

# CONSIDERATIONS REGARDING THE CRIMINAL LIABILITY OF CORPORATIONS – THE ROMANIAN WAY

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## Abstract

*Announced by the legal literature, recommended through an important number of international instruments, already provided for in the majority of European Criminal Codes, the criminal liability of corporations (re)gained its place in the Romanian legislation, through Law no. 278/2006 for the amendment of the Criminal Code and other laws. The purpose of the paper is to present the main regulations governing the criminal liability of corporations, as existing in the Criminal Code, as well as they are provided in Law no. 286/2009 (the new Criminal Code). Although the criminal liability of corporations is now consecrated in Romanian for almost five years, there is however some reticence in engaging the liability of such person which is not “in the flesh”, but only, according to some opinions, an abstract entity which lives only in the universe of jurists. As a consequence, up to present there is little case law in this field. Nonetheless, in the past year, it can be noticed an emergence of the files where the problem of the criminal liability of corporations is raised. Therefore, the objectives pursued by the present study are to provide an approach on the court decisions where criminal charges against corporations were carried out and to see how the relevant legal provisions were applied in these cases.*

**Keywords:** criminal liability, corporations, sanctions, precautionary measures, safety measures

## Introduction

Criminal liability of corporations has become one of the most debated topics of the 20<sup>th</sup> and 21<sup>st</sup> centuries. The debate became especially significant following the 1990s, when all countries have faced an alarming number of environmental, antitrust, fraud, food and drug, false statements, worker death, bribery, obstruction of justice, and financial crimes involving corporations<sup>1</sup>.

In Romania, the criminal liability of corporation was announced by the doctrine<sup>2</sup> and recommended through an important number of applicable international documents<sup>3</sup>. Also, the criminal liability of corporation had been already recognized through many European Criminal Codes<sup>4</sup>. As a consequence of all this factors and of the great number of crimes related to corporations, their criminal liability (re)gained its place in the Romanian legislation in 2006, when

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<sup>1</sup> Anca Iulia Pop, „Criminal Liability of Corporations - Comparative Jurisprudence”, (King Scholar Program, Michigan State University College of Law, 2006): 2.

<sup>2</sup> Please see in this respect the debates of the Second Congress of the International Criminal Law Association which took place in Bucharest in 1929 and further debates in Rome (1953), Bucharest (1978), Cairo (1983). Please also see George Antoniu, “Criminal Liability of Corporation”, *1 Criminal Law Review* (1996): 9-15; Dan Adrian Brudariu, “Criminal Liability of Corporation”, *9 Commercial Law Review* (1996): 145-148; Florin Streteanu, “Criminal Liability of Corporations in the Legislation and Doctrine. Comparative Law Presentation”, *3 Commercial Law Review* (1997): 64-86; Anca Jurma, “Crimina Liability of Corporation”, *1 Criminal Law Review* (2003): 99-118; Adrian Fanu-Moca, “Criminal Liability of Corporation”, *1-2 Romanian Law Studies* (2004): 217-222.

<sup>3</sup> Council of Europe Recommendation (88) 18 concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities; Second Council Protocol of 19 June 1997 to the Convention on the protection of the European Communities' financial interests; Convention on the Protection of the Environment through Criminal Law (Strasbourg, November 4, 1998); Criminal Law Convention on Corruption (Strasbourg, January 27, 1999) etc.

<sup>4</sup> Please see art. 51 of the Dutch Criminal Code of 1976, art. 121-2 of the French Criminal Code of 1994, art. 5 of the Belgian Criminal Code of 1999 etc.

Law no. 278/2006 for the modification of the Criminal Code and of other laws<sup>5</sup> was adopted. Therefore, this paper covers the problem of criminal liability of corporations in Romania, as regulated by the Criminal Code into force.

The criminal liability of corporations lives its first years of life in the Romanian legislation. It is thus understandable that this topic raises numerous problems. The first court decisions against corporations were given in 2009 and the jurists do not seem totally convinced by the utility of this institution, continuously named “recent”. The press periodically offers examples related to criminal prosecutions against the administrators of corporations for crimes such as counterfeit, corruption, environmental crimes, tax dodging etc. although it is obvious that criminal liability of the said corporations should (also) be examined. This situation is generated by both the lack of ignorance of the conditions of the criminal liability of corporations and the fear in front of a new institution. Moreover, the few cases when the criminal liability of corporation was raised ended with questionable solutions. Last, the new Criminal Code adopted in 2009 brings some changes in this field. This is why a detailed presentation of the legal provisions related to this issue is particularly important.

In order to answer this matter, this paper shall cover, in a first phase, the conditions required by the law in order to engage the criminal liability of corporations, also taking into account the foreign regulations which inspired them, if case. Of course, the beginning of a criminal trial against a corporation creates both criminal and criminal procedural consequences, which shall be studied in the second part of the paper.

As resulting from the abovementioned statements, the criminal liability of corporations is still a new institution in the Romanian legislation. Hence, there is little literature on this topic. This paper is not meant to be a synthesis of the existent specialized literature nor does it represent a critic to this doctrine, aiming to offer another perspective on the criminal liability of corporations.

## I. THE CONDITIONS REQUIRED BY THE LAW FOR THE CRIMINAL LIABILITY OF CORPORATIONS

The criminal liability of corporations is regulated in art. 19<sup>1</sup> of the Romanian Criminal Code, named „*The Conditions of the Criminal Liability of Corporations*”), being found in Chapter I („*General Provisions*”) of Title II (“*Crime*”) of the General Part of the Code, immediately after the provisions related to the general characteristics of the crime. According to this article, the corporations<sup>6</sup>, excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field are criminally liable for the crimes committed when performing the object of activity, to their benefit or on their behalf. The Code also states that the criminal liability of corporations does not exclude the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence.

Other provisions related to the criminal liability of corporations are contained in the articles related to the attempt [art. 21 par. (2) of the Criminal Code], the concurrence of crimes (art. 40<sup>1</sup> of the Criminal Code), the recurrence (art. 40<sup>2</sup> of the Criminal Code), the intermediate plurality (art. 40 of the Criminal Code), in Title III of the General Part regarding the sanctions, as well as in the provisions related to the status of limitation of the criminal liability (art. 122 last par. of the Criminal Code) and of the execution of the sanction [art. 126 par. (2), (3) of the Criminal Code], rehabilitation [art. 123 par. (2) of the Criminal Code]. Some relevant provisions are also contained in the Special

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<sup>5</sup> Published in the Official Journal no. 601 of July 2006. The provisions regarding the criminal liability of corporations entered into force 90 days after this date.

<sup>6</sup> For the purpose of this paper, we used the term “corporation” in order to define the collective entities which are liable under the Romanian Criminal Code. As explained below, only the legal persons (which acquired legal personality) can be held responsible, with the exceptions provided by the law.

Part of the Criminal Code [art. 271 par. (5) regarding the non-observance of court decisions and art. 285<sup>1</sup> regarding the sanctioning of the corporations for forgery crimes]. Last, as it is normal, the procedural provisions regarding the criminal liability of corporations can be found in the Criminal Procedure Code (Chapter I<sup>1</sup> of Title IV – „*Special Procedures*”- of the Special Part).

All these provisions create the legal framework of the criminal liability of corporations. In order to determine the conditions of the criminal liability of such persons, there are three questions which need to be answered: who (which corporation) can be criminally liable? (1), for what crimes? (2) and how can we relate those two – the corporation potentially liable and the crimes which can be perpetrated by such entities? (3).

In order to answer these questions, we need to analyze the aspects related to the application field of the criminal liability of corporations, from both material and personal perspective (1), as well as the ones related to the lien between the crime committed and the corporation (2).

### 1. The domain of the criminal liability of corporations

The first issue raised by the criminal liability of corporations is related to its domain. The doctrine, either Romanian or foreign (from the states which inspired the Romanian legislator) affirms that the criminal liability of such entities is general<sup>7</sup>. This means that it is applicable to all legal persons and to all crimes, provided by the Criminal Code or by special laws. Some explanations must however be made in both cases. Therefore, the domain of the criminal liability of corporations include its analysis from both personal perspective, through the examination of the legal persons which can be subjects of the criminal liability, and material one, through the delimitation of the crimes which can be perpetrated by a legal person.

Regarding the legal persons subject to criminal liability, art. 19<sup>1</sup> of the Romanian Criminal Code clearly states that the corporations, excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field are criminally liable. This rule requires however various discussions regarding, on one side, the private legal persons and, on the other side, the public legal persons.

With respect to the private legal persons, as a principle, all such entities can be liable under the Romanian Criminal Code, including the commercial companies<sup>8</sup>. This category of legal persons is mainly concerned by art. 19<sup>1</sup> of the Romanian Criminal Code, taking into account that they are frequently met in the economic landscape and the most capable of perpetrating crimes through their activities. The text also concerns syndicates, economic interests groups, European economic interest groups, owners associations, political parties, associations, foundations etc. Regarding the latter two legal persons, it must be mentioned that, according to art. 1 point 2 of the Government Ordinance no. 26/2000 regarding the associations and the foundations<sup>9</sup>, they are private legal persons without patrimonial scope. The doctrine showed that these categories cannot be included in the one of the persons excepted of the criminal liability, provided by art. 19<sup>1</sup> of the Criminal Code as they cannot be assimilated with the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field, because they have other juridical nature, they function based on other laws and they have other functions than the associations and the foundations. Neither their recognition, through Government Decision, as being of public utility does not exclude them from the criminal liability because, on one side, the legislator does not exclude them from the winding-up when their scope or activity became illicit or contrary to the public order and, therefore, even more they are not excluded from this sanction when they committed criminal offences, and on

<sup>7</sup> Francis Le Gunehec and Frédéric Desportes, *General Criminal Law*, (Paris: Economica, 2006), 573.

<sup>8</sup> For instance, in France, in the projects of the Criminal Code of 1978 and 1983, only private legal persons were concerned by the provisions which regulated the criminal liability of corporations.

<sup>9</sup> Published in the Official Journal no. 39 of January 31st, 2000.

the other side, the associations and foundations are not provided in any legal text as being expressly excluded from the criminal liability<sup>10</sup>.

Therefore, the Criminal Code concerns the lucrative legal persons, as well as the ones without lucrative purpose. Of course, the logical interpretation of the provisions regarding the criminal liability of corporations leads to the conclusion that this institution was mainly created for the lucrative legal persons<sup>11</sup>. It is beyond doubt, taking into account their scope (to obtain turnover), those kinds of persons are the most exposed to criminal liability. From the analysis of the first three decisions against legal persons, it can be noticed that only limited liability companies were sentenced.

Some other issues are raised with respect to the determination of the exact concept of “legal persons”. We must therefore analyze the chronological limits of the criminal liability of corporations<sup>12</sup>, meaning the determination of the criminal liability of the entities lacking legal personality, the entities which are being created, transformed or dissolved.

Regarding the first issue, it must be noticed that, according to the Criminal Code into force, only the legal persons are liable. *Per a contrario*, the entities which lack legal personality do not fall under the provisions of the criminal law. This solution is grounded on the idea that a person who does not have identity or legal existence cannot be sentenced and that, anyway, such sentencing would not have any interest, because the said entity does not have rights or a patrimony<sup>13</sup>. Moreover, the doctrine showed that the limitation of the criminal liability of corporations to the entities having legal personality represents a source of legal security, which would be damaged if such entities would be criminally liable<sup>14</sup>. Thus, it would be difficult to establish who could represent such entities in a criminal trial and the enforcement of sanctions would be hard to conceive with respect to the principle of the personal character of the criminal liability<sup>15</sup>.

A second problem which was raised regarding the criminal liability of private corporations is related to the moment when such liability can be held against them, knowing that there is always an amount of time between the moment when the by-laws of the company are signed and until the date when the person is registered according to the law. In the absence of any case law in this field, the doctrine stated that no criminal liability of such entities could be admitted. Such idea would raise various problems, especially regarding the sanctions applicable to these entities. Moreover, it must not be forgotten that the principle of legality must always be observed: as long as the Criminal Code clearly states that only the legal persons are liable, no collective entity could be responsible before that moment.

What is the solution with respect to the criminal liability of a corporation when such person is being transformed, taking into account the fact that, in such situation, the loss of legal personality normally becomes an obstacle to the liability<sup>16</sup>?

According to the Romania law, the transformation of corporations can be made through merger or demerger. Those two modalities are described in art. 41 of the Decree no. 31/1954

<sup>10</sup> See Valerica Dabu and Remus Borza „Some Considerations regarding the Criminal Liability of Corporation. Constitutionality”, *I-2 Romanian Legal Studies* (2007): 167.

<sup>11</sup> See Le Gunehec and Desportes, *General Criminal Law*, 573. In France, out of 97 decisions against corporations, given in the first four years after the consecration of their criminal liability, 60 were given against commercial companies (limited liability companies or stock companies). See Claude Ducouloux-Favard, “Four Years of Criminal Sanctions against Corporations”, *Recueil Dalloz* (1998): 395.

<sup>12</sup> See Isabelle Urbain-Parleani, “The Chronological Limits of the Engagement of the Criminal liability of Corporations”, *Companies Review* (1993): 239.

<sup>13</sup> See Le Gunehec and Desportes, *General Criminal Law*, 586.

<sup>14</sup> See Frédéric Desportes, “Criminal Liability of Corporations, art. 121-2”, *Juris-classeur penal* (2001): 63.

<sup>15</sup> See Florin Streteanu and Radu Chiriță, *Criminal Liability of Corporations* (Bucharest: C.H. Beck, 2007), 100.

<sup>16</sup> See Marc Segonds, „Frauding article 121-2 of the Criminal Code”, *9 Criminal Law*, (2009): 18.

regarding the natural and legal persons, according to which the merger is made through the acquisition of a legal person from another legal person or through the consolidation of more legal persons in order to create a new legal person, while the demerger is made by the split of the entire patrimony of a legal person between other existent legal persons or who are thus being created.

The Romanian Criminal Code does not state on this issue, but the doctrine generally accepts the possibility of engaging the criminal liability of corporations for offences perpetrated before the transformation, based on the continuity of the legal person<sup>17</sup>. This solution is expressly provided by the new Criminal Code adopted through Law no. 286/2009<sup>18</sup>. Thus, according to art. 151 par. (1) of the new Code, named "*The effects of the merger and the demerger of the legal person*", in case of the loss of the legal personality through consolidation, acquisition or demerger, after the perpetration of the crime, the criminal liability and its consequences shall be suffered by the legal person created through consolidation, the person which acquired the initial one or the persons created through demerging.

The foundation of this solution is related to the effects of the transformation of the legal persons, which suppose the transmission of the patrimony. This idea allows the practical enforcement of the sanctions against the entity which acquired the patrimony of the person which committed the crime. Of course, one could state on the breach of the personal character of the criminal liability. Also, some problems related to equity or opportunity can be raised: it is justifiable to dissolve a newly created person for crimes committed before this moment? The case law shall respond to these problems.

The "death" of a corporation raises as much problems as its birth and life. It is known that the disappearance of a legal person determines a liquidation period, when the legal person keeps its civil capacity, meaning also its legal personality. Although the Criminal Code is silent in this matter, it is generally accepted that the corporation is criminally liable during this time, taking into account the fact that it does not lack legal personality.

While it can be observed that there is no exception to the criminal liability of private legal persons, the situation is different with respect to public legal persons. The Romanian Code provides for two absolute exceptions, concerning the State and the public authorities, and an exception which requires various discussions, regarding the public institutions which develop activities which cannot form the object of the private field.

The criminal liability of the State is expressly excluded by art. 19<sup>1</sup> par. (1) of the Criminal Code. The same exception exists in all the laws or projects of criminal codes which accepted the criminal liability of corporations. The reasons of this exception are related to the principle of sovereignty and of the separation of powers<sup>19</sup>. Another argument links the State to its role regarding the criminal sanctions: the State has the monopoly of the right to punish; as a consequence, the State cannot punish itself<sup>20</sup>. The same arguments are used in order to justify the exclusion of the public authorities from the criminal liability.

With respect to the public institutions, their criminal liability is excluded only if they develop an activity which cannot form the object of the private field. Such solution is yet criticizable. Normally, in the legislations of the States which provide the same exception, only the legal persons which committed the crime while performing an activity which cannot form the object of the public domain are excluded. The contrary solution, existing in the Romanian Criminal Code, allows the

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<sup>17</sup> See Streteanu and Chiriță, *Criminal Liability*, 191.

<sup>18</sup> Published in the Official Journal no. 510 of July 24, 2009. The date of the entering into force shall be provided through the Law for the application of the Code.

<sup>19</sup> See Etienne Picard, "Criminal Liability of Public Legal Persons: Foundation and Domain", *Companies Review* (1993), 261.

<sup>20</sup> See Cosmin Balaban, "The Corporation, Subject of Crime", 2 *Criminal Law Review* (2002): 80; Costica Bulai, Avram Filipas and Constantin Mitrache, *Criminal Law Institutions. Selective Course for the Bachelor of Law Degree 2008-2009*, (Bucharest: Trei, 2009), 80.

immunity of a public institution whenever it performs at least one prerogative which cannot form the object of the private field. Or, the majority of public institutions are in this situation. This conclusion leads to problems with respect to the constitutional principle of equality. Hence, the Romanian National Bank cannot be held liable for a criminal offence, but any other commercial bank shall see its criminal liability engaged for the same crime. The new Criminal Code correctly settles this matter, excepting from criminal liability only the legal persons which committed the crime while performing an activity which cannot form the object of the public domain.

The domain of the criminal liability of corporations also includes the determination of the crimes which can be committed by moral persons. The Criminal Code into force, unlike Law no. 301/2004<sup>21</sup>, provides for a general liability, meaning that corporations can be held liable for all crimes provided by the Criminal Code or by special laws.

The justification of the special liability, provided by Law no. 301/2004 and other foreign laws is related on the crimes which could be attributed to corporations. It was mentioned that such entity cannot commit crimes such as rape, incest, bigamy, desertion etc. However, it must be noticed that all these crime can be perpetrated by corporations, as instigator or accomplice. It is therefore almost impossible to identify a crime which can totally exclude the implication of a legal person from its perpetration<sup>22</sup>. A corporation can be thus sentenced for being accomplice to rape when it allows natural persons to enter its headquarters on this purpose or for helping natural persons committing bigamy, by furnishing forged papers<sup>23</sup>.

The criminal decisions against corporations given so far engaged their liability for crimes related to copyright<sup>24</sup>, accidental injuries and breaches of the labor law<sup>25</sup>.

## 2. The lien between the corporation and the crime committed

The answer of the third question requires the research of the lien between the corporations criminally liable and the crime committed. In order to answer this question, we must first determine which are the natural persons who can engage the criminal liability of corporation, as it is widely accepted that the criminal liability of corporations cannot be conceived in the absence of the intervention of a natural person. Second, the constitutive content of the crime committed by a legal person must be analyzed, through the examination of the material element and of the subjective element.

Law no. 301/2004 which was meant to introduce for the first time the criminal liability of corporations in the Romanian law provided that corporations are liable for crimes committed by their organs or representatives. We can found here the indirect model of criminal liability of corporations. The model of this provision was art. 121-2 of the French Criminal Code. The notion of "representative" was wider than that of "organ," and includes other persons such as the temporary administrators, liquidators, and special agents. Therefore, the acts of other members or subordinate

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<sup>21</sup> Law no. 278/2006 is not the first law on the criminal liability of the legal person. Some precautionary measures against corporations were provided by the Criminal Code in 1937. Also, Law no. 299/2004 on criminal liability of legal persons for crimes of forgery of currency or other values (published in the Official Journal no. 593 of July 1, 2004) came into force in 2004, but could not be applied in the absence of appropriate procedural provisions. Also Law no. 301/2004 on the Criminal Code (published in the Official Journal no.575/2004) provided for the criminal liability of corporations, but it never came into force and was repealed by Law no. 286/2009.

<sup>22</sup> See Andra-Roxana Ilie, "Between the Principle of Specialty and the General Criminal Liability of Legal Persons. View on the New Criminal Code", 4 *Curierul Judiciar* (2009): 234.

<sup>23</sup> See Streteanu and Chiriță, *Criminal Liability*, 397.

<sup>24</sup> See Sibiu Tribunal, criminal decision no. 105/2009, in Anca Jurma, *The Legal Person – Subject of the Criminal Liability* (Bucharest: C.H. Beck, 2010), 246-248; Sibiu Tribunal, criminal decision no. 126/2009, unpublished.

<sup>25</sup> See Iasi District court, criminal decision of March 31<sup>st</sup>, 2010, commentary by Andra-Roxana Ilie, 5 *Legal Courier* (2010): 280-282.

employees cannot engage the criminal liability of corporations even when the acts are committed in the benefit of the corporations.

Law no. 278/2006 did not keep this rule, providing for a direct criminal liability of corporation. This means that the liability can be engaged by any natural person who is sufficiently related to the legal person (administrator, executive director, accountant, employee, representative etc.).

The criminal liability of corporations cannot be however engaged by any person related to these entities, as the law requires for other conditions. Thus, there are three criteria pursuant to which a legal person may be charged with an offence, namely the perpetration of the offence when performing the object of activity, the perpetration of the offence to the benefit of the legal person or the perpetration of the offence on behalf of the legal person.

The perpetration of the offence when performing the object of activity means that the offence must closely connected to the performance of the object of activity of the legal person. Such offences are related to the general policy of the company or to the activities it performs (offences related to the work safety, competition, environment protection).

The perpetration of the offence to the benefit of the legal person refers to those offences that fall outside the activities related to the performance of the object of activity, but considered to result in a benefit for the legal person. The benefit may take the form of a profit or of the avoidance of a loss.

The perpetration of the offence on behalf of the legal person refers to those crimes perpetrated within the process of organizing the activity and operation of the legal person without directly connected to its object of activity<sup>26</sup>.

It must also be stated that, according to the Criminal Code, the criminal liability of the legal person does not exonerate the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence.

One of the arguments which discouraged the criminal liability of corporations was related to their deed, their specific *mens rea*; it was shown that the corporations do not have their own will. However, it must be admitted that, although we cannot find the psychical processes specific to natural persons, the legal persons have their own will, expressed through their capacity to assume contractual obligations or through their tort or contraventional liability.

In the Romanian law, the criminal liability of a legal person represents a direct liability; which means that the infringement must be researched from the part of the company. In this respect, the Romanian Criminal Code expressly provides that a legal person may be held liable under the criminal law where the deed has been perpetrated by means of the infringement provided by the criminal law<sup>27</sup>. Therefore, the offence may be the consequence of either a decision made deliberately by the legal person or of the negligence from its part, negligence which may consist of a faulty organization, insufficient safety measures or unreasonable budgetary restrictions that provided the circumstances for the perpetration of the offence. In respect of the offences perpetrated by an agent or by an attorney in fact, it is required that the company had been aware of his/her intention to perpetrate such offences or had encouraged such actions<sup>27</sup>.

## II. THE CONSEQUENCES OF A CRIMINAL TRIAL AGAINST CORPORATIONS

Once a criminal trial begins against a corporation, there are two sorts of consequences which could be triggered. The first category refers to the criminal consequences and determines the analysis of the criminal sanctions applicable to corporations. The Romanian Criminal Code provides three

<sup>26</sup> See Streteanu and Chiriță, *Criminal Liability*, 230.

<sup>27</sup> See Lex Mundi, *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008), 276-288, accessed February 19, 2011. [www.lexmundi.com](http://www.lexmundi.com).

types of sanctions that may be inflicted on a corporation: a main penalty, some complementary penalties and safety measures (1).

The second category of consequences which a criminal trial determines relates to the provisions of the Criminal Procedure Code. When the criminal liability of corporations was set forth in the Romanian Criminal Code, the legislator also modified the Criminal Procedure Code, by introducing a special chapter in this respect (2).

### 1. The criminal sanctions applicable to corporations

As a preliminary statement, it must be mentioned that the term “sanction” includes both penalties (criminal sanctions pronounced as a consequence of the sentencing of the corporation) and safety measures (such measures can be inflicted against any person which committed illicit acts provided by the criminal law, and not crimes, in order to avoid an emergency condition and to prevent other illicit acts).

With respect to the penalties which can be applied to corporations, it must be mentioned that there are only two categories of such sanctions: a main penalty and complementary penalties.

The single main sentence which may be inflicted on the commercial companies is the fine. The criminal fine which may be inflicted on the commercial companies is between the common limits RON 2,500 and RON 2,000,000 (approximately euros 580 – euros 465,000). The fine is calculated taking into account the penalty provided by the law for the natural person. Thus, in the cases in which, for an offence perpetrated by a natural person, the law provides a maximum penalty of 10 years’ imprisonment or a fine, the special minimum of the fine inflicted on a legal person is of RON 5,000 and the special maximum of the fine is of RON 600,000. In the cases in which, for an offence perpetrated by a natural person, the law provides the life imprisonment or the penalty of more than 10 years’ imprisonment, the special minimum of the fine for a legal person is of RON 10,000 and the special maximum of the fine is of RON 900,000.

It can be noticed that those limits are lower than the common ones (RON 2,500 – RON 2,000,000). Those common limits can be touched however by means of the mitigating or aggravating circumstances (such as concurrence of crimes or recurrence).

The complementary penalties can be applied together with the fine, whenever the judge consider necessary. They are however mandatory whenever the law provides as such (for example, in case of forgery). The service of the complementary penalties shall commence to run from the date on which the conviction sentence remains final.

The complementary penalties are as follows: the legal person’s winding-up; the suspension of the legal person’s activity for a period of 3 months to one year or the suspension of one of the activities performed by the legal person, in respect of which the offence was perpetrated, for a period of 3 months to 3 years; the closing down of certain working points of the legal person for a period of 3 months to 3 years; the prohibition to take part in any tender procedure for a period of 1 to 3 years; the posting or dissemination of the conviction decision<sup>28</sup>.

In this context, it must be mentioned that the new Criminal Code adopted by Law no. 286/2009 introduces a new complementary penalty which can be imposed on a legal person: the placement under judicial surveillance. This penalty determines the appointment of an administrator or a representative who shall supervise, for a period of 1 to 3 years, the performance of the activity that triggered the perpetration of the crime<sup>29</sup>.

<sup>28</sup> See Andra Roxana Ilie, „Criminal Penalties Applicable to Legal Persons. Comparative Study regarding France and Romania” (Dissertation for the Master 2, Fundamental Criminal Law, Montpellier 2008); Ioan Lascu, „Penalties Applicable to the Legal Persons in case of Criminal Offences”, 3 *Law* (2007): 123.

<sup>29</sup> See Anca Jurma, „Sanctions Applicable against Legal Persons”, 1 *University of Bucharest Annals* (2010): 101.



The Criminal Code provides for various safety measures which can be taken whenever an illicit act has been perpetrated. However, there is only one safety measure which can be applied to corporations: the seizure of the assets.

In order to apply this measure, the seized goods shall meet one of the following conditions: (a) such goods are obtained by means of the perpetration of a deed provided by the criminal law; (b) such goods have been used, in any manner, for the perpetration of an offence, in case they belong to the perpetrator, or, in case they belong to another person, such person was aware of the purpose for which they have been used. This measure may not be ordered in respect of the offences perpetrated by means of the press; (c) such goods have been produced and adjusted with a view to perpetrating an offence, if they have been used for the said perpetration and if they belong to the perpetrator. In case such goods belong to another person, the seizure is ordered provided that their production and adjustment has been performed by the owner himself/herself or by the perpetrator and with the full awareness of the owner; (d) such goods have been offered with a view to cause the perpetration of an offence or to reward the perpetrator; (e) such goods have been acquired by perpetrating a deed provided by the criminal law, if they are not returned to the aggrieved person and if they do not serve as a remedy for such person; (f) it is prohibited by the law to own such goods.

## **2. The procedural provisions relevant to criminal trials against corporations**

The Criminal Procedure Code, in art. 479<sup>1</sup>, states that its provisions are also applicable to offences perpetrated by legal persons, being amended by the special provisions contained in the Chapter referred to the enforcement of the criminal liability of corporations.

A first problem related to a criminal trial against a corporation is related to the person who can represent the legal person, especially that mostly the representative of the corporation is also the person who perpetrated the offence. The Criminal Procedure Code distinguishes between two situations. First, if solely the legal person is held liable, it shall be represented for the fulfillment of the procedural steps by its legal representatives. Second, if for the same deed or related deeds, the criminal proceedings have been initiated against the legal representative of the legal person as well, the latter shall appoint an attorney-in-fact to represent it. In the event that the legal person fails to appoint an attorney-in-fact, such appointment shall be made by the body conducting the criminal proceedings or by the court, from among the legal practitioners in the field of insolvency procedures.

Another important mention concerns the interim measures which can be applied to corporations. In this respect, the Criminal Procedure Code provides that during the criminal trial, either the judge or the court may order, for grounded reasons in order to ensure the good and proper development of the criminal trial, one or more of the following measures: the suspension of the legal person's winding-up or liquidation procedure; the suspension of the legal person's merger, division or reduction of the share capital; the prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency; the prohibition to execute certain legal instruments, established by the legal body; the prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated<sup>30</sup>.

The Criminal Procedure Code also provides for the possibility to take precautionary measures against a corporation (the distraint and the garnishment). These precautionary measures may be undertaken with a view to ensuring the special seizure, the remedy of the damage caused by the offence, as well for securing the service of the sentence represented by a fine.

There is not much case law on the criminal procedural provisions regarding corporations. It is however important to mention that, in one court decision given in 2010, it was established that, based on art. 200 and 202 par. (1) of the Criminal Procedure Code, whenever the prosecutor is informed

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<sup>30</sup> See Dorina-Maria Costin, *Criminal Liability of the Legal Person in the Romanian Law* (Bucharest: Universul Juridic, 2010): 529-535.

through a criminal complaint on the perpetration of offences by a natural person who is also a representative of a legal person, the prosecutor must decide with respect to both persons. On the contrary, the prosecutor's decision is subject to suppression, the prosecutor being compelled to also perform investigations on the corporation<sup>31</sup>.

## Conclusions

From the analysis of all these aspects, we can determine the main issues regarding the criminal liability of corporations in Romania. Thus, the Criminal Code provides for the criminal liability of all corporations, either public or private, excepting the State, the public authorities and the public institutions which develop activities which cannot form the object of the private field. Such corporations are liable for any type of crime provided by the Criminal Code or by special laws, as authors, instigators or accomplices. In order to engage the criminal liability of a corporation, the offence must have been committed when performing the object of activity, to their benefit or on their behalf. The Code also states that the criminal liability of corporations does not exclude the criminal liability of the natural person who contributed, in any manner, to the perpetration of the same offence. Following a criminal trial, a corporation can be sentenced to a main penalty (the fine), together with complementary penalties. There is also a safety measure (the seizure of the corporation's assets) which can be taken against a corporation, as well as interim measures and precautionary measures.

The implications of these outcomes can be already seen in the few court decisions which raised the problem of the criminal liability of corporations. Thus, the criminal decisions against corporations given so far concerned only limited liability companies and engaged their liability for crimes related to copyright, accidental injuries and breaches of the labor law. The companies were convicted together with their administrator and the only penalty inflicted was the fine.

All these aspects show that there is still a long way until this institution shall be fully understood and applied. Other than the issues raised by this study, there are many other topics for discussion, such as the consideration of the turnover as a criterion for the individualization of the sanctions applicable to corporations<sup>32</sup>, the criminal liability of foreign corporations or the introduction of new criminal penalties.

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<sup>31</sup> See Iasi Court of Appeal, criminal decision no. 69 of January 2010, commentary by Andra-Roxana Ilie, *12 Legal Currier* (2010): 695-697.

<sup>32</sup> See Anca Jurma, "Some Proposals *de lege ferenda* regarding the Criminal Liability of the Legal Person", *5 Legal Currier* (2010); 283-286.

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