

THE CRIMINAL LIABILITY OF CORPORATIONS – OVERVIEW ON RECENT CASE LAW OF THE ROMANIAN COURTS

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Abstract

Although the criminal liability of corporations is now consecrated in Romanian for more than five years, there is however some reticence in engaging the liability of such person. Nonetheless, in the past years, it can be noticed an emergence of the files where the problem of the criminal liability of corporations is raised. The purpose of this paper is to present the main issues from the Romanian case law in this field. Several topics are to be mainly discussed, such as the enforcement of criminal sanctions such as the winding-up or the diffusion of the decision, the application of precautionary measures and interim measures against corporations, the possibility to call a corporation in the criminal trial both as accused and as third party called liable for other person's acts etc. During this analysis, it can be noticed that the most common crimes perpetrated by corporations are related to employment issues, copyright, corruption, illegal drug trafficking etc. Therefore, the objectives pursued by the present study are to provide an approach on the most recent 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, interim measures*

Introduction

As mentioned in a previous study¹, in Romania, the criminal liability of corporations was first announced by the doctrine, recommended through an important number of applicable international documents until it (re)gained its place in the Romanian legislation in 2006, when Law no. 278/2006 for the modification of the Criminal Code and of other laws² was adopted. Until that moment, only the administrative liability of corporations could have been engaged.

The criminal liability of corporations therefore celebrated its first five years of life in the Romanian legislation. Like in the situation of any new institution, it is obvious that there are numerous problems raised by the case law in the field of the criminal liability of corporations. Although there are few decisions given by the Romanian courts so far, the issues that such decisions address start to create a framework of the most important matters raised by the “new” institution. Moreover, there are many other files currently being judged by the Romanian courts where the criminal liability of corporations is engaged. This is why it is particularly important to study these decisions or the relevant indictments in this field.

In order to answer these questions, the present study shall present the main issues answered by the Romanian courts in the field of the criminal liability of corporations. In this respect, the relevant decisions shall be evaluated following the same topics as the ones studied for the analyze of the material aspects of the criminal liability of corporations, namely the conditions required by the law in order to engage the criminal liability of corporations and the criminal and criminal procedural consequences.

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¹ See Andra-Roxana Ilie, „Considerations regarding the Criminal Liability of Corporations – the Romanian Way”, (CKS e-Book 2011): 120-121.

² 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.

As mentioned already, the criminal liability of corporations is still a new institution in the Romanian legislation. Hence, there is little case law and little literature on this topic. However, this study shall not deal with all the matters that the said case law refers to. Therefore, this paper is meant to offer a perspective over the main issues raised so far by the criminal liability of corporations in Romania.

I. Relevant case law regarding the conditions required by the law for the criminal liability of corporations

According to art. 19¹ of the Romanian Criminal, the corporations³, 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.

The main questions raised by this article in the recent case law refer to the domain of the criminal liability of corporations. In this respect, it must be reminded that the doctrine, either Romanian or foreign (from the states which inspired the Romanian legislator) affirms that the criminal liability of such entities is general⁴. This means that it is applicable to all legal persons and to all crimes, provided by the Criminal Code or by special laws.

Therefore, the case law in the field of 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 (1), and material one, through the delimitation of the crimes which can be perpetrated by a legal person (2).

1. The legal persons which can be subjects of the criminal liability: tendencies of the Romanian courts

Regarding the legal persons subject to criminal liability, art. 19¹ 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.

Based on this article, it is clear that all private legal persons can be liable under the Romanian Criminal Code, including the commercial companies. Actually, this category of legal persons is mainly concerned by art. 19¹ of the Code, taking into account that they are frequently met in the economic landscape and the most capable of perpetrating crimes through their activities, but the Criminal Code also concerns syndicates, economic interests groups, European economic interest groups, owners associations, political parties, associations, foundations etc.

It can be stated without any doubt that the Criminal Code concerns the lucrative legal persons, as well as the ones without lucrative purpose. Of course, the criminal liability of corporations was mainly created for the lucrative legal persons⁵. In this respect, taking the example of France, a country with more experience than Romania in this field, it is important to mention that, 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)⁶.

³ 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.

⁴ Francis Le Gunehec and Frédéric Desportes, *General Criminal Law*, (Paris: Economica, 2006), 573.

⁵ See Le Gunehec and Desportes, *General Criminal Law*, 573.

⁶ See Claude Ducouloux-Favard, “Four Years of Criminal Sanctions against Corporations”, *Recueil Dalloz* (1998): 395.

In Romania as well, from the analysis of the first decisions against legal persons, it can be noticed that only commercial companies were sentenced. Although the law recognizes the possibility to engage the criminal liability of all kind of commercial companies, it must be noticed that mostly limited liability companies were subject to criminal proceedings and penalties.

In order to decide on this matter, the courts have also sentenced the directors of the companies. Indeed, although according to the Romanian Criminal Code, the criminal liability of corporations is distinct from the one of its legal representatives (also meaning that the first one can be engaged without even being necessary to identify a responsible natural person), the courts tend to

The analysis of pending trials leads to the same conclusion: from all the range of legal persons, prosecutions are being carried out only against limited liability companies. There is one exception known so far, a file where three limited liability companies are being prosecuted together with an association having as object the common administration of pasture, lawns and forests (*asociatie composesorala*, in Romania), established based on the provisions of Law no. 1/2000 for the reconstitution of ownership right over agricultural and forestry fields⁷. The association is being prosecuted for money laundering and forgery, the file currently being judged by the Harghita Tribunal.

In accordance with the principle according to which only legal persons (persons which acquired legal personality), are criminally liable, no prosecutions were carried out against person which lack legal personality, as 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 liability⁸. There is still no case law against corporations which perpetrated offences before the finalization of their registration procedure or during the transformation phase. There is however a criminal trial where a corporation is being judged through its liquidator, as it deals the insolvency procedure. It is therefore confirmed, although the Criminal Code is silent in this matter, that the corporation is criminally liable during the insolvency procedure, taking into account the fact that it does not lack legal personality.

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. As mentioned in previous studies, 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. Such opinion also exists in the New Criminal Code.

Until now, there is only one public institution subject to criminal prosecutions, i.e. a public hospital which is being prosecuted for manslaughter of six babies following a fire caused by a short circuit. The file is currently being judged by Bucuresti District 6 Court.

With respect to other public legal persons, it must be mentioned that, as resulting from art. 19¹ of the Romanian Criminal Code, the criminal liability of the State and of public authorities is expressly excluded.

2. The most common crimes perpetrated by corporations

The domain of the criminal liability of corporations also includes the determination of the crimes which can be committed by moral persons, meaning the material domain of the criminal liability of corporations⁹. The Criminal Code into force, unlike Law no. 301/2004¹⁰, provides for a

⁷ Published in the Official Journal no. 8 of January 12, 2000.

⁸ See Florin Streteanu and Radu Chiriță, *Criminal Liability of Corporations* (Bucharest: C.H. Beck, 2007), 100.

⁹ See Andra-Roxana Ilie, *The engagement of criminal liability of corporations*, (Bucharest: C.H. Beck, 2011): 99-120.

¹⁰ Please note that 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.

general liability, meaning that corporations can be held liable for all crimes provided by the Criminal Code or by special laws.

As mentioned in a previous study¹¹, 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 perpetration¹². 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 papers¹³.

The criminal decisions against corporations given so far engaged their liability for crimes related to copyright¹⁴, accidental injuries and breaches of the labor law¹⁵, fraud, tax dodging¹⁶. Also, there are currently criminal prosecutions against corporations for illicit drug trafficking, tax dodging, money laundering, manslaughter, bribery, forgery, using or presenting forged documents which have as a result obtaining European funds and other crimes provided by special laws.

Therefore, it can be noticed that the most common crimes perpetrated by corporations are related to employment issues, copyright, corruption, illegal drug trafficking, money laundering, tax dodging, meaning mostly economic crimes. Such conclusion confirms the idea that the criminal liability of corporation was recognized especially for those type of crimes, as they are most likely to be perpetrated by such entities.

II. Relevant case law regarding the consequences of a criminal trial against corporations

Of course, once a criminal trial begins against a corporation, there are two sorts of consequences which could be triggered. The first category refers determines the analysis of the criminal sanctions applicable to corporations (1), whilst the second one relates to the provisions of the Criminal Procedure Code. In this respect, it must be underlined that, 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 most common criminal sanctions applied to corporations

Under the Romanian Criminal Code, there are only two categories of sanctions which can be applied to corporations: 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 575 – euros 460.000). The Criminal Code provides that the fine it must be 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

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.

¹¹ See Ilie, „Considerations regarding the Criminal Liability of Corporations – the Romanian Way”: 123.

¹² 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.

¹³ See Streteanu and Chirită, *Criminal Liability*, 397.

¹⁴ 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.

¹⁵ See Iasi District court, criminal decision of March 31st, 2010, commentary by Andra-Roxana Ilie, 5 *Legal Currier* (2010): 280-282.

¹⁶ See Ploiesti Court of Appeals, criminal decision of February 2011, unpublished, in Ilie, *The engagement of criminal liability of corporations*: 119.

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.

Up to now, the fines applied to corporations were of RON 20,000 (for crimes regarding copyright), RON 12,000 (for accidental injuries), RON 10,000 (for breaches of the labor law), RON 15,000 (for fraud) and RON 6,000 (for tax dodging). It can be therefore noticed that the judges tend to apply the fines towards the minimum provided by the law. This could represent a solid argument in favor of the idea that the criminal liability of corporation is not meant to be a reason for ruining the activity of corporations, but mostly a way to prevent serious breaches of the law taking into account the preventive role of punishments.

In this respect, it must be reminded that fine can be applied in criminal matters, as well as in civil, administrative, disciplinary, fiscal or procedural disputes. It is interesting to notice that, many times, the regulations which provide fines different than the criminal ones are even more serious than the Criminal Code with respect to the amount of the pecuniary sanction which can be applied to corporations.

For instance, in the field of capital market, the fines go up to 5% of the share capital of corporations, which can obviously exceed the amounts provided by the Criminal Code. Also, the Romanian Competition Law provides for fines up to 10% of the turnover of the corporations.

We do not plead for an exaggerated high level of the criminal fines applicable to corporations. We do not plead either for the ruining of corporations through the application of fines, irrespective of their nature. However, it is questionable whether a legal system can provide that an administrative offence be punished with a fine much higher than the one provided for a criminal offence. For example, according to a recent Report of the Romanian Competition Council¹⁷, a corporation was fined with an amount exceeding more than 74 times the higher general limit provided by the Criminal Code.

There are two possible solutions to this problem. On one side, it would be possible for the legislator to rethink the Competition Law (and other laws) in the sense of reconsidering some offences as crimes (and not administrative offences). Of course, there are various arguments against such solutions, including the possibility that such actions do not have in fact the level of social danger necessary for crimes. Another solution would be the consideration of the turnover of corporations as an element for the individualization of the fine. Such solution exists in several States (for instance, in Poland) and is recommended by the Romanian legal literature¹⁸. The New Criminal Code provides for this approach, although the fine which can be imposed to corporation is capped to RON 3,000,000.

As per the complementary penalties, they 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

¹⁷ See the Report of February 15, 2011, available at www.competition.ro, visited on February 3, 2012.

¹⁸ See Anca Jurma, "Some Proposals *de lege ferenda* regarding the Criminal Liability of the Legal Person", 5 *Legal Currier* (2010): 284.

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 decision¹⁹.

The initial decisions given by the Romanian courts against corporations did not provide for any complementary sanction. The further decisions however provided for the posting or dissemination of the conviction decision as well as for the winding-up of a corporation (for fraud and tax dodging)²⁰. It is interesting to notice that, when the decision was given (by the first court, by the Court of Appeals and by the High Court), the insolvency procedure was already opened against the corporation and, until the cause was re-judged by the Court of Appeals and the decision remained definitive, the corporation had been already radiated following a civil decision.

There is also a safety measure provided by the Romanian Criminal Code 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. Up to now, there is no decision in this respect given by the Romanian courts.

2. The application of the procedural provisions relevant to criminal trials against corporations by the Romanian Courts

Art. 479¹ of the Criminal Procedure Code 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.

As mentioned in a previous study²¹, 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. Thus, 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.

In the file where a Romanian corporation was sentenced to the winding-up, the administrator of the said corporation was also prosecuted for the same facts. For this reason, the corporation was represented in the criminal trial by the sister of the administrator, which is at least questionable from

¹⁹ 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.

²⁰ See Ploiesti Court of Appeals, criminal decision of February 2011, unpublished.

²¹ See Ilie, „Considerations regarding the Criminal Liability of Corporations – the Romanian Way”: 125.

the point of view of the observation of the principles which govern the representation of corporations during the criminal trial.

Another issue concerns the interim measures which can be applied to corporations. The Romanian 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 perpetrated²². There are no known files up to present where such measures have been taken.

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 taken 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. The distraint was already taken against corporations in several cases by the Romanian prosecutors.

Another important issue raised in the current cases refers to the possibility to call a corporation in the criminal trial both as accused and as third party called liable for another person's acts. Until now, there is a file where the court admitted such possibility. Although we can agree that such solution is legal, it must be observed that the same person could not be punished in both qualities for the same act, because this would mean that a corporation is criminally liable both for its own actions and for another person's acts although we are facing the same offence perpetrated.

Conclusions

As a conclusion, from the analysis of all these aspects, we can determine the main problems that the Romanian courts dealt with in the field of the criminal liability of corporations in Romania.

It can be therefore noticed that up to present only limited liability companies were punished by the criminal courts and that, with one exception, only such legal persons are being prosecuted. Also, it must be noticed that the most common crimes perpetrated by corporations are related to employment issues, copyright, corruption, illegal drug trafficking etc. The companies were always convicted together with their administrators for the same crimes.

With respect to the criminal sanctions applied to corporations, it can be concluded that until now courts applied fines oriented towards the minimum provided by the Criminal Code. Complementary sanctions such as the posting or dissemination of the conviction decision and the winding-up began to be applied by the courts.

Regarding the criminal procedural aspects, the most important issues are related to the representation of corporations during the criminal trial and to the precautionary measures which can be taken towards corporations. The distraint is widely used by the prosecutors in the cases against corporations.

All the aspects raised by these decisions show that there is still a long way until this institution shall be fully understood and applied. The decisions offer however the chance to see why it is so important to the consideration of the turnover as a criterion for the individualization of the sanctions applicable to corporations, what should happen when the same corporation is called in the criminal trial both as accused and as person liable for other person's acts, why it should be considered to create new criminal penalties etc.

²² See Dorina-Maria Costin, *Criminal Liability of the Legal Person in the Romanian Law* (Bucharest: Universul Juridic, 2010): 529-535.

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