

# Legal person and the tax evasion offences. From theory to practice

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## **Abstract:**

*Tax evasion is a scourge that affects society both in its economic dimension and in its moral, human and legal dimension. In this context, the judicial penal policy of a State, reflected in how the criminal legal norms are promptly applied in concrete situations is a crucial element in fighting this phenomenon. A legal entity is the main actor in the commission of the tax evasion offences, most of such offences being committed in the name, interests or the achievement of the legal purpose of the legal entity. In these conditions we should boost the judiciary to impose criminal liability of legal persons, in cases when all legal requirements are met both in terms of legal content of the offences of tax evasion provided by Law no. 241/2005 and in terms of criminal liability of legal persons provided by art. 135 of the Romanian Penal Code.*

**Key words:** *tax evasion offences, legal person, criminal liability of the legal person, legal scope, mens rea, criminal deed.*

## **Summary**

- I. Tax evasion – general aspects**
- II. The perpetrator of the tax evasion offences**
- III. The analysis of the conditions provided by art. 135 Romanian Criminal Code (RCC) in relation with the offences provided by Law no. 241/2005 on prevention and combating the tax evasion offences**
- IV. Critics on the practice of the Romanian Courts**
- V. Conclusions**

## **I. Tax evasion – general aspects**

Tax evasion represents a social phenomenon generated and enhanced by a deficient policy of a state on taxes and financial debts, an area where the state must intervene with extreme caution by means of criminal law. The field of tax evasion is a regulatory area that requires highly sensitive interpretation and the enforcement of criminal rules involves an appeal to the tax and financial provisions, both numerous and complex. In this study we try to draw attention to the way in which the legal provisions are imposed to legal persons, although the subject of our analysis does not concern the causes and forms of tax evasion.

The legal source for tax evasion offenses is Law no. 241/2005<sup>1</sup> on prevention and combating the tax evasion offences, which creates the legislative framework necessary

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to maintain financial discipline, reducing damage caused by embezzlements on taxes owed to the state and taxpayers' compliance behavior in their relations with the State and fiscal authorities.

Law no. 241/2005 provides the tax evasion offences (art. 9 par. 1 letter a-g) and the offences in connection with tax evasion offences (art. 3-8). Both categories can be committed by an individual (human being), as well as a legal person. Even in the situations where there is a special legal request on the quality of the perpetrator – taxpayer (art. 3 and art. 8), debtor (art. 9 lett. g) – the criminal liability can be imposed to a legal person.

According to provisions of art. 3-8 from the special law, the offenses in connection with tax evasion offences are:

- the intended refusal of a contributor to recover accounting documents that have been previously destroyed, within the period established by the officials, also he could have been able to do it (art. 3).
- the unjustified refusal of a person to present to the competent bodies legal documents and assets of the estate, within 15 days from notice, in order to escape the tax obligations (art. 4).
- impeding in any form, of the competent organs to enter, as provided by law, the headquarters, premises or on lands, with the purposes for financial, tax or customs verifications (art. 5).
- possession or putting into circulation without having the right to, of stamps, bands and standard forms with special treatment used in the tax area (art. 7 par. 1).
- printing, possession or putting into circulation, of forged stamps, bands and standard forms with special treatment used in the tax area (art. 7 par. 2).
- establishing in bad faith by the taxpayer, of taxes or contributions, leading to obtaining, without right, of amounts of money as reimbursement or refund of the general consolidated budget or compensation owed to the general consolidated budget (art. 8 par. 1).
- association to commit the offence provided by art. 8 par. 1 (art. 8 par. 2).

Regarding the offense provided by article. 6 - intentionally retaining and notpaying within 30 days of the due date, of the taxes or withholding – this provision was declared unconstitutional by *decision no. 363/7<sup>th</sup> May 2015 of Romanian Constitutional Court*<sup>2</sup>

The text was declared unconstitutional since it was unpredictable, not sufficiently precise and clear to be applied. The Court held that neither the art. 6, nor the Law no. 241/2005 or other special laws did not define the term "taxes or withholding". However, the rules adopted to approve the forms used for declaring taxes and contributions inventory the taxes and contributions collected through withholding and the income tax resulted from the transfer of real estate or from other income of individuals are mentioned as a withholding tax at source. The Court therefore held that the material object of the offense is not set by law, but by an administrative act adopted in the purpose of the enforcement of the law, whose regulatory intervention regards a distinct field, namely the model and content of legal forms and acts.

Or, in the case of offenses, including tax and financial offences, the legislature must indicate clearly and unequivocally the material object thereof in the wording of the legal norm, or the legal object should be easily identified by reference to another law which is in connection with the criminalizing text and has an equal force, in order to establish the presence/absence of the offence. Norma criminalization of art. 6 and has exhausted its

<sup>2</sup> Published in Official Monitor, Part I, no. 495/ 6<sup>th</sup> of July 2015.

legal effects as of August 21, 2015, after crossing the 45 days of the publication, during which the legislature did not intervene to restore consistency text declared unconstitutional by the Basic Law.

According to provisions of art. 9 from the special law, the tax evasion offences, if committed in order to escape the tax obligations are:

- a) hiding taxable goods or taxable source;
- b) omission, in full or in part, to highlight in the accounting documents or other legal documents, of conducted trade operations or revenues in order to escape the tax obligations;
- c) highlighting in accounting documents or other legal documents, of charges that are not based on real transactions or highlighting other fictitious operations in order to escape the tax obligations;
- d) altering, destroying or hiding accounting documents, memoirs of electLeiiic cash registers or other means of data storage in order to escape the tax obligations;
- e) performing of double accounting records, using documents or other means of data storage in order to escape the tax obligations;
- f) evading in carrying out financial, tax or customs verifications by fictitious declaring or misreporting on headquarters in order to escape the tax obligations;
- g) substitution, degradation or alienation of forfeitable assets by the debtor or third parties in order to escape the tax obligations.

Art. 9 provides distinct offences of tax evasion and not ways to commit an offense. Assuming that two or more acts of those referred to in a-g of the art. 9 of the Law are committed, will hold a plurality of offenses.

Nomatter if discussing about tax evasion offenses or offenses in connection with them, any of those offences can be committed both by individuals and by a legal person. Moreover, even in situations where the legislature speaks of the existence of a qualifying feature of the agent – taxpayer (art. 3 and art. 8), debtor (art. 9 letter g) – the criminal liability may be imposed on legal entities.

Presented below an oversimplification of the facts incriminated by Law no. 241/2005 indicating the legal content, the penal sanction and the perpetrator.

**Table I. Offences in connection with tax evasion offences**

No.	Legal rule	Legal content	Sanction	Perpetrator
1.	Art. 3	The intended refusal of a contributor to recover accounting documents that have been previously destroyed, within the period established by the officials, also he could have been able to do it.	Criminal fee from 5.000 lei to 30.000 lei.	Qualified perpetrator: tax ayer – Naural or legal person
2.	Art. 4	The unjustified refusal of a person to present to the competent bodies legal documents and assets of the estate, within 15 days from notice, in order to escape the tax obligations.	imprisonment 6 months - 3 years or criminal fee.	Any natural or legal person
3.	Art. 5	Impeding in any form, of the competent organs to enter, as provided by law, the headquarters, premises or on	imprisonment 6 months - 3 years or criminal fee.	Any natural or legal person

No.	Legal rule	Legal content	Sanction	Perpetrator
		lands, with the purposes for financial, tax or customs verifications.		
4.	Art. 6	Withholding and intentionally not paying within 30 days of the due date, of the amounts of taxes or withholding.	Unconstitutional <i>decision no. 363/7<sup>th</sup> May 2015 RCC</i>	Any natural or legal person
5.	Art. 7 (1)	Possession or putting into circulation without having the right to, of stamps, bands and standard forms with special treatment used in the tax area.	imprisonment 2 - 7 years.	Any natural or legal person
6.	Art. 7 (2)	Printing, possession or putting into circulation, of forged stamps, bands and standard forms with special treatment used in the tax area.	imprisonment 3 - 12 years.	Any natural or legal person.
7.	Art. 8 (1)	Establishing in bad faith by the taxpayer, of taxes or contributions, leading to obtaining, without right, of amounts of money as reimbursement or refund of the general consolidated budget or compensation owed to the general consolidated budget.	imprisonment 3 - 10 years.	Qualified perpetrator: taxpayer – natural or legal person.
8.	Art. 8 (2)	Association to commit the offence provided by art. 8(1).	imprisonment 5 - 15 years.	Qualified perpetrator: taxpayer – natural or legal person.

Table II. Tax evasion offences

No.	Legal rule	Legal content	Sanction	Perpetrator
1.	Art. 9 lett. a	hiding taxable goods or taxable source, in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
2	Art. 9 lett. b	omission, in full or in part, to highlight in the accounting documents or other legal documents, of conducted trade operations or revenues in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11	Any natural or legal person

No.	Legal rule	Legal content	Sanction	Perpetrator
			years if a damage more than 500,000 EUR occurred	
3	<b>Art. 9 lett. c</b>	Highlighting in accounting documents or other legal documents, of charges that are not based on real transactions or highlighting other fictitious operations in order to escape the tax obligations	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
4	<b>Art. 9 lett. d</b>	altering, destroying or hiding accounting documents, memoirs of <b>electLeiiic</b> cash registers or other means of data storage in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
5	<b>Art. 9 lett. e</b>	performing of double accounting records, using documents or other means of data storage in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
6	<b>Art. 9 lett. f</b>	evading in carrying out financial, tax or customs verifications by fictitious declaring or misreporting on headquarters in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
7	<b>Art. 9 lett. g</b>	Substitution, degradation or alienation of forfeitable assets by the debtor or third parties in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage	Debtor – natural or legal person/ third parties

No.	Legal rule	Legal content	Sanction	Perpetrator
			more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	– natural or legal persons

Regarding the quality of the perpetrator, we note that a legal person can be found guilty for committing them, because the Romanian criminal legal system provides the institution of criminal liability of legal persons. The tax evasion offenses and the offenses related to them are included in a broader category of offenses on account and financial-banking activity<sup>3</sup>, so they are committed mainly during the ordinary activities of economic agents, mostly legal entities. Therefore there are huge differences between the scholar's interpretation of the legal provisions in counterpart to the position of the Public Ministry and the Romanian Courts in the activity of imposing the criminal liability to legal persons, that are almost impossible to explain or argue.

Initially seen by the doctrine as two irreconcilable systems<sup>4</sup>, the Continental System and Common Law System have succeeded to significantly get closer, especially in the last two decades, the issue of criminal liability of legal persons being the one of the elements that constituted the glue of this rapprochement. Both in terms of quality and in terms of quantity, the legal person criminal phenomenon covers the most significant area of criminality in the society, constituting, according to an author, the most important topic discussed in criminal law today.<sup>5</sup>

In order to impose criminal liability to a legal person, a verification of the conditions for criminal liability provided by art. 135 RCC is needed:

a) if the offense is committed by a legal entity having legal personality, which has not been specifically excluded by the legislature (State, public authorities and public institutions for acts committed in activities that may not occur in the private domain);

b) if the offense is committed in the name, interest or achievement of the legal purpose of the legal person.

The criminal deed – *actus reus* – is committed by the legal person through a human agent – administrator or other legal representative, a contractual representative – or an employee of the legal person.

## II. The perpetrator of the tax evasion offences

The doctrine<sup>6</sup> has identified five categories of perpetrators of tax evasion offences and offences in relation with them: tax payer, payer, taxable, imposing bearer and other persons.

<sup>3</sup> T. Toader, *Infrațiuni prevăzute în legile speciale. Reglementare. Doctrină. Decizii ale Curții Constituționale. Jurisprudență*, 5<sup>th</sup> edition, Editura Hamangiu, București 2012, p. XIII.

<sup>4</sup> R. Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*, in Buffalo Criminal Law Review, vol. 4, no. 1/1999, p. 283, available online at [http://wings.buffalo.edu/law/bclc/bclarticles/4\(1\)/hefehndehlpdf.pdf](http://wings.buffalo.edu/law/bclc/bclarticles/4(1)/hefehndehlpdf.pdf).

<sup>5</sup> B. Schünemann, *Plädoyer zur Einführung einer Unternehmenskuratel*, apud R. Hefendehl, *op. cit.*, p. 284.

<sup>6</sup> Ioana Maria Costea, *Particularități privind subiectele evaziunii fiscale*, in *Analele Științifice ale Universității Al. I. Cuza Iași*, Tom LIV: 87-100, Științe Juridice 2008, p. 89.

1. *the taxpayer* – Art. 2 letter b of the Law no. 241/2005 – "any natural or legal person or any other entity without legal personality who owes taxes, contributions and other financial duties for the State budget"<sup>7</sup> (art. 17 par. (2) FPC<sup>8</sup>, art. 1 pt. 4 of the New FPC<sup>9</sup> applicable from 1 February 2016).<sup>10</sup>

2. *the payer* – a third party that intervenes with the debtor and the creditor within the legal relations of tax law; has an obligation to pay or withhold and pay taxes, contributions, fees and other budgetary incomes -can be a legal person

3. *the taxable* – in the matter of VAT; both individuals and legal entities that were registered for VAT, according to legislation.

4. *imposing bearer* – in the field of indirect taxation (VAT, excise duties) – consumer goods and services; is the final consumer; can be a natural or legal person<sup>11</sup>.

5. *other persons with the potential to become a perpetrator of tax evasion offences*  
- *tax debtor* in the forced execution procedure – (art. 9 letter g) degradation or alienation of forfeitable assets (natural or legal).

- *custodian* – a person who has the obligation to preserve possessions in the forced execution procedure (natural and legal person).

- *persons in specific relations with taxpayer, which are obliged to disclose information or present goods* (art. 4 of Law no. 241/2005) natural or legal persons.

- *third parties* – not subjects of tax law (art. 5, 7 para. 1 and 2, art. 9 letter a), art. 9 letter g, of Law no. 241/2005).

### III. Analysis of the conditions provided by art. 135 RCC in relation to offenses under Law no. 241/2005

Analysing the provisions of art. 135 NRC, we conclude:

a) *the criminal liability of legal person under the legislation in force is a direct liability.*

Criminal liability of legal entities is an independent liability which is imposed by conducting a separate evaluation process of *mens rea*. Legal entities and natural persons are two separate entities.

b) *the analysis of criminal liability of legal entities is performed distinctively by the analysis of criminal liability of the individual who committed the actus reus involving a separate analysis of the mens rea of the offense.*

c) *in order to impose criminal liability of legal entities, the act must be committed by a human agent acting in at least one of the three situations provided by art. 135, namely: in the name, the interest or the achievement of the legal purpose of the legal person.*

#### 1. *The act is committed on the achievement of the legal purpose of the legal person*

The criminal deed is committed by a human agent - a legal representative or a member of the governing bodies of the legal person, or even a contractual representative or *de facto* representative. If the individual is a legal representative, it

<sup>7</sup> Art. 2 lett. B, Law no. 241/2005.

<sup>8</sup> O.G. no. 92/2003 on Financial Procedure Code Code, republished in Official Monitor, Part I, no. 513/31<sup>st</sup> of July 2007.

<sup>9</sup> Law no. 207/2015, published in Official Monitor, Part I, no. 547/ 23rd of July 2015.

<sup>10</sup> To see: Mircea Ștefan Minea, Cosmin Flavius Costas, Diana Maria Ionescu, *Legea evaziunii fiscale. Comentarii și explicații*, Editura C.H.Beck, București, 2006, p.45.

<sup>11</sup> Ioana Maria Costea, *op. cit.*, p. 94.

does not matter if the act is committed with the disregard of its duties (according to the identification theory)<sup>12</sup>. The criminal liability of the legal person shall not be imposed for acts with only a nonspecific and occasional connection with the legal purpose of the legal entity<sup>13</sup>.

Any of the tax evasion offences can be committed in achieving the legal purpose of the legal person, since it seeks to avoid the payment of taxes and other duties to the state budget.

### *2. The act is committed in the interest of the legal person*

In this situation the legal person will obtain a material (to make profit and avoid a loss) or non-material benefit. The human agent may be a legal, statutory, contractual or *de facto* representative or any other employee. But in this case the identification of *mens rea* is difficult: if the individual is a *legal/statutory representative*, according with the identification theory, his/hers will is the legal person's will. If the individual is another employee, we need to verify the decisional structure of the legal entity (if it knew, foresaw or even could have reasonably foreseen the act or had a tolerant and passive policy towards committing such deeds. If the act was committed in the own interest of the human agent, and there is not a *culpa in eligendo* or *culpa in vigilando* of the decisional structure, it is impossible to impose criminal liability to a legal person. The tax evasion offences are committed in order to escape the tax obligations, so obviously are they are committed in the interest of the legal person.

### *3. The act is committed in the name of the legal person*

In this case the offense can be committed only by the governing bodies and the legal/contractual representatives, acting by virtue and within the powers conferred by the legal person by concluding mandate or management contracts.

The legal person "speaks" and acts through its representatives' voice and body – this is the essence of the identification theory developed both in French and Common law doctrine.<sup>14</sup> In practice the analysis of the subjective element – is automatic; any further analysis of the *mens rea* of the legal person is no longer necessary.

If the offence is committed by the contractual representative (e.g. mandate), a verification of the limits of his actions is required. If he acted in respect with its limits, the consent of the legal representative is presumed. If he acted in disregard with its limits, the verification of the decisional structure policy is required.

Referring to all three cases above, we also show that, in practice, they are sometimes difficult to distinguish, the offense being committed in the name of and in the interest or in order to achieve the legal purpose of the legal person so, except where the act is committed by the very governing body of the legal person, in all other circumstances, the task of determining the subjective element of the legal person can not be achieved without performing a careful and complex analysis of the decision-making structure, its corporate policies, its corporate culture, the guilt of the legal person being determined " by the extent to which the organization and functioning of

<sup>12</sup> Viorel Pașca, *Drept penal, Partea generală*, 3<sup>rd</sup> ed., Editura Universul Juridic, București, 2014, p. 183.

<sup>13</sup> Anca Jurma, *Persoana juridică – subiect al răspunderii penale*, Editura C.H. Beck, București 2010, p. 137.

<sup>14</sup> Anca Jurma, *op. cit.*, p. 142



the legal entity determined the offense."<sup>15</sup> In Common law system another theory is used in order to determine the *mens rea* of the legal person - the "*willful blindness theory*"<sup>16</sup>, according to which the criminal liability can be imposed on a legal person if its decisional structure pretends that it knew nothing about the act, in order to successfully deny it in *flEit* of the Court.

#### IV. Critics on the practice of the Romanian Courts

The analysis of judicial practice in relation to criminal offenses provided by Law no. 241/2005 revealed a worrying aspect: the judicial bodies are reluctant to indict a legal entity, although its acts meet the requirements of art. 135 and of the criminalizing rule provided by the special law.

Looking at official statistics provided by the Public Ministry in the past two years, we see a growing number of cases referring tax evasion offences, which we interpretate as an increased effectiveness of actions taken by the judicial bodies on the one hand, and secondly as an increase of the tax evasion phenomenon at a national scale.

Thus, in 2013, prosecutors have issued 1,539 indictments in cases involving tax evasion offenses which represents a share of 3.3% of all solved cases. They prosecuted 2,042 defendants for tax evasion offences and 120 legal persons.<sup>17</sup>

In 2014, from the total number of indictments, 1,279 cases were disposed on tax evasion offenses which represents a share of 3.5% of all solved cases. 1,803 defendants were indicted for tax evasion offenses and 358 legal persons for economic crimes (the number of legal entities indicted for tax evasion offenses: 164).<sup>18</sup>

Most of the acts were committed by the manager of the company, the sole legal representative or the person authorized by the legal person. In some cases the human agent who committed the act was a *de facto representative*.

Thus, by one of its decisions the Supreme Court has showed that the tax evasion offense referred to in art. 9 para. (1) lett. c) of Law no. 241/2005, consisting of highlighting in accounting documents or other legal documents, of charges that are not based on real transactions or highlighting other fictitious operations in order to escape the tax obligations, may be committed within a company, by the *de facto* administrator of the legal person, and not only by the statutory administrator, as the law does not provide a special quality of the perpetrator and does not require for the existence of the offense a person who has a certain quality.

In fact, the defendant, O.M. was prosecuted and sentenced for the offense of tax evasion referred to in art. 9 para. (1) c) and para. (2) of Law no. 241/2005, being that, as the sole shareholder and administrator of the company L., based on a single criminal resolution, in February 2008 – March 2009, registered in the accounts of the company unreal, commercial operations, damaging the State budget with the amount of 1,373,352 lei. Romanian High Court of Cassation and Justice held that, unlike the offenses

<sup>15</sup> Viorel Pașca, *Modificările codului penal (Legea nr. 278/2006). Comentarii și explicații*, Editura Hamangiu, București 2007, pp. 25-26.

<sup>16</sup> Th.A. Hagemann, J. Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, in 65 George Washington Law Review, 1996, p. 210; A. Ragozino, *Note, Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach*, in 24 Southwestern University Law Review, 1995, p. 423.

<sup>17</sup> <http://www.mpublic.ro/presa/2014/bilant2013.pdf>.

<sup>18</sup> [http://www.mpublic.ro/presa/2015/raport\\_activitate\\_2014.pdf](http://www.mpublic.ro/presa/2015/raport_activitate_2014.pdf).

mentioned in art. 3 and art. 8 by Law no. 241/2005 where the legislature speaks of the taxpayer - so we have a qualified perpetrator - in case of other offenses, including that provided by art. 9 para. (1) lett. c) and para. (2), the legislature does not show who should be the offender.

Accordingly, the perpetrator of the offense may be any person or entity acting on behalf or interest of the taxpayer, or in order to achieve the legal entity's legal purpose. Therefore, the perpetrator may be the legal or statutory administrator of the company or any other employee - director, accountant, seller - in so far as their actions and / or inactions their aim the company to evade to pay due taxes.

The special Law does not require for the existence of the offense an express authorization provided by the person responsible for the organization and maintenance of accounting registers if, in fact, the perpetrator does manage the accounting activities of the company.<sup>19</sup>

In another case, the defendant, C.F., as the administrator of the SC X LTD Răchiți, as a de facto representative of the company, committed the offense of tax evasion under art. 9 para. 1, lett. c and para. 2 of Law no. 241/2005, on a basis of a special mandate offered by the legal representative of the company. So C.F. ordered repeatedly and under the same criminal intention the registration of fictitious business operations with two companies and several individuals (farmers), concerning the purchase of goods totalling 4,175,592.61 lei, using false invoices. To these facts, only the individual C.F. defendant was convicted, and not the legal person for which he acted in representation.<sup>20</sup>

Another defendant - B.I.M. - was acquitted by the Romanian Supreme Court for the tax evasion under art. 9 para. 1 lett. a and b of Law no. 241/2005 on the *in dubio pro reo* principle, noting that there is a **stLeig** doubt and showing that it can not be determined with certainty who drafted invoices, receipts and contracts, especially since some of the commercial operations that were not recorded in the accounts of the legal person SC O.P. LTD had occurred before the defendant B.I.M. became the legal representative of the legal person, some of the documents being signed by people who no longer were administrators of this company. In fact, in 2009, the defendant B.I.M., while he was the manager of SC O.P. LTD, has completed two financial leasing contracts for a concrete stand, three equipments used in construction and two loaders, without paying instalments at due dates and systematically refusing to hand over the above-mentioned goods. But not the fact that the individual was acquitted was the controversial issue in this case, but that the legal person involved throughout the financial transaction which included forgeries, false statements and failures to register financial operations has not been brought to justice for committing the same offense. In our opinion it was obvious that the legal requirements provided by art. 135 of the Criminal Code had been met, the acts being committed both in the name and in achieving of the legal purpose of the legal person.<sup>21</sup>

In another case, the court held that the perpetrator U.C. - shareholder and administrator at SC V.R. Ltd, had failed to register three invoices (on the 31st of July 2008 for an amount of 202.109 lei, on the 17<sup>th</sup> of October 2008 for the sum of 91,791.84 lei and on the 20<sup>th</sup> of October 2008, all perfecting the trade relations developed with SC B.I. LTD) in the accounts of the company. The acts committed met the constitutive

<sup>19</sup> High Court of Cassation and Justice, criminal section, decision no. 272/28.01.2013, [www.scj.ro](http://www.scj.ro).

<sup>20</sup> Botoșani Tribunal, criminal sentence no. 1/17.01.2014, [www.legeaz.net](http://www.legeaz.net).

<sup>21</sup> High Court of Cassation and Justice, criminal section, decision no. 145/ 28.01.2015, [www.scj.ro](http://www.scj.ro).

elements of the offense of tax evasion under art. 9 para. (1) b) of Law no. 241/2005. The defendant was a legal representative – administrator- until October 2008 and a *de facto* representative thereafter, behaving as such in relation to third parties, so that in agreement with the prosecution, the court held that the transfer of shares was fictitious. Again, the legal person has not been convicted.<sup>22</sup>

In a similar case, the court found that the perpetrator V.A.N., who, as administrator of SC CC LTD Bordușani, under the same criminal will, between the 14th of September 2007 – the 31<sup>st</sup> of December 2007, omitted to register in the accounts of the company 29 invoices and evaded the payment of the tax of 4.079 lei to the state budget and 3.875 lei VAT payment, constitutes the offense of tax evasion under art. 9 para. (1) b) of Law no. 241/2005. The act of the same perpetrator, who, under the same criminal will, from the 1<sup>st</sup> of January 2009 – to the 31<sup>st</sup> December 2011, registered in the accounts of SC CC Ltd. of 22 invoices representing phantom expenditure, resulting in circumvention of the state budget in the amount of 44.157 LEI of which 9.780 lei represents the income tax and 34.377 lei representing VAT payable constitutes the tax evasion offense under art. 9 para. (1) c) of Law no. 241/2005. Since the perpetrator acted as sole shareholder and administrator of SC CC LTD, this legal person was held civilly liable only. So the legal person has not been indicted in the case, the court aiming to only repair the damage resulted from the offense.<sup>23</sup>

Another human perpetrator was indicted and convicted for the same act provided by art. 9 para. 1 lett. b of the Law no. 241/2005, because, as administrator of SC D.C. Ltd, has failed to register in the accounts of the company during the period 01.01.2009 - 30.06.2009 the sale of a quantity of goods and so he evaded the payment of an income tax amounting to 1449 lei and a VAT amounting to 9163 lei.<sup>24</sup>

Finally, the first conviction of a legal person in Romania dates from 2009. The legal entity SC A.D.M. LTD was sentenced to a criminal fine for the offense provided by art. 6 of Law no. 241/2005 (incrimination currently declared unconstitutional) showing that, on 24<sup>th</sup> of April 2008 – to 30<sup>th</sup> of June 2008, the perpetrator D.M.G., as manager of SC ADM LTD Buzău, issued in favor of some Romanian companies several promissory notes without having enough money in the company's bank account. Thus, the court held that the perpetrator has deceived 14 different companies<sup>25</sup>.

Another conviction of a legal person intervened in 2014 for the offense of tax evasion under article. 9 of 1 letter b Law no. 241/2005. Judicial bodies have found that legal entity SC G. C. LTD Brasov which had the legal purpose of "gambling and betting" carried out the operation of 50 slot-machine devices from which three of them were held and operated without a license and authorization. Thus the state budget was damaged with the amount of 31,000 lei, consisting of non-payment of the license fee and charges for operating permits related to the 3 devices. The statutory representative authorized the perpetrator P.C. through a special proxy with full powers to manage SC G. C. LTD, the lack of authorizations and licenses being known both by the statutory representative and the authorized person. The court also held that the offense was

<sup>22</sup> High Court of Cassation and Justice, criminal section, decision no. 3105/ 5.12.2014, [www.scj.ro](http://www.scj.ro).

<sup>23</sup> High Court of Cassation and Justice, criminal section, decision no. 2719/ 30.09. 2014, [www.scj.ro](http://www.scj.ro).

<sup>24</sup> Ploiesti Appeal Court, criminal, family and minors section, criminal sentence no. 54/ 23.03.2012, [www.portal.just.ro](http://www.portal.just.ro).

<sup>25</sup> Buzau Tribunal, criminal sentence no. 123/14.07. 2009, case no. 335/114/2009; criminal decision no. 1079/22.03.2010, caseno.335/114/2009, [www.scj.ro](http://www.scj.ro).

committed with guilt (knowingly) by the legal entity SC G. C. LTD and by the contractual representative P.C.<sup>26</sup>

## V. Conclusions

If *actus reus* of the offense committed by a legal person under article assumes censorship under art. 135 C.C. – the act is committed in achieving of the legal purpose of the legal person, in the interest or on behalf of the legal person – *mens rea* should be set differently according to whether the acts were committed by the management bodies of the legal person – the identification theory – or were committed by others, in which case one should check whether there is a deficiency in organizing the activity of a legal person, a *culpa in eligendo* in regard with the contractual representative or a policy of toleration of acts which determined the commission of the offense.

The number of indictments of legal persons is very slowly increasing according to official statistic data. The prosecutors are very shy in the case of indictment of a legal person. Also the courts have a certain difficulty in motivating the presence of *mens rea* in case of a legal person and that is why they seem to favor the position in the trial as a civilly responsible party of the legal person because it ensures 100% recovery of damages caused by committing tax evasion offences.

We hope that in the future, judicial organs will find more courage in motivating the conditions laid down by art. 135 C.C. and with regard to the *mens rea* in case of offenses committed by legal persons, which will certainly reflect on the number of convictions.

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<sup>26</sup> Bacău Tribunal, criminal sentence no. 587/ 22.12.2014, [www.legeaz.net](http://www.legeaz.net).