Criminal Liability of Legal Persons. History, Evolution and Trends in Romanian Criminal Law

Ph.D. lecturer ***LAURA STĂNILĂ****
West University of Timisoara, Law Faculty

Abstract:

The issue of criminal liability of legal persons is a new challenge on the "ramparts " of Romanian doctrinal debates, but brings to the fore long forgotten theories and conflicts settled long time ago. Amid the express consecration by Romanian legislator of the criminal liability of legal persons institution, debates on the fundament of this form of liability and on possible explanations concerning the criminal liability of a collective subject of law restarted. Tributary to the principle of subjective criminal liability and to the adagio "societas delinquere non potest", Romanian doctrine is put in the position of trying to abandon the monolithic theoretical schemes and to shyly explain the institution of criminal liability of legal persons. The saving doctrine comes from the West, the common-law system offering flexible and attractive solutions concerning the criminal liability of corporate law subjects through the mechanism of judicial precedent. Rejecting the heavy and rigid schemes, the Common-law system remarks itself by flexibility and dynamism and by an extremely practical spirit. Amid pressure from EU legislation, the Romanian legislator managed to properly regulate the institution of criminal liability of legal persons.

Keywords: *legal persons; subjective criminal liability; crime; punishment; complementary punishment; dissolvence; suspension of the activity; publication of the conviction.*

I. Introduction

Criminal liability of legal persons has become one of the most debated issues of the twentieth and early twenty-first century. This debate really became significant after the '90s, when both the United States and Europe have experienced an alarming number of crimes committed by legal persons – environmental crimes, antitrust crimes, fraud, pharmaceutical crimes and offences, labor law offences, criminal corruption, economic and fiscal policies crimes and offences.[1] Consequences of this phenomenon proliferation consist in both huge economic and human lives losses. Besides those noted, their long-term effects, should not be underestimated. Some of the most important, not visible at this moment, long-term effects are affecting the environment and the human health.

Unlawful conduct of legal persons can be approached from the point of view of civil law and administrative law, and especially criminal law

At present, most states admit civil and administrative liability of legal persons in case of violation by these actors of legal regulations. But criminal liability of legal persons was a controversial topic since the beginning, very difficult to address and

* E-mail: laura.stanila@e-uvt.ro.

[1] *R. Mokhiber*, *R. Mokhiber*, Top 100 Corporate Criminals of the Decade available online at: http://www.corporatepredators.org/top100.html.

resolve. Common law jurisdictions, more pragmatic than those of continental Europe, recognized this institution from the beginning, even if under different models. Vehement criticism against the criminal liability of legal entities comes from continental law system and questions the compatibility of criminal liability of legal entities with the general principles of criminal law. Lately, we notice a new orientation of doctrine to acknowledge the criminal liability of legal persons institution.

Different states – those which initially have refused or still refuse to recognize criminal liability of legal persons – have this attitude because of historical, economic, social, political specificity of each. Under these conditions, they tried to solve in their own and effective way the legal persons sanctioning issue for their illegal conducts. It has been shown in the doctrine that none of these systems is perfect.[2] It is undeniable however, that the most effective method in order to discourage different forms of economic and financial crime is the criminal liability of legal persons.[3] It has been shown that stigmatizing effect of criminal sanctions applied to legal persons can be very effective and dissuasive. For proper functioning of an enterprise, for its economic progress, "good fame" is a decisive factor. When a punishment hits the good reputation, its effect is certainly discouraging.[4]

Although initially the criminal liability of legal persons imitated criminal liability of individuals scheme (so-called *anthropomorphic model*), new models of criminal liability have emerged – *aggregation doctrine*, *separate identity doctrine* – culminating with *constructivist models* that focus on the concept of *corporate culture* and *corporate ethos* concepts. Between all penal systems, the U.S. criminal liability system seems the most opened and evolved on the institution of criminal liability of legal persons, being the first to embrace the *aggregation doctrine*. English and French systems have rejected this theory from the beginning, although it represented in its time an ingenious way of reconciling traditional and modernist visions.

Other states, such as Germany, obstinately refuse to consecrate criminal liability of legal persons, despite all the efforts of the European community to support the project implementation. German legislator chose instead an administrative liability for legal persons which has the advantage of being less expensive and less demanding in terms of theory and has proven a great effectiveness, administrative fines applicable to entities reaching the limit of 1 million euro! Some countries, such as Spain, still "lie" in uncertainty due to unfortunate errors of expression of the legislator. Although the Spanish doctrine believes that the Spanish criminal law indirectly enshrined criminal liability of the legal person, any legal reference does not lead to this conclusion.[5]

In general, in continental Europe, principle *Societas delinquere non potest* and dogma of criminal liability based on fault constituted serious obstacles to the consecration of the institution of criminal liability of legal persons. With all the tribute paid to these true Philosopher`s stones of criminal law, social realities have demonstrated the urgent need to recognize the criminal liability of legal persons, an obstinate rejection of the institution not being beneficial to a proper conduct of legal persons in the field of social relations increasingly troubled by corporate crime phenomenon.

---

[2] *A.I. Pop*, Criminal Liability of Corporation – Comparative Jurisprudence, p. 3, available online at: http://www.law.msu.edu/king/2006/2006_Pop.pdf.

[3] *A. Jurma*, Răspunderea penală a persoanei juridice, in R.D.P. nr. 1/2003, p. 100.

[4] *Idem*, p. 101.

[5] The Spanish legislator has provided in Spanish Criminal Code specific sanctions called "accessory consequences" (*consequencias accesorias*) that apply only to legal persons in case of committing an offense, their juridical nature being hotly disputed by Spanish Criminal doctrine.

II. Evolution of the institution of criminal liability of legal persons

Theories of criminal liability of legal entities and their associated doctrinal research are relatively recent, dating back almost two centuries. But the issue of ascribing criminal liability to a collective entity emerged long time before these theories had been conceived. Since ancient times, local collective entities were held criminal responsible for their conduct. The first ancient collective entities – such as clans, tribes, religious groups, old business enterprises and other groups as such – and the forms of punishment applicable for them constitute the germs of which arose the institution of criminal liability of legal persons. Criminal liability of different groups coexisted for a long period of time with the liability of individuals. Since the occurrence of liberal ideas, the legal field in general and the criminal law field in special, were dominated by individualistic values. This process of humanization of penal institutions was crucial in the direction adopted by different systems of law regarding criminal liability of collective entities. On the other hand, theories of criminal liability of legal entities were designed and modeled in the common law system in the context created by the individualistic trend[6]. As noted in the literature, although these theories were an important step in the field of criminal liability of legal persons, their main weakness is their inherent individualistic component.[7]

In Ancient society, the group liability constituted the rule because ancient society was not conceived as a sum of individuals, but rather as a union of families.[8] This feature gave the main differential element and sketched legal regulations at the time. The law was adapted to a small independent groups system, called clans or families, and liability (no matter which) was incurred in relation to these issues. Conduct of a group member was regarded as emanating from the group itself, viewed as a whole or as an entity. The Book of Genesis says that God punished Sodom and Gomorrah because of corruption.[9] Later Emperor Theodosius punished Antioch city taking its theater, public baths and the title of metropolis. Emperor Severus destroyed Byzantium city, taking the theater, baths, honors and ornaments, reducing it to the status of a village.

Contrary to Ancient law, Roman law reflects the value individualism over collectivism. In those days were born early forms of corporations and the law could not remain indifferent to this new reality, so that the existence and activity of these new entities was governed without seeing them as unique individuals. The earliest forms of legal entities were joint civil enterprises or associations – *civitas*, *municipium*, *republica*, *communitas, scribae*, *decuriae, aurifodinarum*, *argentifodinarum*, *salinarum societas*, *vectigalium publicorum societas*, *sodalidates*, *sodalitia*, *collegia tenuiorum.*

The civil enterprise included a sum of individuals pursuing a common goal, which could be political, professional, religious etc., permanently or for a limited period of

---

[6] *D. Holler Branco*, Towards a New Paradigm for Corporate Criminal Liability in Brazil: Lessons from Common Law Developments, thesis, available online at http://library2.usask.ca/theses/available/etd-04192006-112943/unrestricted/d_branco.pdf, p. 10.

[7] *C.D. Stone*, Where the Law Ends: The Social Control of Corporate Bahviour, Harper & Row Publishers, New York, 1975, p. 1.

[8] *Sir H. Sumner Maine*, Ancient Law, in *D. Holler Branco*, *op. cit.*, p. 11.

[9] Bible, Book of Genesis, verse 19:24: „Then the LORD rained on Sodom and Gomorrah brimstone and fire from the LORD out of heaven" and 19:25: „He overthrew those cities, and all the valley, and all the inhabitants of the cities, and what grew on the ground".

time. Depending on their interest, associations could be public or private.[10] In order to regulate the legal position of these actors in Roman society, Roman jurists created the concept of *legal person*, even if they have not named it like this. Consequently, these entities could hold collective ownership, but because they were legal fictions or ideal entities, were unable to sign legal acts. Individualistic vision of Roman law was not an obstacle for the glossers to assign criminal liability to collective entities. The Romans did not develop a theory of collective entities or of an ability of a group to commit crimes, although they admitted the possibility to engage criminal liability of collective entities such the *city*. Consequently, the principle of *societas delinquere non potest*, which reflects precisely collective entities inability to act and have conscience, has not prevailed in the Roman law.

In the Middle Ages the concept of legal personality was first used in the Church and not the state institutions field. In the year 1245 Pope Innocent the IVth introduced a new principle according to which collective entities were fictions. He was the father of the dogma of fictional and intellectual character of legal persons. According to his theory, the collective entity is not really a person, but is regarded as a person due to a fiction of law or, in certain ecclesiastical entities due to Divine power. By the assumption that legal persons are nothing but fictional entities, ecclesiastical entities acquired a privileged and protected status[11].

Eventually, canonists had to accept criminal liability of legal persons. After the seventeenth century, the School of Bologna began to stipulate sanctions that were intended to be imposed only to communities. Thus, a city that granted asylum to criminals and not helped to their arrest, was captured. As shown, canonists accepted criminal liability of collective entities, but under certain conditions. The most important of these is the fact that the community could not be held responsible for the act of a single individual only if the individual act committed would have been a consequence of collective will or could have been the result of most community members will.[12]

As a consequence of the recognition of liability of a collective entity, there were adopted a series of specific sanctions: fines, restriction of rights and dissolution. In addition, spiritual penalties were applied to the individual members of the group, such as the prohibition of the sacraments and, if they were members of the clergy, religious exercise suspension and excommunication.

In France, criminal liability of legal persons was recognized, according to some scholars, until the French Revolution, as a legacy of canonic law. It was accepted that a collective entity had a factual existence, and that the groups could commit crimes and should be punished irrespective of their nature.[13] In 1331, the city of Toulouse was condemned by the Parliament, by taking inherent rights and privileges of its status as a collective entity and confiscating its assets. Having been removed these privileges, Toulouse could not represent itself as specific and autonomous entity. Parallel to this, by

---

[10] *T. Sâmbrian*, De la statutul persoanelor juridice *„piae causae"* în dreptul roman, la propuneri de legiferare privind regimul juridic al asociațiilor și fundațiilor filantropice din România, in Revista de Științe Juridice nr. 34/2005, p. 29, available online at http://drept.ucv.ro/RSJ/Articole/2005/RSJ34/0103Sambrian.pdf.

[11] *M. Lizée*, De la capacité organique et des responsabilités délictuelle et pénale des personnes morales, in McGill Law Journal, vol. 41, 1995, p. 134-136.

[12] *D. Holler Branco*, *cited*, p. 15.

[13] *Idem*, p. 16. Opinions that deny the recognition by the French of criminal liability of legal persons in those times were also expressed.

denying the right to be a collective entity, the right to be an independent community was also denied. By confiscation of its assets, the Parliament ensured that city of Toulouse obtained no advantage due to its economic position. The same thing happened in 1558 with the city of Bordeaux and later followed Montpellier in 1739.[14]

In 1670 the foundations of modern French law were settled, French Criminal Justice Ordinance adopted that year recognizing, among other things, the institution of criminal liability of groups. The first provision in this regard provided that criminal proceedings could be used against towns, villages, collective entities and various forms of association which committed various crimes such as rebellion or violence. In the category of collective entities were included schools, religious councils, monasteries, professional groups of lawyers, court officials and prosecutors. In order to engage their criminal liability, the criminal deed should have been the result of the collective will, due to the importance given to subjective *mens rea* element. The act *per se* was not sufficient. The will of the group was an essential element of the offense. In addition, the doctrine of those times emphasized that criminal liability of the group did not remove or diminish criminal liability of the individual who committed the wrongful act. In this way, the offender and the other participants to the offence were not exempt from personal criminal liability.[15]

On the other side, English modern law initially rejected the concept of collective guilt so widespread in the medieval period, while the principle of non – liability of legal persons prevailed. According to the general opinion, only individuals who willfully committed an injurious act could be found responsible for committing a crime. Chief Justice of England confirmed this theory in 1701, when he stated that collective entities as corporations cannot be accused of a crime, but only individuals as their members. In the mid nineteenth century a breech occurs in common law legislation and conception, criminal liability of legal entities becoming a reality. Initially, the criminal liability of legal persons was restricted only to breaches of legal obligations – *nuisance*; was later extended to other categories of offenses: *nonfeasance* (such as failure to repair roads and bridges), *defamatory libel* (publishing a defamatory obscene or revolting text against a living person), *blasphemous libel* (publication of any document slandering the Christian faith, the Bible, the Church of England, God, Jesus or any sacred person) and *criminal contempt of court* (any interference in the process of justice).[16]

By the nineteenth century, industrial corporations were held criminal responsible for committing so-called *statutory Crimes*, the fine as a specific sanction being mainly imposed.

In 1889, the British Parliament introduced an interpretive rule according to which the term *person* used in legal incrimination texts refers to both individuals and legal entities. This is the moment that triggered admission of criminal liability of legal persons in case of committing intentional crimes.[17] Common law was the cradle of creation of two models imposing criminal liability of legal entities: vicarious liability (vicarious liability model) and identification model. These doctrines have dominated the field of

---

[14] *L.F. Gomes (coord.)*, Responsabilidade penal da pessoa jurídica e medidas provisórias e direito penal, in Revista dos Tribunais, vol. 72, São Paulo, 1999, p. 80.

[15] *A. Mestre*, Les personnes morales et le problème de leur responsabilité pénale, cited by *Fl. Streteanu, R. Chiriță*, Răspunderea penală a persoanei juridice, Second ed., C.H. Beck, București, 2007, p. 20.

[16] *Fl. Streteanu, R. Chiriță*, *cited*., p. 36.

[17] *D. Holler Branco cited*., p. 20.

criminal liability of legal persons and, although they represented true challenges for scholars of those times, they actually weren't meant to be a breach of the individualistic principles, as erroneously believed by some doctrine.[18]

III. Historical evolution of the legal entities within Romanian criminal law

Ever since the Getae – Dacian period, there have been collective organization forms[19] and in the Middle Age collective responsibility forms in the fiscal, criminal and international commerce area, are being signaled.[20] Under the Turkish-phanariot regime the first companies are being formed. A chapter on juridical entities can be found in the *Pravilniceasca condica*,[21] as well as within the *Legiuirea Caragea* [22] which talk about so called *"tovărăşii"* – comraderies. The *Calimah Code* calls the legal entities *moral persons*.

The Criminal Code of the Romanian United Principalities, known as well under the name of Cuza's Criminal Code from 1864, establishes the personal criminal responsibility in principal excluding the criminal responsibility for collective persons. Until the adoption of the Criminal code from 1936, a series of special criminal laws have been adopted, indirect engaging a criminal responsibility for juridical entities.[23] As such, on February 6th 1924 the law for legal entities has been adopted, which, despite its denomination was referring only at associations and foundation with gainful purpose. This regulatory document contains a very interesting provision on the possibility of dissolution of those legal entities, based on a decision of the executive power (Council of Ministers), in case the public order or state's safety was infringed.

The mine law, adopted on July 3rd 1924 was establishing in art 141 a real criminal responsibility for legal entities: "in case of deviations which would result in deviation within the functioning of the public services and in the general functioning of the state, the following sanctions will be applied by the mine authorities to the enterprise/company as well as to its administrator (…)".

In 1932 a law was passed for unfair competition. This law was sanctioning with penal fines the use in commerce of firms or trademarks which would infringe certain rights previously obtained by others on them. On 7th of April 1934 a law for public defense was passed, directly regarding the right to association. Using an extremely vague terminology, the law was establishing that those political groups which throughout their activity are endangering the states' safety or the social order or they preach for social or state order changes, could have been dissolved by a decision issued by the Council of Ministers. Hence, as it was mentioned by some authors, "a measure

---

[18] *E. Lederman*, Models for Imposing Corporate Criminal Liability: from Adaptation and Imitation toward Aggregation and the Search for Self-Identity, in Buffalo Criminal Law Review, vol. 4:641, p. 642.

[19] *E. Cernea, E. Molcuț*, Istoria statului și dreptului românesc, Casa de editură și presă „Șansa" SRL, București, 1996, p. 12-16.

[20] *E. Cernea, E. Molcuț*, op. cit., p. 117.

[21] Enacted in the Romanian Country (Țara Românească) by the command of Alexandru Ipsilanti in 1775 into force only in 1780, because of the turkish occupation.

[22] Compiled in 1818 by order of the Romanian Country Lord Ioan Gheorghe Caragea and entered into force one year later.

[23] Professor Ion Tanoviceanu names it „quasi-criminal responsability". See, *I. Tanoviceanu*, Tratat de drept și procedură penală, vol. I, Tipografie „Curierul Judiciar", București, 1927, p. 384.

mentioned only exceptionally within the Legal entity Law is trying to get generalized[24]. Secret society activities which concealed their activities in order to preclude the law, was as well prohibited.

The Doctrine and intra-war legislation were acknowledging next to criminal responsibility of the natural person a criminal responsibility of the legal entity.[25]. In 1928 in Bucharest takes place the Congress of the International Association of Criminal Law where the papers concentrate around the idea that legal entities represent very important social forces in today's life[26].

This stream was consolidated by the adoption of the Criminal Code of Carol the II-nd in 1936, in which the Romanian legislator of 1936 envisaged safety measures applicable to legal entities, in Title IV – "Safety Measures" Chapter II – "Different species of safety measures". Because the juridical nature of the safety measures was of penal sanctions, which were applicable only in case a crime was committed, hereby the institution of criminal responsibility of the legal entity was indirectly established. Hence, art. 84 regulated the safety measure of closing the place down, stating that "closing down the industrial or commercial place can be ordered by a court, in the cases specified by the law, when it is being considered that this measure is necessary in order to prevent future crimes. The closing down duration is between 1 month and one year. As an offence, closing down the place can be ordered only in case of a subsequent offence for an identical offence and for a period between, one day to one month." Art. 85 of the 1936 criminal code, regulated de safety measure of dissolution or activity suspension of a legal entity: " when a crime or an offence is being punished by the law with one year of correctional prison was being committed by the directors or administrators of a company, associations or corporations, working in the name of the legal entity and with means procured by it, the criminal court can next to the punishment applicable to the natural person, can pronounce a safety measure of activity suspension or dissolution of the legal entity, in conformity with the danger that it could create for the public moral or order that this company continues to have activity." More, 3rd line of the same article, penal capacity is being recognized to legal entity as a collective entity, being of a separate body then its constituting members, because it's stating that: "activity suspension is based on ceasing any activity of the legal entity, even under another name or with other directors or administrators." These provisions of the 1936 criminal Code made professor Vintila Dongoroz to make the following remark "the affirmative as well as the negative thesis of the criminal responsibility of the legal entity have been reduced to the same common denominator".[27]

The Penal Code of 1968[28] of communist inspiration has disjointed the problem of legal entity criminal responsibility by not recognizing it. This view has been kept for 40 years, the capacity to be held criminal responsible has been recognized only to natural persons.

---

[24] *E. Cernea, E. Molcuț*, op. cit., p. 269.

[25] *A. Fanu-Moca*, Răspunderea penală a persoanei juridice – o problemă de actualitate a dreptului românesc, în Buletinul ştiinţific al conferinţei naţionale „România şi dreptul internaţional", 24-26 aprilie 1998, Ed. Universităţii „Lucian Blaga", Sibiu, 1999, p. 119.

[26] *V. Pașca, R. Mancaș*, Drept penal. Partea generală, Ed. Universitas Timisiensis, Timişoara, 2002, p. 421.

[27] *V. Dongoroz*, *op. cit.*, p. 368.

[28] Published in B. Of. nr. 79-79bis from 21 June 1968, republished in B. Of. nr. 55-56 din 23 April 1973 and M. Of. nr. 65 din 16 aprilie 1997.

In 2004, while failing in the attempt to pass a New Penal Code[29] the Romanian legislator passed the Law regarding the criminal responsibility of legal entities for the crimes of falsifying coins and other values no. 299/2004[30], currently repealed, a special criminal law which was expressly establishing the criminal responsibility of the legal entity in case the offences of falsifying coins or other values, as it is being envisaged by art 282 and art. 284 of the Criminal Codes well as for the crimes of detaining of the necessary means in order to falsify values, envisaged in art 285 Criminal Code, committed in the name of or in the interest of the legal entities, by the organs or their representatives. According to art 2 of 299/2004 Law, the applicable punishments of the legal entities envisaged were: fines, as capital punishment and suspension of activities or one of its activities as complementary punishment, restraining as such the number of complementary punishments which could have been applied to legal entities in case they were committing such crimes. Very interesting though, is the fact that this law came into force on July 1st 2004, while criminal responsibility of a legal entity being expressly established before the entering into force of the 301/2004 Law, but only for an expressly and limited, by law envisaged, number of offences.

Law no. 301/2004 has been abolished by Law no. 286/2009, after it's come into effect has been repeatedly postponed.[31]

In order to ensure its credibility and because the amendments previewed by Law no. 301/2004 have been imposed by the European and International juridical context, the Romanian legislator has been bound to introduce a series of new institutions, among which the legal entities criminal responsibility, within the, still in force, Penal Code of 1936. Therefore, by 278/2006 Law the very famous art. 19 has been introduced, stating that "legal entities, except the State, public authorities and institutions, which are caring an activity which does not comply with the object of the private domain, are being held criminal responsible for the crimes committed while exercising the object of activity or in the interest or name of the legal entity (...)". Within the same article the criminal responsibility of the legal entity is being combined with the criminal responsibility of the natural person which committed the unlawful act. With the introduction of art. 53 by 278/2006 Law the punitive framework has been established, stating that main types and complementary penalties are applicable to a legal entity offender. Main types of punishment are fines comprising between 2.500 lei (RON) and 2.000.000 lei (RON) and the complementary penalties are:

a) dissolution of a legal entity

b) suspension of the legal entities activities for a period of 3 months until one year or suspension of one of the legal entities activity in relation with which the crime has been committed, for a period of 3 months to 3 years.

c) closing down a legal entities working point for a duration between 3 months and 3 years.

d) Prohibition to take part at public auction procedures for a period between one and 3 years.

---

[29] Legea nr. 301/2004, currenty recalled

[30] M. Of. nr. 593 from 1 Jully 2004.

[31] The 301/2004 Law, should have, initially, entered into force on 28 iunie 2005. Later, this date has been shifted by O.U.G. nr. 58/2005 to 1st Septembre 2006, and by O.U.G. no. 73/2008 the entering into force term has been prororogued to September 1st, 2009. Finally this project died at birth, because, even though it was modified multiple times, throughout the period it was not yet into force, the former future Penal Code has been recalled by Law no. 286/2009.

e) Publishing or broadcasting the final judgment/ the conviction judgment.

The applicability conditions of these punishments are being detailed by the provisions entailed in Chapter IV[1] (art. 71[1]-71[7]) brought in the 1968 Criminal Code by art I point 23 278/2006 Law. At the same time, the institution of legal rehabilitation of the legal entity,[32] as shown above, not envisaged by 301/2004 Law, as well as the legal entities relaps, within art. 40[2].

IV. Criminal Responsibility of Legal Persons pursuant to the provisions of the new Criminal Code of Romania

A significant moment in the field of criminal law was the adoption of the new Criminal Code of Romania - Law no. 286/2009 regarding the Criminal Code of Romania, which includes an entire section dedicated to the criminal responsibility of the legal persons - Title VI "The criminal responsibility of legal persons".

Article 135 defines the conditions in which a legal person can be held liable, indicating that the legal person, with the exception of the state and of the public authorities, is criminally liable for the offences committed while pursuing its business purposes or committed in the name of, on behalf of, or for the benefit of a legal person. The public institutions are not held criminally liable for the offences committed during an activity that is not related to the private sector. The new Criminal Code also defines the aggregation of the criminal liability of the legal person with the criminal liability of the natural person who took part in committing that offence. Therefore, the new Criminal Code grants full criminal immunity to the state and to the public authorities, as well as a limited criminal immunity to the public institutions for offences committed during activities that pertain to the public sector. The criminal liability of the legal person does not exclude the criminal liability of the natural person who was involved in perpetrating the same offence.

As far as the criminal sanctions applied to a legal person, a single main penalty was provided for - the fine - which is established according to the day-fine system, to which six additional sanctions are being added (art. 136):

a. the winding-up of the legal person;

b. the suspension of the entire business activity or of one of the business activities pursued by the legal person, for a period of time from 3 month and up to 3 years;

c. closure of business units belonging to the legal person, for a period of time from 3 month and up to 3 years;

d. prohibition from taking part in public procurement tenders, for a period of time from 1 to 3 years

e. placing under judicial supervision;

f. formal publication or communication of the sentence.

The total amount of the fine is established according to the day-fine system. The amount corresponding to a day-fine, between 100 and 5,000 RON, is multiplied with the number of day-fine, which may be between 30 and 600 days. The new Criminal Code of Romania provides the courts with legal criteria regarding the calculation of the day-fine amount: the turnover, in the case of a legal person operating for profit, and the value of the assets, in the case of other type of legal persons, as well as taking into consideration the other obligations undertaken by the legal person.

[32] Art. 134 alin. (2) Penal Code from 1968.

When the main aim of offence perpetrated by the legal person was to obtain financial benefits, the special limits of the day-fine provided for by the law for the offence may be increased by one third, without exceeding the general maximum amount of the fine. Upon establishing the fine to be applied, the value of the financial benefit obtain or pursued shall be considered.

As far as the additional sanctions are concerned, these are established in a general manner, which can yet be improved. The application of the additional sanctions is basically not mandatory, and they are implemented when the court of law acknowledges that, in consideration to the nature and severity of the offence, as well as the circumstances of the said offence, such sanctions are deemed necessary. The application of additional sanctions is mandatory when the law specifically indicates the said sanction.

Except for the winding-up of the legal person – which, in our opinion, should have been set as main sanction, not as additional sanction – all the other five additional sanctions may be applied cumulatively.

The additional sanction of winding-up the company shall be compulsory and added to the main sanction of fine payment when the legal person was established for the purpose of infringing the law, when its business purpose was diverted for the purpose of perpetrating offences, and when the sanction provided for by the law for the committed crime is imprisonment for a period which exceeds 3 years. Another case in which the winding-up of the legal person is mandatory is when one of the additional sanctions is the failure to implement, in bad faith, one of the additional sanctions provided for in article 136, paragraph (3), sections b)-e); in this case, the so-called *cumulative effect* applies. With regard to this additional sanction, the new Criminal Code also provides a list of "immune" legal persons, indicating in article 141 that winding-up cannot be applied to public entities, political parties, trade unions, management organizations, religious institutions or entities belonging to national minorities, established pursuant to the law, as well as the legal persons pursuing their activities in the mass-media. If the interdiction of winding-up public entities is set forth for obvious reasons, we have serious doubts regarding the impossibility for the political parties, religious institutions, trade unions, management organizations and especially entities in the mass-media from being wound-up. These legal persons were included on the list of legal persons immune to winding-up, due to the recognition of the right to association and freedom of expression, established in the European Convention on Human Rights and Fundamental Freedoms; however, even the Strasbourg case law accepted that these rights may be reasonably limited for state protection reasons, applicable in a democratic society. Moreover, the special legislation regarding the above legal persons allows the winding-up as a civil and administrative sanction in the case of political parties, for example, after they are deemed unconstitutional following the application of a special protocol.

The additional sanction of suspending the activity of the legal person consists in prohibiting the legal person, for a period ranging from 3 months to 3 years, from pursuing all or one of its business purposes which are related to the committed offence, while the other business purposes which are not related to the offence and which are pursued according to the law cannot be suspended. Also, if the legal person fails, in bad faith, to comply with the additional sanction of formal publication or communication of the sentence [pursuant to article 136, paragraph (3), section f)], the court of law shall order the suspension of all or one of the business purposes pursued by the legal person, until the additional sanction is implemented, yet this suspension shall apply for no

longer than 3 months. If the sentence passed regarding the legal person was not formally published or communicated within this period, the court of law shall order the winding-up of the legal person.

This additional sanction cannot be applied to the legal persons for which winding-up is not allowed.

The additional sanction of closing certain business units belonging to the legal person shall involve the closing, for a period from 3 months up to 3 years, of one or several of the business units belonging to a legal person operating for profit, where the activity representing the offence was pursued; this time, the Romanian legislator indicated that the business units belonging to legal persons operating in the mass-media cannot be closed, for reasons based on the entitlement to the freedom of expression, which was directly and wrongly interpreted by the Romanian legislator.

The additional sanction related to the prohibition from taking part in public procurement tenders, for a period of time from 1 to 3 years represents the inability to take part, directly or indirectly, in the proceedings regarding the award of public works contracts (public tenders, direct sales and other administrative proceedings for the procurement of goods and services), as provided for by the law.

The placing under judicial supervision is another additional sanction, which requires the legal person to carry out, under the supervision of a legally authorized agent, of the activity which was related to the offence committed, for a period ranging from 1 to 3 years. The legally authorized agent shall refer the case to a competent court when the said agent finds that the legal person has not taken all the steps necessary in order to prevent new offences from being committed. Should the court of law deem that the matter referred is duly substantiated, the said court shall order that the additional sanction be replaced with the suspension of the business activity pursued by the legal person. This additional sanction - the placing under judicial supervision - cannot be applied in case of the public entities, political parties, trade unions, management organizations, religious institutions or entities belonging to national minorities, established pursuant to the law, as well as the legal persons operating in the mass-media.

The easiest of the additional sanctions is the formal communication of the final sentence or its publication. The discrediting and stigmatizing character of this last additional sanction may not be minimized, however, as this is joined by the social sanction of the public disrepute. The formal communication of the final sentence or its publication shall always be at the expense of the sentenced legal person, within the limits regarding the privacy and the protection of the personal information belonging to the other persons involved in the legal affair. Thus, the legislator set forth, in article 145, paragraph 2 that the formal communication or publication of the sentence passed shall not disclose the identity of other persons. The final sentence shall be formally communicated as an extract, in the form and at the place ordered by the court of law, and for a period between 1 and 3 months. The final sentence shall be formally communicated as an extract, in the form ordered by the court of law, in the printed or the audiovisual media, or in other audiovisual communication means, as established by the court of law. Should the sentence be communicated in the printed or audiovisual media, the court of law shall establish the number of issues (no more than 10) and, in the case of other audiovisual means, the duration cannot be longer than 3 months.

The liability of the legal person in case of repeated offence has been very much simplified, as compared to the provisions of article 40^2 from the 1968 Criminal Code, as

the legislation does not define two cases of repeated offence which were strictly distinguished according to the first condition, regarding the execution or not of the sanction with fine. Article 146 defines a single case of repeated offence for the legal person, setting forth that "the repeated offence is considered when the legal person, after a final and definitely imposed sentence and until the recovery of their rights, commits a new offence, with direct or oblique intent". If the legal person commits repeated offence, the special limits of the sanction, as provided for by the law in case of a new offence shall be increased by one half, without exceeding the general maximum amount of the fine. If the previous fine sanction was not executed, in whole or in part, the fine established for the new offence, pursuant to paragraph (2) shall be added to the previous sanction or to the remaining non-executed sanction.

With regard to the attenuation or the aggravation of the criminal liability of the legal person, article 147 sets forth that, in case of aggregated offences, plurality of intermediary devices or causes of attenuation or aggravation of the criminal liability, the legal person is applied the fine in the amount provided for by the law for natural persons. In case of aggregated offences, the additional different sanctions, except the winding-up, or the sanctions that are similar, but have different content, shall be cumulated; also, among the same type and same content additional sanctions, the harder shall be applied. In case of aggregated offences, the safety measures applied shall be cumulated.

A very interesting provision is the one regarding the effect of a merger or winding-up on the liability of the legal person; this provision is of utmost importance, considering the "hazy" corporate environment in Romania. This text of law introduces elements of novelty, inspired from the Criminal Code of Belgium[33]. Thus, in case of merger or total absorption or division, the initial legal person ceases to exist and loses its legal personality, therefore cannot be held criminally liable. Nevertheless, in these cases, the assets of the reorganized legal person are transferred in whole or in part, and this also leads to a transfer, in whole or in part, of its obligations. The previous Criminal Code of Romania defined the principle of the personal criminal liability, which implied that the reorganized legal person could not also transfer its criminal liability. However, the new Criminal Code solves this issue in the provisions of article 151, paragraph 1, which sets forth that, "should a legal person lose its personality following a merger, absorption or division performed after the offence was committed, the criminal liability and its consequences shall be directed:

a) to the legal person created after the merger;

---

[33] Article 86 of the Criminal Code of Belgium indicates that "the loss of the legal personality in case of a condemned person shall not cancel the sanction", while article 20 (repealed by article 21 of the Law 1996-07-10/42 regarding the abolition of the death penalty and the change of criminal sanctions http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn =1996071042) sets forth that "the criminal proceedings shall be cancelled at the end of liquidation, judicial winding-up or winding-up without liquidation. The criminal pursuit may continue if the legal person initiated the proceedings of liquidation, judicial winding-up or the winding-up without liquidation with the view of evading criminal investigation, or if the legal person was indicted by the investigating magistrate before it lost its legal personality." The updated version of the Criminal Code of Belgium may be found at: http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1867060801%2FF&caller=list&row_id=1&numero=2&rech=4&cn=1867060801&table_name=LOI&nm=1867060850&la=F&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27PENAL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=41&imgcn.y=12#LNK0026

b) to the absorbing legal person;

c) the legal persons created following a division or who have acquired parts of the assets belonging to the divided legal person.

In the case referred to in paragraph (1), the sanction shall be established according to the turnover or the value of the assets belonging to the legal person having committed the crime, as well as according to the part of its assets which were transferred to each of the legal persons taking part in the proceedings".

By these legal provisions, the Romanian legislator defines an exception from the principle of the personal criminal liability and establishes the principle of proportion regarding the established sanction with the fine.

V. Conclusions

In Romania, the corporate criminal phenomenon – also known as *corporate crime* in the *common law* system – has expanded especially in fields like tax, customs, constructions, environment, and securities, causing serious losses for the national economy and the population. The fight against economic and financial crimes committed by the natural persons has failed dramatically in the countries which have exempted the legal person from liability. The pragmatic reason must create new entities allowing the justice to operate with legal categories adapted to the present-day social reality. If Romania had not adopted a new approach to the liability of the legal person and a inclusion of this principle in the applicable law, our country would not have been included in the concerted actions implemented by the European member states in order to limit the economic and financial crime. The purpose of the sanction in the criminal law is mainly to prevent any new offences from being committed, by implementing social prevention regarding the offenders, as well as a general prevention, regarding the social aggregate of the persons addressed by the criminal law.

The Romanian legislator has managed to overcome all obstacles and has laid the bases of a modern and bold law, which takes into consideration the criminal liability of the legal person. Notwithstanding certain regulatory requirements which could be improved in our opinion and which could be addressed by a future law, we believe that Romania has adopted the modern trend across Europe by establishing the criminal liability of the legal person in the new Criminal Code.