SPECIAL FEATURES OF THE CRIMINAL OFFENCES LAID DOWN IN THE COMPANY LAW NO.31/1990

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Abstract

The Law No.31/1990 is a non-criminal law with criminal provisions, as it is mainly aimed at regulating the operation of companies, but it also includes incrimination rules. Thus, Art. 271-279, Art. 280[1] and Art. 280[3] incriminate several acts through which the legal rules on companies are violated.

The incrimination rules included in the Law No.31/1990 are special incrimination rules (derogatory), as compared to the ones existing in the Criminal Code [Art.297 (abuse of office), Art.295 (embezzlement) etc.], because they are applied with priority, except when the penalty provided for in the Criminal Code is more severe (see Art.281 of the Law No.31/1990).

The incrimination rules existing in the Law No. 31/1990 apply exclusively to the companies regulated by this law, and not to other types of companies, with or without legal personality.

Keywords: *companies; incrimination rules; non-criminal law with criminal provisions; Criminal Code; active subject; passive subject; legal subject-matter.*

1. General

The most important legislative act, regulating the formation, the organisation and the dissolution of companies is the Law No. 31/1990[1].

This law is a technical and legal support intended for the entrepreneurs who want to start businesses but do now own enough resources to put in practice their ideas, and for those who want to carry out economic activities in cooperation with other persons, although they own the necessary capital or resources. If the first category concerns persons who do not own enough resources, the second category concerns persons who want to share the economic risks with others or who want to limit them.

The companies provided for in the Law No. 31/1990 are **legal lucrative vehicles, configured in forms of organisation aimed at satisfying both the private economic interests and the general ones, made available to business man and to the persons who wish to invest and to make profit.**

According to Art.1 para. (1) of the Law No.31/1990, in order to perform lucrative activities, the natural persons and the legal entities may associate together and set up companies with **legal personality**, in compliance with the provisions of this law.

And Art.1 para. (2) of the same law provides that the companies specified in para. (1) established in Romania are **Romanian legal entities**.

According to Art.2 of the Law No.31/1990, the companies shall be set up in one of the following forms:

- general partnership;
- limited partnership;
- joint stock company;
- limited partnership with a share capital;
- limited liability company.

Art.3 para. (1) of the Law No.31/1990 enshrines the principle (rule) of limitation of the legal liability of the members. The rule in the field of companies is that the **social obligations** (belonging to one of the companies regulated by the Law No. 31/1990) **are secured by the assets of the company**.

By way of exception to this principle, the partners in a partnership and the general partners in a limited partnership or in a limited partnership with a share capital **are jointly and severally liable for the social obligations**. In these derogatory situations, the creditors of the company shall pursue first the company and, only if the company does not pay them within not more than 15 days of the date of the formal notice, they will be able to pursue the partners, who are jointly and severally liable [Art. 3 para. (2)].

The shareholders, the limited partners and the members of the limited liability company are liable only up to the amount of the subscribed share capital [Art. 3 para (3)]. We note that in the business field the overwhelming majority of companies are limited liability companies. The companies limited by shares hold the next place, but at a great distance, while other forms of companies are almost non existent.

It is necessary to note here that the persons who committed acts provided for in the Law No.85/2014 or in the tax legislation shall be liable for the debts of the company regardless of the legal form of the latter, if the company is insolvent or in a state of insolvency.

According to the provisions of Art.4 of the Law No. 31/1990, the company with legal personality shall have at least 2 members, unless otherwise provided for

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[1] For commentaries on the Law No. 31/1990, see St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, The Company Law, Comments on articles, 5th edition, C.H. Beck Publishing House, Bucharest, 2014; S. Bodu, The Company Law, commented and annotated, Rosetti Publishing House, Bucharest, 2017. Please note that this material has been published in a similar form, in the Romanian language, in RRDPA No. 1/2019.

by the law. *The law provides for otherwise*, for example, in the case of the limited liability company, that may be formed by one member.

The violation of legal rules regulating the formation, the organisation, the change or the cessation of the activity of companies can take different forms and can give rise to criminal, civil, disciplinary, tax liability, as the case may be, etc.

Given the reality that the companies have a special importance in the business field, the Romanian legislator incriminates certain violations of the rules laid down in the Law No.31/1990[2].

2. Special and common features of the criminal offences laid down in the Law No. 31/1990

2.1. Special features of the criminal offences laid down in the Law No.31/1990

I. From the standpoint of categories of criminal laws, the Law No.31/1990 is a **non-criminal law with criminal provisions**, as it is mainly aimed at regulating the operation of companies. Thus, Art. 271-280, Art. 280^1 and Art. 280^3 incriminate more acts through which the legal rules on companies are violated.

II. According to the criterion of the scope, the incrimination rules included in the Law No.31/1990 are **special (derogatory) incrimination rules**, as compared to the ones included in the Criminal Code [Art. 297 (abuse of office), Art. 295 (embezzlement) etc.]. These incrimination rules are special because whenever the same act meets both the incrimination requirements laid down in one of the criminal provisions of the Law No.31/1990, and the ones laid down in the Criminal Code or in other laws, the incrimination rules from the Law No.31/1990 are applied with priority, except when the penalty provided for in the Criminal Code is more severe (Art.281 of the Law No.31/1990)[3].

III. The incrimination rules existing in the Law No.31/1990 apply **exclusively to the companies regulated by this law** and not to other types of companies, with or without legal personality (unincorporated voluntary associations, joint ventures, cooperatives, agricultural companies). Also, the application of these incrimination rules may not be extended to other collective entities with legal personality, although there are similarities between them. Thus, the incrimination rules laid down in the Law No.31/1990 are not applicable to autonomous public service undertakings or to associations. *A fortiori*, the incrimination rules included in the Law No.31/1990 do not apply to the natural persons authorised to carry out economic activities, and nor to the individual or family enterprises set up according to the Government Emergency Ordinance No.44/2008.

IV. According to Art.281 of the Law No.31/1990, although the incrimination rules laid down in the Law No.31/1990 are special, **they are also subsidiary.** But the subsidiarity is limited to the cases in which other legislative acts provide for more severe penalties for the same acts, which means that the rule of subsidiarity is correlated with and supplemented by the **principle of specialty**, feature applicable in the case of special rules. If the rule of specialty applied in all cases - regardless of the serious nature of the criminal offence - then it could be said that the rules of the Law No.31/1990 are general rules, and not special ones. Therefore, these are **conditional derogatory rules**.

V. Another specific feature of the criminal offences regulated by the Law No. 31/1990 is that the legislator uses **the technique of reference rules** in respect of most of them. This specific feature - the legislative technique of reference rules - was criticised in the academic literature that claimed that this *is not typical for the criminal legislator*, and that the rules in question lack *predictability and clarity, thus breaching the principle of legality. Moreover*, by successive amendments, *the hypothesis of many criminal rules was so deformed that it can no longer be used to incriminate* [4].

Indeed, the addressee of the incrimination rules has to make many correlations both between the incrimination rules and between them and other rules of the Law No.31/1990, as there many (multiple) references from one rule to another[5].

From a different standpoint, in respect of some of the incrimination rules included in the Law No.31/1990, the legislator should reconsider the need of criminal liability, as long as there are other legal instruments than can achieve the aim contemplated by the legislator. For example, *de lege ferenda*, the failure

[2] For a review of the criminal offences relating to companies, see: A.M. Truichici, *The criminal protection of company's assets*, Universul Juridic Publishing House, Bucharest, 2007. See also the bibliography indicated by this author, including the works: R.Bodea, *Criminal offences laid down in special laws*, Hamangiu Publishing House, Bucharest, 2011, M.A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R. Geamănu, *Criminal offences laid down in special laws*, 4th edition, C.H.Beck Publishing House, Bucharest, 2017; S.Bodu, The Company Law, commented and annotated, Rosetti, Bucharest, 2017; N.Cârlescu, Criminal business law. Criminal offences laid down in the Criminal Code and the Company Law No. 31/1990, Bucharest, C.H. Beck Publishing House, 2018.

[3] Art.281 of the Law No.31/1990 provides that the sanctioning of criminal offences laid down in the Law No. 31/1990 is subject to the rule of subsidiarity according to which if, under the Criminal Code or certain special laws, these acts form the subject-matter of more severe criminal offences, they shall be punishable under the conditions and by the penalties provided for there.

[4] See S. Bodu, op.cit, p.1343.

[5] See A.M. Truichici, *op. cit.*, p. 61.

to call the general meeting by the auditor (Art.276) could be excluded from the scope of criminal law.

In conclusion, after reviewing the incrimination rules provided for in the Law No.31/1990, one can note that the texts describing the criminal acts are not properly drafted, whereas they favour the possible non-unitary application of the law and the emergence of controversies[6], therefore a re-assessment of the criminal rules included in the Law No.31/1990 is required. However, this operation must be carried out in a systematic and global manner, namely both in respect of the correlation between the special incriminatory provisions, and in respect of the correlation of the incrimination rules with the rules to which the first ones make reference to. Also, in the framework of the re-assessment of the incrimination rules, we think that the legislator should review each such rule by reference to the principle of proportionality of the criminal protection.

2.2. Common features of the criminal offences laid down in the Law No.31/1990

I. **The generic legal subject-matter** of the criminal offences provided for in the Law No.31/1990 is represented by the social relationships arisen in connection with the formation, the organisation, the change and the cessation of the activity of limited liability companies, joint stock companies, limited partnerships, limited partnerships with a share capital and partnerships. In other words, **the Romanian legislator protects the legal institution of companies**, institution that is fundamental for any rule of law based on a market economy. The protection of companies is provided both for their benefit and for taking care of *the fabric of social relations* generated by the existence of these collective entities equipped with legal personality. On a different note, the criminal protection of companies covers various virtues or social values, essential for a democratic and social state, namely **the honesty** of the management bodies, **the truth** of the content of the documents issued by these entities, **the observance of the fundamental rights** of third parties, shareholders, employees, etc[7].

II. As regards the **material subject-matter**, the latter usually is absent in the case of criminal offences regulated by the Law No.31/1990.

III. From the standpoint of the consequences on the social values, most of the criminal offences provided for in the Law No 31/1990 **have immediate effects consisting of states of danger for the protected social values**.

IV. As regards the forms of the criminal offence (possible only in the case of intentional criminal offences), by reference to the performance of the criminal activity, we note that **the attempt or the preparatory acts are not incriminated** in the case of any of the criminal offences examined, **whereas the legislator deemed them irrelevant from a criminal standpoint.**

V. Another feature resulting from the analysis of the incrimination rules provided for in the Law No.31/1990 is that **all these criminal offences are committed with intent**. Although it is not necessary, but in order to emphasize the specificity of the subjective side, the legislator uses often, relatively redundantly (mainly in order to warn the addressees of the rules), the wording ”in bad faith” (which means here intent in any of its forms) or other terms that show that the guilt of the perpetrator must take the form of intent, and in some cases even the form of direct intent (for example, when it uses the wording *in order to*).

VI. Another specific feature of the criminal offences regulated by the Law No.31/1990 is that **the criminal offences concerning companies have**, directly or indirectly, a **qualified active subject**, because the persons covered by the incrimination rules must be founders, directors, managers, shareholders, internal auditors etc. The criminal offence provided for in Art. 280[3] (knowingly using the documents of a struck off company for the purpose of creating legal consequences).

The criminal offences provided for in the Law No.31/1990 may be committed, as author or co-author, by: the founder[8], the director, the general manager, the manager, the member of the Supervisory Board or of the Management Board or by the legal representative of the company[9]. No special conditions are required for the instigator or the accomplice, therefore any persons meeting the general conditions of criminal liability can be held criminally liable for this criminal offence.

According to Art.6 para (1) of the Law No.31/1990, **the founders** are the signatories of the memorandum of association and the persons with a decisive role in the formation of the company.

The persons who have (had) an important role in the formation of a company are those persons who, although are not the signatories of the memorandum of association (of course, the signatory founders usually play an important role), had an essential contribution to

[6] Ibidem.

[7] M.A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R. Geamănu, *Criminal offences provided for in special laws…, op. cit.*, p. 348.

[8] The status of founder is required, alongside the other statutes (director, manager, etc.) only in the case of the criminal offences provided for in Art.271-272[1] and Art. 277 para (3)].

[9] According to Art.278 of the Law No.31/1990:” The provisions of Art.271-277 shall also apply to the liquidator to the extent to which they refer to obligations pertaining to his specific duties.” We note that the criminal offence provided for in Art.279 of the Law No.31/1990 may be committed, as author or co-author, only by a shareholder or a bondholder. And according to Art.280[1] of the same law, the incrimination rule implicitly concerns the shareholder and the member of a limited liability company.

the formation of the company in relation to which the act is committed. It concerns the *so-called de facto founders*[10], who *inter alia* had the idea of the business forming the objects, who attracted the investors etc. In any case, the status of **person playing an important role in the formation of a company must follow from the acts legally prepared by the entitled persons**. For example, from the memorandum of association.

Indeed, the founders of the companies may be *signatories or non-signatories of the memorandum of association*. The latter may benefit from certain advantages (public or non-public), according to the agreements between the founders, granted in consideration of their status of persons who played *a decisive role* in the formation of the company. The category of *de facto founders* does not have to include all persons who had a certain *role*, but *less important* in the formation of the company. The persons who were involved in the formation of the company, but without playing *a decisive role*, may not be integrated in the category of founders. For example, there are deemed such persons those who, regardless of the title (for free or for consideration) have contributed in a non-essential manner to the formation of a company (lawyers, consultants, etc)[11].

In the case of **two-tier** companies, two specific structures are regulated: **the Management Board** and **the Supervisory Board**. According to Art. 153^1 of the Law No. 31/1990, the members of the Management Board are the persons who direct the activity of the joint stock company and fulfil the acts necessary and useful for achieving the objects of the company, except for those reserved by the law to the Supervisory Board and to the General Meeting of Shareholders. The Management Board perform its duties under the control of the Supervisory Board.

The Supervisory Board appoints the members of the Management Board and also assigns to one of them the title of Chairman of the Management Board [Art. 153^2 para. (1)].

According to Art. 153^6, the members of the Supervisory Board are appointed by the general meeting of shareholders, except for the first members, who are appointed by the memorandum of association. According to Art.153^8 of the Law No. 31/1990, the members of the Supervisory Board may not simultaneously be members of the Management Board. Also, they may not be members of the Supervisory Board and employees of the company at the same time.

The Supervisory Board has the following main duties:

a) exercises continuous control over the leadership of the company by the Management Board;
b) appoints and revokes the members of the Management Board;
c) verifies that the operations of managing the company comply with the law, with the memorandum of association and with the resolutions of the general meeting;
d) reports at least once a month to the general meeting of shareholders on the supervision carried out.

In exceptional cases, when the interest of the company requires it, the Supervisory Board may call the general meeting of shareholders.

Under Art.31 of the Law No.31/1990, the founders and the first members of the Board of Directors, of the Management Board and of the Supervisory Board respectively, are jointly liable from the time of formation of the company to the company and the third parties for:

- the full subscription of the share capital and the making of the payments established by the law or the memorandum of association;
- the existence of contributions in kind;
- the veracity of the publications made in order to set-up the company;
- the validity of the operations completed on behalf of the company before the formation and assumed by the latter.

Art.18 para. (1) of the Law No.31/1990 provides that, if the joint stock company is formed by public subscription, the founders shall prepare a prospectus that shall include the data laid down in Art.8, except for those concerning the directors and the managers, the members of the Management Board and of the Supervisory Board respectively, and the internal auditors or, where appropriate, the financial auditor, and that shall specify the date of closure of the subscription.

Also, Art.108 of the Law No.31/1990 provides that the shareholders who offer for sale their shares through public offer shall proceed according to the laws on the capital market.

The **director** status is acquired according to the provisions of the Law No.31/1990, and the latter has certain obligations provided for by the law or the memorandums of association. The obligations and the rights of the director have a different configuration depending on the legal form of the company (joint stock company, limited liability company etc.) and its type of organisation (one-tier or two-tier system). Art.71 of the Law No.31/1990 provides that the directors holding the right to represent the company may only transfer it if they were expressly authorised in this respect.

The academic literature considers that the de facto directors may be active subjects of this criminal offence[12]. As far as we are concerned, we consider that the person who is not mentioned as director in the deeds of the company, even if he *de facto* behaves as a director, may not be author or co-author of the criminal offences laid down in the Law No.31/1990. Such person may be held criminally liable as instigator or accomplice, where appropriate, if the other legal requirements are met.

[10] See S. Bodu, op. cit., p. 53.
[11] For more explanations, see S. Bodu, op.cit., p.54.
[12] See N. Cârlescu, op. cit., p. 389.

The **manager** is the person to whom the Board of Directors delegates the management of the company. According to Art.143 of the Law No.31/1990, the Board of Directors may delegate the management of the company to one or more managers, appointing one of them as general manager. The managers may be appointed from the directors or outside the Board of Directors. If the memorandum of association or the resolution of the general meeting of shareholders provides for in this respect, the Chairman of the Board of Directors of the company may be appointed General Manager. The delegation of the management of the company is mandatory in the case of joint stock companies whose annual financial statements are subject to a legal obligation of financial auditing.

The (general or ordinary) manager of the **joint stock company** is only the person to whom powers to manage the company were delegated. Any other person, regardless of the technical name of the position held within the company, is excluded from the application of the legal rules concerning the managers of the joint stock company.

Now, examining as a whole the provisions of the Law No.31/1990, it follows that the executive managers are included in the category of managers. If, besides the legal requirements, other duties than the specific ones are established for other persons, named *executive managers*, these persons may not be legally included in the category of managers.

The legal representative of a company is a person, other than the director, the manager or the general manager, who is authorised, according to the law, to perform certain activities in the name of and on behalf of the company. For example, the person designated as legal representative, in the framework of proceedings for holding liable the legal entities, according to the provisions of Art.491 para. (3) Criminal Procedure Code[13].

We note that the **legal representative of the company** may be a qualified author or co-author only in the case of criminal offences provided for in Art.271-274 of the Law No.31/1990.

The internal auditors are among the persons who may be authors or co-authors of the criminal offences laid down in Art.276 and Art.277 para. (1) and (2) of the Law No.31/1990. Also, **the experts** may be authors or co-authors in the case of the criminal offence laid down in Art.277 para. (1) and (2) of the same law.

In the case of co-authorship, all perpetrators must hold the special capacity provided for by the law, but all persons who meet the legal requirements for criminal liability may be accomplices and instigators. In other words, the secondary participants may come from the ones nominated or non-nominated by the law.

VII. **The passive subjects (the injured parties) are not expressly qualified**, which, at the first sight, means that the sphere of injured parties coincides with the sphere of legal subjects. However, this is indirectly limited to the category of legal entities covered by the law (of the companies in question) and to certain persons who may be harmed by the acts forming offences, to the shareholders, the members and the creditors of the companies in question respectively (the bondholders may also be included here). In other words, **the companies harmed by the acts committed** may mainly be injured parties and, alternatively, if they prove a harm, the creditors of the company, the members or the shareholders may be passive subjects. Of course, the injured parties may be civil parties in the criminal proceedings. The application of incrimination rules of the Law No.31/1990 is limited to the natural persons or legal entities who commit the acts described in relation to the **companies regulated by this law.** Consequently, no other collective entities are concerned, regardless of whether they have legal personality or not. For example, these incrimination rules do not apply to the persons activating within organisations similar to the companies regulated by the Law No.31/1990, such as the cooperatives, the agricultural companies, the unincorporated voluntary associations etc [14].

VIII. According to Art. 6 para. (2) of the Law No. 31/1990: ”The persons who, according to the law, are incapacitated or have been sentenced for criminal offences against the assets by breach of trust, corruption offences, embezzlement, offences of forgery of documents, tax evasion, criminal offences laid down in the Law No.656/2002 on preventing and sanctioning money laundering, and on establishing measures for preventing and fighting the financing of acts of terrorism, republished, or **for the criminal offences provided for by this law** (our emphasis added) cannot assume the position of founders”.

According to Art. 73^1 of the same law:” *The persons who, according to Art.6 para (2), may not be founders may also not be directors, managers, members of the Supervisory Board and of the Management Board, internal auditors or financial*

[13] According to Art.491 Criminal procedure code:” (1) During the various proceedings and procedures the legal entity shall be represented by its legal representative.

(2) If criminal action has started against the legal entity’s legal representative for the same offense or related offenses, said representative shall appoint a proxy to stand in for them.

(3) In the case stipulated at par. (2), if the legal entity has not appointed a proxy, such person shall be appointed, as the case may be, by the prosecutor who performs or supervises the criminal investigation, by the Preliminary Chamber Judge or by the court, selected from the ranks of insolvency practitioners who are certified under the law. Insolvency practitioners thus appointed shall operate, accordingly, under the stipulations of Art. 273 par. (1), (2), (4) and (5).”

[14] For this point of view and for references to the academic literature, see S. Bodu, op.cit., p.1344.

auditors, and if they were elected, they shall be revoked".

As a matter of principle, the prohibition (the forfeiture) of the right to be a founder and of the exercise of other rights (to be director, manager, member of the Supervisory Board and of the Management Board, internal auditor or financial auditor) lasts until the *de jure* rehabilitation occurs or the judgment granting the judicial rehabilitation becomes final. I said *in principle* whereas there might be other cases in which the interdictions, the incapacities or the forfeitures deriving from a conviction judgment cease. For example, if the rule laying down the forfeiture is repealed or if a law decriminalising the act in relation to which the conviction giving rise to the forfeiture of certain rights was ordered entries into force.

3. Conclusions

The Law No.31/1990 represents the legal and technical support intended for the business man and other investors through which they can put into practice their ideas.

As it is the most important law on companies, the legislator has also wanted to insert certain criminal incrimination rules in it, aimed at protecting the companies.

According to the criterion of the scope, the incrimination rules included in the Law No.31/1990 are special (derogatory) incrimination rules, as compared to those existing in the Criminal Code [Art. 297 (abuse in office), Art. 295 (embezzlement) etc.]. These incrimination rules are special, because whenever the same act meets both the incrimination requirements laid down in one of the criminal provisions of the Law No.31/1990 and those from the Criminal Code or from other laws, the incrimination rules of the Law No.31/1990 are applied with priority, except when the penalty included in the Criminal Code is more severe (Art.281 of the Law No.31/1990).

The incrimination rules of the Law No.31/1990 apply exclusively to the companies regulated by this law, and not to other types of companies, with or without legal personality (unincorporated voluntary associations, joint ventures, cooperatives, agricultural companies), and all the more they may not be applied to the businesses carried out by natural persons.

The incrimination rules provided for in the Law No.31/1990 are special and also subsidiary. However, this is limited to the cases in which other regulatory acts lay down offences more serious for the same acts, which means that the rule of subsidiarity is correlated with and supplemented by the principle of specialty, feature applicable in the case of special rules. If the rule of subsidiarity applied in all hypothesis - regardless of the severity of the penalty - then it could have been said that the rules of the Law No.31/1990 are general rules, and not special ones. It can be considered that they are conditional derogatory rules.

Another specific feature of the criminal offences regulated by the Law No.31/1990 is that the legislator uses the technique of reference rules in respect of most of them. This legislative technique of reference rules is questionable.

In conclusion, we note that the texts describing the criminal acts favour the possible non-unitary application of the law and the appearance of controversies, therefore a re-assessment of the criminal rules included in the Law No.31/1990 is required, including by reference to the principle of proportionality of the criminal protection.

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