

THE LEGAL ENTITY: ACTIVE SUBJECT OF THE CRIME

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Abstract: *In recent times there was an increase in criminality among legal entities due, in particular, to economic and financial factors. In this paper I wish to find an answer to the question of whether this form of criminal liability of the legal entity is necessary and at the same time effective by strengthening the current and contemporary legislation both in our country and in other countries. Since fiscal or financial crime is in a continuous procedure of amplification, it is important to be informed about the repercussions that the criminal acts committed by legal entities attract. The Romanian legislator has seen the problem of holding the legal entity criminally liable ever since the amendment of the Old Criminal Code by Law no. 278/2006 updating our legislation with the European one. Therefore, the criminal liability of the legal entity is currently regulated in the national legislation by the Criminal Code in force. This work offers a broad vision on the nature, respectively the foundations of the legal liability of the legal entity as an active subject of the crime, on the beginnings and evolution of this institution. I consider that a clear delimitation of the form and content of the guilt is necessary when we talk about the legal entity, a clear regulation of the intention and recklessness of the legal entity in order to be able to identify a different guilt of the natural person as an organ, so that in the situation where the natural person cannot be identified or cannot be criminally liable, the criminal liability of the legal entity can be engaged. The work is structured in such a way as to offer us both a theoretical and a practical part in order to better understand the issue of criminal liability of the legal entity. The case in this paper is from the judicial practice of the Economic Crime Investigation Service within the Bihor County Police Inspectorate.*

Key words: *legal entity, active subject, crime, criminal liability*

1. Retrospective view of the legal entity

The institution of criminal liability of the legal entity is actually one new concept, outlined only at the end of the 19th century, in the common law system. Over the years, there have been several situations in which collectives/groups have faced criminal charges for the committed acts. Hugo Grotius, one of the founders of modern international law, tells us that Emperor Theodosius of Byzantium punished the city of Antioch, closing its theatres and baths and withdrawing its title of metropolis. King Septimius Severus destroyed Byzantium by taking its baths, theatres and ornaments. (Antoniou, 1996:9). In the Middle Ages, in law canonically, it was accepted that some communities can commit crimes, and therefore can be penalized, cities for example could be punished with the demolition of walls, the payment of particularly harsh fines.

In 1670, in France was issued a Royal Ordinance that instituted the criminal liability of local communities (villages, towns, fairs), also providing for the sanctions that were to be

applied in the event of a conflicting relationship. The period of application of this act ended with the outlining of the new principles of the French Revolution. (Streteanu, 1997:64).

The first regulation in accordance with the law on the criminal sanctioning of a legal entity was provided in art. 19 index 1 of the Criminal Code of 1968, (these provisions were in force from April 16, 1997 until January 31, 2014, when the Criminal Code of 1968 was repealed and replaced by the Criminal Code of 2009) but the courts and prosecutors' offices had a reluctance to such innovation in the years that followed. Thus, with the passing of the years, gradually, the courts adopted in judicial practice decisions regarding the criminal liability of the legal entity.

As we can see, the Recommendation of the Council of Europe no. (88)18 regarding the liability of companies for the commission of crimes, specifying in its first paragraph the fact that the considerable damage caused to people by a large number of crimes committed, in terms of activities that are specific to companies (Recommendation of the Council of Europe no. (88)18 regarding the liability of companies for committing crimes) we can deduce the fact that, the evolution of society, the economic and social development of states has also brought with it the increase in criminality, especially among commercial companies, for example through evasion fiscal. The provisions of the Criminal Code of 1968 regarding the legal entity were also maintained in the Criminal Code entered into force on February 1, 2014, art. 135.

2. Active subject-legal entity

With the amendment of the Criminal Code of 1968 by Law no. 278/2006 introduced art. 19 ind. 1 regarding the manner in which the legal entity is liable from a criminal point of view. This change took place against the background of the development of the expanding market economy and the appearance of a very large number of legal entities in search of obtaining as much profit as possible and as quickly as possible.

The provisions of the Criminal Code from 1968 were also maintained in the New Criminal Code (February 1, 2014), being provided for in article number 135:

"(1) The legal entity, with the exception of the state and public authorities, is criminally liable for crimes committed in the performance of the object of activity or in the interest or on behalf of the legal entity

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

(3) The criminal liability of the legal entity does not exclude the criminal liability of the natural person who contributed to the commission of the same act" (Criminal Code, art. 135 para. 1-3).

Currently, the criminal liability of the legal entity is regulated in the Criminal Code in force in Title VI, entitled Criminal liability of the legal entity (Popoviciu, 2014:156). The introduction of the way in which a legal entity is penalized within our legislation has been a particularly important topic both at the national and international level. Thus, there were a multitude of recommendations of the Council of Europe, as well as Conventions issued at the European level that sought to neutralize criminality committed through legal entities.

2.1. Analysis of the doctrine brought to the idea in which the legal entity is held criminally liable

At the doctrinal level, there are two theories regarding the criminal sanctioning of a legal entity:

- **Theory of the fiction of the legal entity** supports the fact that it is excluded for a legal entity to be subject to criminal sanctions, because it does not have its own entity. These legal entities are seen as entities incapable of committing crimes, they are seen as entities used by natural persons to commit crimes, so that the guilt does not belong to them, but to the natural persons who actually commit the acts. In support of this theory, several arguments were put forward, such as the lack of responsibility of the legal entity, namely the fact that the legal entity cannot feel the effects of the sanctions applied, they also affect the human factor, the individual involved in the actual activity.
- **Theory of the reality of the legal entity** it is also the one adopted by the national legislation in criminal matters based on the fact that the legal entity is an entity endowed with its own will and conscience. So, this theory sees the legal entity as an indisputable reality, to which specific punishments can be applied to the legal entity and which are effective in rectifying its deviant behaviour.

The criminal liability of the legal entity appears as a necessity of today's society, because the criminal phenomenon in which legal entities are involved is booming. Often, natural persons use moral ones to commit crimes or expressly constitute them in this sense in order to avoid criminal liability by exposing the legal entity constituted in this sense. The legislator also provided for this aspect, establishing the fact that a legal entity is not criminally liable if a natural person committed the same criminal act.

Based on the principle of the uniqueness of criminal liability, for the commission of criminal acts there can be only one punishment, therefore the courts are responsible for establishing the person responsible and imputing the criminal activity.

2.2. The conditions regarding the criminal liability of the legal entity

In order for a legal entity to be criminally liable, it is necessary for it to possess a legal existence, legal capacity and the crimes must be committed in the achievement of the objectives regarding its activity or be in its interest or on behalf of that legal entity. These conditions must be met cumulatively.

✓ **The living form of the legal entity**

In order to be able to talk about how a person is criminally liable, it is necessary to possess a legal existence. Speaking of legal existence, we mean the existence of civil rights and obligations that a form of organization has or is bound by. The legal entity is characterized by the existence of an independent organization, its own patrimony, legal and moral object of activity that must correspond to the global interest of society. Depending on their specifics, legal entities acquire legal existence in different ways, as they are for-profit or non-profit.

- Legal entities that have a profit-making purpose, such as firms, national companies and independent registries, agricultural societies, groups that have an economic interest acquire legal existence once they are registered with the Trade Register.
- Associations and foundations, fall under the typology of non-profit legal entities, acquire legal existence from the moment they are registered in the Register of Associations and Foundations, which can be found in the court registry, and federations from the moment they are registered

in the Register of Federations located at the court registry. The legal existence of these legal entities is lost at the time of their dissolution.

- Political parties represent legal entities of public type, (Art. 1 of Law no. 14 of 2003 on political parties, with subsequent additions and amendments) acquires legal existence from the moment a court decision remains final, regarding an admission of an application for registration. (Art. 22 of Law no. 14 of 2003). It should be noted that these legal entities can only bear some of the complementary penalties provided by the criminal legislation. They cannot be subject to dissolution or suspension of activity.
- Religious organizations can be recognized as legal entities by a decision of the Government, the loss of this quality takes place, in the same way, by a decision of the Government.

✓ **Legal capacity**

The legal capacity of the legal entity represents its ability to be criminally liable and bear the consequences/effects of its own criminal activities. A legal entity acquires criminal legal capacity when it is established in compliance with the legal provisions, to have acquired legal existence and not to be part of the category of legal entities exempted from criminal liability. Thus, according to the provisions of art. 135 of the Criminal Code, the state and public authorities are excluded from criminal liability for all crimes committed for the achievement of the activity objectives. According to paragraph number 2 of article number 135 of the Criminal Code, a public institution will never be penalized from a criminal point of view for all crimes committed in the performance of the field of activity that we cannot include in the private field.

The state cannot be the subject of criminal liability, because it is the one that prosecutes natural and legal entities who do not comply with the legal framework. It benefits from absolute and general jurisdiction, its criminal liability is exempted from sanctions regarding the acts committed in relation to the exercise of state authority, nor regarding those acts that concern the private domain of the national state. (Lascu, 2010:66). The state may be subject to civil or international sanctions. Public authorities cannot be criminally liable, because they do not have legal capacity and cannot be passive subjects of crimes. This category includes: the Parliament, the President of Romania, the Government, the local councils, the elected mayors, the prefect, the county councils, the courts, the CSM.

Public institutions do not have the capacity to be criminally sanctioned for acts committed regarding an activity that cannot be assigned to the private domain. This category includes: the National Institute of Magistracy, the Institute of Forensic Medicine named after Mina Minovici, the Institute of Forensic Expertise, the National Bank of Romania, etc.

✓ **Committing the crime in the pursuit of the objective or in the interest or on behalf of a legal entity**

The commission of the crime related to the field of activity requires that the committed acts relate directly to the field in which the legal entity operates, to the main activities it carries out in order to achieve the purpose for which it was established.

There are, however, crimes that, due to their constitutive content, cannot be the object of the criminal activity of legal entities, such as rape, incest, perjury, etc.

Committing a crime in the name of the legal entity requires that the committing person acts as a representative, having an official capacity, and without the deed being carried out for the benefit of the legal entity or in achieving its activity objective.

3. Legal entity - party to the criminal process

The objective basis for which a legal entity is criminally liable is the commission of a crime in compliance with the conditions for which a legal entity is sanctioned from the point of view of the Romanian criminal code. (Diaconu, 2010:60). In order for a legal entity to be criminally liable, on the one hand, the commission of a crime must be established, and on the other hand, the committed crime must be in a certain relationship with the legal entity, that is, be determined by the object of activity of this one. In the legislator's view, it is sufficient to establish that the crime was committed by a representative of the legal entity, by a certain employee of the same or by a person acting to fulfil his object, in his own name or for the benefit of a legal entity.

Certain problems were identified in the development of an effective sanctioning system, characterized by flexibility and diversity, adapted to the nature and specific way of organization and operation of the legal entity, which would allow the choice of the most appropriate measures to prevent and combat illegal activities committed by and through them, it concerned the doctrine and national legislations of the last decades, becoming a favourite topic for international organizations and meetings.

One of the identified obstacles to the reconciliation of institutions of criminal liability and legal entities is the criminal punishment and, in particular, the principle of (individualization) of the personality of the punishments which assume that they would oppose the application of the punishment to a person, who did not individually commit a criminal act. If the representative of a company committed the crime, the other associates who did not participate in it should not, in principle, bear the consequences (Randafir, 2021:54).

The legal entity has a general criminal responsibility for any crime in which he can participate as an author, co-author, accomplice or instigator, directly for his own act and not for the act of others. The Romanian Penal Code from 1937, also called the Penal Code of Charles II, provided for 15 safety measures, of which three of these measures could only be taken against moral persons, for example closing the premises, dissolution and suspension. The Penal Code of 1969 did not maintain the provisions of the Charles II Penal Code regarding the application of security measures for legal entities, as a result between 1969 and 2004 in our country legal entities could only be charged with civil or contravention liability, respectively the criminal liability of these moral persons could not be admitted.

In 2006, by law 278/2006, the rule of liability of the legal (moral) person was established for the first time in Romania. In doctrine three conditions have been outlined for engaging the criminal liability of the legal entity:

- ❖ **"The deed must be committed by a natural person who has the ability to engage criminally the legal entity"**(Cășuneanu, 2007:165). It is about engaging the criminal liability of the legal entity for the crimes committed by its employees, regardless of whether they are management or executive bodies.
- ❖ **"The fact to be imputable to the legal entity"**. In our legislation, the principle was adopted according to which the natural person who has the ability to engage personally and the legal

entity can be anywhere in its hierarchy. Under these conditions, it is necessary to establish in which cases the acts of these persons can also be imputed to the legal entity, because when the act is committed against the legal entity, it will have the status of injured party and the act cannot be imputed to it, even if the author is an organ or his representative.

❖ **"It is committed in carrying out its object of activity."**(Antoniou, 2002:164). We can see from the constitutive act of the legal entity, regardless of whether it is a person with or without patrimonial purpose, which is its object of activity, is committed in the interest of the legal entity. The legal entity, with the exception of public authorities, is liable to criminal liability for an act provided for by the criminal law if there is one of the following conditions:

- , the legal entity is guilty of failing to fulfil or improperly fulfilling the direct provisions of the laws that establish duties or prohibitions for the performance of a certain activity;
- the legal entity is guilty of carrying out an activity that does not correspond to the articles of incorporation or the declared purposes;

the act that causes or creates the danger of causing damage in considerable proportions to the person, society or the state was committed in the interest of this legal entity or was admitted, sanctioned, approved, used by the body or person empowered with management functions of the respective legal entity" (Bobos, 1975:119).

Legal entities, with the exception of public authorities, are criminally liable for crimes for the commission of which a sanction is provided for legal entities.

Talking about the connection of the criminal sanctioning of a legal entity with the criminal sanctioning of a natural person who collaborated in the commission of the same act, in the specific criminal doctrine the opinion was supported that a difference should be made according to the material element of the crime that was committed by a natural person who fulfils the function of an organ or a subordinate thereof, in the case of the first situation the rule should be cumulation and the second situation non-cumulation, or cumulation should be provided only in the case of crimes committed with the form of guilt of intention .”(Mitrache et al., 2009:195).

The Romanian law does not provide for such distinctions, so we can say that it is possible to combine the liability of the legal entity and the liability of the natural person, organ, representative or subordinate in any situation.

4. Penalties applicable to the legal entity

As the greatest threat to an individual would be the loss of freedom, an equivalent threat to the company is the loss of its profit. Since such a loss „strike” the essential purpose of the company, the fine has the potential of a preventive factor. The fine could lead the convicted entity to discipline or dismiss those responsible, who put the company at risk of the law, thus the sanction applied playing a role of filter of its human resources, this being the main punishment as far as legal entities are concerned.

The fine consists in the payment of a sum of money, it constitutes a direct threat to the patrimony of the convicted legal entity. If the legal entity, in bad faith, avoids paying the fixed fine, the court may replace the unpaid amount of the fine with the pursuit of its patrimony. The application of the fine allows the judge to individualize the punishment, taking into account the nature and seriousness of the crime committed and the damages caused, also taking into account the economic and financial situation of the legal entity.

The model according to which the amount of the fine is determined is represented by the system of fine days, according to which the amount of a fine day that is between one hundred and five thousand lei will be multiplied by the number of fine days.

Fines for legal entities are prescribed in five years.

Complementary penalties applied to the legal entity as provided for in article number 136 paragraph 3 letter a to f:

- dissolution of a legal entity
- suspension of an activity or other activities of the legal entity for a period of three months to three years
- closing certain work points of a legal entity for a period of three months to three years
- prohibition to participate in public procurement procedures for a period of one to three years
- placement under judicial supervision
- posting or publishing a conviction

5. Criminal sanctioning of the legal entity - case study

I chose to present a case from the judicial practice of the County Police Inspectorate of Bihor County - the Economic Crime Investigation Service.

On 16.06.2008, the police bodies within the Bihor County Police Inspectorate - the Economic Crime Investigation Service, self-reported the fact that SC X&Y SRL Oradea was established in March 2013 by the accused DJI and VR, the defendant DJI being the administrator. On 16.07.2013 the two defendants assigned the social shares to the defendant PRV, who later became an administrator.

The facts, according to the defendant DJI, is that in the period June - 02.08.2013 he posted several ads on the internet and in the print media for the recruitment of people for employment abroad with a work contract. Over 400 people responded to these announcements and these people were asked to pay the amount of X lei/person for psychological evaluation, money that was collected by DJs. Later, a number of 354 people who were notified by phone by the company's employees, were requested the sum of X euro/person for the transport on the route Oradea - Bremen (Germany). By promising an advantageous work contract in Germany, he misled about 300 people from whom he collected sums of money, causing damage in the total amount of approximately YYY,000 lei, meet the constitutive elements of the crime of **deception**, provided for and punished by article 244 paragraphs 1 and 2 of the Criminal Code with the application of article 35 paragraph 2 of the Criminal Code. And the fact that the sums of money obtained by DJI by committing the crime of fraud were either deposited in bank accounts opened in his name and in the name of his father DZ, or were used for the purchase of movable goods, or were transferred in cash to other persons in order to gives an appearance of legality to the income and operations, meets the constitutive elements of the crime of money laundering, an act provided for and punished by article 29 paragraph 1 letter a and b of Law 656/2002, with the application of article 38 letter a of the Criminal Code.

The facts according to the defendant VR, who participated together with the defendant DJI between June and 02.08.2013 in the posting of several announcements on the Internet and in the print media for the recruitment of people for employment abroad with a work contract. More than X00 people responded to these announcements and these people were requested to pay the sum of Y lei/person for psychological evaluation, money that was collected by DJI

Later, to a number of 354 people who were notified by phone by the company's employees, they were requested the amount of 130 euros/person for the transport on the route Oradea - Bremen (Germany). By promising an advantageous employment contract in Germany, he misled about 350 people from whom DJI collected sums of money, causing damage in the total amount of about YYY,000 lei. Defendant VR assisted Defendant DJI in raising the sums of money, also benefiting from a portion of those sums. All these meet the constitutive elements of the crime of deception, provided for and punished by article 244 paragraphs 1 and 2 of the Criminal Code with the application of article 35 paragraph 2 of the Criminal Code. And the fact that the sums of money obtained from DJI, sums of money resulting from the commission of the crime of fraud, were used for the purchase of movable goods, meets the constitutive elements of the crime of money laundering, an act provided for and punished by article 29 paragraph 1 letter c of Law 656/2002, all with the application of article 38 letter of the Criminal Code.

The facts according to the defendant PRV, who participated together with the two defendants DJI and VR in misleading the injured parties through his capacity as legal administrator of SC X&Y SRL Oradea for the last 2 weeks of activity, benefiting from the proceeds in the amount of X.600 Euro dated August 2, 2013, meets the constitutive elements of the crime of fraud, provided for and punished by article 244 paragraphs 1 and 2 of the Criminal Code with the application of article 38 paragraph 2 of the Criminal Code.

The deed committed by SC X&Y SRL Oradea, whose de jure and de facto administrators in the period June - 02.08.2013 they posted several announcements on the internet and in the print media for the recruitment of people for employment abroad with a work contract. More than Y00 people responded to these announcements and these people were asked to pay the sum of Y lei/person for psychological evaluation. Later, a number of 354 people who were notified by phone by the company's employees, were requested the sum of X euro/person for the transport on the route Oradea - Bremen (Germany). By promising an advantageous work contract in Germany, he misled approximately 350 people from whom he collected sums of money, causing damage in the total amount of approximately YYY,000 lei, meets the constitutive elements of the crime of cheating, an act provided for and punished by article 244 paragraphs 1 and 2 with the application of article 35 paragraph 2 of the Criminal Code. And the fact that the sums of money obtained by the administrators of SC X&Y SRL Oradea by committing the crime of fraud were either deposited in bank accounts, or were used for the purchase of movable goods, or were transferred in cash to other people to give an appearance of legality revenues and operations, meets the constitutive elements of the crime of money laundering, an act provided for and punished by article number 29 paragraph 1 letter a and b of Law 656/2002, with the application of article 38 letter a of the Criminal Code.

The facts according to the defendant CA, who at the age of 25, being a student, without legitimate income, as it also results from the checks carried out, having budget-conscious parents, managed from illicit incomes from the sale of telephones (from theft crimes) and cars to buy a luxury car (AUDI Q7) and a motorcycle (SUZUKI). meet the constitutive elements of the crime of money laundering, an act provided for and punished by article 29 paragraph 1 letter b and c of Law 656/2002, with the application of article 38 letter a of the Criminal Code.

CONCLUSIONS

In our current society there are many people who, in addition to their physical existence, constitute either individually or collectively in entities endowed with legal existence.

The primary thing is, however, that these legal entities seek to obtain as much profit as possible, this process can be short-lived, carried out in a relatively short time, or there may be situations in which this process can take longer, the legal entity encountering difficulties in making a profit or maybe even bankruptcy.

In these situations, various temptations, mechanisms and means may appear which, apparently for the time being, are profitable, but which may ultimately lead to the performance of activities that fall within the criminal sphere. All activities of legal entities led to criminalization by the Romanian legislator of the facts for which it is possible to engage the criminal liability of the legal entity and the conditions that make this possible.

Criminality based on the activity of legal entities is a categorical reality, in many situations it was found that legal entities were created and used by natural persons as tools or as cover masks to carry out various criminal activities.

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