

# ON THE PROSPECTS OF INTRODUCING THE INSTITUTION OF CRIMINAL LIABILITY OF LEGAL PERSONS IN RUSSIA: FROM THEORY TO PRACTICAL IMPLEMENTATION

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## Abstracts

The article touches upon the views of supporters and opponents of the establishment of the institute of criminal liability of legal persons under the Criminal Code of the Russian Federation; analyzes the theoretical proposals and practical steps in this direction. Also, the paper presents an overview of a federal law draft worked out by the Investigative Committee of Russia providing the introduction of other measures under criminal law for legal persons involved in the commission of crimes.

## Key words

criminal liability of legal person, criminal code, corporate crime, legal person, sane person, guilt, measures under the criminal law

The content of Article 19 of the Criminal Code of the Russian Federation<sup>1</sup> provides a negative answer to the question of the criminal liability of legal persons. In this norm a sane person over a certain age is called the only subject of a crime to be brought to justice. This approach is in the tradition of the Russian criminal law that holds that criminally liable are only individuals, those mental development enables them to realize the social danger of voluntary actions performed by them and foresee the possibility of occurrence of related adverse effects. Of course, in itself, this tradition is a legacy of the classical principle of criminal law, enshrined in the era of the French Revolution, the principle of personal criminal responsibility. And the principle that each person is only responsible for what is made by his own, guilty (conscious, volitional) actions was fixed in the theory of Russian national criminal law long ago. By the way, the argument about the impossibility to determine fault is the main one in the arsenal of the opponents to establish criminal responsibility for legal person. After all, if a legal person is a legal fiction that hides most specific group of individuals, then the prosecution of the organization makes it possible for perpetrators of the crime avoid guilt.

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<sup>1</sup> The Criminal Code of the Russian Federation of 13.06.1996 N 63-FZ (as amended on 12.11.2012) // ConsultantPlus Network. – URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=132982;div=LAW>

But, apparently, no science can be infinitely connected by tradition. Especially when life itself is making significant changes in the perception of this tradition. Indeed, in the theory of criminal law proposals of the possibility of recognition of a legal person the offender had gained new acuteness and begun to be seriously discussed since 1991, and were particularly strong - in the preparation of the first post-Soviet criminal code. It was connected, in particular, with the development of the actual institution of legal persons in the Civil law of Russia, the emergence of new forms that were unknown to Soviet legislation. Obviously, the active participation of private enterprises in the economy and increased competition, both then and now provokes many of them to undertake illegal methods to make business income. At the same time the issue of environmental security has become very acute and it still is. After all, the consequences of the activity of large enterprises sometimes lead to serious environmental problems that do not disappear after the prosecution of individual managers. Supporters of introduction of that criminal liability of legal persons believe that serve significant financial sanctions, reputation loss, and possible liquidation may be a deterrent for corporations to commit crimes.

It must be noted that among public sectors of Russian law representatives of the Administrative law were the first to decide to introduce liability of legal persons. Moreover, the Code of Administrative Offences<sup>2</sup> provides for liability in the form of fines, the sizes of which are significantly higher than in the most repressive law – the Criminal law. By the way, in the eyes of the supporters of fixing liability of legal persons in the Criminal Code is also an important argument that this dissonance should not be. Administrative measures can not substitute themselves the influence of repressive criminal law.

However, hot theoretical disputes are still pending. As for the practical level, the most important step to establish in one form or another the institution of criminal liability of legal persons is the preparation by The Investigative Committee of the Russian Federation of a separate draft of federal law. Its working title is “On the amendments to some legislative acts of the Russian Federation in connection with the introduction of measures under the criminal law in relation to legal persons”<sup>3</sup>.

The need to establish such institution is explained in the explanatory memorandum to the bill referring to legal, social, economic and political factors. The authors of the draft stress that in recent years, the number of crimes committed in the interest of or using legal persons, has significantly increased in Russia, which indicates the formation of a new type of crime – “corporate crime”. This type of crime is a real threat to the economic security of the state and the interests of bona

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<sup>2</sup> Code of Administrative Offences of 30.12.2001 N 195-FZ (as amended on 11.12.2012) // ConsultantPlus Network. – URL: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=137794;div=LAW>.

<sup>3</sup> The Investigative Committee of the Russian Federation. Official website. – URL: <http://www.sledcom.ru/discussions/?SID=1273>.

fide participants in the economic circulation. It has a negative impact on the investment attractiveness of Russia, which causes an outflow of capital from the country. Crime entities destabilize the fundamentals of the economy, which indirectly contributes to decline in key economic indicators, including inflation, cuts in production, the outflow of capital in the shadow economy. It is being also noted that corporate crime contributes to higher crime rate trends in the society in general<sup>4</sup>.

Attention is drawn to the fact that, as it follows from the name of the proposed bill and the explanatory memorandum to it, it is not about the criminal liability of legal persons in its present understanding but about special mechanism of legal action. However, it seems, it is made so that the proposed option could be considered as a compromise for both the supporters and opponents of the introduction of the institute of criminal liability of legal persons.

What is the essence of the proposed changes? The draft introduces new Chapter 15.2. of the Criminal Code, which will be called “Measures under the criminal law in relation to legal persons”. The new chapter is to be placed in Section VI of the Criminal Code, called “Other measures under criminal law”, within which the new chapter will be located after Chapter 15 “Compulsory medical measures” and Chapter 15.1 “Confiscation of property”.

In article 104.5 the draft stipulates that measures under the criminal law are to be applied for the involvement of a legal person in the crime if it has the status of a legal person under the legislation of the Russian Federation. But these measures are not applied to bodies of state power and local self-government. By the way, the draft does not specify what is meant by the “measures under criminal law” applicable to legal persons. The new article 104.4 only specifies what the grounds and conditions of the application of such measures are.

The involvement of a legal person in the crime is considered the ground for the application of measures under the criminal law. A legal person would be considered as involved in the crime in two cases. First, if the offense is committed for the benefit of a legal person by a manager exercising an administrative functions or a manager carrying the actual control in it. It is said, that a crime is in the interest of a legal person if it is committed with the purpose of acquisition property benefits. As possible examples profit (increase of profit), avoidance of loss (reduce losses), evasion of property responsibility or another responsibility under laws of the Russian Federation, acquisition of property rights or exemption from duties are given.

Secondly, a legal person is considered involved in the crime if it is being used in order to commit or conceal the crime or the consequences of the crime by the person who is performing managerial functions or carrying the actual control in it. The draft

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<sup>4</sup> The Investigative Committee of the Russian Federation. Official website. – URL: <http://www.sledcom.ru/discussions/?ID=45943>.

stipulates that the usage of a legal person means, for example, financing of a crime using cash or bank accounts of a legal person, contracting on behalf of the legal person to facilitate the commission or concealment of a crime or property derived from the commission of the crime.

The draft also sets forth the general universal concept of the person performing managerial functions in the organization; exceptions may be provided in the articles of the Special Part of the Criminal Code. The sole executive body (the head of the legal person), a member of the collegial executive body, a member of the board of directors, as well as a person permanently, temporarily or by special authorization performing exercising management or administrative functions in a legal person is the person performing managerial functions in the organization. The draft separately specifies who is to be understood a person performing the actual control, that is a person which is not holding a position in a legal person and is not vested in accordance with the law, statute, treaty or by proxy to exercise management or administrative functions in a legal person, but actually determining its control because of prevailing share in the charter capital or due to other circumstances.

As for specific measures under criminal law listed in article 104.7 that can be applied to a legal person involved in the crime and which is familiar to criminal law of Russian Federation is only a fine (article 104.10).

Here a fine is a collection of money, but its size is specifically calculated. It can be installed in a lump sum of money from fifty thousand to five million rubles (fixed fine). Also, a fine may be a multiple of the resulting income made by the crime, or a multiple of loss prevented by committing the crime or a multiple value of the acquired assets as a result of the crime (multiple fines). Finally, a fine may be calculated in systematic quarterly payments from five to twenty-five percent of the income of the convicted legal person within the period from one to two years (annuity fine).

The remaining types of measures under criminal law, which can be appointed by the court to a legal person involved in the crime, are: warning; revocation of licenses, quotas, preferences or privileges; deprivation of the right to be engaged in certain activities; ban on the activity on the territory of the Russian Federation; forced liquidation. The draft allows for the simultaneous appointment one or more of above-sited measures under criminal law. Briefly describing the nature of each of the above mentioned measures under the criminal law the following can be noted.

Warning is expressed in a censure of the legal person and notifying it about the inadmissibility of its involvement in the crime in the future explaining the consequences of violation of such provision (article 104.9).

Revocation means the annulations of the early given license, quotas, preferences or privileges and it can be assigned to those licenses, quotas, preferences or privileges using which, or for the registration of which the crime was committed in which a legal person was involved (article 104.11).

Deprivation of the right to be engaged in certain activities as it is expected will be a ban for the legal person to take part in one or more activities which can be established for a period from one year to five years (article 104.12).

Ban on the activity on the territory of the Russian Federation is determined by the draft as an exceptional measure under the criminal law, which can be appointed to a legal person formed outside the Russian Federation and operating in the territory of the Russian Federation, when its operation in the Russian Federation was connected exclusively with the commission or concealment of a crime or concealment of its consequences (article 104.13).

Finally, forced liquidation is an exceptional measure under the criminal law, which can be applied to a legal person formed on the territory of the Russian Federation whose activity was connected exclusively with the commission or concealment of a crime or concealment of its consequences in the Russian Federation, or a legal person whose charter (share) capital was formed with the property obtained by a crime for more than a half (article 104.14).

If a legal person is involved in the crime for the first time and it is a minor or moderate crime, it may be exempted from the measures under criminal law if it (a) contributed to the detection and investigation of the crime in which it was involved (b) compensated for the crime damage or in some other way wiped out the damage, which had arisen as a result of its actions or decisions (article 104.6). Such a legal person is considered not to be trialed opposed to those who are recognized as involved in the crime, and for which measures under the criminal law were appointed. For the last the draft provides various terms of conviction annulations depending on the severity of crimes they were involved in (article 104.15).

What will the fate of this draft be, which has not even been submitted to the Russian parliament, is unknown. But there is no doubt that the movement towards the establishment of the institute of criminal liability of legal persons for offenses or participation in them has begun. By the way, what makes the discussion actual is the fact that in international legal instruments, including the UN Convention, which the Russian Federation joined (e.g., the UN Convention against Corruption of 31.03.2003), Member States proposed to introduce norms of corporate responsibility to national criminal law.

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