

CRIMINAL LIABILITY OF THE LEGAL PERSON

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Abstract

The legal person, with the exception of the state and the public authorities, is criminally liable for the crimes committed in the accomplishment of the activity object or in the interest or on behalf of the legal person. Public institutions are not criminally liable for the crimes committed in the exercise of an activity that cannot be the subject of the private domain. The criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same deed. The criminal liability of the legal person is direct and personal, which means that the eventual right of recourse of the legal person against the natural person who is responsible for committing the crime is exercisable on the basis of criminal civil liability. Pursuant to the principle of the territoriality of the criminal law, foreign legal persons who commit crimes on the Romanian territory will be criminally liable according to the Romanian criminal law.

Keywords: criminal liability, legal person, criminal offense, criminal law.

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1. Introductory considerations

The criminal liability of the legal person was introduced by Law no. 278/2006 for the modification and completion of the Penal Code, as well as for the modification and completion of other laws, published in the Official Gazette no. 601 of 12.07.2006.

By Law no. 286/2009 published in the Official Gazette no. 510 of 24.07.2009 a new Criminal Code of Romania was adopted, and the criminal liability of the legal person was regulated in Title VI of the General Part, articles 135-151.

The main provisions in the field refer to the fact that it was decided to regulate this institution in a special title, following the Finnish penal code model and the direct liability model, inspired by the Belgian and Dutch penal code, was maintained.

2. Criminal liability of the legal person

The legal person, with the exception of the state and the public authorities, is criminally liable for the crimes committed in the accomplishment of the activity object or in the interest or on behalf of the legal person.

Public institutions are not criminally liable for the crimes committed in the exercise of an activity that cannot be the subject of the private domain.

The criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same deed.

The Romanian legislator has established a model of direct criminal liability², in which the legal person is responsible for his own deed and not for the deed of another person.

The criminal liability can only be committed in the case of a legal person, so that an entity without legal personality (a civil society, a joint venture) cannot be an active subject of any crime.

The state and the public authorities benefit from a general and absolute criminal impunity, but the responsibility of the public institutions for the crimes committed in the exercise of an activity that can be subject to the private domain of the state can be committed.

Thus, from a criminal point of view, all legal persons under private law, regardless of the

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² F. Streteanu, R. Chiriță, *Răspunderea penală a persoanelor juridice în dreptul belgian*, „Revista de drept penal” no. 1/2000, p. 112; F. Streteanu, R. Chiriță, *Răspunderea penală a persoanelor juridice*, Ed. C.H.Beck, Bucharest, 2007; H. Diaconescu, *Este răspunderea penală a persoanei juridice în dreptul român o răspundere pentru fapta altuia?*, „Dreptul” no. 12/2005, p. 147; M. A. Hotca, R. Slăvoiu, *Noul Cod penal și Codul penal anterior. Adnotări, situații tranzitorii, noutăți*, Ed. Universul Juridic, Bucharest, 2014, pp. 238-239.

legal form in which they were constituted (companies, associations, foundations).

The Romanian legislator has set up the system of general liability of the legal person³, in the sense that a legal person can, in principle, commit any crime, regardless of its nature, and it will be established for each case if the conditions for accepting the liability are fulfilled criminal of the legal person.

There are, however, certain offenses that cannot be committed by the legal person as an author, but only as an instigator or complicit in committing such an act (eg. desertion - art. 414, evading - art. 285, crimes against the family - Article 376 - Article 380 of the Penal Code).

The Romanian legislator did not individualize or limit the natural persons or bodies through which the criminal liability of the legal person can be engaged⁴, so that the criminal liability can be incurred by any natural person acting under the conditions provided by law and not only by the natural persons who are part from the governing bodies or representatives of legal entities.

The legal person is not responsible for any crime committed by a person connected with it or in the case of crimes committed by employees of the legal person, who have only taken advantage of the material support offered by the company to commit crimes in their personal interest.

The employment of the criminal liability of the legal person is not conditional on the identification of the natural person who participated in the commission of the same crime. If the employee of a legal person commits an offense directed against the legal person, he will not be criminally liable because he is a person injured by committing the crime, person who can become a civil party during the criminal trial.

In order to be engaged, the liability of the legal person must include all the constituent elements of the crime, including the material element and the subjective element, elements that must be ascertained distinctly from the finding of their existence in the case of a natural person⁵.

The Romanian legislator has established three criteria on the basis of which the criminal liability of the legal person can be employed, so that the legal persons are criminally responsible for the crimes committed: in carrying out the activity object; in the interest of the legal entity; on behalf of the legal entity.

In the case of crimes committed in the accomplishment of the activity object, in order to be committed the responsibility of the legal person, the crime must be closely linked with the accomplishment of the activity object, in the sense that the facts that can be considered crimes are facts that concern the general policy of the person legal or in relation to the main activities by which the object of activity is realized and not facts that were occasioned by certain activities that are indirectly related to the object of activity.

In order to be committed the liability of the legal person, in the case of offenses committed in the interest of the legal person, the respective offenses must not be related to the activities by which the object of activity is carried out, but which are likely to benefit the legal person, and through benefit it can be understood both to obtain a profit and to avoid a loss.

In the sphere of offenses committed in the interest of the legal person the most important and numerous are corruption offenses in order to obtain certain advantageous contracts.

The offenses committed on behalf of the legal person do not concern the object of activity of the legal person, they are not of a nature to bring a benefit to it, as they are crimes that are committed in the process of organizing the activity and functioning of the legal person.

The criminal liability of the legal person is a direct criminal liability⁶, so that in order to commit the criminal liability it must be ascertained the existence of a subjective element proper to the legal person, separate from the subjective element regarding the deed committed by the natural person.

³ D.A. Brudariu, *Răspunderea penală a persoanelor juridice. Experiența legislației franceze*, „Revista de drept penal” no. 1/2006, p. 123.

⁴ C. Ungureanu, E. Paraschiv, *Răspunderea penală a persoanei juridice*, „Pro Lege” no. 2/ 2005, p. 142.

⁵ I. Pascu, M. Gorunescu, *Răspunderea penală a persoanei juridice în perspectiva adoptării unui nou Cod Penal Român*, „Pro Lege” no. 2/2004, p. 25; M. Udroi, *Drept penal. Partea generală. Noul Cod penal*, Ed. C.H. Beck, Bucharest, 2014, p. 46.

⁶ I. Pascu, *Răspunderea penală a persoanei juridice în noul Cod penal roman*, „Pro Lege” no. 4/2004, p. 69.

In order to ascertain the existence of a subjective element proper to the legal person, the subjective position of the governing bodies of the legal person is analyzed, so it is important to establish whether the crime committed is based on a decision intentionally adopted by the legal person, a negligence due to an internal organization deficiencies, insufficient security or prevention measures, unreasonable business plan or budget - issues that created, favored, and determined the commission of crimes⁷.

The liability of the legal person can be committed only if the legal person was aware of the intention to commit such an offense, consented or instigated it.

From a probationary point of view, the criminal prosecution bodies may administer any means of evidence in order to establish the actual subjective position of the legal person.

The criminal liability of the legal person is not committed if he is accidentally confronted with an offense committed by an employee, but his action has not been consented to or is within a practice tolerated by the legal person.

Even if the guilt of the legal person is analyzed separately from the guilt of the natural person who committed the criminal act, it may happen that they act with the same form of guilt or in different forms of guilt.

The Romanian legislator has opted for the system of accumulation of liability between the natural person and the legal person⁸, but it is necessary to analyze clearly and concretely the relations that can exist between the legal person and the natural persons involved in committing the crime, there are two categories of natural persons whose criminal responsibility can to be employed alongside the criminal liability of the legal person: the perpetrator of the crime and the persons with management duties within the legal person.

We can meet the situation in which there is a participation between the offender and the legal person, and in this situation we also have a participation between the natural person who acts as an author and the natural persons who have management duties within the legal person. In this case, all persons involved in committing the deed will be prosecuted.

Persons with managerial responsibilities within the legal person may benefit from mitigating circumstances or the replacement of criminal liability if they can prove that they have made considerable efforts to change the company policy, but all these efforts have been insufficient.

If the criminal liability of the legal person is committed, it cannot be directed against the natural person with a backward action for recovering the amount paid by the legal person as a criminal fine, but may claim from the perpetrators natural persons compensation under the civil liability tort.

Also, the associates of the legal person cannot be obliged to answer for the criminal fines applied to the entity to which they have the status of associates, because the principle of the personality of the criminal liability would be violated, the solution being the same even for those legal persons in which associations respond unlimitedly or solidarity.

According to the provisions of art. 137 of the Penal Code, the amount of the fine is set by the court system the fine by the court, based on the general criteria for individualization.

Another important change, inspired by the Portuguese and Italian Penal Code, is represented by the provisions of art. 151 which regulates the employment of criminal liability in case of loss of legal personality through merger, absorption or division intervened after committing the crime, in charge of the newly created legal person.

Foreign legal persons committing crimes on the Romanian territory will be criminally liable, according to the Romanian criminal law on the basis of the territoriality of criminal law principle.

⁷ D. M. Costin, *Răspunderea persoanei juridice în dreptul penal român*, Ed. Universul Juridic, Bucharest, 2010, p. 21.

⁸ M. Burceag, *Răspunderea penală a persoanei juridice în noul Cod penal*, „Pro Lege” no. 1/2006, p. 205; Gh. Mărgărit, *Conceptul de răspundere penală a persoanei juridice în noul Cod penal*, „Dreptul” no. 2/2005, p. 103; G. Dimofte, C. Rus, *Răspunderea penală a persoanei juridice*, „Revista de Drept Penal” no. 1/2005, p. 122; M. K. Guiu, *Răspunderea penală a persoanei juridice*, „Dreptul” no. 8/2005, p. 158.

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