
CRIMINAL LIABILITY OF LEGAL ENTITIES

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Abstract: The article aims to bring in the most recent legislative changes relating to the institution of the legal person. Given its recently introduced the Romanian criminal law, Law no. 278/2006, it has undergone some changes along with the entry into force of the new Criminal Code, Law no. 187/2012 for implementation of Law no. 286/2009 the Criminal Code.

Keywords: criminal liability, legal person, sanctions, individual, immunity.

I think that Romanian criminal law needs a new regulation regarding the exclusion of legal entities from the area of criminal liability considering that, given the present market economy, the possibility of creating legal entities which can commit crimes is very real. For the first time in our national law, Law no 278/2006 incriminates the legal entity. In the previous regulation, one of the general conditions of the active subject was that of being a person. Currently, the active subject could also be a legal entity. In the special part of the Criminal Code, as well as other special laws, we can find crimes whose active or passive subject can be a legal entity. To point out those stated above, we will provide several examples of crimes which can have as an active or passive subject a legal entity.

Article 250 "*Fraudulent performing of financial operations*", a crime whose secondary passive subject is the legal entity who owns a payment instrument. Article 249 "*Informatics fraud*", the active subject can be a person of the legal entity who suffered a prejudice as a result of the counterfeiting or alteration of data, the restricted access to those data or prevention of the functioning of an information system. The secondary passive subject can be the rightful owner, the person or the legal entity, which uses that system. Article 239 "*Not fulfilling of wrongfully fulfilling the job duties*", the active subject can only be a legal entity, even if the general conditions regarding the criminal liability of a legal entity are met, as it is a crime with a qualified active subject. The same situation can be found in article 330 "*Not fulfilling or wrongfully fulfilling the job duties with guilt*", article 306 "*Illegally obtaining funds*", a crime committed by a person by presenting projects which aim to secure financing from public money. Article 307 "*Embezzlement*", a passive subject can be any legal entity stated in article 176 of the Criminal Code which was given funds or material resources which have been embezzled. The criminal liability of the legal entity can be engaged by any person who acts by respecting the law. At the same time, engaging the criminal liability of the legal entity is conditioned on identifying a subjective element which can be different from the one found in case the author is a person.

By analyzing article 135 of the Criminal Code and the previous regulation, passed by Law no 278/2006 for the change of the Criminal Code, we can see that the principles of the previous regulation were kept.

Therefore, the concept of criminal liability of the legal entity for any crime is maintained, as well as the possibility to cumulate the criminal liability of the legal entity with the criminal liability of a person. On the other hand, the lawmaker reduced the criminal immunity of legal institutions which operate on the public market, the immunity being limited just to crimes committed while performing such activities. There are also some changes in

customizing the sanctions for the legal entity, determined by the newly introduced system of fine days for the legal entity. Also, in case of complementary sanctions, a new punishment was introduced, that of placing the legal entity under supervision. In our current law, the types of persons who are not criminally liable are stated clearly.

The conditions to be met for engaging the criminal liability of the legal entity

1. One of the general conditions for engaging the criminal liability of the legal entity is that it has to be a legally founded company. The legal entity is a collective subject of law, representing an association of people who, by respecting the legal formal obligations, becomes entitled to both subjective rights and civil obligations. Any legal entity must be individually founded and organized; it must have its own goods pertaining to achieving a certain legal and moral purpose, in agreement with the general interest. See also the provisions of article 219, 220 of the Civil Code.

2. The legal capacity: the second general condition in order to engage the criminal liability of the legal entity is that the entity is not a part of the excluded category of entities, as not all legal entities are criminally liable. According to the provisions of article 135 of the Criminal Code, the state and its public authorities are not criminally liable as they have no criminal legal capacity. According to the provisions of the second alignment of article 135 the public institutions are not criminally liable for crimes committed when exercising an activity which is not the object of the private market. We must also mention that the legal entities, except for those who are expressly left out, are criminally liable regardless of whether they are private or public.

3. Committing crimes while performing the activities for which the entity was founded. This means that an organ or a representative of the legal entity committed a crime while exercising their rightful activity, according to the law or the entity's founding papers. Such a crime is committed in the interest of the legal entity in all situations in which the material or moral good obtained by committing the crime, is given to the legal entity. For example: human trafficking, money laundering and smuggling.

According to the provisions of article 136 of the Criminal Code, the punishments to be applied to the legal entity are classified as main and complementary. The main punishment is a fine, described as the amount of money the entity must pay to the state; the amount is determined by using the fine-day system.

We will describe the complementary punishments as the new Criminal Procedure Code establishes certain prevention measures which can be applied, some looking quite similar to the complementary punishments regulated in article 136 of the Criminal Procedure Code, but they must not be mistaken for one another, regardless of their content. See article 493 of the Criminal Procedure Code.

Pertaining to the regime of complementary punishments applied to the legal entity, article 138 of the Criminal Code states that if the court rules that the nature and gravity of the crime, as well as the circumstances in which it was committed, are extremely dangerous, it can apply one or more complementary punishments. But does the law allow for several or even all complementary punishments? The answer is found in the provisions of article 138 third alignment which states that several complementary punishments can be applied, except for liquidation of the entity. Alignment 4 of the same article states that complementary punishments can be applied only as an accessory of the main punishments. We will continue by listing the complementary punishments to be applied to legal entities, while in the next section we will analyze aspects of compared law. According to the provision of article 139 of the Criminal Code, the complementary punishment of liquidation of the legal entity is applied when the company was founded with the sole purpose of committing crimes and the punishment for the crime committed is imprisonment for over 3 years. This is the significant

difference as opposed to the previous regulation. By adding the condition that the crime must be punished with imprisonment for over 3 years, we can state that the most favorable criminal law applies, as it states a supplementary condition.

The provision of article 140 of the Criminal Code states, as a complementary punishment of the legal entity, the suspension of the company's activity, thus forbidding it from exercising any activity in regard to the crime that was committed. The complementary punishment must not be applied for extensive periods of time as it would indirectly cause the liquidation of the company.

Article 142 of the Criminal Code states, as a complementary punishment, the closing of some offices of the company. This complementary punishment can be applied if the entity which committed the crime has at least two registered offices.

Article 143 of the Criminal Code states the prohibition of participating in tenders as a complementary sanction. Thus, the entity which committed a crime is prohibited from participating in tenders of any kind for 1 to 3 years. The reason for this prohibition is that of protecting the public market from an entity which presents no credibility and no guarantees of delivering quality goods or performing quality services.

Article 144 of the Criminal Code regulates the placing under judicial supervision. The person in charge will supervise the activity in which the crime was committed, without having the right to get involved in the management of the entity.

Article 145 of the Criminal Code regulates the complementary sanction of displaying or publication of the sentence. This is a very effective means of punishing the entity as it causes a very strong social impact, causing the players on the market to be warned and to avoid entering into any contract with the entity which was sanctioned.

Elements of compared law:

I. The German Criminal Code states in article 14 – Acting on someone else's behalf

(1) In case the perpetrator acts:

1. as an organism, who legitimately represents a legal entity or members of such a group,
2. as a legitimate representative of a society without judicial personality
3. as a legal representative of another person

than the criminal liability will be determined by taking into account the personal characteristics, the conduct and the circumstances in which the perpetrator acted.

(2) In case the perpetrator is authorized by the owner of a company or other such society:

1. To lead the company partially or totally
2. To undergo actions on his own responsibility and with the specific consent of the owner, although these would fall within his duties,

and he would act within the limits of this contract, the provisions of the law will be applied to him as well, although only the owner fulfilled all necessary conditions for exercising such an activity. Similar to the company as described in the first alignment is the institution (in German law, these are public sector players). If the contract based on which the perpetrator acts provided him with duties within public administration, than the provisions of the second alignment will be applied.

(3) The provisions of alignments (1) and (2) will be applied in case of legal action, when the representation ensured by the person empowered by contract is inefficient.

Article 75 – Special provisions for organisms and representatives.

In case the person acts:

1. as an organism which legally represents an entity or as member of such an organism,

2. as a legitimate representative of a society without legal personality
3. as a member of the board, having the necessary authorization to represent the society without legal personality
4. as the general manager or as a person with the authority to lead the legal entity or one of the entities or societies listed above
5. as any other person who is in charge with managing the society, company by exercising the supervision listed above or by exercising control over that company from management positions,

and undergoes an action contrary to those with which he was invested, thus the provisions of article 74a-74c and 74f can be applied and confiscation would appear as a normal measure to be applied, the criminal action against the entity would be added to the criminal action against a person, if such an action exists. The provisions of article 14, third alignment will be applied accordingly.

Article 74a – Other cases in which the confiscation of goods is required

Regardless of the provisions of article 74 alignments (1) and (2) the goods will be confiscated if, the person who owns the goods at the time of the court decision

1. has contributed to the planning or committing of the crime by using the good he owned
2. has known the circumstances in which the good was acquired at the time he received it.

Article 74b – The principle of proportionality

(1) If the retrieval of goods is not necessary according to the law, confiscation can't be ruled in the cases stated in articles 74 and 74a, as the confiscation of goods would seem disproportionate in regard to the deed that was committed.

(2) In the cases stated in articles 74 and 74a, the court can decide to not confiscate, if the court appreciates that the purpose served by confiscation can be achieved by using a less restrictive measure. In this case, the aspects to be considered are:

1. If the circumstances are of such a nature that they would render the good unusable,
2. If there is a risk that certain features or characteristics of the good would disappear or can be removed or modified
3. If these objects can't be used in any way.

If the measure applied by the court is respected, the decision on confiscation will be annulled; if it is not respected, the court can rule on confiscation at any time.

(3) If the full retrieval of objects is not considered to be necessary, the confiscation can be applied to only a part of those goods.

Article 74c – Confiscating by equivalent

(1) In case the perpetrator or the participant in crime who is in possession of the object that must be given back and he no longer has the object he must return because he capitalized on it, consumed it or rendered it unusable, the court can rule on confiscating by equivalent. Thus, the value of that object, determined in money, will be confiscated from the perpetrator or participant in crime.

(2) This measure can be applied by the court in addition to confiscating in nature or when the good was sold to a goodwill third party or when the good can't be traced in order to be confiscated; if this measure is applied by the court in addition to confiscation in nature, than the confiscated amount will only cover the difference between the value of the goods which should be confiscated and the value of the confiscated goods.

(3) The value of the object about to be confiscated can be estimated.

Article 74f – Granting damages (*compensation*)

If, at the time of the court decision, the good is found in the legitimate property of a third person of good will or the confiscated good became impossible to use by wearing, the person who suffered the prejudice will be granted damages from funds of the State Treasury, considering the value of the good on the market.

The French Criminal Code states the following in article 121-2

The legal entities except for the state are criminally liable for crimes committed by them or on their behalf, by their representatives or organisms; we must distinguish between these provisions and those of articles 121-4 – 127-7.

Given all these, the territorial groups are criminally liable except for the crimes committed while exercising their activities which are susceptible to convention by which a public service is delegated.

Criminal liability of the legal entity does not exclude the liability of the physical person who acted as author or accomplice of the same deed, under the provisions of article 121-3, alignment 4.

Article 121-3

There is no crime committed without intent. We can discuss a crime or offense when another person's safety is deliberately endangered.

In the cases listed by law, the deed which has all the necessary elements of a crime will be considered an offense if it was committed by negligence, imprudence or by not respecting an obligation to be cautious, if it can be determined that the perpetrator did not fulfill his obligations diligently, considering the nature of the activity it exercised or the function, competence and available means of that person.

In the case stated in the third alignment, the people who did not cause the prejudice directly, but who have created or helped create the situation which led to the prejudice, are criminally liable only if it can be established that they have deliberately violated a caution or security obligation stated by law or internal regulations or they committed a serious misdemeanor by endangering other people.

Article 131-37

Criminal punishments or corrections which can be applied to the legal entity are:

1. Fine
2. Punishments stated in article 131-39

As for corrections, the legal entities will be applied the reparatory sanctions stated in article 131-39-1.

Article 131-38

The maximum amount of fine to be applied to the legal entity is 5 times more than the amount stated for the person who committed the same crime.

When we are discussing a crime for which no amount of fine is established, the fine will be 1.000.000 Euros.

Article 131-39

In case the law states, one or more of the following punishments can be applied to the legal entity:

1. Liquidation, for when the entity was founded legally but was subsequently hijacked for committing crimes, if the punishment stated for such a deed is imprisonment of three years or more;
2. Prohibition from exercising any professional or social activity, directly or indirectly, for good or at least for a period of 5 years;
3. Placing the entity under judicial supervision for at least 5 years;
4. Closing one or more offices of the institution for good or for at least 5 years;
5. Prohibition from participating in public tenders permanently or for at least 5 years;

6. Prohibition from participating in tenders for awarding valuable immobile goods which are traded on the stock market permanently or for at least 5 years;
7. Prohibition of giving checks, other than those which allow withdrawal of funds or using credit cards, permanently or for at least 5 years;
8. Seizure of goods, as regulated by law;
9. Displaying or publication of the court's decision, by press or other media;
10. Confiscating the animal which was used in committing the crime or which was subject to the crime;
11. Prohibition to own an animal, permanently or for at least 5 years;
12. Prohibition to receive any kind of public help granted by the state, the local administration, or other institutions, as well as any other form of financial assistance provided by a private entity, permanently or for at least 5 years.

Complementary punishments stated at points 1 and 3 will not apply to public law legal entities, political parties or syndicates. The punishment stated at the first point will not be applied to the representative organisms of employees.

In Great Britain, the criminal liability of the legal entity is founded on the identification theory, which entails a mechanism of two stages: first is the analysis of the elements of the crime and second is the verifying of whether a certain person with a position inside the company is representative for the will of the entity.

Conclusions

As we have seen throughout this article, we can easily notice the importance and urgency of incriminating the legal entity, a measure which was taken rather late in our internal law, considering the social, economic and political factors. As it is a newly introduced institution in our internal criminal law, we notice that our lawmakers followed the Finnish Criminal Code in regulating the criminal liability of the legal entity. Also, the option to directly engage the liability of the legal entity, according to the Belgian and Dutch model, was maintained.

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