

LEGAL PERSON – ACTIVE TOPIC OF CORRUPTION INFRACTIONS

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Abstract

In the context of the changes occurred in the international legislation, under the circumstances of the necessity of amortize the penal legislation with the provisions of the European legislation concerning the corruption, Romania made efforts in adopting the Law no. 70/2000, regarding the prevention, identification and retribution of corruption deeds¹ with the aim of counteracting the illicit activity of some category of persons who, using the positions and attributions which they should carry on, broke the law with the aim of gaining, for them or for other persons, money, goods, and other material benefits. In this context it becomes necessary to analyze the opportunity of incriminating the corruption deeds committed by the legal person as an active topic of these categories of infractions.

Keywords: criminal liability, sanctions, legal person, natural person

Introduction

The corruption phenomenon exists from the dawn of time, the corruption as universal social phenomenon developed along with the society, with the state and the right, getting new forms of existence. At present, it manifests as a phenomenon typical for the bureaucratic state, budgetary, representing a threat for democracy, circumventing the good administration, equity and social justice principles, denaturing the competition and impeding the economical development of the state and the stability of democratic institutions.

This phenomenon can be identified both in underdeveloped countries, where the corruption phenomenon is favored by the lack of authority of the administration, leading to an inadequate reaction towards the corruption acts, increasing this phenomenon to exacerbate dimensions following the dictatorial character of the administration, culminating with the dissemination of the corruption at all high levels of the political hierarchy², and also in the countries developed from economical point of view, with stabile, traditional democracies, which are capable, due to the competence and stability of the legal system, to counteract the effects of the large corruption scandals, out of which businessmen and politicians were incriminated in countries as Italy, Latin America, France, Japan, United States of America³.

¹ Published in the Official Journal (OJ) no.219, dated on May 18th 2000.

² V. Dobrinouiu, *Corupția în dreptul penal român*, Atlas Lex Publishing House, Bucharest, 1995, pp. 6.

³ V. Dobrinouiu, *Corupția în dreptul penal român*, op. cit, pp. 22.

Being a universal phenomenon, the corruption raises concern at global level affecting both private and public sector. The phenomenon, which represents not only an ethic problem, affects the loyal competition between companies and can lead to financial and image prejudices. Moreover, with the lapse of time there are destroyed the benefits of the free market forces, due to the defalcation of large amounts of money by the public authorities from various countries in the disfavor of the citizens who should benefit of the investments in large projects in education and health domain.

The existence of corruption can be noticed at the level of all structures of the society, affecting severely the political, economical, justice, central and local⁴ administration area, generating the weakening of political authority, degradation of the standard of living, alteration of the state authority, reduction of the population confidence in the institutions and social values⁵. Due to the dimensions of this phenomenon with severe consequences for the social-economical or regional development, the international community developed useful instruments with the aim of preventing and combating efficiently the corruption acts⁶. Despite the negative effects generated by this phenomenon at global level, there is an international right to contain efficient rules which lead to the eradication of corruption, each country adopting its own laws and strategies.

European normative framework

By means of the provisions of art. 3 of the second protocol of the Convention, regarding the protection of the financial interests of the European Communities⁷ it is foreseen the obligation of the members states to take the necessary measures with the aim of bringing the legal persons to book for committing three categories of infractions: fraud, active corruption and money laundering. To be able to bring the legal person to book for committing these types of infractions it is necessary that the infraction to be committed on behalf of the legal person, by any person who acts on its behalf as member of an organ of the legal person, who exercises leading duties in it, having the power to represent the legal person and the capacity to make decisions on its behalf. Also, in case of committing an infraction, the legal person can act either as an accomplice or instigator and also, it can commit only an attempt to an infraction.

Also, OECD (Organization for Economic Co-operation and Development)⁸ Convention regarding the combat of bribery over the foreign public agents in the international commercial transactions⁹, elaborated in 1997, establishes by means of the provisions of art. 2, the obligation of the members states to take the necessary measures with the aim of inserting in its legal rules provisions regarding the responsibility of the legal person in case of committing a corruption infraction.

Likewise, we mention on these lines also the provisions of the R Recommendation (88) 18, adopted by the Committee of Ministers of the European Council, on October 20th 1988, regarding the commitment over the criminal liability of the legal person.

⁴ E. Cherciu, *Corupția caracteristici și particularități în România*, Lumina Lex Publishing House, Bucharest, 2004, pp. 4.

⁵ V. Dobrinou, *Corupția în dreptul penal român*, op.cit., pp. 6.

⁶ S. Corlățeanu, D. Ciuncan, *Infrațiunile de corupție și infrațiunile privind piața de capital*, Universul juridic Publishing House, Bucharest, 2009, pp. 21.

⁷ Published in OJ 221, on July 19th 1997, pp. 12-22.

⁸ OECD is an international organism founded in 1960, which has in its competence 30 member states and its objective is to perform economical and social research, by collecting and analyzing information regarding the economical development and financial stability of the states. Romania is a member of OECD, but by means of GD no. 1607/2004 (published in OJ no. 932, dated on October 12th 2004) it was founded the Romanian Center for Information and Documentation and an Information and Documentation Point OECD, within the Ministry of External Affairs. In the activity of this international organism, a constant priority was represented by the fight against corruption.

⁹ Document available online on www.oecd.org

Criminal Law Convention regarding corruption¹⁰ from 1999, adopted by the Multidisciplinary Group within the Action Programme against corruption in 1999 contains legal procedure rules and substantial criminal law¹¹ and by means of its provisions it imposes to the signing states the adoption of legislative measures by which to incriminate the active and passive corruption deeds committed by the members of the national public assemblies, who exercise legislative and administrative power¹².

Also, by means of the provisions of art. 18 of the Convention it is recommended for each part to adopt the necessary legislative measures to enable bringing the legal persons to book for committing infractions of active corruption, influence peddling and money laundering, established according to it, in case there are committed on their behalf by a natural person, who acts either individually or as member of an organ of the legal person, in which it exercises leading duties, manifested by the power to represent the legal person, making decisions and exercising the control within the legal person. All these provisions regulate the performance of the legal person's activities, since these are, sometimes, involved in committing corruption infractions, especially in commercial transactions, in practice being quite difficult to track natural persons who act on behalf of a legal person, considering the dimension of the companies and the complexity of their activity, and sometimes the corruption practices continue also after applying sanctions which deprive of freedom the members of company's administration¹³, following the fact that the company is not affected by applying individual sanctions¹⁴. On this line, the legal persons will be brought to book if the following conditions are not followed: in case they committed deeds qualified as active corruption, influence peddling and money laundering, these infractions were committed on the interest of the legal person, or especially on its behalf, by a person who owns a leading position within the legal person.

Also, according with the provisions of art. 18, pct. 3, of the Convention, the responsibility of the legal person do not exclude criminal prosecution of the natural persons, as perpetrators, instigators or accomplices in committing corruption infractions, cumulating in this way the criminal liability of the legal person and who participated to the infraction commission as perpetrator, co-perpetrator, instigator or accomplice¹⁵.

United Nations Convention¹⁶ against corruption aims to promote and consolidate the measures with the scope of preventing and combating the corruption in the most efficient way. With this purpose, the Convention's provisions sustain the promotion, easement of

¹⁰ Document available online on www.cccec.gov.md, adopted at Strasbourg, on January 27th 1999; The Criminal Law Convention regarding corruption was ratified by Romania by means of Law no. 27/2002, published in OJ no. 65, on January 30th 2002.

¹¹ See Gh. Mateuț – “Sinteză teoretică și practică privind represiunea traficului de influență în reglementarea actuală și în perspectivă”, R.D., no. 5/2002, pp. 163.

¹² See V. Dobrinioiu, M. A. Hotca, N. Neagu, M. Murea, C. Cășuneanu, *Legea 78/2000 pentru prevenirea și sancționarea faptelor de corupție*, Wolters Kluwer Publishing House, Bucharest, 2008, pp. 63.

¹³ See F. Stretianu, R. Chiriță, *Răspunderea penală a persoanei juridice*, 2nd Edition, C.H.Beck Publishing House, Bucharest, 2007, pp. 106.

¹⁴ C. F. Ușvat, *Infrațiunile de corupție în contextul reglementărilor europene*, Universul Juridic Publishing House, Bucharest, 2010, pp. 276.

¹⁵ On this line see also R. Valeur, *La responsabilité pénale des personnes morales dans les droits français et anglo-américains avec les principaux arrêts faisant jurisprudence en la matière*, Edition Marcel Giard, Paris, 1931, pp. 69.

¹⁶ United Nations Convention against corruption (Convention from Merida) was adopted by means of the resolution no. 58/4, on October 31st 2003, and it became effective on December 14th 2005, ratified by Romania by means of Law no.365/2004, published in OJ no. 903, on October 5th 2004, the document is available online on www.transparency.org.ro. Between 9th–11th of December 2003, United Nations Convention against Corruption was opened to be signed by all states, in Merida (Mexico), subsequently on the United Nations' premises in New York, by December 9th 2005. By means of the Resolution no. 58/4, dated on October 31st 2003, the United Nations General Assembly established also the day of December 9th as the International Day of International Anti Corruption Day.

international cooperation and technical assistance with the aim of preventing corruption; it promotes the integrity, responsibility and good management of the public affairs and assets. It is important to underline the fact that this Convention, brings completions to the Convention regarding the combat of transnational organized crime by defining the following terms: public official, foreign public official, servant of an public international organization¹⁷.

Also, the provisions of this convention recommend to each signing state to adopt the necessary measures, according to its judicial principles, to establish the responsibility of the legal persons who take part in the infractions established according to this convention, liability which can be penal, civil or administrative and which cannot be detrimental to the criminal liability of the natural persons who committed the infractions.

Internal normative framework

As regards the penal liability of a legal person who committed an infraction, in the penal doctrine there were controversies regarding the consideration of a legal person as an active topic of an infraction. Therefore, there were two tendencies namely, negative thesis on the basis of which the legal persons don't have a proper existence, but there are creations, a fiction of law, according to which the companies cannot commit infractions¹⁸, but also the affirmative thesis according to which the legal persons represent a reality, being entities provided with proper will and conscience¹⁹. As a result of the acceptance of the liability commitment by the legal person, from the penal point of view, this measure was inserted in the Penal Code provisions, following the recommendations contained by the international documents in domain, and also as a result of the general tendency in the penal matter to consecrate the criminal liability of the legal person as a basic principle in the action of repressing the delinquency phenomenon. For the legal person who committed an infraction to be able to be brought to book for criminal liability, it is necessary for deed to be committed by a natural person with the guilty from requested by the incrimination rule, but to be imputable to the legal person²⁰.

In Romanian criminal law had applicability the personal nature of criminal liability the principle under which only the individual can be an active subject of crime²¹.

Therefore, the legal persons can be brought to book for criminal liability for the infractions committed on their behalf by any natural person, who acts individually, as a member of an organ of the concerned legal person, on the basis of a trust mandate or of an authorization to make decisions in the name of the legal person or to exercise a control activity within it.

In the line of the criminal liability commitment of the legal person for the commission of corruption infractions we mention that, according to the provisions of art. 19¹ from Penal Code, "legal persons, excepting the state, public authorities and public institutions which perform an activity that cannot be the subject of private domain, are criminally liable for the infractions committed in performing the object of activity or in the interest or in the name of the legal person, if the deed was committed with a guilty form foreseen by penal law"²². According to these provisions there are criminally liable the commercial companies, but also other legal persons of private right (such as: associations, foundations, syndicates, political parties, employer's associations), and also the legal persons for which after the commission of the infraction it is discovered the nullity of the foundation procedure, this aspect resulting

¹⁷ P. Abraham, *Corupția-cauze, mecanisme, efecte*, effects, solutions, op. cit., pp. 298

¹⁸ See T. Pop, *Dreptul penal comparat. Partea generală*, vol. II, Cluj, 1928, pp. 272

¹⁹ See C. Bulai, *Manual de drept penal*, All Publishing House, Bucharest, 1997, pp. 203

²⁰ A. Boroș, *Drept penal. Partea generală*, C.H.Beck Publishing House, Bucharest, 2008, pp. 147-148

²¹ Laura-Roxana Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011, pp. 296.

²² Provisions of art. 19¹, of the Penal Code, were inserted by means of the provisions of art. I, pct. 1 from Law no. 278/2006, to modify and complete the Penal Code and to modify and complete other laws, published in OJ no. 601, on July 12th 2006.

from the provisions of art. 58²³, of the Law no. 31/1990, regarding the commercial companies²⁴. On the other hand a legal person, which is foundation process, cannot be criminally liable for committing an infraction²⁵. According to the provisions of art. 19¹, of the Penal Code, the state, public authorities and public institutions, whose activity is not the subject of the private domain, are exonerated from criminal liability.

To enable the criminal liability commitment of the legal person it is necessary to fulfill all the constitutive elements of an infraction, existing some criteria on the basis of which an infraction to able to be allocated to a legal person, and namely the commission of an infraction in performing the object of activity of the legal person, in its interest or name. According to the provisions of art. 19¹, from the Penal Code, the criminal liability of the legal person do not exonerate the criminal liability of the natural person, who contributed, in any way, to the commission of the same infraction, of course this enunciation implies not always the liability of the natural person with that of the legal person, but in case of the joint criminal enterprise between the legal person and the perpetrator of the infraction it is possible not to be involved the criminal liability of the legal person if the decision to commit the infraction was reached by means of secret vote with majority of votes, by a fellowship organization of a legal person and not being able, therefore, to establish who caused, by its vote, the commission of the infraction²⁶.

The provisions regarding the liability of the legal person were foreseen also in art. 135, from Law no. 286/2009, regarding the actual Penal Code, are superior by including in the content of this article the provisions of align. 2, which stipulate that public institutions are not criminally liable for the infractions committed in exercising of some activity which cannot be the object of private domain.

As regards the categories of infractions which can be committed by the legal person, according to the Penal Code, it is regulated a general liability of the legal person for all categories of infractions, but it should be checked, yet, in case of each infraction if there are fulfilled the conditions for criminal liability commitment of the legal person, since there are some infractions which, by their nature, can be committed only by natural persons (escape, bigamy, false testimony). Also, in an opinion²⁷, it is considered that a company cannot be liable for the deed of the official in charge, by which it prejudiced the company itself, in this case having the quality of aggrieved party. In case of corruption infractions, within the provisions of Law no. 301/2004, regarding the Penal Code²⁸, according to the provisions of art. 313, concerning the incrimination of the legal person, it is mentioned that the legal person can be criminal liable for committing the infractions foreseen at art. 309 (hush money) and 312 (influence peddling), provisions which are no longer in the content of Law no. 286/2009, regarding Penal Code, being no provisions on this line also in the content of Law no. 78/2000, regarding prevention, identification and incrimination of corruption deeds²⁹ and also in Law

²³ Art. 58, align.1., On the date on which the court decision, regarding the nullity ascertainment or declaration, becomes final, the company stops its activity with no retroactive effect and goes into insolvency. The legal provisions regarding the insolvency of the companies, as a result of development, apply accordingly”.

²⁴ Published in OJ no. 126-127, on November 17th 1990.

²⁵ C.F. Ușvat, *Infrațiunile de corupție în contextul reglementărilor europene*, op.cit., pp. 282.

²⁶ See F. Streteanu, R. Chiriță, *Răspunderea penală a persoanei juridice*, 2nd Edition, op.cit., pp.330; L. M. Stănilă, *Răspunderea penală a persoanei juridice*, Hamangiu Publishing House, Bucharest, 2012, pp. 170; C.F. Ușvat, *Infrațiunile de corupție în contextul reglementărilor europene*, op.cit., pp. 291; A. Boroi, N. Neagu, - “Armonizarea legislației penale române cu legislația europeană în materie de corupție”, in Right Magazine, no. 4/2003, pp. 118

²⁷ I. Pascu, M.Gorunescu – “Răspunderea penală a persoanei juridice în perspective noului Cod penal român”, in Law Project, no. 2/2004, pp. 30

²⁸ Published in OJ no. 575, on June 29th 2004, abrogated by means of the provisions of Law no. 286, from 2009, regarding the Penal Code (published in OJ no. 510, on July 24th 2009).

²⁹ Published in OJ no. 219, on May 18th 2000.

no. 187/2012, to enforce the Law no. 286/2009, which brings changes and completions to Law no.78/2000.

On the other hand, the hush money infraction cannot imply the criminal liability of the legal person, as a result of the fact that this infraction, according to the content of the incrimination rule can be committed only by an official, on the line foreseen by law, and in case the hush money giver acts in the interest or in the name of a legal person, this will be criminally liable for committing the infraction of hush money giving among the legal person who will be liable in the quality of moral person.

Conclusions

We consider that to establish the criminal liability for a legal person for committing an infraction it is necessary to be fulfilled the constitutive elements of the infraction, but the rule enounced in the law text do not create the possibility of incriminating the legal person with the natural person, only in case of joint criminal enterprise, since in case there is no joint enterprise, the criminal liability can be committed either only for the natural person, or only for the natural person, moreover in case of incriminating the legal person for fine payment, this will not be able to perform a recourse action against the natural person, for its payment, as a result of the fact that the criminal liability is personal.

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