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Corporate Prosecutions – on Some Relevant Issues Related to the Criminal Procedural Status of Legal Entities

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The article is dedicated to the issues related to corporate prosecution, which the authors see as relevant. The two main lines explored herein are the applicability of human rights to legal entities and the possibility of using procedural (preventive, security coercive measures during the proceedings. The outcomes of researching the currently valid regulatory enactments and those that have become void, examples of law application and theoretical sources are used to present the authors' perspective on the most important aspects of the respective issues, problems are foregrounded and proposals are advanced to facilitate further discussion.

Keywords: corporate criminal liability, corporate prosecutions, procedural coercive measures, legal entities and "human rights".

Contents

Introduction

Corporate criminal prosecution has become an inalienable part of modern criminal proceedings. It has been known for more than 17 years also in Latvia. However, the issues related to this topic that can be considered as being relevant, still remain problematic and unresolved. The institution of corporate criminal liability is sufficiently challenging from the perspective of both substantial and procedural law. This article focuses on the issues of procedural law nature pertaining to the corporate criminal liability. Admitting that such issues are numerous and diverse, general characteristics of them are provided at the beginning, further on paying greater attention to two of these – applicability of human rights to corporate entities and the possibility of applying procedural (preventive, security) coercive measures during the proceedings. To a large extent, these two aspects were chosen because the authors have explored them already in their previous publication some time ago and now see the need for deepening this discussion and/ or for assessing changes in the views on these issues since the previous publications and proposals were made. The article includes the authors' views on the most important aspects of these issues, developed on the basis of researching valid regulatory enactments and such that have become void, examples of law application and theoretical sources, relevant problems are updated and proposals made with the purpose of initiating further discussions.

1. Corporate prosecutions in Latvia – a brief insight into the legal regulation and practice of application

Corporate criminal prosecution, which has been known in Latvia already for more than 17 years, was introduced by amendments[1] to the Criminal Law[2] (hereafter – CL), and adoption of the Criminal Procedure Law[3] (hereafter – CPL), which included the institution of coercive measures (hereafter – CM), and regulated the procedure of their application[4]. CPL and amendments to CL entered into force on 1 October 2005, which should be considered the date as of which CM could be applied for committed criminal offences also to legal entities. It is important to note that CM applied to legal entities cannot be regarded as the corporate criminal liability because the opinion that legal entities, due to the impossibility of establishing guilt, cannot be made criminally liable is still prevailing in Latvia[5]. The authors, however, strictly adhere to the opinion

[1] Grozījumi Krimināllikumā [Amendments to the Criminal Law]. (05.05.2005.) Available: https://www.vestnesis.lv/ta/id/108851-grozijumi-kriminallikuma [last viewed 01.05.2022].

[2] Krimināllikums [Criminal Law]. (17.06.1998.). The version in force at present available: https://likumi.lv/ta/id/88966-kriminallikums [last viewed 01.05.2022].

[3] Kriminālprocesa likums [Criminal Procedure Law]. (21.04.2005). The currently valid version available: https://likumi.lv/ta/id/107820-kriminalprocesa-likums [last viewed 01.05.2022]

[4] See in greater detail – *Rozenbergs, J., Strada-Rozenberga, K.* Krimināltiesiskie piespiedu ietekmēšanas līdzekļi juridiskām personām, to piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [Criminal Procedural Coercive Measures for Legal Entities, the Procedure of Application thereof and Related Relevant Problems in Latvian Criminal Procedure]. In: Juridisko personu publiski tiesiskā atbildība. Rīga: Latvijas Vēstnesis, 2018., 169.–174. lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

[5] Professor U. Krastiņš can be considered as being the most visible and leading representative of this opinion, as the result of his insistent effort, the idea of introducing corporate criminal liability was dismissed by the Latvian parliament, replacing it by coercive measures for a legal entity (see in greater detail the course of reviewing draft law No. 699 of the 8th *Saeima*. Available: https://www.saeima.lv/L_Saeima8/index.htm). Also, *Krastiņš, U.* Konceptuāli par vainu administratīvajās tiesībās [Conceptually about Guilt in Administrative Law]. Jurista vārds, 2207, Nr.23(476). Available: https://juristavards.

that, although criminal liability of legal entities has not been introduced in Latvia, CM for legal entities should be regarded as their liability of criminal law nature. Moreover, taking into account the severity of CM (they may include even liquidation of a legal entity or confiscation of its entire property), it should be recognised that, with respect to criminal procedural safeguards, a legal entity should be ensured the same safeguards as when someone is made criminally liable.

The criminal procedural regulation on the process of applying CM is included in several norms of CP, e.g., CPL Chapter 39 "Special Features of Pre-trial Criminal Proceeding Applying Coercive Measures to a Legal Person" and Chapter 51 "Special Features of Court Proceedings in Proceedings regarding the Application of Coercive Measures on Legal Persons". The legal regulation on the process of applying CM cannot be deemed to be stable since it has undergone a series of amendments. Thus, amendments applicable to the corporate prosecutions had been introduced into CPL already eight times[6]. Currently, the parliament is examining one more draft law regarding possible amendments[7] with respect to the legal entity, involved in the process of applying CM, mainly pertaining to the application of preventive coercive measures, and it will be examined further in this article.

To characterise the prevalence of CM procedures in practice, we can rely only on perceptions and observations gained in practice, i.e., that initially there have been no such proceedings, this period was followed by a spur at the beginning of the last decade, whereas currently the number of such proceedings remains unchanged and they cannot be regarded as widespread. The lack of reliable statistics forces to use one's own observations as the basis, which is a significant obstacle to a quantitative data analysis. Information about the number of corporate prosecutions is not publicly available. Unfortunately, this issue has not been disclosed in the publicly accessible reports on the work of the prosecutor's office, either. Thus, for example, the issue of corporate prosecutions is examined only episodically in the report by

lv/doc/158182-konceptuali-par-vainu-administrativajas-tiesibas/; *Krastiņš, U.* Kriminālsods un citi kriminālie piespiedu ietekmēšanas līdzekļi [Criminal Punishment and Other Criminal Coercive Measures]. Jurista vārds, Nr.1194640, 2007. Available: https://juristavards.lv/doc/154290-kriminalsods-un-citi-kriminalie-piespiedu-ietekmesanas-lidzekli/; *Krastiņš, U.* Konceptuāli par juridisko personu kriminālatbildību [Conceptually about Corporate Criminal Liability]. Jurista vārds, Nr.33(338), 2004. Available: https://juristavards.lv/doc/92916-konceptuali-par-juridisko-personu-kriminalatbildibu/ [last viewed 01.05.2022].

[6] Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law]: (12.03.2009.). Available: https://likumi.lv/ta/id/190010-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (14.03.2013.). Available: https://likumi.lv/ta/id/255728-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (29.05.2014.) Available: https://likumi.lv/ta/id/266815-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (18.02.2016.) Available: https://likumi.lv/ta/id/280784-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (30.03.2017.). Available: https://likumi.lv/ta/id/290109-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (20.06.2018.) Available: https://likumi.lv/ta/id/300107-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (11.06.2020.) Available: https://likumi.lv/ta/id/315655-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022]; Grozījumi Kriminālprocesa likumā [Amendments to the Criminal Procedure Law] (19.11.2020.) Available: https://likumi.lv/ta/id/319095-grozijumi-kriminalprocesa-likuma [last viewed 01.05.2022].

[7] Draft law No. 1323/Lp13 "Grozījumi Kriminālprocesa likumā" [Amendments to the Criminal Procedure Law]. Available: https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webAll?SearchView&Query=([Title]=*krimināl procesa*)&SearchMax=0&SearchOrder=4 [last viewed 01.05.2022].

Prosecutor General on the performance in 2021 and priorities for 2022, providing statistical data only with respect to some prosecution offices, without including them into the total statistics and without characterising trends.[8] This indirectly confirms the assessment expressed by one of the authors, creating a digest of case-law with respect to applying CM to legal entities in the Latvian courts in 2015–2020, in the framework of the European Social Fund (ESF) project "Justice for Development" (No.3.4.1.0/16/I/001)[9]. Namely, analysis of the available case law creates the impression that practitioners treat the process of applying CM as an addition to charges brought against a natural person, without paying due attention to it and without granting it appropriate meaning.

Furthermore, the assessment of the Latvian case law has led to the conclusion that, for the time being, it is rather simple and no complicated legal and factual issues are actually found therein[10]. However, this does not mean that there are no problems and outstanding issues. This means that the issues of procedural significance are not always, or, to be more precise – almost never, reflected in the final rulings in criminal proceedings, which are the only ones made publicly accessible and available for analysis. Likewise, it cannot be excluded that procedurally complex corporate prosecution cases do not reach the court at all, or do not reach it in the initially intended scope or form, exactly due to procedural problems.

Therefore, the fact that, currently, in Latvia no significant problems can be found in the case as reflected in the final rulings is not an obstacle for attempting to identify such problems theoretically, modelling possible problematic situations and proactively providing proposals for resolving them.

As noted above, there is no lack of relevant and problematic issues related to the topic of corporate prosecutions. We have focused on them in our previous publications and presentations at conference, and these will not be reiterated in this article.

Briefly characterising the current issues related both to the legal regulation on corporate prosecution and in the practice of its application, the following may be noted as being still relevant:

- application of the principle of mandatory nature of criminal proceedings (the legality principle) to procedures of CM;
- inaccurate legal regulation on the status of a legal entity and is representative; ambiguities in identification/ differentiation in practice;
- application of criminal law compensation to a legal entity and the division of the obligation to pay compensation between the guilty natural person and the legal entity, for whose benefit, in whose interests or due to whose insufficient supervision or control the criminal offence was committed;

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[8] Latvijas Republikas ģenerālprokurora ziņojums par 2021. gadā paveikto un 2022. gada darbības prioritātēm [Report by the Prosecutor General of the Republic of Latvia on the Performance in 2021 and Priority Actions in 2022]. Available: http://www.prokuratura.gov.lv/media/Normativie_akti/Zinojums.pdf [last viewed 01.05.2022].

[9] See in greater detail – *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu piemērošana juridiskajām personām. Tiesu prakses (2015–2020) apkopojums [Application of Coercive Measures to Legal Entities. Digest of Case-Law (2015–2020)]. Rīga, 2020, p. 44. Available: https://2a6c95cf-045b-40e7-840c-f4bd65b3ede4.usrfiles.com/ugd/2a6c95_bf620c60bf484b45a50c3f0dd444e6fd.pdf [last viewed 01.05.2022].

[10] See in greater detail – *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu piemērošana juridiskajām personām. Tiesu prakses (2015–2020) apkopojums [Application of Coercive Measures to Legal Entities. Digest of Case-Law (2015–2020)]. Rīga, 2020, p. 44. Available: https://2a6c95cf-045b-40e7-840c-f4bd65b3ede4.usrfiles.com/ugd/2a6c95_bf620c60bf484b45a50c3f0dd444e6fd.pdf [last viewed 01.05.2022]..

- establishing the grounds for applying CM in problematic situations when the guilty natural person has not been identified, *inter alia*, compatibility of this possibility with the regulation included in CL (i.e., alignment of the CL and CPL provisions);
- insufficient clarity regarding the rights, obligations and safeguards of legal entities and their representatives, in particular, during adjudication of the case, etc.

However, in this article, we would like to explore in greater depth two issues – namely, the possibilities for preventing counter-actions by a legal entity during criminal proceedings or the preventive procedural coercive measures and the application of human rights, characteristic of criminal proceedings, to a legal entity.

2. Application of procedural coercive measures to legal entities

Undeniably, just like natural persons, legal entities and their representatives, in the course of criminal proceedings, may engage in such actions (failure to act) that are contrary to statutory requirements and may hinder proper course of criminal proceedings. Thus, for example, anyone may fail to perform one's duties, organise or actively engage in prohibited counter-actions (destruction of evidence, influencing witnesses, etc.), or measures to make reaching of a fair resolution of criminal law relations, which is the aim of criminal proceedings, difficult or impossible. Likewise, the wish of those persons, who are targeted by the criminal proceedings, to avoid negative consequences that could set in as the result of criminal proceedings, can be clearly identified. CPL provides for sufficiently diverse types of response to such possible actions by natural persons and, from the perspective of legal regulation, they are comprehensive. The same cannot be said about legal entities. Undoubtedly, in the majority of cases there will be natural persons who, on behalf of a legal entity, in its interests, etc., will take actions that are incompatible with a fair resolution of criminal proceedings; however, not always these will be such persons who are involved in criminal proceedings with a status that would allow applying the preventive coercive measures to them. Moreover, even in cases where restrictions may be applicable to particular natural persons, often, these CM will not always provide sufficient security in proceedings against legal entities. Thus, for example, the application of such CM as the liquidation of a legal entity, intentional decrease of its property, etc. may cause significant obstacles to reaching and enforcing the outcomes of the proceedings. However, it should be recognised that, with respect to certain range of cases, the possibility to arrest a legal entity's property, already now envisaged by CPL, could be useful; however, it might not be sufficiently effective in all possible situations that require ensuring preventively proper "conduct" by a legal entity with the right to defence.

The fact that existing CPL regulation is not sufficiently effective was noted in the Latvian legal literature already 10 years ago. Thus, for example, J. Baumanis has pointed out that it could be possible to provide that security measures are applied also to representatives of legal entities. However, he does not support this idea himself, being of the opinion that it would not be sufficiently effective because there might not be a legal entity's representative in the proceedings at all[11]. Thus, to ensure effectiveness of the proceeding and prevent counter-actions by the legal entity, the author

[11] *Baumanis, J.* Prevencija piespiedu ietekmēšanas līdzekļu piemērošanas kontekstā [Prevention in the Context of Applying Coercive Measures]. Jurista vārds, Nr. 32(834), 19.08.2014. Available: https://juristavards.lv/doc/265004-prevencija-piespiedu-ietekmesanas-lidzeklu-piemerosanas-konteksta/ [last viewed 01.05.2022].

proposes envisaging in CPL the possibility of applying security measures to legal entities themselves.

One of the authors of this article has supported the idea regarding the possibility of applying security measures to legal persons already some years ago[12]. Today, it still can be recognised that, in principle, application of security measures to a legal entity (but not to its representatives) could be both necessary and possible.

After several years of waiting, the Latvian legislator has taken steps to align the unregulated situation. Currently, the next amendments to CPL[13] have been adopted in the first reading, which will introduce security measures applicable only to natural persons – suspects or accused persons, differentiating a group of procedural coercive measures – security measures for a legal entity. The following are envisaged as the grounds for applying a security measure – 1) counter-actions against reaching the aim of criminal proceedings, or 2) failure to perform procedural obligations, 3) grounds to consider that the course of proceedings will be hindered or that the natural person will commit a new criminal offence on the behalf of the legal person, in its interests or due to insufficient supervision or control over them. It is noted in the annotation to the draft law that "such actions by a legal entity or its representative as avoiding communication with the person directing the proceedings, intentional destruction of documents important for the criminal proceedings and other activities that hinder the course of criminal proceedings may be recognised as counter-actions against reaching the aim of criminal proceedings. Likewise, one of the grounds for applying one of the security measures is the fact that the procedural obligations, set out in law, are not discharged, e.g., the legal entity's representative does not arrive when summoned by the person directing the proceedings in accordance with Section 146 of CPL or intentionally delays issuing items, documents on information about facts, relevant for the criminal proceedings, upon the request made by the person directing criminal proceedings. [...] At the same time, it should be noted that, in accordance with Section 93 (5) CPL, the fact that a representative does not participate in the proceedings is not an obstacle to continuing the proceedings; hence, security measures would be applicable to a legal entity also in those cases, where the representative of the legal entity does not participate in the proceedings."[14]

It is envisaged that it will be possible to apply one of the following security measures to a legal entity: 1) prohibition of certain activities; 2) prohibition to change entries into the registers maintained by the Register of Enterprises of the Republic

[12] See in greater detail, e.g., *Meikališa, Ā.* Mantiskie preventīvie piespiedu līdzekļi kriminālprocesā – atsevišķi piemērošanas problēmjautājumi. Ārvalsts investīcijas: kad tiesības mijiedarbojas [Property-based preventive coercive means in criminal proceedings – certain problematic issues of application. Foreign investment: When laws interact]. Latvijas Universitātes 74. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2016, 382.–401. lpp.; Preventīvo piespiedu līdzekļu piemērošana juridiskām personām kriminālprocesā [Application of preventive coercive measures to legal entities in criminal proceedings]. In: Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi. Rīga: LU Akadēmiskais apgāds, 2018, 239.–245. lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

[13] Likumprojekts: Grozījumi Kriminālprocesa likumā" (likumprojekta nr. 1323/Lp13) [Draft Law: Amendments to the Criminal Procedure Law" (Draft law No. 1323/Lp13)]. Available: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument#B [last viewed 01.05.2022].

[14] Likumprojekta (1323/Lp13) "Grozījumi Kriminālprocesa likumā" sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial Impact Assessment (Annotation) of the Draft Law (1323/Lp13) "Amendments to the Criminal Procedure Law]. Available: https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument#B [last viewed 01.05.2022].

of Latvia; and 3) prohibition of takeover of the company. It is underscored in the annotation to the draft law that "security measures cannot be graded according to their restrictive impact; hence, the person directing the proceedings will not have the possibility to select a more restrictive security measure in the case if a legal entity violates the provisions of the applied security measure or does not discharge its procedural duties [...]".

It is intended to make the regulation with respect to security measures for legal entities applicable from 1 January 2023.

In addition to the introduction of the intended amendments regarding coercive security measures, changes are envisaged also in provisions on procedural sanctions; i.e., a kind of punishment, set out in CPL, for the failure to discharge procedural obligations, showing disrespect forwards the court, etc. We have expressed our opinion also on this matter in our previous work[15], recognising that "neither prohibition nor admission of applying procedural sanctions to a legal entity is envisaged because they can be applied to any "person who does not fulfil the procedural duties provided for by law, interferes with the performance of a procedural action or does not show respect to the court" (Section 288 of CPL)." Notwithstanding such finding, the legislator has decided to amend CPL, providing directly that "A pecuniary sanction in the amount up to thousand minimum wages, defined in the Republic of Latvia, may be applied to a legal person who interferes with the procedure established in criminal proceedings or does not respect the security measure applied."

In general, the legislator's intentions are commendable. However, it must be recognised that they contain one dangerous aspect. It is related to the episodic nature of the amendments drafted. Namely, it has been noted previously that the main problem in the Latvian CPL is not the fact that the procedural-preventive coercive measures targeting a legal entity have not been directly enumerated but the fact that the status of a legal entity itself is not sufficiently clear, *inter alia*, its (or its legal representative's) obligations have not been defined[16]. It is this particular ambiguity with respect to the legal entity's status that could cause problems and suggests that without concerted amendments to other provisions of CPL and/or development of practical guidelines or doctrinal perspective effective implementation of the legislator's intentions in practice could be seriously jeopardised. To prevent this, primarily, the obligations, the possible consequences of the failure to discharge these obligations or other procedural violation committed by the legal entity itself and the natural persons, representing it in various statuses, should be clearly understood and differentiated between (*inter alia*, assessing the possibility of simultaneous onset of consequences for a natural person and a legal entity, etc.). In this context, it is important to remember that the legal entity itself is and remains a legal construct (fiction), irrespectively of the procedural status that it has been granted, it does not "act" or "fail to act" on its own accord. A legal entity is always represented by a natural person. Consequently, it must be understood, when to consider that actions by a natural person who is related to a legal entity that are

[15] See in greater detail, e.g., Preventīvo piespiedu līdzekļu piemērošana juridiskām personām kriminālprocesā In: Autoru kolektīvs, Juridisko personu publiski tiesiskā atbildība: aktualitātes, problēmas un iespējamie risinājumi. Rīga: LU Akadēmiskais apgāds, 2018, 239.-245.lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/izdevumi/2018/Jurid.pers.publiski_tiesiska_atbild.pdf [last viewed 01.05.2022].

[16] *Strada-Rozenberga, K.* Piespiedu ietekmēšanas līdzekļu juridiskām personām piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā [The process of applying means of coercive influence to legal entities and its current problems in Latvian criminal proceedings]. In: *Meikališa, Ā., Strada-Rozenberga, K.* Kriminālprocess. Raksti 2010–2015. Rīga: Latvijas Vēstnesis, 2015, 647. lpp.

incompatible with the legal proceedings could be identified as actions by the legal entity itself and when it can no longer be done. Thus, for example, whether not only the respective employee but also the legal entity itself could be accused of the failure of a legal entity's employee to come for interrogation or unauthorised actions by the guard of the legal entity – not letting police officers enter the territory, etc., in the process of applying CM. Presumably, this issue cannot be deemed to be simple, and both in doctrine and in the practice of applying law it might turn out to be as complicated as the identification of the grounds for corporate criminal liability (or in Latvia – for applying CM). Moreover, it should be kept in mind that legal entities and their representatives may be involved in criminal proceedings in different statuses. Consequently, the perspective should be aligned also with the legal entities and their representatives with other criminal procedural statuses, for example, legal regulation on a legal entity as the victim or the owner of property infringed during the criminal proceedings.

3. Legal entity and human rights

The previous section of the article focused on the ways of coercing a legal entity not to act contrary to the interests of fair resolution of proceedings. In this section, however, we shall address a fundamental issue –whether the legal entity in legal proceedings directed at it has also rights, procedural safeguards and, if so, whether these are "human rights". Even before embarking on elaborate examination of this issue, it has to be admitted that it and the previous one, which substantially are opposites (one examines obligations and coercion, the other – rights and protection), in the context of a legal entity, are united by one condition, the crux of the matter is, to our mind, the connection between particular natural persons and the legal entity and the obligation of a state governed by the rule of law to treat appropriately all subjects of law. In particular, a person who implements their aims, intentions, interests directly themselves or using the mediation of various legal tools, *inter alia*, by establishing legal entities.

Whether a legal entity has been endowed with human rights is not a new matter for discussions in legal literature. The opinions expressed are very diverse and sometimes diametrically opposite. In 2014, the publishing house "Springer" released a fundamental research "Regulating Corporate Criminal Liability"[17], where these issues were noted as being relevant, substantial, problematic and, currently, unresolved both in the article by D. Brodowski, an author representing the German school of law, on the minimum procedural rights that should be applied to legal persons[18] and in an article by A. N. Neira Pena, representing the Spanish academic community, dedicated to relevant aspects of corporate liability[19].

In the Latvian legal literature, in this context, we have focused on the attributability of the presumption of innocence to a legal entity[20]. It was noted already in 2016,

[17] *Brodowski, D. et al.* Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014.

[18] *Brodowski, D.* Minimum Procedural Rights for Corporations and Corporate Criminal Procedure. In: *Brodowski, D. et al.* Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014, pp. 211–226.

[19] *Neira Pena, A. M.* Corporate Criminal Liability: Tool or Obstacle to Prosecution? In: *Brodowski, D. et al.* Regulating Corporate Criminal Liability. Springer International Publishing Switzerland, 2014, pp. 197–210.

[20] See in greater detail – *Strada-Rozenberga, K.* Juridiskā persona un nevainīguma prezumpcija kriminālprocesā [Legal Person and Presumption of Innocence in Criminal Procedure]. In: Constitutional Values

that the aspect of the so-called typical human rights of a natural person had been taken into account on the level of the EU law creation. Thus, for example, the Meijers Committee in its comments on the draft EU Directive on the presumption of innocence and the right to be present at trial had noted, at the end of 2014, *inter alia*, that the safeguards included in this directive should be applicable also to a legal entity, to the extent possible in connection with its substance[21]. Notwithstanding the proposals made, the directive on the presumption of innocence and the right to be present at trial[22] was adopted in 2016, without applying it to a legal entity. Its Article 2 sets out that this directive is applicable to natural persons, whereas recitals 13-15 of the Preamble provide: "This Directive acknowledges the different needs and levels of protection of certain aspects of the presumption of innocence as regards natural and legal persons. As regards natural persons, such protection is reflected in well-established case-law of the European Court of Human Rights. The Court of Justice has, however, recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons. At the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons. This should be without prejudice to the application of the presumption of innocence as laid down, in particular, in the ECHR and as interpreted by the European Court of Human Rights and by the Court of Justice, to legal persons. The presumption of innocence with regard to legal persons should be ensured by the existing legislative safeguards and case-law, the evolution of which is to determine whether there is a need for Union action."

Evasion of attributing the presumption of innocence to a legal entity is one of the reprimands addressed at the directive. Thus, for example, it has been noted that the failure to apply the presumption of innocence to legal entities is a wasted opportunity for clarifying and improving the protection[23]. Likewise, it has been recognised that, unfortunately, the EU legislator chose not to apply the presumption of innocence to legal entities, gaining support for its position also in the case-law of the Court of Justice of the European Communities, wherein it has been recognised that, in the framework of this right, legal entities are less protected, which actually means that legal entities should rely on other legal tools, e.g., the Convention and the case law of the European Court of Human Rights.[24]

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in Contemporary Legal Space I: Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia. 2016. gada 16.–17. novembris. Rīga: LU Akadēmiskais apgāds, 2016, 606.–614. lpp. Available: https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Jur-Konf-6_2016_Legal-Space-I.pdf [last viewed 01.05.2022].

[21] *Edecapitani.* Presumption of Innocence and the Right to be Present at Trial: The Meijers Committee's (*) position, 12.12.2014. Available: https://free-group.eu/2014/12/12/presumption-of-innocence-and-the-right-to-be-present-at-trial-the-meijers-committees-position/ [last viewed 01.05.2022].

[22] Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (09.03.2016). Available: http://data.europa.eu/eli/dir/2016/343/oj [last viewed 01.05.2022].

[23] *Sayers, D.* The new Directive on the presumption of innocence: protecting the 'golden thread'. 2015. Available: http://eulawanalysis.blogspot.com/2015/11/the-new-directive-on-presumption-of.html [last viewed 01.05.2022].

[24] *Lamberigts, S.* The presumption of innocence (and the right to be present at trial) directive. 03.05.2016. Available: http://europeanlawblog.eu/?p=3192 [last viewed 01.05.2022].

However, admittedly, the issue of rights that legal entities should be endowed with, is broader than solely the presumption of innocence, although numerous criminal procedural safeguards have "found shelter" in this principle.

As mentioned above, there is no unequivocal and uniform answer to the question whether human rights are applicable and should be applied to legal entities. It was noted in already in the 2005 edition of "Human Rights in Criminal Proceedings" that, currently, it is impossible to examine the issue of corporate criminal prosecution because international institutions had not encountered it. An assumption is made that the presumption of innocence will be applied to a legal entity *mutatis mutandis* as to a natural person[25]. In the commentaries on the European Convention of Human Rights, published in 2014, the applicability of the Convention's provisions to a legal entity is examined very briefly, merely noting that legal entities enjoy the human rights set out in the Convention. However, it is admitted that there are such human rights, which, due to the "Special circumstances in relation to corporate defendants – the opaqueness of the corporate veil, the specialized knowledge of corporations, their ready access to the resources for legal representation – all justify measures to ease the burden of proof on the state"; "Where corporations are defendants, legal innocence need not necessarily be an evidentiary blank sheet, and in fact is not. The imposition of a persuasive burden on corporations once the fact of the prohibited harm occurring has been proven in the way that background political morality says: for this class of defendants, legal innocence is over. The legal innocence criminal justice demands for corporations is that there is available to the corporate defendant a defence of due diligence even though the defendant has the burden of proving on the balance of probabilities that the defence lies". Shiners believes that not only the evidential burden, bet also the persuasive burden may be applied to a legal person, recognising that it is "not merely morally permissible in the case of corporate defendants, but morally justified"[26]

It seems that the essential differences between legal and natural persons serve as the basis for the denying attitude shown by the US representative Isiksel towards the legal entity as the subject of human rights. Analysing attribution of human rights within a sphere beyond criminal proceedings she notes that application of human rights to a legal entity would be "dehumanization of human rights ", stating, in continuation, that "It also has the potential to destabilize the moral and political force of human rights by diverting their focus from the protection of urgent human interests towards protecting the commercial interests of large firms. Although it is tempting to dismiss the attribution of human rights to corporations as preposterous, the settled practice of recognizing corporations as legal persons and bearers of rights in many domestic legal systems suggests that the issue is more complex." Isiksel points out: "I make the case for distinguishing the legal rights of business corporations from human rights on account, first, of the fundamental differences between natural persons and business corporations as moral agents, and second, on account of the kinds of interests these agents respectively hold. These are morally and legally salient differences that must be taken into account in determining the standards of

[25] *Treshel, S.* Human Rights in Criminal Proceedings. Oxford: Oxford University Press, 2005, p. 172.

[26] *Shiner, R. A.* Corporations and the Presumption of Innocence. Criminal Law, Philosophy, 8, 2014, pp. 487, 493. https://doi.org/10.1007/s11572-013-9287-9 [last viewed 01.05.2022].

treatment that business corporations are entitled to expect from states and other institutions that wield public power"[27].

German scholar Brodowski points to a very important nuance – namely, what exactly the consequences are that these procedures provide for the legal entity. He writes – "from a constitutional law perspective, the legislature has the choice: If it decides to limit the liability of legal persons for criminal behaviour to incapacitation and restitution – which is enough in order to achieve the goal that "crime must not pay" – no criminal proceedings and no criminal procedure guarantees are required. As these legal consequences may also be very severe, however, there is a strict constitutional and human rights requirement to legal review including a fair trial (Art. [...] Moreover, legislators are free – and, as we will see below, wise – to grant more procedural guarantees also in cases where there is no strict constitutional or human rights requirement to do so. If, instead, the legislature decides to introduce also a punishing element – as is the case in many modern criminal justice systems, including the German *lex lata* – criminal procedure guarantees are applicable, also when these legal consequences are targeted at legal persons."[28]

It can be noted, as a comment to this statement, that CM that have been introduced in Latvia, definitely, contain punishing elements. Issues of restitution, etc., including confiscation of criminally acquired property, cannot be considered as being application of CM. Also, the Latvian legislation had the possibility to decide, which model of response to involvement of legal entities in criminal offences to choose. It did not have to select the criminal law punitive form. However, in Latvia, without formally introducing the corporate criminal liability, CM were introduced, whose severity and punitive nature, undeniably, makes one subscribe to Brodowski's opinion that criminal procedural safeguards, definitely, should be applied to a legal entity.[29]

It seems that Neira Pena successfully brings certain clarity regarding differences in theoretical opinions. She sees as an important determinant of differences in views the states' affiliation with different circles or families of law, different legal traditions. She notes: "Most of the European and especially the Spanish doctrine understand that the broader—and even coextensive with the individuals—recognition of rights and guarantees to legal persons is the unavoidable counterpart of introducing corporate criminal liability in our law. They base this assertion on an *anthropomorphic conception* of the legal person. This also involves a conception of procedural rights and guarantees based on protecting the indicted from abuses of power, rather than on human dignity. Following this approach *strictu sensu*, legal persons could also enjoy other rights they lack in the U.S., such as free legal aid, the right to the presumption of innocence, the right to self-defence through a representative, the right not to incriminate themselves, or the right against unreasonable searches and seizures, including the inviolability of the domicile. All of them reinforce the entity's right of defence but the problem is that sometimes it overly hinders criminal investigations". Analysing the Spanish experience and opinions held by legal scholars, the author notes that with the introduction of criminal liability of legal persons and acquisition of defendant's status, the protection of legal entities themselves has been reinforced[30].

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[27] *Isiksel, T.* The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights. Human Rights Quarterly, Vol. 38, No. 2, 2016, pp. 297–298, 315. Project MUSE, doi:10.1353/hrq.2016.0031 [last viewed 01.05.2022].

[28] *Brodowski, D.* Minimum Procedural Rights, pp. 218–219.

[29] *Brodowski, D.* Minimum Procedural Rights, p. 221.

[30] *Neira Pena, A. M.* Corporate Criminal Liability, pp. 205–208.

It is worth noting that neither the Latvian CPLs provide for any differences with respect to the defendant status of a legal entity, thus, to a certain extent, equalling it to a natural person (it is stated in CPL *expressis verbis* that the representative of a legal person has the same rights as the accused).

Comparing the experience of the US and continental countries, the author recognises that "in the U.S. attempts have been made to adapt the procedural system of guarantees to the specialties of corporate criminal liability. By contrast, [...] in general in other continental countries, the option has been for a full alignment with individual, natural persons charged. The argument is simple and even simplistic: corporations can become charged as individuals, so they should have the same procedural rights." At the same time, she rejects equating legal entities with natural persons: "But full equality between natural and legal persons is not appropriate for several reasons. First of all, this equalization overly hinders investigation and prosecution. And above all, it should not be forgotten that corporations and individuals have an entirely different nature, among other things because corporations lack human dignity. Corporations and individuals are not the same at all!"[31] Without concealing that, possibly, corporate criminal liability is used too extensively in the U.S., Neira Pena, nevertheless, is inclined towards stricter proposals to continental countries, noting that "the equalization between firms and individuals overly hinders investigation and prosecution, and the strict principle of legality prevents negotiating with companies and makes it difficult to keep legal proceedings secret." The conclusion is harsh – "substantial differences between European and the U.S. procedural systems may cause corporate criminal liability to change from a useful tool in the U.S. into an obstacle to criminal investigations in Europe".[32]

Summing up this brief insight into the ongoing discussion, we shall try to find an answer to the question, whether, in our opinion, continental countries should revise their approach in granting comparatively extensive procedural safeguards to legal entities. An unequivocal answer cannot be provided also to this question. Our answer would be – both yes and no. In our opinion, it must be recognised that, in a state governed by the rule of law, legal entities as defendants in criminal procedures, which might lead to criminal sanctions or measures that, as to their severity, can be likened to them, should be granted effective rights to the protection of their interests. Whether these should be called human rights, in our opinion, is not a decisive issue. Legal persons, of course, are not human beings, they do not have human dignity and morality. However, this does not mean that they, as a separate legal construct, could be legally unprotected, *inter alia*, by international human rights provisions.

It is essential, in cases of corporate prosecutions, that actions linked and related to the legal entity highlight not only the issue of the protection of the legal entity itself but also the protection of particular natural persons related to it. Particular natural persons may be linked to the legal entity in various ways, as very successfully described by Brodowski in the article quoted above[33]. There are no grounds not to uphold Neira Pena's opinion that a corporation is not the same an individual at all, but wrongdoers acting within a corporation must enjoy the same rights as any other defendant[34], at the same time recognising that those linked to the particular

[31] Neira Pena, A. M. Corporate Criminal Liability, pp. 208–209.
[32] *Neira Pena, A. M.* Corporate Criminal Liability, pp. 209–210.
[33] *Brodowski, D.* Minimum Procedural Rights, p. 221.
[34] *Neira Pena, A. M.* Corporate Criminal Liability, p.198.

legal entity (employees, management, owners) must be ensured appropriate legal opportunities for protecting their infringed or potentially infringed interests[35].

At the same time, the legal entity itself also should enjoy certain protection. Brodowski's opinion can be upheld that these safeguards should not mandatorily be equalled to the safeguards for a natural persons, and whether and to which extent these guarantees apply in criminal proceedings against legal persons is primarily a question of criminal policy[36]. The Latvian legislator has chosen not to provide special regulation on this issue, which allows equalling the legal entity as the defendant to the suspect or the accused. In our opinion, a model that allows too much space for unclarity and non-uniform practice or, to put it differently, jeopardises legal certainty, should not be supported. It is more or less clear that there are rights, which, due to their nature, cannot be applied to a legal entity, e.g., the right to freedom. There are also such that, thanks to the case law of the ECHR and CJEU are already viewed as inalienable rights of legal entities, e.g., inviolability of offices or attorney-client privilege. However, still many issues remain that require a clearer vision, e.g., the right to not self-incriminate, the right to defence, etc. In our opinion, full equalising to a natural person (which, actually, has happened in Latvia), should not be supported because, firstly, may be incomprehensible (e.g., what does that mean that a legal person is not obliged to cooperate – who exactly from the legal entity is "privileged", and at the same time, which kind of commitment is not sufficient for refusal?) and, secondly, also an excessive burden upon the state, which may prohibit from ensuring effectiveness and reaching the aim of criminal proceedings. Hence, the issue – how to strike balance between protecting the interests of legal entities, to which they, undoubtedly, are entitled to, and effectiveness of the proceedings, ensuring of public interests – remains challenging.

Summary

1. The legal regulation on corporate prosecutions, although introduced in Latvia more than 15 years ago and amended several times, still cannot be considered as sufficiently clear or precise, and creates grounds for proposing changes to it.
2. The practice of corporate prosecutions, at least insofar as it can be judged by the publicly accessible court rulings, is rather simple, without many legally complex issues and problems. However, this does not allow assuming that there are no relevant issues or problems. Rather, it can be assumed that a large part of procedurally important issues does not appear in the final court rulings or that procedurally complex cases do not even reach courts.
3. One of the relevant issues of corporate prosecution is ensuring a proper conduct of legal entities during the criminal proceedings (or the so-called preventive coercive measures applied to legal entities), and attributing human rights to legal entities.
4. In the area of preventive coercive measures and procedural sanctions, the Latvian legislator intends to introduce the so-called security measures for legal persons and a pecuniary penalty as the possibility for applying a procedural sanction. This intention is commendable. However, it must be recognised that without aligned amendments to other CPL provisions and/ or developing guidelines on practice or doctrinal perspective, effective implementation of these intentions in practice could be seriously jeopardised. To prevent it, primarily, the obligations, possible

[35] See in greater detail also Strada-Rozenberga, K. Juridiskā persona, 606.–614. lpp.
[36] *Brodowski, D.* Minimum Procedural Rights, pp. 211, 221.

consequences of the failure to discharge one's duties and other procedural violations of the legal entity itself and of various natural persons, representing it in various statuses, should be clearly understood and differentiated between (including the possibility of simultaneous onset of consequences both for the natural person and the legal entity).

5. In corporate prosecution cases, it is important to respect the rights of both the involved, infringed or potentially infringed natural persons and of the legal entity. The protection of natural persons should be viewed, *inter alia*, in the light of huma rights, typical of them. The status of a legal entity should not be equalled to the status of a natural person; however, it should be ensured an effective possibility for protecting its rights, complying with the scope of the right to a fair trial. How exactly this should be achieved remains a challenge.

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