CONSIDERATIONS ON CORPORATE CRIMINAL LIABILITY

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***Acknowledgement**: This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.*

Abstract: *The current article deals with a concept recently introduced in the Romanian criminal law- the corporate criminal liability. The essay starts with a short presentation of some historical aspects regarding this issue, focusing on the practical necessity to admit the criminal liability of the legal entities. Then the article deals with the concept of corporate criminal liability as a whole, presenting the theoretical objections to establishing corporate criminal law, and focusing on some of the most important objections, the fictional character of the legal entity and their incapacity of action and especially, the so said "non punishability" of the legal entity with the traditional punishments in the criminal law. Every objection is accompanied by the contrary theoretical and practical reasons for not admitting the principle "societas delinquere non potest" in the criminal law, and we insisted on the efficiency and the advantages of the pecuniar punishments for the legal entity. In the last part, the article presents the recent regulations from the Romanian criminal law regarding the corporate criminal liability and the specific punishments consecrated in the new Romanian Criminal Code.*
***Keywords**: legal entity, corporate criminal liability, corporate sanctionary system, corporate crime, societas delinquere non potest.*

1. INTRODUCTION. A BRIEF HISTORY OF THE CONCEPT OF CORPORATE CRIMINAL LIABILITY

If within the theory of civil law, the civil liability of the legal entity is a unanimously admitted, beyond any controversy issue, in the theory and practice of criminal law the matter of the corporate criminal liability was one of the most controversial issues of law. [1]

In doctrine it was noted that, viewed either as real, as fiction, or just as organization technique of the patrimony, the legal entity, and implicitly the legal personality, have followed a prosperous genetic process in the field of civil and commercial law [*2*]. So, for a long period of time, the legal liability of the legal entity has been assigned only a civil character, which was mainly motivated, as we will show, by

arguments such as the fictional character of the legal entity and its impossibility of physical action.

Unlike the non-discriminatory treatment in comparison with the natural person offered in civil law, in criminal law the legal entity has been "maltreated" as it is also expressly indicated in the title of a reference work in the field of criminal law [2]

Law history attests the fact that corporate criminal liability constituted a necessary reality and applied since ancient times, but which has not been granted, because of doctrinal disputes, special and specific regulation.

Thus, since ancient times there were recorded various forms of liability and of sanctioning bodies for grave and harmful acts to society. Thus, actions such as demolition of walls, depriving citizens of theaters, baths, the confiscation of artillery and bells of the cities are undoubtedly repressive measures taken against certain communities, so against some collective persons.

Moreover, the case of the Montpellier city, that in 1379 massacred the king's officers as protest against the taxes considered illegal, which was then sanctioned by the king to pay fines of considerable amount, the demolition of the city walls, withdrawal of privileges and deprivation of university, is the first case of conviction of a community, so not a natural person, for committing the crimes of murder.[3]

Over time, the institution of corporate criminal liability has been the subject of serious doctrinal disputes, started as a result of the discrepancies between the reality that demanded the punishment of reprehensible conduct of some communities and theoretical constructs whose arguments were trying to advocate for conceptual impossibility of engaging the criminal liability of a non-natural person.

2. **OBJECTIONS TO ESTABLISHING CORPORATE CRIMINAL LIABILITY. THE FICTIONAL CHARACTER AND THE INCAPACITY OF ACTION OF THE LEGAL ENTITIES**

The main objections raised over the years to corporate criminal liability were: the fictional character of the legal entities, their incapacity of action, the principle of specialty of capacity, the lack of the subjective element in the case of legal entities and the personal nature of criminal liability.

The argument of *the fictional character of the legal entities*, their lack of physical, concrete existence, this was the oldest and main argument against the possibility of engaging the criminal liability of legal entities. The argument has its origins in the civil law theory of the fiction of legal entities, theory according to which only the human being can be a genuine subject of law, while legal entities can only be fictional subjects, recognized only to address the need to identify the holder of some patrimonial rights. [1]
Illustrative of the controversy about the fictional character of the legal entity is the exchange of doctrinal lines between the French jurist Leon Duguit that launched the famous French aphorism "*I have never had dinner with a legal person*" and the answer of his colleague, the jurist Jean Claude Soyer "*Neither have I, but I often saw it paying the bill*." [2]

This conversation reflects the essence of the controversy between the fictional, theoretical character of the legal entity and the obvious reality of its existence and involvement in the social and economic life today.

It is a fact that nowadays legal entities play an essential role in all areas of social and economic life and enjoy recognition of their legal capacity in most areas of law, they have their own patrimony, distinct from the patrimonies of the persons who compose it, they have rights and obligations distinct from those of their component members, thus their "reality" the non-fiction of their existence is an evident aspect that cannot be disputed.

Moreover, according to a recently expressed opinion in the doctrine, which was appreciated as "the effect of an anthropomorphic reflex" [2], legal entities are born, live and die, are in a deplorable or in a good state of health, are surrounded by friends or by enemies, and have the possibility to be part of a family [2].

In this context, the recent Romanian doctrine reminds the phrase that defines a national, large-scale, contemporary process, having tax evasion flavor, namely the action of "registering on the firm" various goods to avoid the payment of some taxes or to get the diminishing of profit and consequently of the income tax. [2]

As appreciated in the doctrine, the non-recognition of corporate criminal liability becomes a shield which provides cover for natural persons to commit acts positioned at the delicate border between licit and illicit. [1]

In conclusion, it is obvious that, on the fictional character of the legal entity in conceptual terms, the controversy can never be solved in the favor of one or the other opinion that supports or denies it. Therefore in the recent doctrine it was sought to reconcile the contrary opinions through acceptance and inclusion of both arguments and consequently the admission of the idea that "the legal entity cannot be defined as belonging exclusively to the real or fictional domain" being placed "with one foot on a land and the other on another, suggesting, in other words, that legal personality is an undoubtful reality, but for its full analysis and understanding in criminal law terms, one must resort to imaginative processes" [2].

The author brings in support of his opinion a decision of the British Supreme Court that, using such an imaginative method, stated that the legal entity can be anatomically described as consisting of a brain and a nerve center which controls what it does, represented by the managerial staff, with arms that act in accordance with the received instructions, represented by the company workforce. Therefore, concludes the author of the opinion, by analogy with the natural person, as long as the brain acts with the intent to commit a crime, and arms put into practice this intention, the legal entity can and should be held liable for the committed crime. [2]

From the fictional character of the legal entity derived the other objections, such as the incapacity of action of the legal entity, the principle of specialty of capacity, the lack of the subjective element in the case of legal entities, the personal nature of criminal liability as well as the unpunishability of the legal entities.

Regarding *the incapacity of action of the legal entities*, it has been argued that legal entities do not have their own capacity to act, all their acts being in fact the

expression of a human substrate, and that, consequently, this is actually the element on which criminal law should act, and not on the legal entity. [2].

However, the conflicting doctrinal views have showed that, on the contrary, one can speak of a legal entity's own action when a deliberative committee of the legal entity secretly adopts the decision of committing a crime, and that actually it is not necessary a true power of action of the legal entity, its governing bodies being those who hold this power. Moreover, it was argued that as long as the legal entity is recognized a capacity to act in civil law, it is not possible for this capacity not to be recognized in criminal law. [1]

3. CONSIDERATIONS REGARDING THE PUNISHABILITY OF THE LEGAL ENTITY

Another highly supported argument against the possibility of engaging corporate criminal liability was the *unpunishability* of legal entities, their impossibility of being sanctioned with the penalties prescribed by criminal law, impossibility resulting mainly from the technical difficulty of implementing a punishment on legal entities, as well as their inability to feel the full effects of the penalties, in the event of finding appropriate sanctions. [1]

These arguments have also been discarded with the help of logical and relevant arguments, being shown in the recent doctrine that, on the one hand, the sanctions applicable to legal entities cannot and must not be identical to those set for natural persons, which is only normal, given the fundamental differences between the two categories of persons. [2] On the other hand, it has been rightly argued that the lack of identity of the sanctions applicable to the two categories of subjects of law does not discriminate between the natural persons and the legal entities, as it does not create any premises for different effectiveness, perhaps a lack of effectiveness of the sanctions applicable to a category in comparison to the sanctions applicable to the other category. [1] In other words, it was argued that, since the legal entity cannot be "convicted" and forced to execute classic custodial sentences, its engagement of criminal liability could only be theoretical, lacking any practical effectiveness.

Thus, if the legal entity is not capable of movement and self-determination as is the natural person, the imprisonment of its governing bodies cannot be an effective sanction for it, as the guilty governing bodies can be and are actually soon replaced anyway.[2] Instead, legal entities have patrimony, economic and fiscal rights, freedom of self-management and legal existence. So the sanctions applicable to legal entities must concern these aspects, and mainly the economic, pecuniar aspects.

To prove the effectiveness of primarily pecuniary sanctions applicable to the legal entity, it is relevant the case of an American company producing medical equipment, which sold medical instruments that had not been tested sufficiently in advance and, shortly after their use in hospitals, have killed a person and produced serious damage to the health of 10 other people, which led to the withdrawal from the market of these instruments. During the criminal trial, the company pleaded guilty to the crime of illegal experimentation on humans, recognizing that it had released for sale a small number of catheters to see if they were safe and effective. The company was sanctioned with a

criminal fine in the amount of 30.9 million dollars, was put under the tutelage of a third party board of directors elected by the authorities and was under obligation to hire experts and consultants to verify that products comply with the legal norms and to send periodic reports to the control authorities in the field. All these sanctions and measures did not affect the company's activity, which continued to produce medical instruments and to make profit, and which did not violate the legal provisions, so that it can be argued that the purpose of the punishment was reached. Thus special prevention was clearly made, and the general one was presumably made, since after this case there was no record of similar acts committed by other companies in the area. [2]

4. CORPORATE CRIMINAL LIABILITY IN THE NEW ROMANIAN CRIMINAL CODE

The general legislative consecration of corporate criminal liability in the Roman criminal law came with Law no. 278/2006 amending the previous Criminal Code, although special provisions in this respect could be found already in Law no. 299/2004 concerning the corporate criminal liability for the offenses of counterfeiting currency and other valuables, but these provisions had never been implemented due to the lack of proper criminal procedure provisions.

De lege lata, corporate criminal liability is consecrated by the provisions of art. 135 of the new Criminal Code, which state in paragraph 1 that *"The legal entity, excepting the state and the public institutions, is criminally liable for crimes committed in achieving the object of its activity or in the interest or on behalf of the legal entity."* and in paragraph 3 that *"Corporate criminal liability does not exclude the criminal liability of the natural person who contributed to the commission of that act."*

Thus, the Romanian criminal law establishes a model of direct criminal liability, consisting of the legal entity being liable for its own act, and not for the act of another person, regulatory model taken from the Dutch and Belgian legislations.[1]

As it was noted in the doctrine, the legislator does not individualize the natural persons or the bodies through which corporate criminal liability could be engaged, in order to avoid the limitation of the scope of these persons/bodies, and thus to avoid providing opportunities to evade criminal liability by the legal entity formally entrusting decision attributions to persons other than those expressly provided by law. [4]

De lege lata, the sanctions applicable to legal entities are regulated in art. 136 of the new Criminal Code, and they are: the fine, as main penalty, and a series of complementary penalties: legal entity dissolution, suspension of activity or of one of its activities, the temporary closure of some branches, temporary prohibition to participate in public procurement procedures, being placed under judicial supervision, and also the display or publishing of the decision of conviction.

CONCLUSIONS

Beyond doctrinal disputes, the consecration of corporate criminal liability is legitimized by necessities of practical nature, imposed by the realities of today's complex economic and social life.

The increase of crime of collective entities - corporate crime - is now a reality that no one denies any longer. Logically, to find an effective response against this phenomenon, the criminal legislator has only two options: either to adapt individual criminal liability as to cover situations in which a crime was committed "under the umbrella" of a legal entity, or to establish a liability specific to legal entities. But, as noted in the doctrine, although solving the new problems based on individual criminal liability would perhaps be the most convenient solution, in practice it has revealed many shortcomings and the inability to substantiate an effective reciprocation to corporate crime.[1]

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