

THE CONSEQUENCES OF ENGAGING THE CRIMINAL LIABILITY OF LEGAL PERSONS ON THE CRIMINAL LIABILITY OF NATURAL PERSONS

Luca-Ioan PĂUN*

Abstract

This paper examines the relationship between the criminal liability of legal persons and the criminal liability of natural persons under Romanian criminal law. Starting from the legislative framework established by Article 135 of the Romanian Criminal Code, the analysis focuses on whether holding a legal person criminally liable excludes, limits, or coexists with the liability of the natural person who contributed to the commission of the offence. The paper argues that Romanian law adopts a model of autonomous and parallel liability, under which the criminal liability of the legal person does not remove the individual liability of the natural person. At the same time, it highlights the doctrinal and practical controversies generated by this model, particularly in relation to the individualisation of sanctions, evidentiary difficulties, and the proportionality of cumulative punishment.

Keywords: *corporate criminal liability, criminal liability of natural persons, concurrent liability, organisational fault, ne bis in idem, compliance programmes, Romanian criminal law.*

1. Introduction

The criminal liability of legal persons is one of the most debated topics in contemporary criminal law, both in legal doctrine and in case law. Traditionally, criminal law was built around the individual offender, while collective entities were regarded as incapable of criminal guilt. However, the development of economic and financial crime has gradually required the extension of criminal liability beyond natural persons, in order to address offences committed within or through corporate structures.

The recognition of criminal liability of legal persons has therefore raised a fundamental question: what is the relationship between the liability of the legal entity and that of the natural person involved in the commission of the offence? More specifically, does the punishment of the legal person exclude the punishment of the individual perpetrator, or can both forms of liability coexist?

Under Romanian law, this issue is addressed by Article 135 para. (3) of the Criminal Code, according to which the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act. This provision reflects the legislator's preference for a model of independent and concurrent liability. Nevertheless, the practical application of this model continues to raise important questions concerning the limits of such independence, the attribution of guilt, and the possible influence of corporate sanctions upon the individualisation of punishment imposed on natural persons.

2. Normative Framework

Under Romanian law, the criminal liability of legal persons is regulated by Art. 135 of the Criminal Code, according to which "a legal person, except for the State and public authorities, shall incur criminal liability for offences committed in its name or in its interest by natural persons acting within the scope of the legal person's object of activity or for the purpose of achieving such object of activity."

This wording highlights two fundamental aspects:

This legislative solution is consistent with European trends in the matter, numerous Member States of the European Union recognising the criminal liability of legal persons without always conditioning it upon establishing the identity of the natural person who committed the offence.¹

Furthermore, Art. 135 para. (3) Criminal Code expressly provides that "the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act."

* PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest (e-mail: paunluca@gmail.com).

¹ See J. Pradel, *Droit pénal comparé*, Dalloz Publishing House, Paris, 2008, p. 352.

This provision enshrines the principle of parallel liability, meaning that the same act may attract distinct sanctions for both the entity and the individual.

No hierarchy or order of priority is established between the two forms of liability.

Arts. 136–138 Criminal Code regulate the sanctions applicable to legal persons (criminal fine, dissolution, suspension of activity, publication of the conviction judgment, etc.).

These provisions form part of the broader European and international tendency aimed at strengthening mechanisms for holding legal persons accountable, particularly in the fields of organised crime, corruption, and economic-financial offences.

3. The Relationship Between the Criminal Liability of the Legal Person and That of the Natural Person

The engagement of criminal liability of a legal person inevitably presupposes the existence of an act or omission committed by a natural person. Such person may be a member of the management body, a representative, or even an ordinary employee acting in the name or interest of the entity. The Romanian legislator chose not to condition the liability of the legal person upon the effective identification of the natural person, thereby allowing the entity to be sanctioned even where the material perpetrator has not been discovered.

Where the natural person is identified, the issue arises concerning the relationship between the two forms of liability. Three possible approaches may thus be identified:

- Exclusion of the liability of the natural person

According to this view, sanctioning the legal person would absorb the liability of the natural person, since the collective entity becomes the exclusive holder of the unlawful conduct. This solution is, however, rarely accepted and has been criticised for leading to the impunity of those who effectively acted.²

- Conditional concurrence of liabilities

This opinion admits the simultaneous liability of both the legal person and the natural person only in certain situations, for instance where the act serves both the interests of the entity and the personal interests of the individual.³

- Unconditional concurrence of liabilities

At present, this is the solution enshrined in Romanian legislation and supported by the majority of doctrine and case law: the criminal liability of the legal person does not exclude the criminal liability of the natural person, the two forms of liability coexisting autonomously and applying independently⁴.

The preference for unconditional concurrence is justified by the distinct nature of the two types of liability: the legal person is liable for the act committed in its interest, whereas the natural person is liable for his or her own conduct. Moreover, recognising concurrence ensures the effectiveness of the sanctioning mechanism and prevents possible gaps in criminal liability.

4. The Majority Doctrine

The prevailing Romanian doctrine starts from the premise established by Art. 135 para. (3) Criminal Code, according to which engaging the criminal liability of a legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act. In this regard, most scholars emphasise that:

This conception is supported not only by domestic case law, but also by comparative law influences (France, Italy, Belgium), where the principle of concurrence of liabilities applies. The central argument is that excluding the liability of the natural person would lead to a form of disguised impunity, thereby undermining the effectiveness of criminal law.

Example: In a tax fraud case, the Bucharest Court of Appeal (Decision no. 146A/2018) upheld the simultaneous liability of both the company and its administrator, rejecting the defence argument that sanctioning the company should lead to mitigation of the administrator's punishment⁵. Other courts

² See G. Antoniu, *Despre răspunderea penală a persoanei juridice*, Romanian Journal of Criminal Law, no. 2/2004, p. 21.

³ D. Dobrinioiu, *Drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2016, p. 428.

⁴ High Court of Cassation and Justice, Criminal Chamber, Decision No. 3824/2012.

⁵ Bucharest Court of Appeal, Criminal Decision No. 146A/2018.

consolidated the same line of reasoning, holding that the distinct nature of the liabilities excludes any form of compensation between the sanctions imposed upon the two subjects.

5. The Minority Conception

On the other hand, a minority doctrinal current, sporadically supported by certain judicial decisions, advocates for a relative mitigation of the criminal liability of the natural person where the legal person is also held liable. The arguments invoked include:

Another argument advanced in legal literature is that, in the absence of mitigation, a form of “double punishment” could arise, potentially conflicting with the case law of the European Court of Human Rights concerning proportionality and the reasonable nature of sanctions.

Example: In a corruption case, the court justified a more lenient sentence imposed upon the natural person by reference to the severe patrimonial and reputational consequences already suffered by the company, thereby reducing the necessity of a harsh sanction against the individual (Cluj Court of Appeal).⁶

6. Procedural Challenges

Criminal investigations simultaneously targeting natural persons and legal persons generate a series of practical and conceptual difficulties requiring careful handling by judicial authorities.

6.1. Establishing Individual Guilt

One recurring issue concerns the exact identification of the natural person responsible for the conduct attributed to the legal person. In practice, offences may be committed by employees lacking decision-making authority or direct representative powers. In such cases, the question arises whether liability should be attributed to such executants, to the management bodies, or cumulatively to both categories.

Furthermore, there is a risk that the criminal liability of the legal person may be based exclusively upon organisational deficiencies, while the establishment of individual guilt remains incomplete, thereby affecting the coherence of the final judicial solution.

6.2. The Principle of “Ne Bis in Idem”

Formally, the separate sanctioning of the natural person and the legal person does not infringe the principle of ne bis in idem, since the legal subjects are different. Nevertheless, in practical terms, the cumulative effect of sanctions may create the perception of excessive punishment, particularly where the same act generates both patrimonial consequences (corporate fines, confiscation measures) and personal consequences (imprisonment of the administrator). This situation raises concerns regarding legitimacy and fairness and is frequently invoked in defence arguments seeking a more lenient individualisation of punishment.⁷

6.3. Evidentiary Issues

The evidentiary regime differs significantly between natural persons and legal persons.

With respect to the legal person, guilt is often inferred indirectly from the absence of effective internal control mechanisms, tolerance of unlawful practices, or the benefit obtained by the company.

With respect to the natural person, the evidentiary threshold is stricter, requiring direct evidence of intent or negligence.

This evidentiary asymmetry may lead to paradoxical outcomes, such as the conviction of the legal person in the absence of a conviction of the natural person, or vice versa.

6.4. Difficulties of Procedural Coordination

Complex investigations involving both categories of subjects require careful administration of evidence, simultaneous summoning and hearing of legal representatives, and a clear delimitation of defence strategies. In practice, conflicts of interest frequently arise between the company and its representatives (for example, the

⁶ Cluj Court of Appeal, Criminal Decision No. 872/2019.

⁷ C. Mitache, C. Mitache, *Drept penal român. Partea generală*, Universul Juridic Publishing House, Bucharest, 2021, p. 142.

administrator may argue that he acted in the interest of the company, while the company may attempt to prove the contrary). Such situations complicate procedural strategy and may result in lengthy proceedings.

6.5. Procedural Effects upon Third Parties

Sanctioning a legal person also affects shareholders, creditors, employees, and contractual partners who are not directly involved in the proceedings. This indirect extension of consequences raises questions regarding the proportionality and fairness of the measures adopted, especially where the company continues to conduct legitimate economic activity.

7. Case Law and Doctrinal Opinions

Romanian judicial practice has firmly established the solution of concurrence of liability, courts repeatedly holding that the criminal liability of the legal person does not exclude the punishment of the natural person who contributed to the commission of the offence. For example, the High Court of Cassation and Justice held that the liability of the legal person is grounded upon the unlawful act committed by the natural person, yet retains an autonomous character, thereby justifying the simultaneous application of both forms of liability.⁸

Likewise, the Courts of Appeal have delivered similar judgments, emphasising that sanctioning only the legal person, without holding accountable the natural person directly responsible for producing the harmful result, would contradict the principle of personal responsibility in criminal matters.⁹

From a doctrinal perspective, the majority of scholars support the concurrence of liabilities. It is argued that the two forms of liability are connected through a relationship of conditioning, but not exclusion. The natural person represents the instrument through which the will of the entity manifests itself, while the concurrence of liabilities reflects the necessity of sanctioning both the individual conduct and the collective benefit obtained through the commission of the offence.¹⁰

Moreover, admitting concurrence also fulfils a preventive function, discouraging both abusive conduct by natural persons and its tolerance by legal entities.¹¹

Conversely, as previously indicated, a minority part of doctrine expressed reservations concerning concurrence, arguing that there exists a risk of double punishment for the same act, potentially conflicting with the principle of *ne bis in idem*. Nevertheless, this criticism does not appear to have been embraced either by Romanian or European jurisprudence, which has progressively consolidated the concept of autonomy of the liability of legal persons.

8. European and Comparative Jurisprudence

European Court of Human Rights (ECtHR): the Court recognised the legitimacy of corporate liability, while emphasising the necessity of respecting the proportionality of sanctions (*Paksas v. Lithuania*, by analogy concerning prohibitions).¹²

Court of Justice of the European Union (CJEU): the Court held that Member States must ensure effective, proportionate, and dissuasive sanctions against legal entities (Case C-45/08, *Spector Photo Group*).¹³

France: the French Criminal Code (Art. 121-2) enshrines parallel liability, and case law allows the simultaneous conviction of both the company and its director.¹⁴

9. Trends and Practical Recommendations

O Strengthening Compliance Programmes

At European level, judicial practice and sectoral regulations encourage companies to adopt and implement effective compliance mechanisms. Such programmes include:

⁸ High Court of Cassation and Justice, Criminal Chamber, Decision No. 3824/2012.

⁹ Bucharest Court of Appeal, Second Criminal Chamber, Decision No. 1472/2015, excerpt published in the *Romanian Review of Criminal Law*, No. 3/2016, p. 143.

¹⁰ N. Volonciu, *Tratat de procedură penală*, vol. I, C.H. Beck Publishing House, Bucharest, 2014, p. 217.

¹¹ Gh. Mateuț, *Răspunderea penală a persoanei juridice în dreptul român*, *Romanian Journal of Criminal Law*, no. 1/2010, p. 57.

¹² ECtHR, *Paksas v. Lithuania*, Judgment of 6 January 2011.

¹³ CJEU, Case C-45/08, *Spector Photo Group and Van Raemdonck*, Judgment of 23 December 2009.

¹⁴ French Criminal Code, Art. 121-2.

In France, for instance, the “Sapin II” Law expressly establishes compliance obligations in the field of anti-corruption, while in Germany the Lieferkettengesetz (Supply Chain Due Diligence Act) emphasises corporate responsibility in relation to suppliers and subcontractors. In Romania, although there is not yet a comprehensive regulation governing compliance programmes, both legal doctrine and recent judicial practice increasingly regard the existence of effective compliance mechanisms as a relevant factor in the individualisation of sanctions imposed on legal persons.

O Digitalisation and Artificial Intelligence

An emerging trend concerns offences committed through artificial intelligence systems or complex digital instruments. These raise issues of attribution of liability: who is the real perpetrator — the developer, the user, or the company’s management? In the future, an expansion of the concept of “organisational fault” may be envisaged in order to cover failures of supervision concerning emerging technologies. The European Union is already working on the AI Act, which includes provisions concerning legal liability for damages caused by AI systems.

O Liability for the Acts of Subcontractors and Contractual Partners

Globalisation and outsourcing complicate the attribution of criminal liability. In transnational corruption cases, parent companies are frequently held liable for acts committed by their partners or intermediaries. The trend in Romania also appears to be moving towards strengthening the standard of corporate due diligence, meaning the obligation to verify business partners and subcontractors.

10. Conclusions

The analysis of the relationship between the criminal liability of legal persons and that of natural persons reveals a clear option adopted by both the Romanian legislator and judicial practice in favour of the unconditional concurrence of the two forms of liability. This solution has the merit of avoiding, on the one hand, the risk of impunity of the natural person through the exclusive transfer of guilt to the entity, and, on the other hand, the risk of “exonerating” the legal person merely through the identification of the material perpetrator.

Furthermore, the solution of concurrence aligns with European and international standards promoting extended accountability of collective entities in combating economic-financial crime, corruption, and other complex criminal phenomena. Legislative models in France, Belgium, Italy, and even the United States confirm this orientation, reinforcing the idea that sanctioning only the natural person would be insufficient to combat complex criminal phenomena rooted in organisational structures.

In my opinion, double sanctioning does not infringe the principle of *ne bis in idem*, since the legal person and the natural person are not the same subject of criminal law, and liability is grounded upon different criteria and interests. The natural person is liable for his or her own conduct, whereas the legal person is liable for the benefit obtained or the interest pursued through the commission of the offence.

In conclusion, the criminal liability of the legal person should not be regarded as an alternative to, but rather as a complement of, the criminal liability of the natural person, the two coexisting within a coherent system aimed both at sanctioning the material perpetrator and the entity that tolerated, encouraged, or benefited from the unlawful conduct. Consequently, the concurrence of liabilities is not only possible, but necessary, in order to reflect the complex reality of contemporary criminal phenomena. Such an approach contributes not only to the effectiveness of criminal repression, but also to the promotion of an organisational culture based upon legality, ethics, and responsibility, through the pressure placed upon legal persons to adopt prevention and compliance mechanisms.

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