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## Criminal Liability of the Legal Entity

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**Abstract:** Economic and financial crimes committed by individuals through legal persons grew every year in Romania after the communist era while court decisions have varied in their final sentences. The lack of jurisprudence in this field has led to a slow development of legislation covering all areas that individuals and legal persons use them to commit this infraction. Romanian law has failed to keep up with the ingenuity of criminals that get around the law and gets a mere administrative or penal fine. In this article the authors present and explain a number of Romanian jurisprudence decisions and problems that lack of a properly applied law led to encouraging this type of economic crimes among individuals through legal persons or on behalf of them, infractions that led to damage to the state patrimony. This paper may be useful both to theorists and practitioners in the field. The essential contribution of this paper consists of critical observations, conclusions and proposals made by *lex ferenda* regarding the subject examined.

**Keywords:** natural person, penalties under criminal law, crime

### 1. Introduction

According to our doctrine, it was argued that “legal relations are social relations that can be established only among people, but these do not act only in an isolated manner, as individuals, but also reunited within structural groups. Thus, with individuals, these groups of people make up these social realities, that subject to fulfill certain requirements expressly specified by the law, are likely to be subjects of rights and obligations. In this manner, the legal entity represents that subject of civil law which is the group of people who meets the conditions set by law in order to acquire that status. It is the collective legal entity, that is, a group of people, which, by possessing the qualifications required by law, becomes the holder of subjective rights and civil obligations“. (Cășuneanu, 2007, p. 4)

Regarding the category of collective entities that can be held criminally liable, the legislature has provided criminal liability of both legal persons of private and those of public law. The latter, however, benefits from the exception according to which the State, the public authorities and public institutions engaged in an activity that may not be of private domain cannot be held criminally liable. However, “*in case of public institutions one has to analyze for each case, to what extent could their activity be conducted also by a legal entity of private law, in which case they will not be exempted from criminal liability. For example, can the activity conducted by a school or university be subject of the private domain? The answer is positive, since although the educational activity is a public service, it can be conducted also by private schools, not just by the public schools. In these circumstances, the public school may be held criminally liable for the offences under Article 19<sup>1</sup> of the Criminal Code.*” (Jurma, 2010, p. 131)

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## **2. Offences That Can Involve the Criminal Liability of the Legal Entity**

Regarding the offenses that can lead to criminal liability of the legal entity “the offenses of fraud, tax evasion, money laundering and also computer hacking offenses under Law 8/1996 on copyright and related rights were taken into consideration.” (Jurma, 2010, p. 155)

There are, of course, offenses which by their nature cannot be committed by a legal entity as an author, such as: offenses committed by clerks, desertion, bigamy, jailbreak etc. but this “*does not prevent the participation of a legal entity, as instigator or accomplice, in committing of such offenses; for example, a legal entity that carries out its activity in the audio-visual field, instigates soldiers to desert unit or a legal entity facilitates the performance of new marriages by persons already married, providing them with falsified documents indicating the termination of the previous marriage.*” (Streteanu & Chiriță, 2007, p. 397)

Thus, since the coming into force of the Law 278/2006<sup>1</sup> which regulated the criminality liability of the legal entity, more companies were prosecuted. Thus, D.I.I.C.O.T. (Directorate for Investigating Organized Crime and Terrorism) ordered the prosecution of the defendants C. V., D. A. M. M. and T. M., and also of the defendant legal entity S.C. TRANS COJAN S.R.L., for committing trigger offenses, formation and support of an organized criminal group, an offence provided and punished by Article 7 of Law no. 39/2003, illicit trafficking of high-risk drugs, an offence provided and punishable under Article 2, paragraphs 1 and 2 of Law no. 143/2000 and an attempt to illicit international trade of high-risk drugs, an offence provided and punishable under Article 20 of the Criminal Code in conjunction with Article 13, paragraph 1 of Law no. 143/2000, in relation to Article 3, paragraphs 1 and 2 of Law no. 143/2000<sup>2</sup>.

Prosecutors within D.N.A. (National Anticorruption Directorate) have decided to prosecute the following defendants, who held the qualities stated at the moment of committing the offence: D. V., administrator and CEO of S.C. GALAXY TOBACCO S.A., and C. A., president and shareholder of S.C. GALAXY TOBACCO S.A., who were charged with the crime of tax evasion, I. G. D., State Secretary of the Ministry of Finance and B. L., Head of Division within the Department of legislation in the field of excises of the Ministry of Public Finance, who were charged with the offense of complicity to tax evasion and the legal entity S.C. GALAXY TOBACCO S.A. (former National Company “Tutunul Românesc”(Romanian Tobacco), which was charged with the offense of tax evasion.<sup>3</sup> Prosecutors of the Prosecutor's Office of Craiova Court have decided on 20.09.2010, by means of indictment, to prosecute the defendants M. V., S.C. SILVFAL-AP S.R.L. Podari for committing tax evasion and false statements crimes, and of the defendant P. L. L. for complicity in crimes of tax evasion and false statements.<sup>4</sup>

## **3. Natural Persons, Who Can Criminally Involve the Legal Entity**

According to Article 19<sup>1</sup> of the Criminal Code, legal entities are held criminally liable responsible for crimes committed in achieving the object of activity or interest or in the name of the legal person and in the second paragraph it is provided that criminal liability of the legal entity does not exclude criminal liability of the natural person, who contributed in any way to the commission of the same offenses.

<sup>1</sup> Published in the Official Gazette no. 601 from 12<sup>th</sup> of July 2006.

<sup>2</sup> D.I.I.C.O.T., press release from 11.08.2010, [www.diicot.ro](http://www.diicot.ro).

<sup>3</sup> D.N.A., statement no. 699/VIII/3 from 20.12.2010, [www.pna.ro](http://www.pna.ro).

<sup>4</sup> Department of Public Information and Relations with the Press within the Public Prosecutor's Office attached to the High Court of Cassation and Justice- statement from 30.09.2010, [www.mpublic.ro](http://www.mpublic.ro).

Thus, the court decided to hold criminally liable of the defendant E. N. H., as manager of S.C B.E.N. S.R.L.[Ltd], together with the legal entity S.C. B.E.N. S.R.L. for offenses of fraud with particularly serious consequences, tax evasion and the use of company's patrimony for personal interests, offences provided and punished by Article 215, paragraphs 1,3,4 and 5 of the Criminal Code, Article 6 and Article 9, paragraph 1 of Law no. 241/2005 and Article 242, line 2 of Law no. 31/1990, all with the application of Article 41, paragraph 2 of the Criminal Code and Article 33, letter a of the Criminal Code.<sup>1</sup> However, there have been cases in which the legal entity was not held criminally liable together with the natural person, the first being declared the responsible party in the civil lawsuit. Thus, the court decided to hold criminally liable the natural person L. M. for the offense of tax evasion and asked the defendant L.M. and the responsible party in the civil lawsuit be ordered to jointly pay the tort caused to the state budget.<sup>2</sup> Similarly, the Court decided to hold criminally liable the defendant M. N. for the offense of tax evasion and asked the defendant M. N. and the responsible party in the civil lawsuit be ordered to jointly pay the tort caused to the state budget.<sup>3</sup>

#### **4. Penalties Imposed to the Legal Entity**

In international law, legal entities know various penalties. Thus, "in the Finnish and Swiss law, the sole penalty imposed to the legal entity is the fine person and the Norwegian law provides penalties such as fines and the prohibition to perform certain activities for a period of maximum 5 years. According to the Moroccan fines are imposed on legal entities and the accessory punishments consist of partial confiscation of goods, dissolution and publication of the sentence of conviction; against these entities can be provided also safety measures such as confiscation of illegal or dangerous objects and temporary or permanent shut off of a industrial or commercial premises. According to the Japanese law, the only applicable punishment for legal entities is the fine but also administrative sanctions consisting in the confiscation of the legal profit, seizure of property, that helped to commit the offense, the license revocation, the publication of the sentence of conviction.

In Estonia, the Criminal Code provides for just two penalties that can be imposed to legal entities, e.g. the fine under Article 44 of the Criminal Code and the dissolution of the legal entity provided by the text of Article 46 of the Criminal Code. It should be noted that the fine may be imposed to the legal entity and as an accessory punishment with dissolution; the latter penalty can be applied only if the legal entity has as a goal the commission of offences" (Marinescu, 2011, p. 213). In Romanian law, according to Article 53<sup>1</sup> of the Criminal Code, a single main sentence, that is, the fine can be imposed on the legal entity, and several accessory punishments.

The main punishment, as it is provided in Article 53<sup>1</sup> of the Criminal Code is a general minimum of 2,500 lei and a general maximum of 2,000,000 lei. "The determination of special limits is made by means of an algorithm similar to that used in the case of the natural person, namely, depending on the sentence of imprisonment provided for the offense committed. Thus, when the law provides for the offense committed by the natural person, the sentence of imprisonment of at most 10 years or a fine, the special minimum of the fine for the legal entity is of 5,000 lei and the special maximum of the fine is of 600.000 lei. When the law provides for the offense committed by the natural person, the sentence of life imprisonment or the imprisonment for more than 10 years, the special minimum fine for the legal entity is of 10.000 lei and the special maximum of the fine is of 900.000 lei. "(Streteanu & Chirita, 2007, p. 409)

<sup>1</sup> Court of Buzau, penal sentence no. 123 from 14<sup>th</sup> of July 2009, [www.portal.just.ro](http://www.portal.just.ro).

<sup>2</sup> Court of Bucharest – 2<sup>nd</sup> Criminal Division, penal sentence no. 333 from 14.05.2012, [www.portal.just.ro](http://www.portal.just.ro).

<sup>3</sup> Court of the 2<sup>nd</sup> district Bucharest, penal sentence no. 234 of 26.03.2009, [www.portal.just.ro](http://www.portal.just.ro).

Besides the main penalty of the fine, the legal entity may suffer one or more accessory punishments such as: the dissolution of the legal entity, the suspension of the legal entity's activity for a period of 3 months to a year or the suspension of one of the activities of the legal entity in connection with which the offense was committed for a period of 3 months to 3 years, the shut off of some work points of the legal entity for a period of 3 months to 3 years, the prohibition to participate in public procurements for a period of one to 3 years, the display or dissemination of the sentence of conviction. Thus, the court, by sentence, has convicted the legal entity S.C. B.E.N. S.R.L to pay the fine of 15,000 lei under Article 215, paragraphs 1, 3, 4 and 5 of the Penal Code, by applying the Article 41, paragraph 2 of the Criminal Code. In accordance with Article 53<sup>1</sup>, paragraph 3, letter a of the Criminal Code in relation to Article 72<sup>2</sup>, paragraph 1 of the Criminal Code, the court decides also upon a complementary penalty regarding the dissolution of the legal entity SC B.E.N. S.R.L.1

## **5. Conclusions and Proposals for *Lex Ferenda***

From the content of this paper one can see gaps in speech and case-law. Although criminal liability of legal entities is a relatively new regulation that passed through 3 forms of enactment, first in 2004, then in 2006 and finally in 2009), the phenomenon should be treated carefully because of large number of crimes committed by natural persons through, for or in the interest of the legal entity.

One of the problems highlighted by other authors is that of defining the terms of public authority and public institution. *“Thus, the term of public authority has a constitutional consecration (Title III of the Constitution), although the Constitution also enumerates in other titles, other authorities not falling into any of the 3 branches of government. On the other hand, the terms of public authority and public institution find definitions and different scope in certain special laws such as Law no. 554/2004 of the Administrative Litigation, Law on Public Finance no. 500/2002, Law on Public local finance. 273/2006, depending on regulatory requirements specific to the areas covered by those laws.”* (Jurmală, 2010, p. 272)

This exact undefined terms could lead to an increase in crime in the economic field. *“For example, within a non-profit association, an entity without legal personality in accordance with the legal provisions in this field, one can commit offenses of money laundering, but they cannot be held criminally liable, because of the way the Article 19<sup>1</sup> of the Criminal Code was formulated. For this reason, it may proceed as in Article 51 of the Dutch Penal Code, in which, after paragraph 1 provides that offenses can be committed by natural persons or legal entities, paragraph 2 adds up that the legal entity shall be assimilated, in order to apply the provisions of criminal law and the company that has no legal personality, the association and the foundation.”* (Casuneanu, 2007, pp. 176-177)

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<sup>1</sup> Court of Buzau, penal sentence no.123 of 14<sup>th</sup> of July 2009, [www.portal.just.ro](http://www.portal.just.ro).