

PENAL LIABILITY FOR THE JURIDICAL PERSON IN ROMANIAN PENAL LAW

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Abstract

The criminal liability of the moral/legal person is a newly created juridical institution for the Romanian penal legislation it appeared due to the modification of the Romanian Penal Code through the Law no. 278/2006. The idea of introducing this new institution had been outlined since the project of the new Penal Code that was adopted in 2004. The criminal liability of the moral/legal person could be essentially, involved when its organs or its representatives who are entitled to express juridically the moral person's will, should have realized, on its behalf, both the material and the moral elements of the infraction.

Key words

Criminal liability, Romanian Penal Code.

1. THE QUESTION OF PENAL LIABILITY FOR THE JURIDICAL PERSON

As we know, the quality of subject of law belongs not only to physical persons, but to juridical or moral persons as well. A problem much discussed and implying a lot of controversies in specialized literature was to establish if the juridical person could also have the quality of subject of the penal law. As subject of law, the juridical person benefits from juridical-penal protection and it might have the quality of passive subject of a crime. But the question if the juridical person should or not also have the quality of active subject of the crime was raised. The institution of penal liability for the juridical person is not new, and has been applied since the antiquity.

During the antiquity, the punishment of moral persons was allowed. In the Genesis it is said that God allegedly punished Sodoma and Gomora because of their corruption. It is claimed that Emperor Theodosius punished the city of Antiochia by taking away its theatres, its public bathhouses and its title of metropolis. Emperor Severus destroyed the city of Byzantium by taking away its theatres, its bathhouses, its honours and ornaments, reducing it to the status of a village.

In canonical law, the principle of collective liability was admitted.

In ancient law, moral persons, towns, cities and counties were liable from a legal point of view; they could be submitted to sanctions (such as, for example, the loss of their privileges, the demolition of the city walls, amercements, and so on).¹

After the French Revolution (1789), the principle of punishing communities was abolished in Europe, but it kept functioning in England.

¹ V. Dongoroz, Drept penal, republishing of the 1939 edition, Romanian Association of Penal Sciences, Bucharest, 2000, p. 295.

In modern penal law the necessity of introducing the penal liability of the juridical person was acute. Thus, in the preamble of the Convention for the Protection of Environment through Penal Law (Strasbourg, 4-th November 1998) it is stated that penal and administrative sanctions pronounced against juridical persons might have an effective role in the prevention of harm done to environment. According to article 9, paragraph 1 of the Convention, the states joining it take upon themselves to adopt the necessary measures, in order to institute possibilities of applying sanctions and penal or administrative measures, to the juridical persons who have committed, by their organs or representatives, one of the felonies stated in articles 2 and 3 of the Convention.

On jurisprudence, the European Committee of Human Rights decided that, although the European Convention of Human Rights makes no reference to a penal liability of juridical persons, it is not incompatible with such a liability. Consequently, when a penal accusation against a juridical person exists, it has the guarantee of receiving an equitable trial, ensured by article 6 of the European Convention of Human Rights. This jurisprudence is in compliance with the orientation of the European doctrine, which estimates that art. 6 and 7 of the European Convention of Human Rights do protect both physical and juridical persons.

The theory of modern penal law, has formulated and supports both the negative thesis, according to which juridical persons cannot have the quality of active subjects of the felony, and the affirmative thesis, which states that juridical persons can have the quality of active subjects of a felony.

The negative thesis, according to which juridical persons can not have the quality of active subjects of a felony, is based on the fiction theory, according to which juridical persons do not have an existence of their own, and that they are creations of the law, thus they cannot commit felonies. The main arguments of those who cannot conceive the penal liability of a juridical person are:

- The juridical person can't think and have a will, so it cannot act differently from what the physical persons which make it up might think or want to do; penal liability concerns only the physical persons which constitute the juridical person;
- It is inconceivable that a punishment could be inflicted upon a community when part of its members are innocent, because they didn't think of anything wrong, were not consulted and took no part in committing the felony;
- If a punishment should be inflicted upon a juridical person, this measure of constraint would impact, in an unavoidable way, on the innocent members of that community as well, who did not know and did not desire the acts done by the leaders of the juridical person.

The affirmative thesis is based on the so-called theory of reality, according to which the juridical person represents a reality, being an entity, which has a will and a conscience of its own, thus might be an active subject of a felony.

Arguments:

- The juridical or moral persons represent an undoubtful juridical reality; as well, they represent social forces in modern life, which might manifest themselves by committing felonies; if there are crimes such as those against persons, which could not be committed

naturally by a juridical person, there are, however, many crimes which might be committed by juridical persons, and in some cases, especially by juridical persons (such as forgery, dis-loyal competition, counterfeiting factory goods, fiscal felonies, frauds in business); according to the affirmative theory, we are dealing not with facts committed by the leaders, without the knowledge and approval of the members of the juridical person, but with actions to which all the members of the collectivity consent and desire, and which are executed in compliance to their views; juridical persons have thus a will of their own, and this collective will might be able to commit reprehensible deeds, just like the individual will of the physical person;

- There are punishments which can be applied to juridical persons taking into account their specificity, such as the dissolution, the suspension of activity, the amercement, or even security measures (for example, the prohibition from owning offices in certain places or the expulsion from the country's territory);
- Although applied to juridical persons, the punishments and the other sanctions of penal law are effective, because they might determine a changement of behaviour of the members of the juridical person, meaning by to determine them to obey to legal dispositions.

2. REGULATIONS ON THE PENAL LIABILITY OF THE JURIDICAL PERSON IN ROMANIAN LAW

In the new Romanian Penal Code² the idea of a penal liability for the juridical person was stated for the first time, specifying the conditions, which lead to it. Thus, juridical persons, with the exceptions of: the state, public authorities and public institutions, do have a penal liability, in cases determined by the law, for felonies committed in the name or in the interest of the respective juridical person, by its organs or representatives³. The penal liability of the juridical person does not exclude the penal liability of the physical person who participated in committing the same felony.

Since the enforcement and application of the new Penal Code was postponed, the current Penal Code was modified⁴; since 2006, juridical persons can be declared responsible for the felonies committed in their activity; a system of sanctions and measures adapted to juridical persons was also created, with the purpose of realizing efficient sanctions for illicit deeds, of preventing felonies from being committed and of repairing the prejudices caused.

According to the dispositions of art. 19 of the Penal Code, juridical persons, exception made of the state, public authorities and public institutions which have an activity that could not constitute the object of the private field, would have a penal liability for felonies committed in realizing the object of their activity in the interest or in the name of the juridical person, if the deed should be perpetrated in the form of guilt stated in the penal law. Penal liability for the juridical person does not exclude penal liability for the physical person who participated in committing the same felony.

²Adopted by the Law 301/2004, published in the "Monitorul Oficial", Part 1, nr. 575 of 29/06/2004.

³ According to the article 45, paragraph 1 of the Law 301/2004.

⁴ By the Law no. 278/2006, published in the "Monitorul Oficial", no. 601 of 12 July 2006.

The first aspect we must clarify is the determining of the collective entities that might assume penal liability for committing felonies. According to the law, the state, public authorities and public institutions which have an activity which cannot constitute the object of the private field are excluded from the field of penal liability. The motivation which determined the legislators to exclude these juridical persons from penal liability is justified, on the one hand, by the necessity of these entities's services, and, on the other hand, by the continuity of these services. Thus, juridical persons attaining to public law provide services in order to guarantee the general interests or to ensure that fundamental purposes are realized. Their purpose is to satisfy social necessities, who are of interest to the entire community, not to satisfy the interests of those exercise those activities.

Juridical persons of private law however, could assume liability from a penal point of view, for the felonies committed. In this category we can include, first of all, commercial societies of their own and the branches of these societies, as they have a juridical personality. The field offices of these societies are small parts of them which do not have a juridical personality, reason for which they cannot be held accountable separately.

Associations, foundations which have patrimonies, do have the possibility of committing felonies determined by transfers of patrimony. Patronages and unions can be held accountable for deeds which break the laws on labour or other regulations.

Another important aspect is to determine the exact extent of liability for the juridical person. In Romanian legislation there are two systems for determining the area of felonies for which juridical persons might also be held penally accountable. Initially, with the new Penal Code, a system was adopted, which implied that the legislator indicated, for every felony, the possibility of it being committed by the juridical person. In the case of most of the felonies mentioned in this Code, the penal liability of the juridical person existed.

Later, with the law that modified the current Penal Code and by which the institution of penal liability for the juridical person came into force, there was another system for determining the felonies committed by juridical persons. Thus, in compliance with current regulations, penal liability of collective entities is organized upon the principle of general liability; according to this system, juridical persons have a penal capacity similar to the one of physical persons, and are able to commit whatever felony, in the qualities of author, instigator or accomplice.

The system of general penal liability does not suffer from the deficiencies that the system of specialized liability for the juridical person had. The major default of this system was that it excluded from the sphere of penal liability for juridical persons the felonies that they could not commit as author. Consequently, felonies committed by the juridical person in the qualities of instigator or accomplice were not penally sanctioned.

Current regulations cover and sanction all the actions of the juridical person which have penal consequences. In theory also⁵ the system of the general clause was preferred, leaving the task of determining, in every concrete case, if the juridical person can or cannot be held accountable for a certain felony to the judge.

⁵ A. Levy, St. Blach, J.D. Blach, "La responsabilité pénale des collectivités territoriales, de leurs etlus, de leurs agents, Litec, Paris, 1995.

Another aspect that must be determined is the subjective element which must be considered in the case of collective entities. Thus, article 19 of the Penal Code states that a condition for the penal liability of the juridical person is that the deed should be committed in the form of guilt specified by penal law. The Penal Code regulates deeds committed as well with intent, and in the second degree. Accordingly, the juridical person could penally be liable, both for felonies with intent, and for second degree felonies as well.

Penal liability for the juridical person can be activated when the organs or their representatives - which express the society's will juridically – committed, in realizing their object of activity, in the interest or in the name of the juridical person, the material element of the felony, in the form of guilt determined by the penal law.

The sanctioning of juridical persons is realised through principal punishments and complementary punishments. The principal punishment is pecuniary and it is represented by an amercement from 2.500 lei to 2.000.000.

Complementary punishments are:

- a. the dissolution of the juridical person;
- b. the suspension of the activity of the juridical person for a period starting from 3 months up to a year, or the suspension of one of the activities of the juridical person, related to which the felony was committed, for a period starting from 3 months up to 3 years;
- c. closing down work points of the juridical person for a period starting from 3 months up to 3 years;
- d. the interdiction to participate in the procedures of public auctions for a period starting from 1 year up to 3 years;
- e. the conviction becomes a public fact.

The principal punishment will be decided upon and applied for every concrete felony committed by the juridical person, taking into account the limits of the punishment determined in the special part for physical persons, the gravity of the deed itself and the circumstances which decrease or increase the level of penal liability.

As for complementary punishments, their application is optional. One or many complementary punishments are applied when the Court estimates that, considering the gravity and the nature of the felony, as well as the circumstances in which it was committed, such complementary punishments would be necessary.

The application of one or many complementary punishments is compulsory when the law so specifies it. A situation of compulsory application of complementary punishments is the case of forgery of currency, stamps or other valuables. The sanction of the juridical person is then compulsory, along with the application of the amercement the complementary punishment of dissolving the juridical person or suspending its activity or one of its activities, as the case may be, is unavoidable.

Practical necessities do institute and legitimate regulations for the liability of juridical persons, due to the reality of life, actually. Although the application of these regulations is still at an

early stage, and meets a lot of difficulties along the way, the institution of penal liability for juridical persons proves to be necessary and efficient in striving against the actual level of corporate crime.

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