

Current regulation of the sanctions which can be applied to legal entities

Assist. Maria-Magdalena BARSAN, PhD.
Stud. Claudia COZMA

Transilvania University of Brasov, Law School
magdalena_maria_neagu@yahoo.com

Abstract

The criminal liability of the legal entity is a rather delicate subject in Romanian law, especially since this institution was only recently regulated. We feel that Romanian criminal law, much like other laws, needed to reconsider the exclusion of the legal entity from criminal liability considering that, once the country had a market economy, the possibility of creating such legal entities increased and they are all capable of committing crimes. The current study contains information regarding the main aspects of this institution as it is regulated by the new Criminal Code. Also, at the end of this study, we have described a few examples of international law which are relevant to the matter we are discussing.

Keywords: *legal entity, crime, criminal liability, sanction, conditions, compared law.*

Introduction

The issue of criminal liability of the legal entity caused several contradictory discussions across time, in regard to the possibility of the legal entity to become the active subject of a crime. After nearly a decade of existence in the Romanian Criminal Code, the institution of criminal liability of legal entities continues to arouse the interest of literature and is a truly controversial topic. This institution gave rise to different opinions and conflicting solutions. As a consequence, the practitioners are rather reluctant regarding this topic, due to the lack of jurisprudential sources. The absence of a coherent jurisprudence in the matter of criminal liability of legal entities led to a slow evolution of this institution, which the legislature expressly regulated for the first time after the fall of communism (in the spirit of which legal entities present no social danger in order to require regulation), by Law no. 301/2004 on the new Criminal Code of Romania. Therefore which we chose this subject are easy to understand as well as our desire to study this matter. From a legal perspective, there are three relevant texts in the new Civil Code, essential in the phrasing of possible definitions of the legal entity. The first text which claims our attention is art. 25 para. (3), which states that "a legal entity is any form of organization, meeting the conditions required by law, and is the

holder of civil rights and obligations". The second text, art. 187, states that "any legal entity must have a legitimate and moral purpose, in accordance with the general interest" and, finally, according to art. 188, "legal entities are those established by law, and any other legally formed organizations which, although not declared legal by law, meet all the conditions of art. 187". Sometimes the expression of "moral person" is used for designating a legal entity. In other words, the entity that fulfils all the conditions provided by law and is a holder of rights and obligations represents a legal entity. As the legal entity holds some obligations, it entails the possibility of liability,, both civil and criminal, of a legal entity seen as logical and normal. Regarding criminal liability, which we shall discuss, the legislator has established a series of conditions which need to be fulfilled for this liability to be involved.

The legal entities which are not criminally liable

The new regulation distinguishes between legal entities of private law and legal entities of public law. The rule is that public legal entities are not criminally liable and the exception is represented by those public legal entities which undertake activities that can be the subject of the private field [1]. Thus, art. 135 of the new Criminal Code, in its first paragraph, exempts from the criminal liability the State and public authorities. The state, as a legal entity is not criminally liable in most systems of law in Europe. This is explained by the fact that the State holds the monopoly on the right to punish, so it would be absurd to punish himself [2]. On this occasion, we shall list Romanian public authorities, as they are prescribed by law: Parliament, Government, central and local public administration, the judicial authority, which includes the courts, the Public Ministry and the Superior Council of Magistrates, Court of Accounts and Constitutional Court, the Ombudsman. In paragraph (2) of the same article, public institutions are exempted as well, provided that they have not committed a crime in the exercise of an activity that can be the subject of the private field. Per a contrario, if a public institution commits an offense in relation to an activity that can be the subject of the private field, it will be prosecuted. Instead, any legal entity of the private field can be held criminally liable, regardless of the legal form they have. As an example, their legal forms may include associations, companies, foundations et cetera. Although foundations and associations can acquire the status of legal entities of public interest under the terms of art. 39 of

Ordinance no. 26/2006, by Government Decision, they remain essentially private legal entities and can still be held criminally liable [3]. Another condition of criminal liability of a legal entity results from art. 135 of the new Criminal Code and is that the offense must be committed in regard to the object of activity (offenses which basically are committed by individuals – e.g. the representative of a legal entity) or interest or on behalf of the legal entity (which usually targets to acquire material and / or moral gains). In the meaning of criminal law, a crime is committed on behalf of the legal entity when the person who performs the material element of the crime acts as an organism or representative of the legal entity, being officially empowered to act, without the deed being committed as a part of achieving the current activity of the entity or to the benefit of that legal entity.

As a principle, a legal entity can commit any crime. However, it is obvious that not all offences can be committed by a legal entity (as author), among which we can list rape, bigamy, escape from prison, false testimony and so on, but that does not mean that legal entities cannot participate in such offences as instigator or accomplice. For example, a legal entity facilitates new marriages for people who already married, by issuing forged documents stating the termination of the previous marriage [4]. Usually, legal entities act illegally in order to obtain a material benefit or to avoid material damage, such as offenses of money laundering, tax evasion, deceit or the ones on copyright and so on, and sometimes they even reach the offense of manslaughter in the aggravated form [5].

Main sanction

In regard to the sanctions which can be applied to a legal entity, the legislator distinguishes, just as he does in the case of individuals, between main sanctions and complementary sanctions. The fine is the only sanction which can be applied to a legal entity "and consists of the money a legal entity is ordered to pay to the State" as provided by art. 137 of the new Criminal Code.

In establishing the amount of the fine, the day-fines system is used. First, the number of days is established, taking into account the general criteria for customization of penalty provided by art. 74 of the new Criminal Code. Subsequently, the amount of one day-fine is established, in relation to its turnover (as it is the case of for profit legal

entities) or according to the patrimonial assets and other obligations of legal entity (as it is the case of the other legal entities). Finally, the fine that shall be paid results from multiplying the amount of a day-fine with the number of days subject to the fine. The same article provides both general limits and special limits of days-fine. The general boundaries are between 30 days and 600 days, and a day-fine amount is between 100 lei and 5.000 lei. The limits on the fine are between 3.000 lei and 3.000.000 lei and they cannot be exceeded in establishing the penalty. Moreover, there may be mitigating or aggravating circumstances which can influence the final penalty and which will operate within the general limits.

Regarding the special limits of the days subject to the fine, they range between:

- 60 and 180 days, when only the penalty consisting of the fine is provided by law for the offense committed;
- 120 and 240 days, when the law provides a term of imprisonment of maximum five years, as such or as alternative to the fine;
- 180 and 300 days, when the law provides a term of imprisonment of maximum 10 years;
- 240 and 420 days, when the law provides a term of imprisonment of maximum 20 years;
- 360 and 510 days, when the law provides a term of imprisonment exceeding 20 years or life imprisonment.

When the offense committed by the legal entity resulted in obtaining of a monetary benefit, the special limits of the fine-days provided by law for the committed offense may be increased by one-third, without exceeding the general maximum of the fine. However, it appears that the task of the court to determine the involvement of criminal liability of a legal entity is not always easy, especially because the actual offences are committed by individuals whose criminal liability is by no means removed by engaging liability for legal entities. In other words, the court must identify those situations where an individual commits crimes under the guise of a legal entity in order to give a proper sanction.

According to the provisions of article 497 of the Criminal Procedure code, „the legal entity sanctioned with a fine is forced to present to the judge the receipt which

proves payment of the fine within three months since the sanctions was final; when the legal entity is unable to pay the entire fine, the judge can rule to pay the amount in several monthly payments within two years”.

Complementary penalties

Complementary penalties apply to legal entities usually on a voluntary basis, this being left at the discretion of the court, considering the nature and gravity of the offenses as well as the circumstances of the case, as such penalties are necessary. Thus, the court may pronounce one or several complementary sanctions (except for the complementary sanction of natural dissolution which cannot be applied along with other complementary sanctions). As an exception, the law may explicitly stipulate the application of these penalties.

The complementary sanctions which can be applied to legal entities are:

- Dissolution of the legal entity; it is applied according to the law, when the entity committed a crime;
- Suspension of one of the activities of the legal entities; forbidding one or more of the activities which was performed when committing the crime.
- Closing of some branches of the legal entity, in case the legal entity has at least two branches.
- Removal of the right to participate in public tenders from 1 to 3 years; removing the possibility to participate, directly or indirectly, in any tenders for awarding contracts as stated by law.
- The placing under judicial supervision; According to article 144, placing under legal supervision represents the designation of a person by the court, a legal administrator or an empowered person who will oversee the activity of the legal entity for 1 to 3 years.

The legal administrator or the empowered person is obliged to call upon the court when they see the legal entity did not take the necessary means in order to prevent new crimes. In case the court finds this to be true, the sanction is replaced with that of suspending the activity of the legal entity.

- Listing or publishing the sanction. Sanctioning legal entities for committing crimes and publishing the sanctions can cause a much stronger impact on public opinion. This

complementary punishment is an advantage for all those who can work with the legal entity which was sanctioned, as they would be warned regarding the conduct of the entity; this is also a sanction with positive effect in regard to its purpose, as it affects the public image of the legal entity which committed a crime.

Comparative law elements

Whereas the discussed topic represents a relatively new institution for Romanian law, a research work on this matter, as is the present study, prevents the scarcity of sources both doctrinal and jurisprudential, which is natural in this context. It becomes therefore inevitable and justified the use of foreign sources, especially the European ones. For example, in the Estonian Criminal Code [6] there are two main penalties which can be applied to legal entities, namely: fine and dissolution of legal entities. Moreover, the Code allows these two penalties to be applied simultaneously, as opposed to Romanian law where the only main penalty is a fine, which can be applied along with the complementary sanction of dissolution of legal entity. Basically, the final sanction resulting in both codes (the Romanian one and the Estonian one) can be identical, as only the theoretical framing of sanctions is different. In Germany [7], on the other hand, the criminal liability of legal entities is not established, the as the German legislator chose to regulate an administrative liability that is less expensive and quite effective given the fact that the fines may reach enormous amounts of money of up to one million euros. In French law, the criminal liability of the legal entity was first regulated by the 1994 Criminal Code; the same regulation is found in Romanian law in case the entity is a legal one. In regard to the conditions which need to be met for criminal liability, the French Criminal Code was interpreted in such a manner that criminal liability can be entailed only if a crime was committed by an organism or representative of the legal entity [8].

Conclusion

Therefore, the issue of criminal liability of legal entities represents an exciting subject, which, like any emerging institution, arouses the interest of Romanian literature. Also, it raises many problems of practical application, and manages to become a real challenge for international debates. This work represents a panoramic view of the subject, which although did not fully treat all the theoretical and practical problems

concerning this institution of criminal law, this research approach is far from being superficial.

Bibliography

Chiriță, R., Streteanu, F., Criminal liability of the legal entity, second revised and completed edition, Ed. C.H. Beck, Bucharest, 2007;

Ilie, A.R., Summary of Criminal liability of the legal entities thesis <http://www.unibuc.ro/studies/Doctorate2011Noiembrie/Ilie%20Andra%20Roxana%20%20Angajarea%20r aspunderii%20penale%20a%20persoanei%20juridice/Rezumat%20teza%20Andra%20Roxana%20Ilie.pdf>, last accessed on 05.15.2015;

Marinescu, C., Criminal liability of the legal entity, Ed. Universul Juridic, Bucharest, 2011;

Păvăleanu, V., Criminal liability of the legal entity in Romania and in comparative law http://www.umk.ro/images/documente/publicatii/conferinta2013/vasile_pavaleanu.pdf

Stănilă, L. M., Criminal liability of the legal entity, Ed. Hamangiu, Bucharest, 2011;

Udroiu, M., Criminal law. General part, Ed. C.H.Beck, Bucharest, 2014.

Pascu I., Dima T., Paun C., Gorunescu M., Dobrinou V., Hotca M.A., Chis I., Dobrinou M., The new commented Criminal Code, The General Part, second revised and completed edition, Universul Juridic, Bucharest, 2014

8. Pradel J., Droit pénal général, éd. 14, Éd. Cujas, Paris, 2002

9. The Romanian Civil Code

10. The Criminal Procedure Code, Law no 135/2010, published in the Official Bulletin of Romania no 486 oj July, 15th, 2010

References:

[1] Păvăleanu V., Criminal liability of the legal entity in Romania and in comparative law http://www.umk.ro/images/documente/publicatii/conferinta2013/vasile_pavaleanu.pdf, last accessed on 05.15.2015

[2] Pradel J., Droit pénal général, éd. 14, Éd. Cujas, Paris, 2002, p. 474 apud. V. Păvăleanu, ibidem.

[3] Pașca V., Commented Criminal Code. General part, vol. I, Ed. Hamangiu, Bucharest, 2007, p. 106 apud. V. Păvăleanu, ibidem.

[4] Chiriță R, Streteanu F., Criminal liability of the legal entity, second revised and completed edition, Ed. C.H. Beck, Bucharest, 2007.

[5] Ilie A.-R., Summary of Criminal liability of legal entities thesis <http://www.unibuc.ro/studies/Doctorate2011Noiembrie/Ilie%20Andra%20Roxana%20-%20Angajarea%20raspunderii%20penale%20a%20persoanei%20juridice/Rezumat%20teza%20Andra%20Roxana%20Ilie.pdf>, last accessed on 05.15.2015.

[6] Marinescu C., Criminal liability of the legal entity, Ed. Universul Juridic, Bucharest, 2011.

[7] Stănilă L. M., Criminal liability of the legal entity, Ed. Hamangiu, Bucharest, 2011.

[8] Pascu I., Dima T., Paun C., Gorunescu M., Dobrinou V., Hotca M.A., Chis I., Dobrinou M., The new commented Criminal Code, The General Part, second revised and completed edition, Universul Juridic, Bucharest, 2014