

## CRIMINAL SANCTION OF THE LEGAL PERSON

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***Abstract:** The criminal liability of the legal person is not a new institution in terms of criminal law, being a necessity of the current times in which legal persons are more and more involved in criminal resolution. Many times, natural persons resort to the moral side of individuals to commit illegal acts or give birth to legal persons aiming to avoid criminal liability through them, by interposing the legal person to the completed act. Thus, the criminal activity of the legal person represents the specific actions of one or more natural persons.*

***Keywords:** legal person, punishment, fine, criminal activity*

### **1. The conditions of criminal liability of the legal person**

In order for the legal entity to be held liable, it must meet certain cumulative conditions, have personality and legal capacity, the crimes must be committed in the pursuit of the object/interest of the activity or in the name of the legal entity.

The legal person has an independent organization (Popoviciu, 2014, p. 376). Legal personality consists in the existence of civil rights and obligations that the legal person has and is characterized by the existence of its own patrimony, independent organizations, lawful and moral object of activity, which must correspond to the global interest of society (Barbu, 2016, p. 284). The legal capacity of the legal person is its ability to be criminally liable and bear the effects of the criminal activity. There are categories of legal entities that have legal immunity, they being expressly excluded by the legislator.

According to the provisions of art. 135 C.P., the state and public authorities are exempt from criminal liability for crimes committed in the pursuit of the object of activity or in the interest or on behalf of the legal entity. The state, as an entity, cannot be the subject of criminal liability because it is the one that sanctions natural/legal persons who do not comply with the legal criminal framework, benefiting from general and absolute criminal immunity, but in terms of civil or international liability, the state can be subject.

The commission of the crime in the pursuit of the object of activity or in the interest or name of the legal entity requires that the committed acts do not have an occasional character, but relate directly to the field of activity of the legal entity, to the main activities that it carries out in achieving the purpose for which was constituted. The legal person cannot commit criminal acts, the criminal activity being carried out by one or more natural persons who must have a special connection with the legal person. When committing the criminal act, the subjective side of the legal entity can take the form of intention or guilt, and with regard to the intentional aspect, there must be the decision of the legal entity that is the basis for committing the crime. In the case of crimes caused by fault, account is taken of the obligations that the legal person had but as a result of their non-compliance, the negative consequence occurred.

In order to impute the crime committed to the legal person, it can also be carried out by persons who do not represent organs of the legal person (representatives of the legal person), provided that the latter has knowledge of the criminal activity carried out.

## **2. Penalties applicable to the legal entity**

According to art. 136 of the Criminal Code, the legal person is subject to the main and complementary penalties. Within para. 2 there is only one main penalty, namely the fine, but para. 3 of the same article lists "complementary punishments:

- a) Dissolution of the legal entity;
- b) Suspension of the activity or one of the activities of the legal entity for 3 months to 3 years;
- c) Closing some workplaces of the legal entity for a period of 3 months to 3 years;
- d) Prohibition to participate in public procurement procedures for a period of 1 to 3 years;
- e) Placement under judicial supervision;
- f) Display or publication of the conviction."

As in the case of the natural person, the legal person may be subject to the single main penalty (fine) accompanied by one or more complementary penalties from those listed above, with the exception of security measures (the most common measure being that of special confiscation) which are expressly provided by the incriminating text.

Preventive measures are ordered by the judge of rights and liberties through a reasoned decision given in the council chamber, with the citation of the legal entity, with the mention that they can be ordered for a period of no more than 60 days, being the possibility of extension for a period that does not may exceed 60 days.

### **2.1. Fine penalty regime for legal entities**

Within the art. 137 C.P. the only main penalty applicable to the legal person is defined as the amount of money that the legal person is sentenced to pay to the state. The amount regarding the penalty of the fine is established through the system of fine days, a fine day worth between 100 and 5,000 lei. When individualizing the penalty of the fine, the court must initially establish the number of days-fine, taking into account the general criteria for individualizing the punishment and later the court establishes the value of a day-fine taking into account the turnover, respectively the value of the patrimonial asset, as well as other obligations of the legal entity. "The special limits of fine days are between:

- a) 60 and 180 days-fine, when the law only provides for the penalty of a fine for the offense committed;
- b) 120 and 240 days fine, when the law provides for a prison sentence of no more than 5 years, single or alternatively with a fine;
- c) 180 and 300 days-fine, when the law provides a prison sentence of no more than 10 years;
- d) 240 and 420 days-fine, when the law provides a prison sentence of no more than 20 years;
- e) 360 and 510 days-fine, when the law provides for a prison sentence of more than 20 years or life imprisonment."

It should be mentioned that the legislator provides for the application of an increased sanction in case the legal person had in mind, when committing the act, the obtaining of a patrimonial benefit, thus the special limits of the days-fine provided by law for the crime committed can be increased by one third, without exceeding the general maximum of the fine.

## **2.2. The regime of complementary penalties applied to the legal person**

### **2.2.1. Dissolution of the legal entity**

The complementary penalty of dissolution is a capital sanction, and by applying it, the legal person loses both its capacity and legal personality, which can be compared to a "death penalty" because it effectively terminates its legal existence (Udroiu, 2017, p . 395).

Within the art. 139 C.P. the cases in which such a "sanction" is justified are listed:

- a) The legal person was established for the purpose of committing crimes;
- b) His object of activity has been hijacked for the purpose of committing crimes, and the punishment provided by law for the committed crime is imprisonment for more than 3 years;
- c) In case of non-execution, in bad faith, of one of the complementary penalties provided for in art. 136 paragraph 3 letter b-e.”

### **2.2.2. Suspension of the activity of the legal entity**

The suspension of the activity or one of the activities of the legal person represents the prohibition of that activity of the legal person in the performance of which the crime was committed. ([https://www.umk.ro/images/documente/publicatii/conferinta2013/vasile\\_pavaleanu.pdf](https://www.umk.ro/images/documente/publicatii/conferinta2013/vasile_pavaleanu.pdf)) This complementary punishment can be ordered for a period not exceeding 3 months, because it would undoubtedly generate the de facto cessation of the existence of the legal entity and lead to the creation of unfavorable situations for third parties involved in the activity of the legal entity (e.g. employees , beneficiaries) who cannot be blamed for the criminal activity.

### **2.2.3. Closing some work points of the legal entity**

According to art. 142 C.P. "the complementary punishment of the closure of some workplaces of the legal entity consists in the closure of one or more of the workplaces belonging to the profit-making legal entity, in which the activity that led to the crime was carried out."

### **2.2.4. Prohibition to participate in public procurement procedures**

This penalty consists in the exclusion of the possibility of taking part, directly or indirectly through interposed persons or subcontracts concluded through them (Jurma, 2019, p. 134), in the procedures for awarding public procurement contracts provided for by law and can be applied for a period from 1 to 3 years.

### **2.2.5. Placement under judicial supervision**

Placement under judicial supervision consists in the appointment by the court of a judicial administrator or a judicial trustee who will supervise, for a period of 1 to 3 years, the conduct of the activity that caused the commission of the crime, having the role of a supervisor and without is involved in the administration of the legal entity, but only the obligation to notify the court in case it finds that the legal entity has not taken the necessary measures in order to prevent the commission of new crimes.

### **2.2.6. Display or publication of the judgment of conviction**

This punishment aims to protect the possible future beneficiaries of the services offered by the legal entity as well as to inform the company about the activity of the legal entity, having a general preventive nature regarding business relations.

**Sanctioning the legal person with the main penalty accompanied by the complementary penalty**

In the following case, I reported the court decision by which the defendant legal entity was sentenced to the main penalty of a fine accompanied by the complementary penalty of publication of the conviction.

In fact, the defendant S.C. EF 12345 S.R.L., in the period January 2016 - August 2019, in the performance of its object of activity, in order to evade the fulfillment of fiscal obligations, declared and recorded in the accounting records unreal purchases from several supplier companies on the basis of which it illegally deducted VAT in the total amount of 134,029.64 lei and evaded the payment to the consolidated state budget of a profit tax in the amount of 111,948.16 lei. The checks carried out in the case during the criminal investigation established that the defendant S.C. EF 12345 S.R.L., in carrying out the object of activity, registered and declared purchases from various commercial companies based in Oradea, but these purchases do not correspond to reality, an aspect highlighted by the evidence administered in the case, the approach aimed at reducing the obligations owed to the consolidated state budget .

Specifically, from the evidence administered in the case it appears that during the period that is the subject of the criminal action, a number of 50 commercial companies appear as suppliers in the records of SC EF 12345 SRL, but these commercial companies did not confirm the transactions fictitiously recorded in the records of the defendant legal entity . Therefore, the active subject of the crime of tax evasion is the part of the fiscal law relationship, being the criminal liability, as the author of the crime of tax evasion, of both natural persons and legal persons to the extent that the acts are committed in the name and in the interest of the latter.

As regards the defendant legal entity S.C. EF 12345 S.R.L., the court found that the evidence administered in the case confirms the accusation made by the prosecutor against him, this in the conditions where it is as clear as possible that the crime of tax evasion that is the subject of the criminal action was committed in the interest of the legal entity that has the capacity of defendant in the case. Thus, the active subject of tax evasion offenses brought to trial cannot be only natural persons who have attributions, responsibilities regarding the highlighting in official accounting documents of commercial operations and realized incomes, but the S.C. taxpayer himself. EF 12345 S.R.L. and only as a result of this liability, his representative. Given that the criminalization of tax evasion punishes failure to fulfill tax obligations, it is natural that the active subject of the crime should be, mainly, the subject to whom these obligations fall, the taxpayer who owes taxes and fees motivated by the fact that the tax evasion action and taxes benefit primarily the legal entity - debtor of the obligation - in the present case, S.C. EF 12345 S.R.L. and, in the alternative, to the natural person who contributed to its execution, in this case the de facto administrator of the company. In reference to the legal entity SC EF 12345 SRL, the court finds that it can have the status of an active subject of the crime of tax evasion as long as the criminalization of this crime sanctions the failure to fulfill fiscal obligations and the company has these obligations, of paying taxes and fees . In addition, the court notes that the evasion of the payment of fees and taxes primarily

benefits the legal entity, debtor of the obligation, and, subsidiarily, the natural persons who contributed to its fulfillment, in this case, the person who carried out specific administration activities, in this case the de facto administrator of the company.

Under the aspect of the objective side of the crime, it consists, in the case of the alternative variant of committing the act of tax evasion, provided for by art. 9 para. 1 lit. c from Law no. 241/2005, in the highlighting, in the accounting documents or other legal documents, of the expenses that are not based on real operations or the highlighting of other fictitious operations, specifically the fraudulent reduction of the taxable base when the object of taxation is the value of a certain good, the amount of an income or an income-generating activity or an operation. In the present case, as it appears from the evidence administered both during the criminal investigation and during the trial, we are in the presence of expenses that are not based on real operations, for which fictitious supporting documents were issued in the name of commercial companies who at the time of issuing these documents were either no longer engaged in commercial activity, or had another object of activity, not knowing that these apparently justifiable documents had been issued in their name.

In the case of the offense provided for by art. 9 para. 1 lit. c from Law no. 241/2005, under the aspect of immediate follow-up, the court finds that the law does not require the production of a materialized result in a damage for the qualification of the deed as a crime. As such, it can be appreciated that the analyzed crime is a crime of danger, being sanctioned by the legislator simply endangering the social value protected by the norm of criminalization. In the case referred to the judgment, the immediate consequence consisted in the creation of a state of danger for the social relationship protected by the norm of incrimination, a state of danger materialized in the reduction of fiscal obligations to the state - the amount of 134,029.64 lei as VAT and the amount of 111,948, 16 lei as profit tax.

From the subjective aspect, the crime of tax evasion inferred in the judgment is carried out with intention, being qualified by purpose, namely that of evading the fulfillment of fiscal obligations. From the analysis of the administered evidence, it follows, without a doubt, that the defendants acted with direct intention in the sense that they foresaw the result of their actions and followed its occurrence by committing the act, acting according to art. 16 para. 3 lit. a from the Criminal Code. Regarding the retention of the continued form of the crime, the court considers that the crime is continued when a person commits at different time intervals, but in the realization of the same criminal resolution, actions or inactions that represent, each separately, the content of the same crime.

In the present case, the defendant committed the acts on the basis of a single criminal resolution, which was outlined in general terms from the beginning of the criminal activity, resulting from the registration of some fictitious purchases in the company's accounting records in the period 2016 - 2019, the existence of time intervals between the successive actions/inactions and the existence of the same criminal purpose – evading the fulfillment of fiscal obligations. The court, based on art. 9 para. 1 lit. c from Law no. 241/2005 with the application of art. 35 para. 1 of the Criminal Code, sentenced the defendant SC EF 12345 SRL to a penalty of 19,000 lei criminal fine for committing the crime of tax evasion, committed in continuous form (50 material documents) - 190 days fine established according to the provisions of art. 137 para. 4 lit. c from the Criminal Code; 100 lei, the value of a day's fine established according to the provisions of art. 137 para. 2 of the Criminal Code.

When determining the amount of a one-day fine, the court takes into account the current legal situation of the company, being in the liquidation of the assets, but also the data regarding the defendant's financial situation in the period 2019 - 2021 as they result from the certificate issued by ONRC with regarding the situation of the accused S.C. EF 12345 S.R.L. – tabs 171 – 173, court file, volume II. Based on art. 9 para. 1 of Law no. 241/2005 and art. 138 para. 2 of the Criminal Code, will apply to the defendant legal person the complementary punishment provided by art. 136 para. 3 lit. f of the Penal Code, respectively the publication of the device of the sentencing decision, at the expense of the convicted legal entity, in a local newspaper, in the number of 3 appearances, under the conditions established by art. 138 para. 4 of the Criminal Code (Criminal sentence published by the Bihor Court, Criminal Section, on the website of the Supreme Council of Magistracy <https://rejust.ro/juris/ee33g4e6e>)

### Conclusions

The criminal liability of the legal person is a delicate subject due to the complex nature of the situations in which it is involved. They are found more often in areas that are supposed to be tax havens, where the legislator has imposed a precarious legislative basis, leaving room for interpretations.

In judicial practice, in many cases in which legal entities were involved, only the civil liability of the legal entity was engaged, thus only being obliged to make compensatory payments. An argument of this practice is the fact that in order to apprehend a crime, even if it was committed by the legal person through an action or inaction, the presence of a human substrate is necessary, namely the decisions taken by an individual or group of individuals. Thus, most of the time the criminal liability of the natural persons responsible for the administration of the legal persons and not of the entity is involved, for example the cases where the companies facilitate acts such as tax evasion, money laundering, etc., in which of the several times only the administrators were held criminally liable, because the court considered that the main perpetrators who had the capacity of active subjects were the administrators, the legal person being only a screen used by them to mask the commission of illegal acts. On the other hand, this judicial practice can also be understood because in the case of many legal entities there are employees who are in good faith and carry out their activity in accordance with the law, having no involvement in the criminal phenomenon, thus it would be immoral for the respective natural persons to feel the repercussions of a sanctions to which the legal person was subjected, so most of the time the court opts for the joint criminal liability of the natural person and the legal person.

### REFERENCES

1. Barbu I.A., *Drept penal Partea generală*, Editura Universul Juridic, București, 2016,
2. Jurma A., *Persoana juridica-subiect al răspunderii penale*, Editura C.H. Beck, București, 2019.
3. Popoviciu L. R., *Drept penal. Partea generală*, Ediția a II-a revăzută și adăugită, București, Editura Prouniversitaria, 2014
4. Sentință penală publicată de Tribunalul Bihor, Secția Penală, pe site-ul Consiliului Suprem al Magistraturii <https://rejust.ro/juris/ee33g4e6e>, accesat în data de 22.08.2023
5. Udroiu M, *Drept penal Partea generală*, Ediția 4, Editura C.H. Beck, București, 2017