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**Criminal Liability and Sanctioning the  
Legal Entity in the Romanian Law - Realities and Perspectives**

**Monica Pocora<sup>1</sup>**

**Abstract:** Over the past 25 years, Romania has entered into the market economy club, which means the constant growth of the economic actors that carry out their commercial activities. Over time, criminal activities conducted by legal entities have become more and more elaborate, so that there has been a need to identify the shortcomings, complemented by effective measures to coerce the illicit activity, and identifying prevention methods that appear to be effective. Moreover, the economic actors with transnational activities have begun to take advantage of the “favorable” jurisdictions of the illicit deeds, being more profitable. Thus, in the context in which Romania receives foreign investors and, more recently, gives rise to companies with international operations, the importance of modernizing and aligning the legislation on the liability of the legal person with most European and even global jurisdictions becomes evident.

**Keywords:** criminal liability; legal person; prevention; repression

## **1. Introduction**

In the light of the modernization needs of the Romanian legislative framework perceived during the research, the *de lege ferenda* proposals are built on the ideas found in the paper, repeating certain proposals already mentioned in the context of the suggestions for a European directive in the matter, and also recommending to the legislator the adaptation of the Romanian legislation on the liability and sanctioning the legal person to the current requirements by:

- (1) increasing the general maximum of the fine sanction for the legal person;
- (2) supplementing legislation on safety measures, in the sense of introducing a specific measure for the legal person;
- (3) the regulation of a legal attenuating circumstance specific to the legal person;
- (4) completing the legal provisions on the complementary punishment of placement under judicial supervision.
- (5) completing the legal provisions on complementary punishment of the interdiction to participate in public procurement procedures.

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<sup>1</sup> Associate Professor, PhD, Faculty of Law, Danubius University of Galati, Romania, Address: 3 Galati Blvd., Galati 800654, Romania, Tel.: +40372361102, Corresponding author: monicapocora@univ-danubius.ro.

## **2. Modification of the General Maximum Penalty by Fine applicable to the Legal Person**

Currently, art. 137 par. (2) The new Criminal code sets the limits of the fine applicable to the legal person after the commission of a crime, setting the general maximum of 3,000,000 lei (the equivalent of approximately 670,000 Euros). Since the primary purpose of the regulation of a criminal penalty is general prevention and its scope tends to be a reflection of the importance given to the social values defended by the incrimination of that act and the importance or even the urgency of preventing and combating a certain type of behavior, we consider that the current maximum provided by the Romanian law is not such as to prevent the corrupt behavior of companies with the turnover of millions of euro, nor to ensure the coercion and re-education of the mega-companies to which the penalty was imposed.

In the face of the different economic power of legal persons, we consider it appropriate *to amend the general maximum of the punishment of the fine imposed on the legal person in the sense of not limiting it*, according to the Canadian legislation, so that *the individualization criteria will occupy a central place in determining a truly proportionate, effective and dissuasive punishment*, of the criminal behavior of the legal person. Thus, if the legal person sought to obtain a patrimonial benefit through the commission of the offense, e.g. obtaining a public procurement contract of around EUR 54 million (Microsoft case), the effective operation of the special circumstance provided by art. 137 par. (5) according to which the fines will take into account the value of the patrimonial benefit obtained or pursued, it will not find the maximum much too low of 670,000 Euros.

Adapting the maximum penalty to the needs of the reality characterized by legal entities with economic force is all the more appropriate as, according to a recent study by PriceWaterhouseCoopers, around 200 mega-companies will appear on the Romanian market in the next 15 years, in addition to the multinational companies already active.

## **3. Supplementing the Legislative Framework on Safety Measures, in the sense of establishing the Implementation Measure of the Compliance Programs as a Measure specific to the Legal Person**

By definition, the safety measures have a preventative role, they are applied *in order to eliminate a state of danger and to prevent the commission of a new act provided by the criminal law*. In this context, we consider it appropriate to supplement the current legislative framework on safety measures, currently regulated around the nature of the individual by the New Criminal Code in Art. 112, with a specific safety measure for the legal person, namely the implementation of a compliance program with the law.

In the context of committing corruption acts, the legal person could apply the measure of the implementation of an anti-corruption compliance program, consisting of making it necessary for the legal person to take effective organizational measures for the prevention and detection of corruption, at its expense. *Stricto sensu*, the content of an anticorruption compliance program should consist of the elements otherwise provided by the French project law *Sapin II*, which has been inspired by the current practice of the companies and the North American norms in the field:

- adopting a code of conduct detailing prohibited behavior;
- a procedure to verify the integrity of customers, direct suppliers and intermediaries;

- a clear internal procedure that allows employees to report to management about the existence of situations contrary to the code of conduct;
- a map of the corruption risks per sector and region, updated periodically;
- an accounting control procedure to ensure that the records are accurate and do not attempt to mask corruption;
- training seminars for staff exposed to corruption risks; and
- a disciplinary sanction regime applicable to violations of Code of Conduct rules.

Therefore, we propose to the Romanian legislation *the supplementation of the legislative framework regarding the safety measures, in order to establish the implementation measure of the compliance programs to the law as the specific measure of the legal person, either by amending the provisions of art. 112 of the New Criminal Code, or through the elaboration of a separate article (e.g. Art.136<sup>l</sup>) under Title VI of the New Criminal Code.*

#### **4. The Regulation of a Mitigated Judicial Circumstance specific to the Legal Person Consisting in the Existence of a Program of Compliance with the a Priori Law for the Commission of the Criminal Offense**

While we consider it premature to introduce a legal obligation on the legal person to implement a specific program of compliance with the independent law of committing a crime, in our law, *we consider it appropriate to introduce a legal provision regulating the circumstance of such a compliance program and also the attenuating judicial circumstance.* We believe that the usefulness of such a legal plural provision: on the one hand, it will stimulate the voluntary implementation of law enforcement programs by companies, and on the other hand it will reward the good faith of companies that have done diligence and reasonable measures to prevent crimes, even if they have proven to be partially ineffective.

The reason behind the proposal to frame the circumstance of a compliance program in the category of *judiciary* mitigating circumstances and *not legal ones* is to avoid encouraging scenarios where companies adopt such compliance programs superficially, as a façade, just in anticipation of mitigating effects in the case of criminal proceedings. By regulating the court circumstances, the implementation of compliance programs will need to be real and robust to mitigate the applicable punishment, and the court may ask the company for evidence to that effect.

#### **5. The Completion of Legal Provisions regarding the Complementary Punishment of Placement under Judicial Supervision**

Placement under judicial supervision is a new institution for the Romanian law, introduced for the first time by the provisions of art. 136, par. (3) of the New Criminal Code, implying the conduct of the activity which caused the offense under the supervision of a judicial trustee. In the section devoted to the analysis of this punishment in this paper, we have brought to the current regulations to three main reproaches; the first refers to the poverty of legal provisions that leave too many variables in the operation of punishment, the second reproach consists in limiting the function of this punishment to the purpose of special prevention and rehabilitation, and the third refers to the restriction of the scope of punishment by art. 144, par. (3).

In order to remedy the perceived shortcomings of the current regulation, we consider that the legislator's intervention is necessary, in order to elucidate and detach the operation of the punishment of placement under judicial supervision, in order to specify (a) who can be called a judicial manager, namely what professional qualifications are required to take responsibility for surveillance; (b) what are the powers which may be attributed to the judicial trustee; (c) what are the obligations of the manager in relation to the court; (d) what are the criteria for determining the remuneration of the trustee and who determines the due amount of payment.

We also consider that the extension of the purpose of punishment to assuring a support function in executing other sanctions imposed by the court, for example implementing *a compliance program*, and granting broader powers to the guardian to intervene in the organization of the legal person, would contribute efficiently to the efforts to reorganize and re-socialize the legal person, and it would effectively supplement the sanctioning framework applicable to the legal person.

Regarding the scope of the punishment of placement under judicial supervision, contrary to the current regulations, we consider that art. 144, par. (3) by virtue of which the punishment is not applicable in the case of the legal persons stipulated in art. 141 of the New Criminal Code, namely political parties, public institutions, trade unions, employers' organizations, religious organizations or those belonging to national minorities, as well as the legal persons working in the media field, must be removed. The reason for which the legal persons mentioned in art. 140 are exempted from the application of the dissolution and suspension of activity, namely the necessity of continuity of their activity under the principles of the rule of law, cannot justify their exclusion and the punishment of the judicial supervision, because the punishment in question does not interrupt the activity of the mentioned legal entities. On the contrary, we appreciate that the placement under judicial supervision is appropriate for all legal entities mentioned in art. 141, due to the strong preventive feature, and maybe, in the near future, a support function.

## **6. Completion of Legal Provisions on the Complementary Punishment of the Prohibition to Participate in Public Procurement Procedures**

According to the current regulation, the application of the prohibition to participate in public procurement procedures is left entirely to the discretion of the court, as the art. 138 of the New Criminal Code imparts an optional feature to the punishment, and moreover, the law keeps silent on the need for a link between the offense committed and a public procurement procedure.

As far as we are concerned, we propose ***to the legislator the obligatory investment of the application of the prohibition to participate in the public procurement procedures in all cases where the court finds that a deliberate offense is directly related to the organization of public procurement procedures or the execution of a public contract.***

The public services or products are in the interest of the entire society, putting at stake directly the resources of the state; at the time of conviction for an offense that alters the public's confidence in the ability of the legal person to serve with integrity and performance the public interest and resources, withdrawing the right to contract with the state or other public authorities or institutions is at least useful and welcome, if not absolutely necessary.

Regarding the maximum period of 3 years for which the punishment can be ordered according to the provisions of the New Criminal Code, we propose to increase it to 5 years in order to bring the criminal provisions into line with the Public Procurement Directive.

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