

# The issue of ensuring the participation of accused legal entities

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**Abstract:** The author of the article is dealing with the issue of securing the participation of accused legal persons in criminal proceedings, which in comparison with securing the participation of physical persons shows significant differences. The author deals in detail with the issue of bringing to court, summons and imposition of a fine on a person who performs acts on behalf of a legal person pursuant to Section 34 of the TOPO.

**Key words:** Liability of corporations, criminal proceedings, legal entities

**JEL Classification:** G32, G33, C35

## 1 Introduction

Criminal proceedings against legal persons have a number of differences compared to proceedings against physical persons, which are due to the specific characteristics of a legal person, which is an artificial organised entity without physical existence and which by its nature does not act and is represented only through physical persons. By their nature, legal persons cannot ensure their participation in criminal proceedings and thus defend their rights. At the same time, it is necessary to distinguish in the proceedings whether this security institution is exercised directly against the legal person or against a physical person who merely acts on behalf of the legal person.

### Regulation of the person acting for the legal person

The Act on Criminal Liability of Legal Persons and proceedings against (TOPO) them provides the law enforcement authorities with a physical person who will act with them in substitution for the accused legal person. The special regulation of acts of a legal person in criminal proceedings is provided for in Section 34 of the Act on Criminal Liability of Legal Persons and proceedings against them. For better illustration I present its text below:

#### § 34

##### *Acts of a legal person*

*(1) A legal person shall be represented in proceedings by a person who is authorised to do so in proceedings before the court pursuant to the Civil Procedure Code. That person must prove that he is authorised to act on behalf of the legal person.*

*(2) A legal person may choose an agent. The power of representation shall be evidenced by a written power of attorney. The power of attorney may also be granted orally in the protocol. An accused legal person may have only one agent in the proceedings at a time.*

*(3) In proceedings, only one person may act for a legal person at the same time.*

*(4) A person who is an accused, a victim or a witness in the same case may not perform act in the proceedings. If this occurs in the course of the proceedings, the President of the Court and the public prosecutor in the preliminary proceedings shall call upon the legal person to appoint another person to perform acts in the further proceedings; for this purpose he shall set a time limit of 7 days as a rule for the appointment of such a person.*

*(5) If the person referred to in subsection (4) is not designated within the time limit, or if the legal person does not have a person capable of performing acts in the proceedings, or if it is demonstrably impossible to serve documents on the legal person or its agent, the President of the Court and, in preliminary proceedings, the judge shall appoint a guardian for the legal person. A person may be appointed guardian only with his or her consent. A person may not be appointed guardian if he may reasonably be considered to have such an interest in the outcome of the proceedings as to justify a fear that he will not properly defend the interests of the legal person. The order appointing a guardian shall be notified to the person who is appointed guardian and, unless the nature of the case so excludes, also to the legal person.*

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*(6) The person referred to in subsection (1), the agent and the guardian shall have the same rights and obligations in the proceedings as the person against whom the criminal proceedings are being conducted.*

*(7) If the person referred to in subsection (1), or the agent of the accused legal person or the guardian, fails to appear at the main trial without a proper excuse, the court may conduct the main trial in their absence if the indictment was duly served on the accused legal person, if the accused legal person was summoned to the main trial in due time and in due form, if the provisions on the initiation of the criminal prosecution were complied with and if the accused legal person was notified of the possibility to study the file and to make proposals for supplementing the investigation.*

*(8) Where a legal person has an agent or has been appointed a guardian, documents addressed to the legal person shall be served only on that agent or guardian, unless the Criminal Procedure Code provides otherwise.*

It follows from Section 34(1) of the Act on Criminal Liability of Legal Persons and proceedings against them that, in addition to the above, Section 21(1) of the Civil Procedure Code is also a key provision which determines not only the persons authorised to act for a legal person in civil proceedings but also in criminal proceedings. In accordance with Section 21(1) of the Civil Procedure Code, the following physical persons act for a legal person:

(a) a member of the statutory body;

if the statutory body is composed of several persons, the chairman of the statutory body or,

where appropriate, a member of the statutory body who has been authorised to act for the legal person;

if the chairman or authorised member is a legal person, the physical person who has been authorised or otherwise empowered to act by that legal person shall always act; or

(b) an employee (member) thereof who has been authorised to do so by the statutory body; or

(c) the head of its plant, in respect of matters concerning that plant; or

(d) its proxy, if he or she may act independently pursuant to the proxy granted.

Section 21(2) of the Civil Procedure Code sets out the exceptions under which the aforementioned persons are excluded from acting on behalf of a legal person. These are cases where the application of Section 21(1) of the Civil Procedure Code is excluded either directly by the Civil Procedure Code or by a special law. Such a special law may be, for example, the Insolvency Act, on the basis of which the insolvency administrator will act for the legal person in certain cases. Similarly, if the legal person is in liquidation and a liquidator is authorised to act for it instead of the persons referred to in subsection 1, the liquidator will be authorised to act for the legal person. Where a legal person has been placed under receivership, the receiver shall act. (See ust. § 21 odst. 3 OSŘ)

It also follows from the above-mentioned Section 21(1) of the Civil Procedure Code that the actions of the persons mentioned therein are considered to be the legal entity's own actions. For this reason, the prosecuting authorities must take all actions directly against the accused legal person, not against the physical person acting on its behalf, including service of process. (Jelínek, 2019) Acts of the statutory body of the accused legal person are thus considered to be acts of the legal person. (Jelínek, Herczeg, 2013)

Like the Civil Procedure Code (See ust. § 21 odst. 5 OSŘ), the Act on Criminal Liability of Legal Persons and proceedings against them (See ust. § 34 odst. 3 TOPO) requires that only one person at a time acts on behalf of a legal person in criminal proceedings.

The statutory body of a legal person, the head of its branch or the proxy only has to prove in criminal proceedings that they are authorised to perform acts on behalf of the legal person in accordance with section 34 of the Act on Criminal Liability of Legal Persons and proceedings against them; no further express authorisation is required. However, if an employee of the accused legal person is to act on behalf of the accused legal person, such authorisation is already necessary. The employee of the legal person is obliged to prove that he has been authorised by the legal person to act on its behalf, for example by submitting the internal regulations of the legal person or an explicit authorisation granted by the statutory body, proving his authorisation to act on behalf of the accused. On that basis, the employee is an ad hoc person authorised to act on behalf of the accused legal person to a specific extent. (Forejt, Habarta, Třešlová, 2012)

## Statutory body

The task of the law enforcement authorities is to determine whether the person acting on behalf of the legal person has actually proved that he or she is authorised to act for the legal person. However, law enforcement authorities can no longer determine whether or not someone is authorised to act for a legal person. (Jelínek, 2019)

It is primarily the legal person itself that determines who is authorised to act for it in criminal proceedings. According to Section 21(1) of the Civil Procedure Code, this is in particular the statutory body. In the case of a collective statutory body, the chairman, vice-chairman or another authorised member of the statutory body acts for the legal person. A limited liability company which has several managing directors forming a collective body may be represented by each managing director separately. However, in the context of criminal proceedings, a situation could arise where each of the managing directors represents a legal entity and their actions contradict each other. Such a situation can be considered completely inadmissible from the point of view of criminal proceedings. The prosecuting authorities would thus have no choice but to appoint a guardian for such a legal person. An analogous application of Section 29(2) of the Act on Criminal Liability of Legal Persons and proceedings against them would probably result.

A legal person may also be represented by an authorised employee. However, only the statutory body may grant a delegation to an employee. If the above situation were to arise, it would not be possible to appoint an employee of the legal person instead of a guardian, since such an authorisation can only be granted by the statutory body.

In criminal proceedings, a legal person may also choose an agent for its defence, in accordance with Section 34(2) of the Act on Criminal Liability of Legal Persons and proceedings against them. Such a person must be granted a procedural power of attorney in writing. The granting of a procedural power of attorney orally in the protocol is not excluded. A legal person may be represented in proceedings by only one agent. Should there be a change of agent, the power of attorney must first be revoked or terminated and only afterwards be granted to a new agent for representation. (Jelínek, 2019) It is not permissible for more than one agent to be involved in the proceedings, even for a short period of time. Since the law does not expressly require that the chosen agent must be a lawyer, any physical person, regardless of his or her educational background, may be such an agent. This can be perceived as a certain legislative deficiency, when explicitly providing for representation by a lawyer can enhance and extend the guarantees of a fair trial.

In practice, a situation can certainly arise many times when the accused legal person is a limited liability company with only one managing director. In such cases, it is highly likely that criminal proceedings will be initiated not only against the legal entity, but also against the managing director of the legal entity itself. Therefore, if there is a conflict of interest, it is completely impossible for the prosecuted managing director to represent the limited liability company in a criminal case. This follows from section 34(4) of the Act on Criminal Liability of Legal Persons and proceedings against them in conjunction with section 21(4) of the Civil Procedure Code. It will be necessary to appoint a guardian for such a limited liability company, and the criminal prosecution will be initiated on the date on which the order to initiate the criminal prosecution is delivered to the appointed guardian. Any actions taken by the managing director in the interim period, *i.e.* between the service of the order instituting criminal proceedings on the legal entity and the service of the order instituting criminal proceedings on the managing director, cannot be accepted. (Žďárský, 2017)

In accordance with the existing case law, the above written no longer applies and the automatic appointment of a guardian for a legal person pursuant to section 34(5) of the Act on Criminal Liability of Legal Persons and proceedings against them does not occur. It follows from the ruling of the Constitutional Court of the Czech Republic of 23 June 2020, Case No. I. ÚS. 2638/19, that in order to properly ensure the legal person's right to defence, it is necessary to allow even a formally excluded person (*i.e.* the prosecuted managing director who has a conflict of interest) to choose an agent for the legal person pursuant to section 34(2) of the Act on Criminal Liability of Legal Persons and proceedings against them. Instead of the automatic appointment of a guardian for the legal person, the possibility to choose the legal person's agent is in principle left to the formally excluded person, which is a manifestation of the presumption of innocence.

## Right to defence

A physical person who represents a legal person in criminal proceedings is obliged to appear duly before the prosecuting authorities when summoned. If he or she fails to appear without a proper excuse, he or she may be brought before the court. If the representing physical person disrupts the course of the proceedings, behaves disrespectfully or insultingly towards the court, the public prosecutor or the police authority, or if he/she disobeys an order or fails to comply with a summons, he/she shall be liable to a fine. It should be noted that the amount of the fine may be up to CZK 500,000, *i.e.* ten times higher than the fine that may be imposed under the Criminal Procedure Code. However, the orderly fine will be payable directly by the accused legal entity, not by the physical person acting on its behalf. (Vidrna in Jelínek a kol., 2013)

Section 32(2) of the Act on Criminal Liability of Legal Persons and proceedings against them allows, under certain conditions, for the transfer of criminal liability to the legal successor of the accused legal person during criminal proceedings. The question then remains whether the already elected agent of the legal person will continue to represent its legal successor. However, it can be assumed that in such a case the legal successor of the legal person would be deprived of its rights, since it would not be able to choose its own representative. If such a situation arises, the successor to the legal person must be allowed to determine who will be authorised to act for him in criminal proceedings. (Šámal a kol., 2012)

In practice, a situation may certainly arise in which the person entitled to act for the accused legal person will be in the position of a witness or a victim. The circumstances which will place such a person in that role may not yet be known at the commencement of the criminal proceedings and may only be discovered in the course of the criminal proceedings. If the conflict of interest described above arises, it is not possible for such a person to continue to represent the accused legal person. This is the same as in the above-mentioned case, i.e. where the person authorised to act for the accused legal person is also in the position of the accused. However, in comparison with the previous case of an accused physical person acting for an accused legal person, it can be assumed that the situation where that person is in the position of a witness or victim will be less frequent.

If any of the three situations referred to above arise, the President of the Court or, in the preliminary proceedings, the public prosecutor shall set a time limit for the legal person to choose another person or representative. The time limit is usually set at 7 days.

If no person is chosen within the above period, the court shall issue an order appointing a guardian without delay. The guardian of an accused legal person may only be a person who has no interest in the outcome of the proceedings and is not in conflict of interest. No person may be appointed guardian against his will.

As already mentioned above, it may only become apparent during the criminal proceedings that the person authorised to perform procedural acts on behalf of the legal entity in criminal proceedings has a conflict of interest. Particularly in corporations with a large number of bodies and employees, it may be difficult to ascertain which particular individual actually committed the offence attributable to the legal person. If it turns out in the course of the proceedings that a person authorised to act in criminal proceedings on behalf of a legal person has participated in or committed a criminal act of the legal person, it is necessary to consider the procedural acts already taken as ineffective. (Čep in Gřivna, 2016)

The legislation governing the appointment of a guardian for a legal person may be problematic, as no ordinary appeal is admissible against this order. The accused legal person can therefore defend itself only by lodging a constitutional complaint. A complaint for breach of the law may also be lodged, but only by the Minister of Justice, so it is classified as an extraordinary remedy. In both cases, however, there will be no quick and effective protection for the legal person. This issue is pointed out, for example, by Říha, who states that the rights of the legal entity are often not sufficiently protected by the appointed guardian. In his articles, for example, he also mentions a case where the appointed counsel for a legal person did not appeal against a decision imposing the most severe possible penalty, i.e. the penalty of dissolution of the legal person. (Říha in Kalvodová, Fryšták, Provazník, 2018)

In the above-mentioned case, it can be seen as problematic that in practice the legal entity can only defend itself very difficult in case of disagreement with the procedural actions taken by the guardian. At the same time, the appointed guardian may often not have a proper understanding of the structure of the legal person, which, moreover, knows practically nothing about its activities. In such a situation, it may be very difficult to defend its rights properly.

The above-mentioned problem has also been addressed by the Union of Defence Counsel, which considers the above to be a violation of the constitutional order, since even a legal person is guaranteed the right to defence. In the opinion of the Union of Defence Counsel No. 1/2017 it is stated that a person who is in the position of a witness should at least be able to determine who will be authorised to act on behalf of the accused legal person in criminal proceedings. (Unie obhájců České republiky, 2017)

Thus, in the framework of the amendment of the Act on Criminal Liability of Legal Persons and proceedings against them, it would be advisable for the legislator to also address the above-mentioned issue.

#### Collateral institutions

Next, I will deal with the issue of ensuring the participation of the accused legal person in criminal proceedings, which is enshrined, *inter alia*, in Section 36 of the Act on Criminal Liability of Legal Persons and proceedings against them.

### Summons, bringing to court, orderly fine

(1) If a person who performs acts for a legal person under section 34 fails to appear without sufficient excuse, he may be brought before the court if he has been duly summoned.

(2) If a person who performs acts on behalf of a legal person pursuant to section 34 (1), (2) or (4), despite having been previously warned, disrupts the proceedings or behaves in an insulting manner towards the court, the public prosecutor or the police authority, or if, without sufficient excuse, he fails to obey an order or to comply with a summons given to him pursuant to the Criminal Procedure Code or this Act, a fine of up to CZK 500,000 may be imposed on the legal person he represents by the President of the Court and, in the preliminary proceedings, by the public prosecutor or the police authority.

If the guardian commits the act referred to in the first sentence, a fine of up to CZK 50 000 may be imposed on him.

(3) A complaint against a decision under subsection (2) shall be admissible and shall have suspensive effect. Section 146a of the Criminal Procedure Code shall apply *mutatis mutandis* to the decision on the complaint.

Individual collateral institutes can also be found in the Criminal Procedure Code or elsewhere in the Act on Criminal Liability of Legal Persons and proceedings against them. It is then necessary to assess whether a particular measure is also applicable to legal persons and whether it is directed directly against the legal person or against a physical person authorised to act on its behalf.

For example, a legal person may be suspended from exercising one or more objects of activity or restricted in the disposal of its assets pursuant to Section 33(1) of the Act on Criminal Liability of Legal Persons and proceedings against them on the grounds of fear of an act pursuant to Section 67(c) of the Criminal Procedure Code, or section 33(2) of the Act on Criminal Liability of Legal Persons and proceedings against them, if it is expected that the financial penalty will be frustrated. However, by the nature of the case, it is not possible, for example, to bring, detain or take into custody a legal person. (Říha in Jelínek a kol., 2013)

The above-quoted Section 36 of the Act on Criminal Liability of Legal Persons and proceedings against them is intended to ensure the participation of the legal person in criminal proceedings and is one of the prerequisites for the fulfilment of the purpose of criminal proceedings.

The first of the institutes of ensuring the participation of a legal person is a summons. As the institution of summons does not contain an element of coercion, the criminal prosecution authorities are expected to comply voluntarily with the obligation. It is an invitation by the law enforcement authorities to the legal person to appear at a certain date and time at a specified place and to perform a certain procedural act. It is then always the responsibility of the physical person acting on behalf of the legal person in criminal proceedings to ensure that the legal person is present to perform a certain procedural act. In the event of failure to comply with this obligation, the physical person may, if necessary, be brought before the court and must be duly informed of this in the summons. However, in certain justified cases, the individual may be brought before the court without a summons. This could occur if the person authorised to act for the legal person is not permanently resident. However, it is essential that the law enforcement authorities take this approach only in exceptional cases where there is no possibility of serving the summons by any means.

It follows from the text of Section 36(1) of the Act on Criminal Liability of Legal Persons and proceedings against them that bringing to court may only take place after a prior proper summons. It is therefore necessary to deal with the question of what actually be considered as a proper summons. Should it be addressed only to the legal person or must it be addressed directly to the physical person? The third option is to serve the summons on both the legal person and the physical person. Jelínek is of the opinion that the summons must be addressed directly to the physical person acting on behalf of the legal person, and it must be clear from the summons that it is that person who is to appear in person to perform the procedural act. (Jelínek, 2019) Říha takes the opposite view, arguing that the summons should be addressed directly to the legal person and submits that this can be deduced from an interpretation of the specific provisions of the Act on Criminal Liability of Legal Persons and proceedings against them, where the summons of the legal person is provided for in particular in Section 34(5) and (7), from which he concludes that not only decisions but also summonses are to be served on the legal person. (Říha in Jelínek a kol., 2013) In this case, I agree with Říha's view and I also consider that the legal person should be summoned directly. If the summons is addressed directly to the legal person, the legal person will be able to decide which physical person will represent it when carrying out the procedural act. Nor it can be excluded that, in the interval between the summons and the date on which the procedural act is to take place, the legal person may wish to designate another physical person to continue to act for it in the criminal proceedings. If, for example, in connection with the performance of a certain procedural act, some specific knowledge concerning the activities or, for

example, the organisational structure of the legal person is required, the legal person may appoint an employee who has such detailed knowledge to perform that act and can thus better defend its rights than a member of the statutory body.

The law enforcement authorities may also impose an orderly fine. However, the special legal regulation in relation to legal persons differs in this case from the regulation contained in the Criminal Procedure Code as regards the amount of the fine, the Act on Criminal Liability of Legal Persons and proceedings against them allows for the imposition of a fine of up to CZK 500,000. Since the obligation to pay the fine is incurred directly by the legal person, this can be seen as a certain sanction for the choice of a physical person. (Jelínek, 2019)

## 2 Conclusion

In view of the above mentioned, it is clear that the issue of ensuring the participation of accused legal persons in criminal proceedings has significant differences compared to securing the participation of physical persons. The existing legislation has a number of legislative deficits which have not always been overcome by the interpretation of the law enforcement authorities, and even in the academic debate there is no uniformity of opinion, as discussed in more detail in this article. For the future, I would consider it advisable if the legislator also focuses on extending the guarantees of a legal person to a fair trial, where, from my point of view, its position is considerably worse than that of a physical person.

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## List of abbreviations

Sb.	Collection of Laws
Sb. m. s.	Collection of International Treaties
NOZ	Law no. 89/2012 Coll., Civil Codex
ZOK	Law no. 90/2012 Coll., the Commercial Companies Cooperatives (Business Corporations Act)
TOPO	Act no. 418/2011 Coll., the law on criminal liability of legal persons and proceedings against them
TZ	Law no. 40/2009 Coll., Criminal Code Act
TŘ	Act no. 141/1961 Coll., The Law on Criminal Procedure (Criminal Procedure Code)
OSŘ	Act. No 99/1963 Coll., Civil Procedure Code