8 criminal proceedings were initiated against legal entities, 14 in 2018, 32 in 2019, and 38 in 2020 (LRIMIC, 2020).

2. The Currently Valid Regulation

Currently, Section 12 of the Criminal Law includes the general regulation (liability of a natural person in the case of a legal person), which provides that a natural person who has committed a criminal offence acting in the interests of a legal person governed by private law, for the benefit of the person or as a result of insufficient supervision or control thereof is to be held criminally liable, but the coercive measures provided for in this Law may be applied to the legal person.

Section 70[1] of the Criminal Law, in turn, defines the grounds for applying coercive measures to a legal person, stating that for the criminal offences provided for in the Special Part of this Law, a coercive measure may be applied to a legal person governed by private law, including a State or local government capital company, as well as a partnership, if a natural person has committed the offence in the interests of the legal person, for the benefit of the person or as a result of insufficient supervision or control, acting individually or as member of the collegial authority of the relevant legal person:

1) on the basis of the right to represent the legal person or act on the behalf thereof;
2) on the basis of the right to take a decision on behalf of the legal person;
3) in implementing control within the scope of the legal person.

Thus, currently, the principle that a legal person is not an independent subject of criminal liability has been enshrined in the Latvian criminal law, a legal person's liability is subordinated to and is derived from a criminal offence committed by a natural person.

At present, four coercive measures applicable to legal entities have been defined in the Criminal Law – liquidation (compulsory termination of activities, all property of the legal person being alienated in the ownership of the State), restriction of rights (the deprivation of specific rights or permits or the determination of such prohibition which prevents a legal person from exercising certain rights, receive State support or assistance, participate in a State or local government procurement procedure, to perform a specific type of activity for a period of one year and up to ten years), confiscation of property (confiscation of property is the compulsory alienation of the property owned by a legal person to the State ownership without compensation), and recovery of money (depending on the severity of the criminal offence, amounting to from 5 to 100,000 prescribed minimum monthly wages, which, in 2021, constitute the amount from EUR 2,500 to 50 million EUR).

The criminal procedural regulation allows establishing that the process of applying coercive measures is characterised by the following important features:

1) it is usually initiated in the framework of criminal proceedings brought against a particular natural person;
2) may be initiated during the pre-trial proceedings;
3) is initiated by a reasoned decision by the official in charge of the proceedings;
4) is initiated against a particular legal person.

When criminal proceedings have been initiated with respect to the fact of a criminal offence, and if, within the framework of these criminal proceedings, substantive law grounds for applying coercive measures to a legal person are found, then the investigator or prosecutor during the pre-trial proceedings may adopt a decision to

initiate proceedings also against a legal person within the framework of the existing criminal proceedings. Basically, this criminal procedural arrangement is determined by the theoretical position, prevailing in the Latvian criminal law, that a legal person's liability is subordinate in its nature and follows from the particular criminal offence committed by a particular natural person, which simultaneously comprises the substantive law grounds, described above, for applying a coercive measure to a legal person. Thus, in regular circumstances in court, within the framework of one criminal proceeding, the issue of the existence of the accused natural person's guilt and applying a criminal sanction to them as well as the issue of applying a coercive measure to a legal person would be decided on simultaneously.

Paras. 3 and 3^1 of Section 439 of the Criminal Procedure Law, however, provide for some exceptions when proceedings against a legal person may exist in isolation from the criminal proceedings against a natural person. This norm envisages situations, where there are objective obstacles to conducting or continuing criminal proceedings against a natural person and the proceedings against a natural person are terminated on non-exonerating grounds.

And yet, also circumstances that prevent from clarifying or holding liable a particular natural person are envisaged among the grounds for conducting proceedings against a legal person outside the criminal proceedings against a natural person. This reference allows posing the question – are criminal proceedings against a legal person and application of coercive measures to it actually possible if a natural person, who has committed the criminal offence, has not been identified.

It is likely that in the absolute majority of cases the answer to this question would be negative. It is based on the conclusion that the grounds for applying the coercive measures cannot be even established without identifying the person who has committed the particular criminal offence. This should be linked to the opinion enshrined in the substantive criminal law provisions, pursuant to which, in order for the required grounds for applying coercive measures to exist, the "connection" between the natural person, who has committed the criminal offence, to the legal person (acted on the basis of the right to represent the legal person, act on the behalf thereof, to take a decision on behalf of the legal person or to implement control on its behalf over the legal person) and the purpose of committing the criminal offence (in the interests of or on behalf of the legal person) or circumstances – as the result of insufficient supervision or control, must be mandatorily identified. At the same time, one cannot deny that an exception to this strict requirement could be possible. I.e., if the grounds for applying coercive measures can be established without identifying a particular person. This would be possible only when, although a particular person is not clarified, it is established beyond reasonable doubt that such a person had existed and, while being in a certain way connected to the legal person, actually acted in the name of, on behalf of the legal person, or that a criminal offence had been committed as the result of insufficient control or supervision. In the Latvian case law, such cases are usually linked to violations of copyright and neighbouring rights, as well as tax evasion.

It must be noted that, as regards the scope of criminal procedural rights, a legal entity to which coercive measures are applied is equalled to an accused natural person; a

legal person also is viewed as a person with the right to defence. The limits of the criminal law accusation brought against a legal person during the pre-trial proceedings are set in the decision adopted by the official in charge of the proceedings (an investigator or a prosecutor) on initiating proceedings against a legal person. Actually, requirements set for the content of this decision and the scope of information to be included therein, comply with the requirements set for the charges brought against a natural person in criminal proceedings. It follows from this, in turn, that in cases, when the charges brought against the accused are changed due to newly established circumstances, the decision adopted with respect to the legal person should also be changed accordingly.

Also, as regards the basic principles of criminal procedure, it should be recognised that, exactly as in the proceedings against a natural person, also with respect to a legal entity all basic principles of criminal procedure, to the extent these can be applicable to it, must be respected. Assumably, the application of such principles as the language of criminal proceedings, the right to have proceedings completed within a reasonable term, the right to have one's case adjudicated by a court, etc. to a legal person is not doubted. At the same time, undeniably, there are grounds for a discussion as to how far such principles that until now have been to a larger extent associated with a natural person are applicable to a legal person, e.g., the presumption of innocence or *ne bis in idem*. It is clear that these two subjects differ as to their nature; therefore, objectively, it would be impossible to grant to them exactly the same rights. Admittedly, these issues are far from simple and no uniform answer can be provided. This matter has attracted attention also on a larger scale. To mention just a few examples: in 2014, the fundamental study "Regulating Corporate Criminal Liability" (Brodowski *et al*., 2014) was published, in which these issues have been highlighted as being topical, important, problematic and, currently, unresolved both in the article by D. Brodowski, representing the German legal school, in his article on the minimum procedural rights that should be applicable to legal persons (Brodowski, 2014, pp. 211-226) and by Neira Pena, representing the Spanish academic circles, in her article dedicated to topical aspects of corporate responsibility (Neira Pena, 2014, pp. 197-210). This circumstance has also been focused on the level of the EU law-making. Thus, for example, the Meijers Committee, in its comments on the draft Directive on the presumption of innocence and the right to be present at trial at the end of 2014 has noted, *inter alia*, that the guarantees included in this Directive should be applicable also to a legal person, insofar it is possible in connection with its nature (Meijers Committee, 2014). One must agree to Brodowski, who notes that the level of procedural guarantees for legal persons "first of all is a matter of criminal policy. However, there are limits to it, determined by constitutional and human rights, which protect also legal persons" (Brodowski, 2014, p. 211). At present, the Latvian legislator, intentionally or unintentionally, has chosen, within the process of applying coercive measures, to equal, in terms of the scope and content of rights, the legal person with the accused, thus applying to it a comparatively high level of procedural guarantees. Although this does not exclude problems as such either (e.g., defining those subjects who have the right to refuse to give testimonies, see below in this article); however, this clearly shows that Latvia has declared a high level of protection for a legal person.

Continuing to explore the issue of applying the basic principles of criminal proceedings to the proceedings against legal entities, the issue of the mandatory nature of criminal proceedings that is essential and needs to be resolved precisely can be singled out as one of the basic principles of criminal proceedings. The mandatory nature of criminal proceedings as one of the basic principles of criminal proceedings has been enshrined in Section 6 of the Latvian Criminal Procedure Law, which provides that the official who is authorised to conduct criminal proceedings has an obligation, within their competence, to conduct criminal proceedings in each case where the reason and grounds for initiating criminal proceedings have become known.

This approach raises the question whether the application of coercive measures to legal persons is mandatory. One must agree that "the issue, whether these proceedings can be called criminal proceedings, is open for discussions", as well as with the finding "that it seems peculiar that proceedings, which are not criminal proceedings, are regulated in the Criminal Procedure Law" (Baumanis, 2012). It can be assumed that also the process of applying coercive measures to legal entities is to be viewed as criminal proceedings, which, consequently, leads to the conclusion that also the mandatory nature of criminal proceedings applies to it. This is indirectly confirmed by the reference included in Section 439(1) of the Criminal Procedure Law, that if it has been ascertained during the course of criminal proceedings that, most likely, there are grounds for the application of a coercive measure, then the person in charge of the proceedings must take a reasoned decision that proceedings are initiated for the application of a coercive measure to a legal person.

The formulation of this norm suggests that the official in charge of the proceedings, upon identifying grounds for applying coercive measures to a legal person, has not been granted the right to decide whether to initiate proceedings against a legal person or not but a mandatory model of action has been established – initiation of proceedings.

3. The Prospects of Development for the Normative Regulation

Regarding the effectiveness of proceedings for applying coercive measures to legal persons, it is usually linked to the effectiveness of the security measures applied during the pre-trial proceedings. Of course, this thesis is not applicable to all situations. There may be cases, where the property of a legal person is insignificant already at the beginning of the proceedings or is non-existent, in such cases, most probably, the legal person will terminate its existence faster than the proceedings against it develop. Likewise, cases are possible where proceedings are conducted against large companies, to which these proceedings and the possible coercive measure causes adverse financial consequences, but these are not so serious as to make the company conceal or alienate its property.

In accordance with the current legal regulation, if proceedings regarding application of coercive measures to a legal entity have been initiated, its property may be seized to ensure the application of the eventual coercive measure (Section 361(2) of the Criminal Procedure Law). At present, the Criminal Procedure Law does not envisage the application of any other restrictions during the proceedings conducted against a legal person.

The Ministry of Justice views this regulation as insufficiently effective, thus, a draft law on the next amendments to the Criminal Procedure Law is being prepared (LRTM, 2021). The Ministry of Justice, having analysed the practice of applying the norms and consulting with the investigative institutions and prosecution office, has established that not always seizing the property ensures that the aim of the proceedings conducted against a legal person is reached. Practitioners have indicated that representatives of legal entities are counteracting investigation, avoid providing information, etc. Practitioners also indicate as one of the risks "targeted raiding attacks" on legal persons aimed at overtaking the company's management, replacing the company's council and board, thus gaining control over the company's assets, encumbering or alienating them. Likewise, natural persons can, on behalf of a legal person, with the aim of avoiding the enforcement of the applied coercive measure, transfer the company's assets to another legal person or liquidate the legal person, or register changes in the registers maintained by the Enterprise Register of Latvia, as the result of which the aims of criminal proceedings cannot be reached.

To prevent such situations, draft amendments to the Criminal Procedure Law have been prepared, envisaging to establish three types of security measures: 1) prohibition of certain activities, 2) prohibition to introduce changes into the registers maintained by the Enterprise Register without the permission of the official in charge of proceedings, 3) prohibition to transfer the totality of assets of the legal person.

The prohibition of certain activities is the restriction, imposed by a decision of the official in charge of proceedings, to engage temporarily in certain commercial activities or other types of activities if the criminal offence is linked to the particular activity. It is envisaged to apply this security measure in cases when it must be ensured that the criminal offence is not continued, as well as in cases when significant public interests are at risk. For example, if the actions of a legal person cause substantial harm to the environment, with respect to which criminal proceedings have been initiated, and discontinuation of such actions needs to be ensured.

The prohibition to introduce changes into the registers maintained by the Enterprise Register without the permission of the official in charge of proceedings means that an entry, established by the decision of the official in charge of the proceedings, is made, prohibiting the registration in the registers maintained by the Enterprise Register reorganisation, liquidation of the legal person, change of members or shareholders or registration of a commercial pledge. If, after this entry has been made in the Enterprise Register, an application is received requesting to register changes that are prohibited by the registered security measure, then the requested changes will be registered only after the permission by the official in charge of the proceedings is received.

The prohibition to transfer the totality of assets owned by the legal person is a restriction, established by the official in charge of the proceedings, to take such actions without the permission of the official in charge of proceedings. This security measure is applicable to ensure that the legal entity does not transfer in civil law procedure the property owned by the company (tangible and intangible) to another person, as the result of which it would be impossible to reach the aim of the criminal proceedings.

The intention is that the official in charge of legal proceedings regarding the application of coercive measures to a legal person will be able to apply these in the case where one or several of the grounds set it – counteractions are taken to prevent reaching the aim of criminal proceedings or the statutory procedural duties are not fulfilled, as well as in cases where the official in charge of proceedings has grounds to assume that the course of criminal proceedings will be hindered or that the natural person will commit a new criminal offence in the interests of this legal person, on behalf of this person or as the result of insufficient supervision or control by it.

4. Concluding Remarks

In conclusion, it can be recognised that the criminal law and criminal procedure law that allows, within the framework of criminal law, to bring proceedings against legal persons is still in the stage of development in Latvia. At the time when the institution the liability of the legal person was introduced in the Latvian criminal law, scepticism prevailed and the dominant attitude in the legal community was that these amendments to the law were needed only to align the national legal acts with the international legal acts binding upon Latvia, not to combat criminal activities effectively; however, during the last decade, the mood has significantly changed. The coercive measures applicable to legal persons already are seen as an effective or, at least, potentially effective measure for combatting and preventing crime, therefore, also law enforcement institutions have engaged in more active communication regarding problems in the application of this legal institution with the representatives of the Ministry of Justice and the legislator, and also the Ministry of Justice and the legislative power have undertaken serious improvements of the legal provisions regulating this issue to achieve as effective as possible application of these norms. This path is never fast, and the outcomes of work can be assessed only after many years have passed; however, the current progress allows believing that this process to improve the law has not been wasted.

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Dr Kristīne Strada-Rozenberga
Profesor, dekan Pravnog fakulteta Univerziteta u Letoniji, Letonija
e-mail: *strada@lu.lv*

Dr Jānis Rozenbergs
Predavač, Pravni fakultet Univerziteta u Letoniji, Letonija;
predsednik Letonskog saveta advokata, Letonija
e-mail: *janis.rozenbergs@advokatura.lv*

KRIVIČNA ODGOVORNOST PRAVNIH LICA U LETONIJI – NAČELNI UVIDI, OSOBENOSTI I AKTUELNOSTI

Sažetak

Put koji su prošli letonsko normativno regulisanje i letonska krivičnopravna doktrina kako bi došli do mogućnosti primene krivičnopravnih mera protiv pravnih lica nije bio ni brz ni jednostavan. Početno stanovište je bilo da ovakva mogućnost ne bi bila u skladu sa osnovnim načelima krivičnog prava Letonije budući da, istorijski gledano, psihološko razumevanje krivice predstavlja karakteristiku letonskog prava, te se krivica opredeljuje kao psihološki stav nekog lica prema krivičnom delu, a krivica je takođe jedan od elemenata krivične odgovornosti. Stoga nije bilo jasno kako bi ovakvo određenje krivice bilo u skladu sa kažnjavanjem jedne „pravne fikcije" kao što je pravno lice u krivičnopravnom kontekstu. Način na koji je Letonija mogla da prilagodi svoje propise različitim međunarodnim normativnim dokumentima kojima je pristupila, a da istovremeno ne utiče na dominantne osnovne institute svog krivičnog prava, tražen je prilično nevoljno. Dugogodišnje diskusije dovele su do toga da su u krivično pravo uvedene prinudne mere, koje postoje izvan sistema krivičnih sankcija, a koje se mogu izreći u odnosu na pravna lica. Shodno tome, definisani su i kriterijumi za primenu tih mera na pravna lica, od kojih se kao ključni kriterijum izdvaja izvršenje krivičnog dela od strane fizičkog lica povezanog sa pravnim licem, a koje je u interesu pravnog lica ili koje je posledica nedovoljne kontrole od strane pravnog lica. Posledično, razvijene su i odgovarajuće procesne norme, kojima se pravna lica u značajnoj meri izjednačavaju sa optuženim fizičkim licima u krivičnom postupku. Iako krivičnopravni propisi kojima se omogućava primena krivičnopravnih prinudnih mera u odnosu na pravna lica postoji u Letoniji već šesnaest godina, praksa primene ovih krivičnopravnih instrumenata počela je da se razvija tek u poslednjih nekoliko godina. To je za posledicu imalo i identifikovanje određenih nedostataka u normiranju, te se već sada može pristupiti analizi koja bi poslužila za unapređenje pravnog okvira.

Ključne reči: krivično pravo, krivično procesno pravo, odgovornost pravnih lica.

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