CRIMINAL LIABILITY OF A LEGAL ENTITY ACCORDING TO ROMANIAN LAW NO.46/2008

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Abstract

The purpose of this paper is to highlight the main practical issues concerning the enforcement of Law no.46/2008, in regard to the protection granted under the regulations of title VI, in the particular case when the perpetrator is a legal entity.
In order to establish a frame for the content of this article, alongside the introduction, its structure shall be divided in three parts.
The first part will point out the terminology used in Romanian Law no.46/2008, which shall prove to be necessary for the analysis proposed.
The second part will refer to specific provisions found in Law no.46/2008, mainly articles 106-110, with a brief reference to the Decision of the Romanian Constitutional Court no.670/2008, alongside the Decision given in an appeal in the interest of the Law, by the High Court of Cassation and Justice, no. XII/12.02.2008, and will also consist of a critical approach, from a practical point of view, of the provisions earlier mentioned, holding into account the manner of incrimination by reference to another provision, or to another normative act.
The third and final part will consist of brief conclusions as resulting from the present article.

Keywords: *Forest protection, criminal liability, moral person, legal entity, practical difficulties*

Introduction:

The idea for this paper occurred while trying to establish the compatibility of Romanian special criminal legislation with the criminal liability of legal entities, especially when the legislation referred to is prior to the enforcement of the actual Romanian Criminal Code, namely Law no.286/2009.

The importance of this issue is given by the need to effectively protect the national forest fund, mostly because the greatest environmental damages are not made by individuals acting separately, but by organizations, regardless of their legal form.

My approach was to analyze particular crimes provisioned by title VI of Law no.46/2008 taking into account especially the problems that emerge alongside the interpretation of legal norms as requested by the need of clarity and predictability of criminal law, when the perpetrator is not an individual, but a legal entity.

Mainly because judicial practice lacks in this matter, I focused on analyzing the provisions earlier mentioned in a critical manner, expecting to cover some of the issues that may be raised in practice, without claiming that my approach is exhaustive.

Unfortunately, dedicated literature in this matter is hard to encounter, reason for which my paper deals with issues which are not definitively settled neither in practice nor in theory.

Specific terminology:

It is useful, for the purpose of this paper, to highlight the terminology used in Law no.46/2008[1].

Art. 1 of the Forest Code, in its first paragraph, defines the "*national forest fund*" as all forests, fields intended for afforestation, land that serves the needs of crops, production, or forest administration, ponds and other fields with forestry destination, including those that are not productive, part of forest arrangements on the 1st of January 1990, including surface modifications, done according to the law, regardless of the form of property exercised upon the land[2].

The second paragraph provides that, according to the first paragraph, the *national forest fund* includes:

a) forests,
b) fields under regeneration, and plantations established under forestry purposes,
c) fields intended for afforestation,
d) land that serves the needs of crops: nurseries, solariums, plantations and crops of mother-plants,
e) land that serves the needs of forest production: walnut plantation, trees destined for Christmas, ornamental trees and shrubs and fruit trees,
f) land that serves the needs of forest administration: fields intended to represent feed for the game, and for the production of

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[1] This article is based on conditions of criminal liability of the legal entity imposed by art.135, 136 and 137 of Law no. 286/2009 regarding the Criminal Code of Romania, enforced since the 1st of February 2014. Any reference to the Forest Code, will be considered made to the form republished in the Official Gazette, no.611/12.08.2015, after the last amendments made by law no.232/2016.

[2] D.Marinescu, M.C.Petre – *Treaty of environmental law* (original title: *Tratat de Dreptul Mediului*), Univesitara Publishing House, Bucharest, 2014, pag.271.

feed, or fields temporary used by the forestry staff,

g) fields occupied by constructions and the yard associated with them: administrative headquarters, cottages, pheasant raising facilities, trout raising facilities, animal breeding grounds for hunting purposes, roads and railways used for forest transportation, industrial spaces, forestry technical equipment, fields temporary occupied or affected by obligations or litigation, alongside forest fields in the border corridor and the border protection strip and those intended for objectives within the State Border Integrated Security System,

h) ponds, and non-productive fields, part of forest arrangements.

Paragraph 3 of article 1 states that all surfaces included in the national forest fund are defined as *fields with forestry destination*.

Art.2, paragraph 1 defines the "*forest*" included in the national forest fund as the surface of at least 0,25 ha, covered with trees, that must reach a minimum of 5 meters at maturity, in normal growth conditions.

The second paragraph of the same article states that a "*forest*", as defined by the law, contains a) the surfaces used as forest, part of forest arrangements on the 1st of January 1990, including surface modifications, done according to the law, b) forest protection curtains, c) fields on which juniper thickets are located, d) fields covered with forested pastures with a higher consistency than 0,4, calculated only for the surfaces effectively occupied by forest vegetation, e) plantations forest species located in the protection area for hidrotechnic developments or land improvements on fields that are part of the State public property, if they satisfy the conditions imposed by paragraph 1 of the same article, earlier mentioned.

Paper content:

Title VI of Law no.46/2008 reunites the crimes provisioned by this law, and, to indicate the main practical issues that can rise from the interpretation of these provisions a punctual analysis will be made on art.106-110 of the earlier mentioned law.

Art.106, in paragraph 1 incriminates the reduction of the national forest fund surface, contrary to the provisions of art.36 and 37 of Law no.46/2008 which represents a crime and is punished by prison between 6 months and 1 year, or a fine.

The act incriminated, more precisely the material element, is the *reduction* of the national forest fund surface. This can be done either by an action of deforestation, destruction or by an omission, like the avoidance of taking the legal measures for the protection of the integrity of the forest, or of other components of the national forest fund, as defined by art.1 of Law no.46/2008. For this act to be a crime, it is essential that the reduction of the national forest fund surface to be done with disrespect to the provisions of art.36 and 37 of Law no.46/2008.

Article 36, paragraph 1 stipulates that by exception from the provisions[3] of art.35, the reduction of the national forest fund surface is allowed by the removal of fields necessary to accomplish objectives of national interest, declared of public utility, according to the law, and of fields on which production facilities and/or services for strategical defense in the purpose of national security are placed.

The second and third paragraphs of this article mainly stipulate that by the request of the beneficiary of the land removed from the national forest fund, in order to fulfill the objectives indicated in paragraph 1, the value of the land can be compensated by another land of at least equal value and surface. In this case, the value of the land definitively removed from the national forest fund will not be reimbursed, but other monetary obligations will be paid in advance.

The fourth and fifth paragraphs essentially indicate that no compensation or other monetary obligations are owed if the reduction of the national forest fund will be done at the request of the Ministry of Defense for strategical defense reasons. Equally, if the land measures less than 400 square meters, at the request of the Ministry of Internal Affairs, it will be excluded from the national forest fund without compensation or other monetary obligations, only if it will be used for the accomplishment of an objective within the State Border Integrated Security System.

Art.37, paragraph 1 states that surfaces from the national forest fund can be definitively removed, only if their value is compensated, without the reduction of the entire surface of the national forest fund and with anticipated reimbursement of monetary obligations, only for the fields necessary for the edification or extension of the following categories of objectives:

a) exploitation of mineral resources indicated in art.2, paragraph 1 of Law no.85/2003[4],

b) tourist objectives, including touristic facilities, places of religious worship, medical and sporting objectives, or social objectives done only by the providers of social services, for the administrative territory in the area of economic interest of the Danube Delta Biosphere Reserve mooring pontoons for tourist boats in order to provide food and fuel, floating pontoons and fishing shelters for fishermen organized in associations,

c) holiday houses, only in the private owned surfaces of national forest fund,

d) objectives installed in the national forest fund prior to 1990, alongside the surfaces related to actives sold by the National Forest Administration Romsilva,

[3] Art.35 of Law no.46/2008 stipulates: The reduction of the national forest fund surface is prohibited.

[4] Law no.85/2003 regarding mines, Published in the Official Gazette no.197/27.03.2013.

e) sources and networks of water and sewerage, sources and networks of energy from conventional or regenerable resources, networks and systems of communication, roads of districtual or local interest, recreational parks, theme and educational parks, alongside hidrotechnical and fishing facilities,
f) exploration of the following mineral resources: coal, useful rocks, mineral aggregates, ores, the exploration, exploitation and transport of petrol and natural gas, alongside the installation, repairs, maintenance and dismantling of transportation networks used for petrol, gas and electric energy distribution.

Paragraph 2 of the same article stipulates that the location for the objectives found in paragraph 1, letter c, shall be done according to the following conditions: a) both construction and land are property of the same entity, b) the maximum surface that can be removed from the forest fund, including the building, access road and yard is of maximum 250 square meters if the entire forest property is larger than 5 ha., and maximum 5%, but not more than 200 square meters if the entire forest property is smaller than 5 ha.

Paragraphs 3 to 10 of art.37 establish particular rules regarding the manner of compensation for the fields removed in accordance with paragraph 1.

As previously pointed out, the incrimination is activated only if the reduction of the national forest fund surface is contrary to art.36 and 37, therefore, art.106, paragraph 1, consists of an incrimination *per relationem*, with reference to another article from the same law.

In what concerns art.36, only the first paragraph establishes the conditions in which the fund can be diminished, and the other four paragraphs indicate particular provisions regarding the compensation or reimbursement for the land removed.

I find this particular case imprecise, mainly because it refers to all provisions of art.36, not only to the first paragraph, and the effects of an interpretation regarding all these provisions might exceed the intentions of the legislator. As a consequence, in a theoretical case, if a legal entity exploits, without legal conditions, part of a forest by illegally placing an industrial building on the site (contrary to paragraph 1), the legal qualification of this act will be the same as in the case of a legal entity that intends on building a public utility facility and offers in compensation a field of the same dimensions, but of an inferior value (contrary to paragraph 3). Here, actions themselves and the effects of the crime are completely different, and it is excessive to qualify both acts under the same provision.

Also, I cannot consider the provisions of paragraphs 2,3,4,5 as legal stipulations of a action or omission allowed, because they are only used to indicate the conditions in which a compensation or reimbursement for the value of the land removed is necessary.

In what concerns art.37, I believe that for the same reasons as shown above, only paragraphs 1 and 2 are able to represent the complimentary part of the incrimination, because these are the only provisions that establish the actions allowed in order to reduce the national forest fond. Paragraph 2 consists of a special provision for the case in which the forest fund is reduced in order to allow a holiday home setup, reason for which I believe it can be treated as a supplement of paragraph 1, letter c.

Equally, I must add that the legislator regulated in art.37, paragraph 2, the situations in which the entire forest property is *strictly larger or strictly smaller* than 5 ha, without providing any rules if the forest property is exactly of 5 ha.

Therefore, I believe that art.106, paragraph 1 should have only indicated art.36, paragraph 1 and art.37 paragraphs 1 and 2, not the entire article, in order for the incrimination to be adequate.

Art.106, paragraph 2 states that the same penalty, as provisioned in paragraph 1, shall be applied if the destination of an objective from the national forest fund, that was removed or occupied, is changed within 5 years since the approval date.

In this case the material element is clear, and it consists of an action to change the destination of an objective that was earlier found in the national forest fund, and afterwards removed or occupied, with approval.

It is essential that the change of destination occurs in an interval of 5 years, since the approval to remove the objective from the national forest fund was given. The purpose of the provision is to prevent the unlawful use of an objective after its removal from the national forest fund, by continuously changing its destination into something that would have never been approved. After five years since the approval date, the destination of the object may be changed, and it is likely to be changed for economic or social reasons, fact that is not incriminated according to the provision earlier mentioned.

Paragraph 3 of the same article, 106, provides that the *author* of the acts indicated in paragraphs 1 and 2 must *clear the land* of any constructions or installations illegally edificated.

The first element of debate is the legal nature of this provision: is it a complementary sanction established by the law against the author of the actions incriminated in the first two paragraphs or is it a legal obligation of private nature imposed by the law as part of reestablishing the facts as they were before the action described in paragraphs 1 and 2?

The solution I find most suitable is that of a legal obligation, derived from an action prohibited by the law, mainly because the complementary sanctions are expressly stipulated in the Criminal Code or other normative acts and secondly because it is not

consequent to a criminal conviction[5], but to an unlawful act, regardless of its qualification as a crime or not. Personally I consider this obligation to be a partial[6] form of *restitutio in integrum* after an unjust conduct.

Criminal law literature[7] appreciates that this provision has the nature of a reparatory measure.

The second element of debate is whether the term "author" refers only to the perpetrator of the acts, or to any entity in whose interest the act was committed or if a conviction for the crime is necessary to qualify, beyond reasonable doubt, an entity as the author.

The answer relies in the definition of the author in the Criminal Code (art.46, paragraph 1), which applies accordingly by effect of art.114 of the Forest Code. By these texts, an author is a person that directly commits a fact incriminated by Criminal law. As a consequence, apparently, there is no need for a definitive conviction of a person for it to be liable under the provisions of art.106, paragraph 3 of the Forest Code.

In this case, can the provision be applied to a legal entity, given the specific manner in which it is regulated, namely the *author* of the acts indicated in the first two paragraphs must *clear the land*?

My point of view is that a legal entity can be considered author a crime, only if it is convicted by a definitive criminal ruling mainly because under Romanian law it can be liable for a crime as an author, if the conditions provisioned in art.135, paragraph 1 of the Criminal Code. In this case, the legal entity is considered to be the author of the crime, if during its activity, in its interest, or in its name, *a crime* is committed. Criminal law literature[8] stipulates that the Romanian legislator established a form of direct liability for the legal entity, therefore it can act as author of a crime.

To attract the liability of the legal person it is essential for a crime to be committed, not only an act prohibited by Criminal law. If there is no crime, for no matter what reason, although the act is regulated by the law as a crime, it shall not attract the liability of a legal entity.

Equally, if the conditions provisioned in art.135, paragraph 1 of the Criminal Code are not fulfilled, the legal entity cannot be considered as author of the crime, because, by its nature, it cannot directly commit the crime.

Therefore, to answer the question earlier stated, the legal entity is liable under the provisions of art.106, paragraph 3 of the Forest Code only if it is convicted as an author for the crimes regulated by the first 2 paragraphs of the same article. If a definitive conviction was not ruled, the legal entity cannot be author in the acceptance of art.46, paragraph 1 of the Criminal Code, reason for which it cannot be held liable under the provisions of art.106, paragraph 3 of the Forest Code.

The third and final element of debate for paragraph 3 of article 106 is the reference to both previous paragraphs.

Although the legislator stipulated that the author of acts regulated by "paragraph 1 *and* 2" must clear the land, I believe that the purpose of this provision wasn't to establish a legal obligation only for those perpetrators that commit both crimes (the main form in paragraph 1 and the assimilated form in paragraph 2), but to remove the effects of either crimes, so I consider that the rational interpretation is to hold liable the author of the crime regulated by paragraph 1, *or* the author of the crime regulated by paragraph 2, in accordance with the legal obligation found in paragraph 3.

Paragraph 4 of article 106, indicates that the reinstallation of forest vegetation is done, on the expense of the author of the crimes regulated by paragraphs 1 and 2, by the Forest district which provides forestry services or administrates the forest, on the site that is the object of the crime.

Here, the legislator used the term "crime", and for this reason, I believe that it implies a definitive legal ruling that establishes the fact that a crime had taken place and its author. For this reason there is no doubt that a legal entity can be held liable under this provision. More than that, this provision has the nature of a legal obligation, subsequent to a conviction, with the purpose of reestablishing the facts before the crime.

Art.107 paragraph 1, art.108 paragraph 1 and art.109 paragraph 1 will be briefly analyzed together, because the main difference between al three of them is the material element, which is clear in all cases, and it is not plausible to generate difficulties in practice.

The most important point of the analysis is the main penalty for each crime, which is set, by the legislator, depending on the value of one cubic meter of wood, value established by Government decision.

Therefore, in order to establish the punishment for a certain act it is necessary to refer to a Government decision that is adopted annually, according to art.116 of Law no.46/2008, based on information provided by the National Statistics Institute, according to point 39 of the Appendix to the Forest Code.

In this matter I do not see a problem regarding the legality of the incrimination, mainly because by organic law the constitutive elements of the crimes have been established, and the penalty is subjected to an update depending on the price of the cubic meter of wood, fact expressly stipulated in the provisions of the articles mentioned.

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[5] The text does not refer to a definitive legal ruling that establishes the author of the crime provisioned in paragraphs 1 and 2, or to a conviction, but only to an "author" of the acts indicated in the previous paragraphs.

[6] The term "partial" has been used because the simple clearing of the land from construction facilities does not take it back to its original state. This action can, at most, prepare the area for afforestation, and in a matter of 5-10 years a complete *restitutio in integrum* can be made.

[7] M.Gorunescu – *Crimes against the environment* (original title: *Infracţiuni contra mediului înconjurător*), CH Beck Publishing House, Bucharest, 2011, pag.201.

[8] G.Antoniu, T.Toader (coord.) – *Explanations of the New Criminal Code* (original title: *Explicaţiile Noului Cod Penal*), vol.II, Universul Juridic Publishing House, Bucharest, 2015, pag.388.

The only way in which the regulation would have been arbitrary is when it would have depended only on the free will of the Government, with no limitations, but, in accordance with article 116 of the Forest Code, *the medium price of a cubic meter of wood is established annually, by Governmental Decision, at the proposal of the central public authority in matter of forestry*. The price is settled in an objective manner, namely, in accordance with the medium sale price of a cubic meter of wood, at national level, determined according to statistic data issued by the National Statistics Institute, as provided by point 39 of the Appendix to the Forest Code.

This way, firstly, the incrimination is not about to be established in a subjective manner, depending on the interests of the Government, but in an objective manner, as resulting from an organic law, updated in a manner provided by the same law, depending, essentially, on national statistics.

Secondly, the text is not contrary to art.23, paragraph 12 and art.73, paragraph 3 letter h of the Romanian Constitution[9], as continuously shown by the Constitutional Court of Romania[10]. Essentially, the Court decided that the establishment of the medium price of a cubic meter of wood is done by enforcement given by the organic law to the administrative authority that establishes the price.

Thirdly, considering the decision given in an Appeal in the interest of the Law, by the High Court of Cassation and Justice, no. XII/12.02.2008[11], it is obvious that the incrimination by reference to a Government decision (the act of an administrative authority) is subjected to the principle of the most favorable criminal law, in case of a time-succession of penal laws. In this situation, although at the time of the act it would have been considered a crime, if the price later established by the Government generates a prejudice under the value of 5 cubic meters of wood, the action will not be qualified as a crime.

Paragraph 2 of the same provisions establishes an aggravated form for each of the incriminations, but, as long as my research focuses, this does not raise practical issues, therefore, it doesn't fit the purpose of this paper.

Art.110, provides in its only paragraph that the disrespect of the obligation stipulated in art.30, paragraph 1 represents a crime and it is punishable by fine. According to article 30, paragraph 1, activities of artificial regeneration and of completion of natural regenerations is done in an interval of at most two vegetation seasons starting from the unique or definitive cutting of the trees.

The first point of the analysis aims at stipulating the limits of the penalty, given the fact that the legislator only stipulated a fine.

The answer for this issue resides in the provisions of art.137 of the Criminal Code, namely in paragraphs 2, 3 and 4 letter a.

The second paragraph stipulates that the quantum of the fine is determined by the system of days-fine, were the value of one day-fine (established between 100 and 5.000 lei) is multiplied by the number of days-fine (between 30 and 600 days). Paragraph 3 indicates that the specific number of days-fine will be determined by general criteria in what concerns the individualization of the punishment, and the value of one day fine will be established depending on the sales figure, for legal entities with a lucrative purpose and by the value of patrimonial assets and other obligation for other legal entities.

The special limits of the number of days fine is established, according to paragraph 4, letter a, between 60 and 180 days, if the law only stipulates the fine as a penalty.

In this case, for the crime provisioned by art.110 of the Forest code, the effective penalty can be established between 6.000 and 900.000 lei, depending on the factors indicated in art.137 paragraph 3 of the Criminal Code.

The second point of analysis regards the material element, as referred to in art.30, paragraph 1. Effectively it consists of an omission to accomplish the activities of artificial regeneration and those of completion of natural regenerations, or to accomplish them in more than two vegetation seasons since the unique or definitive cutting of the trees.

A vegetation season is defined by point 45 of the Appendix to the Forest code as the time frame between the entry into vegetation and the vegetative rest of an arboret.

In this case, the act can be qualified as a crime if the perpetrator failed to act according to the provision previously stipulated for at least two vegetation seasons, that cannot be established in precise intervals, depending on the trees found in the arboret.

More than that, the law did not specify that the vegetation seasons should be complete, reason for which, if the definitive cutting is made a few days before the end of the vegetation season this year, after the end of the vegetation season of next year the act could be qualified as a crime because one vegetation season was pending when the cut took place and the other was completed next year. Therefore, two vegetation seasons can practically represent one year and a few days.

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[9] Art.23, paragraph 12: Penalties shall be established or applied only in accordance with and on the grounds of the law.
Art.73, paragraph 3, letter h: Organic laws shall regulate: criminal offences, penalties, and the execution thereof.

[10] Decision no.670/12.06.2008, published in the Official Gazette, no.559/24.07.2008 (regarding the actual Forest code, namely Law no.46/2008), or decision no.599/19.06.2007, published in the Official Gazette, no.523/02.08.2007 (regarding the previous Forest code, namely Law no.26/1996, where the same legislative solution has been adopted).

[11] Published in the Official Gazette, no.866/22.12.2008.

Equally, given the relativity of the time frame that represents a vegetation season, the incrimination of article 110 of the Forest code does not effectively meet all expectations of predictability.

Conclusions

In this last part of the article, the main conclusions will be highlighted in a brief manner, primarily considering that the purpose of this paper was to identify practical issues regarding the enforcement of title VI of Law no.46/2008.

As a general observation, an incrimination *per relationem*, as found in all provisions subjected to analysis has its own limitation, determining an imprecision in establishing the material elements of the offence[12].

In this regard, I stated that art.106, paragraph 1 should have only indicated art.36, paragraph 1 and art.37 paragraphs 1 and 2, not the entire article, in order for the incrimination to be adequate.

Equally, analyzing the provisions of paragraph 3 of the same article I consider that the legal entity is liable under those provisions only if it is convicted as an author for the crimes regulated by the first 2 paragraphs of the same article. If a definitive conviction was not ruled, the legal entity cannot be author in the acceptance of art.46, paragraph 1 of the Criminal Code, reason for which it cannot be held liable under the provisions of art.106, paragraph 3 of the Forest Code.

In what concerns art.107 paragraph 1, art.108 paragraph 1 and art.109 paragraph 1, I believe that the legality of the incrimination is satisfied, mainly because by organic law the constitutive elements of the crimes have been indicated, and the penalty is subjected to an update depending on the price of the cubic meter of wood, objectively established, fact expressly stipulated in the provisions of the articles mentioned.

Finally, given the fact that incrimination is depending on the time frame that represents a vegetation season, the provisions of article 110 of the Forest code don't effectively meet all expectations of predictability.

By this approach, surely many practical issues were not treated accordingly, but I consider those already indicated to be part of the main problems usually encountered in criminal judicial activity, when enforcing title VI of Law no.46/2008.

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[12] This observation has proven to be a general problem of contemporary environmental law, according to M.Duțu – *Introduction to environmental Criminal Law* (original title: *Introducere în dreptul penal al mediului*), Hamangiu Publishing House, Bucharest, 2013, pag.64.