SHORT REFLECTIONS REGARDING PRECAUTIONARY AND PREVENTIVE MEASURES ORDERED IN THE CRIMINAL TRIAL AGAINST AN INSOLVENT LEGAL PERSON

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Abstract

The judicial realities have shown us that the field of the precautionary and preventive measures ruled in the criminal trial against the insolvent judicial person is not correctly and efficiently regulated. There are a series of peculiarities that should be attentively analyzed in order to eliminate the negative effects of the interference of the criminal procedures with those of insolvency. The lack of a specific package of standards that help managing such a situation, but also, sometimes, the misinterpretation of the existing regulations in the field may generate situations that go almost beyond the legal persons in such a position.

Keywords: *insolvency, procedure, legal person, precautionary measures, preventive measures, order, trial/ law suit.*

Introduction

This study is intended to approach some aspects implied by the interference of the insolvency procedure with the criminal trial and since the most frequent question of the experts in insolvency has become if, the criminal trials may block the insolvency procedure, it seems convenient to start with the conclusion itself, that criminal trials should not hold back the insolvency procedure.

The lack of clear judicial provisions and especially enacted for managing such issues and sometimes the misinterpretations of the existing provisions may generate situations that the legal persons may find hard to go beyond.

1. Economic measures taken against the insolvent legal person

During a criminal trial, several categories of economic measure can be taken against a legal person and it is important to make a clear-cut distinction between measures that may be taken during the criminal trial and those taken by final criminal judgement.

If the respective legal person is in an insolvency procedure, as a debtor, the distinction above is very important since the existence of an ongoing criminal trial or, on a case to case basis, of a final criminal judgement influences in different ways the insolvency procedure, as follows.

1.1. Measures taken during the criminal trial

The measures that may be ordered during the criminal trial that have economic consequences for the legal person and for the insolvency procedure, are:

- precautionary measures meant to remedy the damages caused by the offence;
- preventive measures;

These two categories of measures raise significant problems with respect to the interpretation of the law and to the correct and efficient management of the two procedures.

1.1.1. Precautionary measures that can be inflicted on a legal person during the criminal trial

Precautionary measures have as a result the preservation of the assets or real estate belonging to the suspect, defendant or to the liable person, with a view to a special confiscation, to an extended confiscation, to the execution of the fine sentence or of the judiciary expenses or to covering the civil damages.

During a criminal trial, against the legal person the court may rule precautionary measures in three situations:

- the legal person has the quality of defendant in a criminal trial in which it may undergo precautionary measures in order to offer the guaranty of executing the fine sentence, the judiciary expenses, the warranty of the special confiscation and of the extended confiscation, the warranty of repairing the damages resulting from the offence;
- the legal person is liable in the civil lawsuit, case in which it may undergo precautionary measures that guarantee the recovery of the damage resulting from the offence, in order to cover the judicial expenditures;
- finally, the legal person may not have any of the qualities above, but it may be imposed precautionary measures, as a third party, in whose custody or possession are the goods that may be affected by the safety measures of the special confiscation or of the extended confiscation, stipulated in art. 112 and 112 [1] of the Criminal code.

A. The legal person, defendant in a criminal trial

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The provisions regulating the criminal liability are contained in art.135 of the New

Criminal code, and from the way of regulating this liability, we can easily conclude that a legal person may frequently be considered liable from the criminal point of view, be it only for offences committed while achieving its own objectives, to its benefit or in the name of the legal person.

Still, as it is, the criminal liability of a legal person is a problem of law that cannot be solved only by the simplistic interpretation of the provisions in the criminal laws, but also by corroborating them with the stipulations of Law 31/1990 on companies, regarding liabilities and the mandate of managers and other persons representing legal persons, and with the stipulations of the Civil code, that are particularly relevant from this point of view.

Thus, according to art. 219 of the Civil code, lawful or illegal acts committed by the representatives of the legal person, are incumbent upon the legal person itself, but only if they are connected to the attributions or to the purpose of the positions it was entrusted with.

At the same time, according to the provisions of art. 72 of Law 31/1990, the obligations and liabilities of managers are regulated by provisions regarding the mandate and by those especially mentioned in this law.

As a result, even in situations when an executive, an agent, the representative of the legal person commit an offence within the sphere of activity developed by the legal person in carrying out the object of its activity, according to the law or to the articles of incorporation, or to the benefit of the legal person (the offence to the benefit of the legal person is that when the profit resulting from the offence goes wholly or partly to the latter or when the profit consists in avoiding a loss)[1] or in the name of the legal person (we must stress the fact that in the name of the legal person, offences may be committed only by the persons officially appointed for representation attributions)[2], in my opinion, the legal person cannot be automatically, ope legis, held liable, except when material evidence shows that the natural person who committed the offence did not exceed the limits of the mandate or the attributions or purpose of the position the legal person entrusted him/her with.

That is why I consider faulty the opinion formulated in the doctrine[3], according to which if hypothetically a natural person commits an offence to his/her exclusive benefit, but in connection with the object of activity of the legal person or even against its interests, given the fact that at least one of the hypothesis alternatively stipulated by the law is met, the legal person may be considered criminally liable.

Accepting the thesis of the criminal liability of the legal person only as a result of meeting only one of the three alternatives stipulated by art. 135 of the Criminal code (the offence was committed while carrying on the object of activity, to the benefit or in the name of the legal person) would mean denying the principle of criminal personal liability, but also a dilution of the criminal and civil liability of natural persons – actual authors of the offences- who, under the umbrella of the liability of the legal person may continue the criminal activities.

The problem of the criminal liability of legal persons is very sensitive in the case of the legal persons whose objects of activity are very complex, who have many employees, multiple shareholders, many executives and it cannot be approached in the same way with the situation of the companies with limited liability, where the manager and the associate are usually taken for the legal person.

Without enlarging upon the issues connected to the criminal liability of the legal persons, the opinion in the doctrine[4] is worth mentioning: the legal persons in the phase of compulsory liquidation may be held criminally liable for offences committed exclusively during this phase, for the reason that the liquidated legal persons maintain the legal capacity necessary for capitalizing goods as money and for the payment of the liabilities.

B. Legal person, a party with civil liabilities

The legal person may undergo precautionary measures with a view to the remedy of the damage resulting from the offence committed by its agent and of the judicial expenditures made during the criminal trial, when it has the quality of a party liable in the civil lawsuit.

Regulations on the tort, in a criminal trial, regarding the legal person as a party liable in the in a civil lawsuit, are to be found in the provisions of the procedural criminal and civil law.

According to art 19. Par 2 of the Criminal code procedure , the civil action in a criminal trial is exercised against the defendant and, on a case to case basis, against the party liable in a civil lawsuit.

According to art. 86 of the Criminal procedure code, a party liable in a civil lawsuit is that person who, according to the civil law, is liable to remedy, wholly or partially, single or jointly, the damages resulting from the offence.

According to art. 1373, par. 1 of the Civil code, the principal is liable to remedy the damage caused by his/her agents anytime the offence committed by the latter is connected to the attribution or to the purpose of the positions they were entrusted with, while according to par. 2 of the same article, the principal is the person who, by virtue of an agreement or by law, exercises direction, supervision and control of the person who has positions or assignments to his interest or to another person's interest.

It goes without saying that the legal person, as the party liable in the lawsuit, will be held responsible for the remedy of the damages caused by its agent only to the extent the latter committed the offence in

[1] F.Streteanu, R. Chirita, *Criminal liability of legal person,* ed. a II-a, Editura C.H.Beck, 2015.
[2] Ilie Pascu, Vasile Dobrinoiu ș.a,, *New Criminal Code annotated, vol I, General section*,Ed. Universul Juridic, 2012, p.696.
[3] Dobrinoiu, ș.a *New Criminal Code annotated, general section, vol. I,* Ed. Universul Juridic, București, 2012.
[4] Jurma, *The legal person – active subject of civil liability*, Editura C.H. Beck, București,2010.

connection with his attributions or functions he was assigned.

The principal will be held liable for the damage caused by his agent(s), according to art.1373 in the Civil code, only when the agent causes damages to a third party as a result of an illicit action outside the field of the agreement, that is tort. The principal will always be held responsible for cases when the agent committed the illicit action to his own interest or upon his request to another person's interest, within the strict limits of the attributions entrusted to him, by complying with the instructions and orders the principal gave him. The principal will also be held responsible for damages caused by the agent when the latter acted by deviation from his assignment, by exceeding his limits and even by abuse of office, if the offence committed was connected to his/her assignment or with the purpose of the entrusted position"[art.1373 par. (1) final part of the Civil code] or, if at least apparently the agent acted – when the harmful event was committed – in connection with the assignment or with the purpose of the entrusted position [art. 1373 par. (3) in the New civil Code][5].

Art 1373 par. (3) stipulates that this condition is not fulfilled and, consequently, the principal will not be held liable in case he "proves that the victim knew, as the case may be, or could know – at the moment of the harmful event was committed – that the agent acted in no relation to the assignment or with the purpose of the entrusted position"; in the New Civil code, bona fide is presumed by the law to the benefit of all the natural and legal persons until proven otherwise; thus, the principal may dispute the relative legal presumption of the victim's bona fide, proving the contrary.

In the New Civil code, the liability of a legal person, as a principal, is regarded as an objective liability, based on the idea of the principal's obligation of guaranteeing everyone's safety in connection with the activity it organizes and develops, by association with or by hiring agents, and it manages it to his own direct or indirect interest. The obligation of guarantee is sustained by the risk of activity which also includes the authority's risk, since between agents and principals there are subordination relations that give the principal the right to give orders, instructions to the agents and to supervise, guide and control them[6].

C. The legal person, third party in the criminal trial

Precautionary measures may be inflicted to legal persons, third parties in the criminal trial who own or have in custody goods that may be subject to a special or extended confiscation.

The goods stipulated by law that can be subject to special confiscation and according to art. 112 in the Criminal Code that, thus, may undergo precautionary measures, are the following:

- goods obtained by committing actions stipulated in the criminal law;
- goods that were, in any way, used or meant to be used to commit an offence stipulated by the criminal law, if they belong to the offender or if, belonging to another person, the latter knew the purpose to which they were used;
- goods used immediately after committing the offence, in order to ensure the offender's escape or keeping the profit or the product obtained by offence, if they belong to the offender or if, belonging to another person, the latter knew the purpose to which they were used;
- goods that were given to determine committing the offence stipulated by the criminal law or for rewarding the offender;
- goods acquired by committing the offence stipulated by the criminal law, if not returned to the injured person and to the extent they do not serve to the latter's remedy/compensation;
- goods whose possession or holding is forbidden by the criminal law.

The precautionary measures with a view to the special confiscation may be taken, as shown above, in most of the cases, when the legal person has the capacity of defendant (or suspect) and less in cases where it has the capacity of third party in the criminal suit. An exception is the situation in which, although a third party and owner of the goods, the legal person was aware of the purpose to which the offender used them, be they goods used to commit the offence, or goods that ensured the offender's escape or the keeping of the benefits or of the product obtained by offence. The incidence of these cases in practice is rare, since we speak about a psychological, cognitive element, that is, about the legal person's awareness of the fact that its goods are used to a certain purpose by the offender, and, in most of the times, it is hard to be proved.

As regards the extended confiscation, according to art. 112^1 in the Criminal code, this measure can be taken only if there is a decision of conviction for one of the offences mentioned by the legislation and, given their peculiarities, only certain of them can be committed by the legal person, for example: offences against the patrimony, tax evasion, violations of the customs regime, disclosure of classified economic information, unfair competitions, offences against the financial interests of the European Union.

According to art.112^1 in the Criminal code, the extended confiscation may also be decided if the value of the goods (obtained by the convicted person during the previous 5 years, and, if necessary, after the offence was committed, until the issue of the referral note) is obviously exceeding the income obtained illicitly by the convicted person and if the court has the firm belief that the goods were obtained by offences of the kind stipulated in the same judicial text.

According to art 112^1 of the Criminal code, the value of the goods transferred by the convicted person

[5] Oana Andreea Motica, Special Conditions of Tort Liability of the Principal for Damages caused to Third Parties by Illegal Acts of Agent, avaliable at https://drept.uvt.ro.

[6] www.legeaz.net/noul cod civil, principal's liability for the agent's action.

or by a third party, to a member of the family or to a legal person controlled by the convicted person will also be taken into account.

According to par. (7), money and goods obtained from the service or use of the goods confiscated as well as the goods produced by the latter, will also be confiscated[7].

At present, the measure of extended confiscation, as per criminal laws, may be taken in several cases against a legal person, as compared to the special confiscation, at least in its capacity of legal person controlled by a convicted person, but criminal laws, as conceived by the law makers, are rather vague and the law maker did not establish a procedure to be followed for determining the incomes during the 5 years before and after committing the offence, the incomes that exceed the licit amounts, as, for example, stipulates Law no. 176/2010 regarding integrity in public offices. At the same time, the too vague wording of this legal text, according to which the confiscation may be decided if the court "firmly believes" that the goods result from offences, has been received with a grain of salt. During the criminal suit, all the decisions of the court, both criminal and civil law decisions, are based only on firm proofs, on material evidence and not on presumptions and, on the other hand, the question arises if by these decisions, the law maker did not deviate from the constitutional principle of the licit acquirement of property, stipulated in art.44 par. (8) of the Constitution.

The Constitutional Court's jurisprudence states that "regulating this presumption of innocence does not impede the investigation of the illicit character of the acquirement of property, the task of presenting the proof being incumbent on the part invoking it. To the extent the interested party proves that some goods, part of, or all the property of a person was acquired illicitly, for those goods or for the property acquired illicitly, confiscation may be decided, "under the conditions stipulated by the law'. The Constitutional Court's jurisprudence also states that "regulating the presumption of innocence does not impede the primary or authorized legislator to implement the provisions of art. 148 of the Constitution – European Union integration, to adopt regulations that allow the full compliance with the legislation of the European Union in the field of fighting criminality", with direct reference to the Framework- Directive of the Council of February 24th 2005 regarding the confiscation of products, instruments and goods connected with the offence[8].

Still, due to the lack of regulations in a probation system, the lack of a procedure defining clear rules for overturning this relative legal presumption, but also appropriate procedural guarantees for the owners of goods, the legal provision regarding the extended confiscation may be regarded as an interference in the right to a private property, according to art.1 of the Protocol no.1, additional to the Convention for the defense of human rights and fundamental liberties.

The court's firm belief that the goods or money owned by the convicted person might result from offences committed before the one for which the conviction was decided, can be based only on evidence, the criminal trial being governed by the principle of finding the truth based on evidence, or speaking about previous actions that are not the subject of the *pending* judgement and for which, as a result, no evidence has to be produced, this firm belief cannot be but subjective, arbitrary. The arbitrary will also be found in the quantification of the sums of money that will be confiscated, in distinguishing the licit from the illicit incomes. Not very clear is also the way of establishing the sums of money transferred to the legal person controlled by the convicted person, but, most probably, the law maker had in mind the contribution/ shares within the legal person, under the form of goods or sums of money, equities or interests owned by the convicted person.

Cautiousness in applying these rules regarding the extended confiscation is even more necessary as we also speak of goods belonging to third parties that have the constitutional right to have their property rights protected. Any interference with the exercise of this right can be justified only by strong beliefs, based on material evidence, on the respect of all the procedural guarantees and of the right to defense, including the third parties, meaning that their goods, all or part of them, result from offences of the type stipulated in art.112¹ Criminal code – provisions that are also to be found in art.8 par.(8) of the 2014/42/EU Directive.

It is also important to mention that according to the Constitutional Court's decision no. 365/June 25th 201, the precautionary measures connected to the extended confiscation can be taken only for goods acquired after Law no.63/2012 took effect, while the offences should have been committed after that date.

1.2. Measures taken as a result of a final criminal judgement

If the criminal trial is over and the legal person, be it convicted, or a party liable in a lawsuit, was deemed to pay damages to the civil parties, the judiciary expenses or condemned to a criminal fine (as defendant), or if a special or extended confiscation was inflicted on the legal person, according to art 112 or 112¹ of the Criminal code, we will face certain and exigible claims in favor of common creditors or, on a case to case basis, in favor of the State. Within the insolvency procedure for legal persons, these certain and exigible claims do not differ much from the rest of the competing claims, the only difference being that they are decided by final judgement and can no longer

[7] By the decision of the Constitutional Court no. 11/2015, they found out that the dispositions under art. 1121par.. (2) letter. a) din of the Criminal Code are constitutional to the extent to which the measure of extended confiscation will not apply to assets acquired prior to coming into force of Law no.. 63/2012 on amending and supplementation of the Criminal Code of Romania and Law no.. 286/2009 on the Criminal Code.

[8] published in the official Gazette of Romania, Part I, no. 440 / 23.06.2011.

be challenged in court. Moreover, they are not subject to the trustee's or liquidator's verification, according to art 58, par (1) let. K and art 64 let. f of Law no. 85/2014.

The fact that these claims have the judicial regime of the common receivables or of tax receivables results from the provisions of the criminal procedure that regulates the way the claims are executed.

Thus, civil damages and judicial expenditures due to the parties and established by criminal judgement, will be executed according to the civil law, as stipulated in art.581 of the Criminal code procedure.

As regards the safety measures connected to the special or extended confiscation, according to art. 574 of the Criminal code procedure, the confiscated goods will be handed over to the bodies lawfully appointed to take them over or to capitalize them. If the confiscation regards sums of money that are not registered in banks, the judge appointed for the execution will send a copy of the operative part of the judgment to the tax bodies, the execution being performed according to the legal provisions on budgetary debts.

As a result, in case the criminal trial is over, the claims resulting from the final criminal judgement will be capitalized against the insolvent debtor, just like any other claims, in a collective procedure and having the priority conferred by the insolvency law.

2. Interference of safety measures with insolvency procedure

Against a legal person under the insolvency procedure they can order security measures, in the criminal trial, for the purposes already above presented. Naturally there is this question arising: what is going to happen with the assets affected by the safety measures, in relation to the ongoing insolvency procedure?

We should seek the answer in the definition given by the law in connection with establishment of the safety measures, respectively to avoid hiding, alienation or removing the assets from investigation, this is, assure the creditors' chance to obtain enforcement of the enforceable title against the debtor, at the time of delivery of the final judgment, and also in respect of the definition given by the law for the actual safety measure, and also the definition of the safety measure itself, according to art. 249 par. 2 of the Criminal code procedure, respectively preservation of movable and immovable assets by establishing a seizure on them.

Preservation of the movable or immovable assets means for the owner of the assets loss of the right to dispose of them, execute deeds on the disposition of the assets, according to the meaning of the word preservation itself.

Such preservation may not have the effect of, in principle, blocking the insolvency procedure, yet with certain nuances. To the question whether the criminal investigation can hold down the insolvency procedure, there is no simple answer: the criminal investigation cannot hold down the insolvency procedure since there is no legal disposition in this respect, yet at the same time, it does not allow the procedure to take place normally, according to the provisions of the Insolvency code.

We should point out that at this time, the criminal procedure no longer holds down the civil procedure, absolutely and unconditionally, as provided by former criminal procedure provisions.

According to the provisions of art. 27 par. (7) Criminal code procedure, when the victim of an offense decides to initiate an action before a civil court, the lawsuit before the civil court shall be suspended after initiation of the criminal action, yet solely until settlement of the criminal case by the court of first instance, and no longer than one year.

Setting aside the fact that suspending the law suit before the civil court, in carrying out the right of indemnification, may not exceed one year, and the civil law suit may continue unimpeded even when there is no final decision in the criminal procedure, we should add that , if suspending of a civil action before the civil court is grounded on the fact that the object of civil action itself is based on the damage caused by an offense, the insolvency procedure is not a civil action, and the object thereof is not to *establish the claims* of various creditors, which are usually preexistent, but its object is *to capitalize* such claims, by a *collective procedure* and following a certain order as provided by the law, and also *set up a collective procedure in order to cover the liabilities of the debtor under the insolvency procedure.*

The legal provisions in this matter make few references and definitely are not helpful in the settlement of this issue.

Thus, according to art. 75 of Law no. 85 / 2014, " starting with the date of commencement of the procedure, all judicial and extrajudicial actions or enforcement measures for *establishment of the claims against the debtor's assets will be lawfully suspended.* Recovery of their rights will only take place within the insolvency procedure, by filing the request for registration of the claims.

According to par. (2) , the lawful suspending provided under par. (1) will not operate for: (1) the debtor's appeals against the actions of one/several creditor/s commencing before starting of the procedure, and also the civil actions brought in the criminal trials against the debtor".

According to art. 91 of Law no. 85/2014, "(1) the assets alienated by the judiciary administrator or judiciary liquidator, in carrying out its attributes as provided under this law, are acquired free of any encumbrances, such as privileges, mortgages, pledges or detention rights, seizures, of any kind. The precautionary measures ordered in the criminal trial for the purpose of special and / or extended confiscation are excepted from this regime.

(2) By way of exception from the provisions under art. 85 par. (2) of the Civil code, removal from the land book of any encumbrances and interdictions as

provided under par. (1) will be carried out in compliance with the deed of alienation signed by the judiciary administrator or judiciary liquidator."

According to art. 102 par. (8) of the Insolvency code, the claim of a damaged party in the criminal trial falls under the suspensive condition, until the final settlement of the civil action in the criminal trial in favor of the damaged party, by filing a request for registration of the claim. In case the civil action in the criminal trial is not settled until closing of the insolvency procedure, either due to the success of the reorganization plan, or the liquidation, any claims resulting from the criminal trial will be covered by the properties of the re-organized legal person or, where necessary, from the amounts obtained in the action of joint patrimonial liability of the persons having contributed to the insolvency of the legal person, in compliance with the provisions of art 169 and the subsequent ones.

The above provisions, beside the fact they do not settle the issue, are somehow contradictory.

The interpretation of the provisions under art. 75 of the Insolvency code reveals the fact that, the civil action brought in the criminal trial and the insolvency procedure are taking place at the same time, and the insolvency procedure can block any other civil actions on the *establishment of claims* against the debtor's property, *less the civil action initiated in the criminal trial.*

Upon the systematic and grammatical interpretation of the dispositions of art. 91 of the Insolvency code it results that they can sell also the assets under criminal seizure, with only one exception concerning thereof , namely they will not be sold free of encumbrances (respectively precautionary measures ordered in the criminal trials, in view of the special confiscation and extended confiscation)

The text of art. 91 of the Insolvency code is criticizable. We can see that, although art. 75 of this code seems to grant a certain protection to the potential creditor in the criminal trial, which could be the person suffering damage by the offense, in case his claim for damages is accepted, but this can be the state as well, when the special or extended confiscated is ordered, art. 91gives up the protection of the ordinary creditor and preserves solely the right of the state, maintaining solely the seizures established in view of confiscation.

Nevertheless, it is essential to retain that, by maintaining the seizure in favor of the state, even after selling the assets, the lawmaker indirectly admits that the assets can be sold prior to the completion of the criminal trial.

Thus, according to jurisprudence[9], they appreciated that, "establishment of preventive seizure will not prevent selling of the assets in the insolvency procedure, and will not affect the distribution order of claims in the procedure, the only scope of the seizure being preventing the debtor to alienate his property in detriment of creditors, for whom it might be impossible to recover the damage caused by the alleged offense imputed to the debtor.

Blocking the recovery in the insolvency procedure, similarly with blocking the enforcement, would signify non compliance with the principle of proportionality between the demands of the general interest and individual rights imperative defense.

(…). The text of art. 91 of Law 85/2014 refers to the pre-existing situation of alienating, by the judiciary administrator or judiciary liquidator of the assets under seizure, therefore the measures taken in the criminal trial are compatible with the insolvency procedure, and the assets under seizure are not overlooked. The criminal law establishes an interdiction for the suspect, accused or civilly liable party to carry out activities of voluntary disposal of the assets making the object of seizure.

In the hypothesis of the assets under pre- existing warranty, the mortgagee has priority even when there is a preventive seizure established in connection with the asset, noted prior to the mortgage, since the mortgage is a real accessory right granting its holder a pursuing right, whoever is holding it, and a preferential right in order to satisfy his claim against the other creditors (in this respect see also the Decision of the High Court of Cassation and Justice, Criminal section, no. 1392/2013)".

We consider that, in principle, the precautionary measures in the criminal trial should not block the insolvency procedure, nevertheless, when prior to the time of distributing the amounts of money resulted from the liquidation of the debtor's property the criminal trial has not been completed, at least this distribution should be postponed until obtaining an executory title. Otherwise, the persons suffering damages caused by the offense, and the state, in case of confiscation, would be definitively deprived of the right to recover their claims against the debtor, the more so as the law allows that their civil action continue against the debtor under insolvency procedure.

Conditioning the claim settlement of the civil party in the criminal trial by the decision of personal liability of the administrator or the person having contributed to the insolvency of the legal person is opposed to the provisions of art. 75 which allow continuation of the civil action in the criminal trial, since this personal liability is totally unsure, both regarding the existence and the amount thereof.

As regards the opinion expressed in practice, according to which it is impossible to sell the assets under seizures, during the insolvency procedure, taking into account that the state, following the confiscation , would be granted a preferential right, and I consider, being in agreement with the experts in the field of commercial and insolvency law, that such right cannot be granted.

[9] Resolution dated 10.02.2017 of the Court of Appeal Bucuresti, First Criminal Section, delivered on case no. 1022 / 2/ 2017.

Special confiscation and extended confiscation represent economic safety measures , having direct effects on the property regime, and representing a specific way of acquiring properties by the state, as a consequence of Court decisions, and , implicitly, a means to put out the property right of the subject, as of right, suffering this sanction.

There is no legal disposition which confers such preference to the state, the claim acquired by it being a budgetary, tax claim.

3. Preventive measures ordered during the criminal trial

As regards the preventive measures that can be ordered during the criminal investigation, and also during the Preliminary Chamber procedure, and during the trial, against the legal person; there are five measures according to art. 493 of the Criminal Procedure Code and can be ordered:

- if reasonable doubt exists that the legal person committed an action falling under the criminal law;
- solely in order to ensure the good procedure of the criminal trial.

Mention should be made that the law does not condition taking the preventive measure of the nature of the offense, or seriousness thereof, which means that theoretically, the preventive measures against legal persons can be taken for any kind of offenses, solely on the condition that they are necessary for the good performance of the criminal trial.

Unlike the preventive measures taken against natural persons, for which the criminal procedure law provides conditions relating to the seriousness of the offense, resulting from the punishment limits or enumeration of the offenses for which they can order the preventive measures (art. 223 par. 2 of the Criminal procedure code), and the offender's behavior (the defendant ran away, went into hiding, in order to avoid the trial, tried to influence finding out the truth, continued to commit offenses), conditions related to protection of public order – letting the defendant go free may endanger the public order, for the legal persons the lawmaker no longer provided such conditions, and only stipulated that preventive measures can be ordered for the good performance of the criminal trial. According to the modality of setting the conditions, we may draw the conclusion that the lawmaker was more permissive, reagrding the preventive measures against legal persons, which can sometimes lead to arbitrary measures against them and prejudices to the good performance of their activity.

We should point out that, in the case of legal persons, the legal dispositions (art. 493 of the Criminal procedure code) do not provide a maximum limit of the preventive measures, which obviously contravenes the prevention regime that applies to natural persons. Nevertheless, by Decision no. 139/2016, the Constitutional Court turned down the constitutional challenge of the dispositions of art. 493 of the Criminal procedure code, holding that " If a maximum limit up to which they can extend/maintain the preventive measures against the legal person would be set up, then the scope of the criminal action itself is denied, which is to hold the legal person liable for criminal offense, since, by allowing the dissolution, liquidation, merger or splitting thereof, the object of the criminal action, thus defined by art. 14 of the Criminal procedure code, would be left without purpose, Thus, although when the criminal trial has ended, the Court would order the punishment of the accused, this could no longer be held liable for criminal offense, since it lost its identity due to the legal disappearance thereof and removal from the Trade Registry"

Nevertheless, there is a legitimate question arising: what is happening with the activity of a legal person , the accused in a criminal trial, when certain activities thereof have been forbidden, as a preventive measure, and the criminal trial would last for several years. Although the legal person enjoys the presumption of innocence, and theoretically is innocent until being sentenced by final judgment, extended preventive measures may lead to the liquidation *de facto* thereof, prior to being found guilty.

3.1. Interdiction to initiate or suspend the procedure of dissolution or liquidation of the legal person

In fact, this preventive measure includes two hypothesis: first, interdiction to initiate or suspend the procedure of dissolution or liquidation of the legal person, when such procedure was not yet initiated, secondly, suspending the procedure of dissolution or liquidation, when it was already initiated.

Since the terms used are rather clear, I consider the issue refers strictly to the dissolution and liquidation, and not the insolvency procedure, which the lawmaker did not understand to forbid, as a preventive measure, specifically taking into account the declared scope of this procedure.

The reason for which the lawmaker provided this preventive measure is obvious. Any legal person suspected for having committed an offense cannot cease to exist at the time of its investigation, since not only that this would any longer hold the capacity of a legal person, and therefore the passive subject of the criminal action, but it might lose its patrimony as well, and the consequence would be the impossibility to be held liable for a criminal offense, as the case may be.

3.2. Interdiction to initiate or suspend the merger, splitting or decrease of the registered capital of the legal person, which started prior, or during the criminal investigation

The above reason also applies in the case of this preventive measure, since they are interested in preventing the risk that the legal person ceases to exist by merger with other legal person, or by absorption by other legal person, or by distributing the patrimony of the legal person terminating its activity, between two or

among several legal persons that already exist, or which are established as such. The measure does not apply to a legal person under insolvency.

3.3. Forbid certain asset transactions that may cause a significant decrease of the patrimony or the insolvency of the legal person

This is the preventive measure usually taken against the legal persons in criminal trials, leading to many discussions regarding the generic character of the text.

For instance, in a criminal case on the dockets of the Court of Appeal, Bucharest[10], Second Criminal Section, concerning the appeal filed by a trading company, accused in a criminal file, against the Court resolution ruling the extension of the preventive measure of forbidding the asset transactions that may cause the decrease of the patrimony or insolvency of the legal person, for another 60 days, they had ordered against the company investigated for several tax evasion offenses, the preventive measure of forbidding the asset transactions that might cause the decrease of the patrimony or insolvency of the company, without actually specifying which asset transactions were forbidden.

The Judge of Rights and Liberties of the Court of first instance ordered this measure while he actually held by the resolution for extending the preventive measure that the company was already under the insolvency procedure, but that, there was the risk that the company assets were decreased within the general procedure of the insolvency, prior to the final settlement of the criminal trial.

As a consequence of the preventive measure ordered in the case, the company could no longer carry out any kind of activity, or any kind of operations, all the accounts thereof being blocked, and even the salaries could not be paid, on the grounds that all the company's economic and financial transactions had been forbidden.

The legal person appealed against this resolution, by the judicial administrator, who essentially, besides the argumentation on the non existence of guilt in perpetrating the acts of which the company was accused, also showed that the text of law specifically provides that solely those asset transactions that may cause the negative results provided by the law can be forbidden, and not all the economic and financial transactions, and that the legal person carries out solely the activity for which it was established, according to Law no. 31/1990, while totally forbidding the asset transactions will represent the dissolution *de facto* of the legal person, prior to the delivery of the solution on criminal grounds, and by the unlawful deprivation of property, and that it is impossible for the company to perform the preservation and management of the assets, and also to support the legal procedures for the recovery of the claims from its own debtors.

The Judge of Rights and Liberties of the Court, having assessed the resolution against which the appeal was filed, ruled that it did not comply with the legal demands:

"According to art. 493 par. 1 of the Criminal procedure code, the Judge of Rights and Liberties can order, if reasonable doubt exists to justify the reasonable suspicion that the legal person has committed a criminal offense as provided by the criminal law and only in order to provide a smooth operation of the criminal trial, one or several preventive measures be taken, among which forbidding certain asset transactions, that may cause the decrease of the company's patrimony/assets or the insolvency of the legal person (letter c).

According to par. 4 of the same article, the measure can be extended during the criminal investigation, and each extension may not exceed 60 days.

According to par. 5 the preventive measures shall be ordered by the Judge of Rights and Liberties by reasoned judgment; this demand being also provided by art. 203 par. 5 of the Criminal procedure code.

The Court resolution challenged in this case does not meet the prerequisite condition of its motivation, which entails consequences both legally and as regards the impossibility of controlling thereof, in this appeal. The judgment includes solely one motive, which represents the grounds for extending the measure of forbidding the transactions that may cause the decrease for the company's assets or the insolvency of legal person , respectively, "the risk continues that the company assets be decreased during the insolvency procedure prior to the final settlement of this criminal file". This sole argumentation will not cover the non-existing motivation and it is not compatible with the exceptional character of the preventive measures.

(…) The existence of the reasonable doubt that the company committed the offense provided by the criminal law is not sufficient itself to take/extend the measure, but the measure shall be taken solely to assure the good operation of the criminal trials, and this condition was not analyzed at all by the Judge of Rights and Liberties of the Court of First Instance, and no specification was given regarding the reason for which such measure was deemed necessary for the good operation of the criminal trial, and not to what extent the good operation would be prevented in the absence of this measure.

Although in the judgment it was specified that there was the risk that the assets be decreased during the insolvency procedure, the judge did not show the circumstances based on which he concluded that there was the risk of decreasing the assets, and this while preventive measures were applied to the company assets and the insolvency procedure against the company was controlled by the syndic judge.

As regards the other operations, as correctly presented by the accused person in the appeal, such operations were not individualized, since there are many

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categories of operations which, in either way, can decrease the assets, yet it is important to know whether they belong to the category of preservation actions, or management or disposition. Forbidding all the operations as a whole equals with the interruption of the company activity, and liquidation in fact thereof, while this is not the scope of the provisions of art. 493 of the Criminal procedure code. No actual specification of the grounds making it necessary, in the opinion of the judge of first instance, extension to the measure, non identification of the operations forbidden for the accused party, make the control of the resolution of the appeal impossible.

In this case, the argumentation of the accused was not at all examined, and the forbidden operations were not specified, and the accused party was thus faced with the impossibility of carrying out its activity any more.

At the same time, we find that the connections between the two procedures in which the accused is a party were not clarified, respectively the criminal procedure and the insolvency procedure, taking into consideration that, according to art. 46 of Law no. 86/2005, all the acts, operations and payments performed by the debtor are null except for the operations and payments authorized by the syndic judge. Therefore, it is not clear, what was allowed by the syndic judge to the debtor and what was forbidden by the judge of rights and liberties"

Consequently, in view of the above considerations, according to art. 282 par. (1) of the Criminal code procedure and art. 6 of ECHR, the Instance – Judge of Rights and Liberties admitted the appeal filed, annulled the court resolution challenged and sent the case for retrial to the same instance.

3.4. Forbid signing of certain legal acts, as established by the judicial body.

This measure is similar to the above one, referring to legal acts strictly determined, and deemed by the judicial body that might influence the proceedings of the criminal trial.

3.5. Forbid activities of the same nature as those on the occasion of which the offense was committed.

This preventive measure seeks to prevent repetition of the material criminal acts, although actually it is an ancillary punishment.

4. Conclusion

The criminal liability of the legal person in general, and of that under insolvency procedure , in particular, represent a rather complex issue, which definitely requires a more accurate regulation, especially concerning the area of confluence of the two procedures , and which, according to the law seem to be parallel although in reality they intermingle with each other and represent an inconvenience for each other.

The preventive measures that may be ordered against the legal persons need revaluation, in order they may not lead to the dissolution *de facto* of the legal person, prior to settlement of the guilt thereof by means of the judgment.

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