

# DISCUSSIONS REGARDING THE CONDITIONS OF THE CRIMINAL RESPONSIBILITY OF THE LEGAL PERSON IN THE REGULATION OF THE NEW CRIMINAL CODE

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## Abstract

*According to the new Criminal code, the legal person, except for the state and the public authorities, is criminally responsible for the infractions committed for the carrying out of the activity object or in the interest and in the name of the legal person. The public institutions are not criminally responsible for the infractions committed for the carrying on of an activity that is not the object of the private domain. The criminal responsibility of a legal person does not exclude the criminal responsibility of the natural person that contributed to the committing of the same deed. In what follows, we will try to present the general conditions regarding the engagement of the criminal responsibility of the legal persons, filtering through our own analysis various opinions expressed in doctrine regarding this theme, the purpose of which is the prevention of some non-unitary solutions in the judicial praxis.*

**Keywords:** *new Criminal code, criminal responsibility, legal persons, public institutions, public authorities, non-unitary solutions.*

## I. Introduction

The criminal responsibility of the legal person is encountered in more national law systems. For instance, in the Great Britain, the Netherlands, Belgium, France, the USA etc. In what comes, we will briefly analyze some of these.

In the **Great Britain**, the criminal responsibility of the legal person is based on the theory of identification that implies a mechanism that contains two stages: (1) the analysis of the constitutive elements of the infraction regarding the natural person doer; (2) the identification, that is the verification if the natural person that has a certain position within a legal person represents this one's thinking and will<sup>2</sup>. The criteria based on which the natural persons that are the carriers of the thinking and will of the legal person are to be identified refer mainly to the idea of authority and control over it and it is considered that only the deeds committed by the **controlling officer** attract the criminal responsibility of the company. To this category belong the natural persons that have the capacity of manager, director etc. and that participate to the controlling of the legal person, as well as the officials with similar functions. The theory of identification was criticized,

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<sup>2</sup> A. Jurma, *Persoana juridică – subiect activ al infracțiunii/ Legal person - active subject of the infraction*, C.H. Beck Publishing house, Bucharest, 2010, page 43.

assuming that the controlling officers could detach (isolate) from the illicit practices of the legal person that they controlled, so that the criminal responsibility of a certain legal persons should not be engaged<sup>3</sup>.

In the **United States of America**, with some exceptions, the criminal responsibility of the legal person was based on the idea of the **respondent superior**. According to this theory, a company is criminally responsible for the deeds committed by any of its agents or employees, if two conditions are met. The first condition is that the agent or employee of the legal entity should have carried on its activity within the limits of its attributions granted by the latter. The second condition is that that natural person should have totally or partially taken action for the benefit of the corporation. At present, it is encountered the **theory of the aggregation** (called also of the collective consciousness), that was conceived by certain American federal courts and allowed, if the corporatist will belonged to more natural persons, that all the „particles” of subjective elements should be united in a single subjective element, imputable to the legal person. Besides its innovative character, this theory was not accepted by all the America courts that reproached with it that the individual cognitive elements could not be comprised in order to make a whole, and if, by referring it to the involved natural persons, the entire subjective element could not be retained, the comprising was not possible<sup>4</sup>.

The **Netherlands** also instituted the criminal responsibility of the legal person, which had a certain particularity compared to the regulation in our country<sup>5</sup>. One of the elements that singularize the criminal responsibility of the legal person in the Dutch law is the domain of the collective entities that are criminally responsible; certain groups of persons that do not benefit from the legal personality belong also to this category. Then, in order to engage the criminal responsibility of the collective entity, it is necessary that the criminal responsibility of a natural person that carries out a function according to the social purpose of the entity should previously be established.

In the **French law**, the criminal responsibility of the legal person was introduced through Criminal code since 1994 (art. 121-2) which was incident, also as in the case of the Romanian law, only in the case of the entities endowed with legal personality. Although, in the initial form, the criminal responsibility of the legal person was exclusively incident in the case of the infractions for which there was a precise provision in this sense (specialty principle), starting with year 2005 (when the Criminal code was modified), it has been instituted the **generality rule of the criminal responsibility** of the legal person, without this should be limited to certain infractions. From the point of view of the conditions necessary for the engagement of the criminal responsibility of the legal person, the French Criminal code was interpreted in the sense that this form of responsibility could be engaged only if an infraction had been committed by a representative or organ of the legal person. It is still accepted that, based on the legislative modifications in 2000 in the case of the voluntary infractions, the holding criminal responsible of the legal person is possible, no matter of the previous retaining or not of the conditions of the criminal responsibility of a natural person.

Based on monitoring reports drawn up by GRECO<sup>6</sup> and OCDE<sup>7</sup>, certain conclusions were drawn regarding the way how the criminal responsibility of the legal persons was regulated in

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<sup>3</sup> Idem, page 45.

<sup>4</sup> In praxis, it was shown that „One can not add an innocent mental attitude to another innocent mental attitude so that the result should be guilt” (cause of *Armstrong v. Strain*), quoted by *A. Jurma*, quoted work, page 48.

<sup>5</sup> We mention that the criminal responsibility of the legal entities was stipulated in the Dutch law since 1870.

<sup>6</sup> Group of States against Corruption set up at the level of the Council of Europe. This Group consists of 45 European states and the United States of America. [www.coe.int](http://www.coe.int).

<sup>7</sup> [www.oecd.org](http://www.oecd.org).

various systems of law. Basically, GRECO considers that, at present, its recommendations were satisfyingly implemented in the member states of the group<sup>8</sup>.

The GRECO evaluation is based on the following main criteria<sup>9</sup>:

- Existence of the responsibility of the legal persons (criminal, administrative etc.);
- Conditions of the engagement of the criminal responsibility of the legal person and the deeds for which such a form of responsibility can be engaged (for instance, money laundering);
- Engagement of the responsibility of the legal person no matter of the circumstance that this managed or not to obtain the benefit had in mind through the corruption act;
- If the responsibility of the legal person is engaged also in the case of the lack of surveillance from the natural person with control attributions;
- Existence of some discouraging and proportionate sanctions for the deeds committed by legal persons;
- Possibility of engaging the responsibility of the legal person independent of the responsibility of the natural person;
- Existence of the criminal record for the convictions of the legal persons;
- Existence of some measures through which the states assure the effective sanctioning of the legal persons.

With regard to the OCDE evaluation internationally drawn up through WGB<sup>10</sup>, it is found, that although there were significant progresses regarding the regulation of the criminal responsibility of the legal person, there are still some criticisms that can be brought to certain national systems of law. For instance, it is criticized the discretionary power that the prosecutor in the Australian legislation has, that can appreciate that, regarding the sanction that is to be applied, the activity of criminal prosecution is disproportional and consumption of power is not justifying<sup>11</sup>.

With regard to the compared law, at present, we remark the tendency of the European states to regulate the criminal responsibility of the legal person, tendency determined mainly by the fact that many conventions and juridical instruments that deal with or recommend such a responsibility were adopted at the level of the Council of Europe and of the European Union<sup>12</sup>.

Among the documents adopted at the European level that contain references to the criminal responsibility of the legal person, we mention:

- Recommendation R(81)12 of the Council of Europe on the criminality of business (that accept the possibility of instituting the criminal responsibility of the legal persons for the infractions committed in the commercial law);
- Recommendation R(88)18 of the Council of Europe on the responsibility of the legal person enterprises for the infractions committed in their activity. Within this European juridical instrument, the member states are recommended to institute the criminal responsibility of the enterprises independent on an eventual criminal responsibility of some natural persons, considering that these have their own guilt distinct from guilt of the natural persons that also have to answer if the conditions of their criminal responsibility are met;
- Recommendation R(96)8 regarding the criminal policy in an Europe in transformation;

<sup>8</sup> www.coe.int.

<sup>9</sup> For additional data, see *A. Jurma*, quoted work, page 100.

<sup>10</sup> Working Group on Bribery (Grupul de Lucru privind Coruptia).

<sup>11</sup> For more data, see *A. Jurma*, quoted work, page 105.

<sup>12</sup> Among the European states that regulated the criminal responsibility of the legal person, we mention Denmark, Finland, France, Belgium, the Netherlands etc.

- Resolution (97) 24 regarding the 20 directory principals in the fight against corruption;
- Convention regarding the protection of the financial interest of the European Communities (1995);
- Convention regarding the environment protection by means of the criminal law (1998);
- Criminal convention regarding the corruption (1999);
- Convention regarding the cybercriminality (2001).

We mention that, through the decision of the Court of Justice of the European Community on October 2<sup>nd</sup> 1991, this court indirectly admits the principle of the criminal responsibility of the legal persons<sup>13</sup>.

Among the documents adopted at the international level that contain references to the criminal responsibility of the legal person, we mention:

- Convention regarding the fight against the corruption of the foreign public clerks in the international trading transactions<sup>14</sup>. This convention binds the party states to sanction also the legal persons with sanctions, even non- criminal (if the responsibility of the legal person is not instituted), proportionate and discouraging ones;
- Convention against the organized transnational criminality concluded in Palermo (Italia)<sup>15</sup>;
- Convention against corruption concluded in Merida (Mexico)<sup>16</sup>.

## Specialty literature

*Fl. Streteanu, R. Chiriță, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Second edition, C.H. Beck Publishing house, Bucharest, 2007; A. Jurma, Legal person – subiect activ al răspunderii penale/ Legal person - active subject of the infraction, C.H. Beck Publishing house, Bucharest, 2010; Fl. Streteanu, Răspunderea penală a persoanei juridice potrivit Legii nr. 278/2006, în CDP nr. 3/2006/ Criminal responsibility of the legal person according to Law no. 278/2006, in CDP no. 3/2006; Fl. Streteanu, R. Chiriță, Răspunderea penală a legal persons în dreptul belgian/ Criminal responsibility of the legal persons in the Belgian law, RDP no. 1/2000; I. Pascu, M. Gorunescu, Răspunderea penală a persoanei juridice în perspectiva adoptării unui nou Cod Penal Român/ Criminal responsibility of the legal person in the perspective of adopting a new Romanian Criminal code, Pro Lege no. 2/2004; C. Cășuneanu, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Hamagiu Publishing house, Bucharest, 2007; G. Antoniu, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, in R.D.P. no. 1/1996; G. Dimofte, C. Rus, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, in R.D.P. no. 1/2005; A. Jurma, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, in R.D.P. no. 1/2003; R.V. Mancaș, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, in R.D.P. no. 3/1998; I. Pascu, Răspunderea penală a persoanei juridice în noul Cod penal/ Criminal responsibility of the legal person in the new Criminal code, in Pro Lege no. 4/2004; M. Ketty Guiu, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Law no.*

<sup>13</sup> For more references, see *N. Iliescu, Noul Cod penal/ New Criminal Code*, pages 465-467.

<sup>14</sup> Adopted under the aegis of the Organization for Economic Co-operation and Development (OECD), on December 17<sup>th</sup> 1997.

<sup>15</sup> Adopted by the General Assembly of ONU in 2000.

<sup>16</sup> Adopted by the General Assembly of ONU in 2003.

8/2005; C. Ungureanu, E. Paraschiv, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Pro Lege no. 2/2005; D.A. Brudariu, Răspunderea penală a legal persons. Experiența legislației franceze/ Criminal responsibility of the legal persons. Experience of the French legislation, RDP no. 1/2006; Ghe. Mărgărit, Conceptul de răspundere penală a persoanei juridice în noul Cod penal/ Concept of criminal responsibility of the legal person in the new Criminal code, Law no. 2/2005; I. Lascu, Răspunderea penală a persoanei juridice în lumina noului Cod penal/ Criminal responsibility of the legal person in the light of the new Criminal code, Law no. 8/2010; H. Diaconescu, Este răspunderea penală a persoanei juridice o răspundere pentru fapta altuia/ Is the criminal responsibility of the legal person a responsibility for the deed of another, Law no. 12/2005; C. Balaban, Legal person, subiect activ al infracțiunilor i/ Legal person, the active subject of the infraction, RDP no. 2/2002; V. Mirea, Legal person – subiect activ al infracțiunilor i/ Legal person - active subject of the infraction, Law no. 12/2005; S. Bacigalupo, La responsabilidad penal de las personas jurídicas, Bosch, Barcelona, 1998; J.R. Spencer, La responsabilité pénale dans l'entreprise en Angleterre, Revue de science criminelle et de droit comparé, 1997; D.M. Costin, Răspunderea persoanei juridice în dreptul penal român/ Responsibility of the legal person in the Romanian criminal law, Universul Juridic Publishing house, Bucharest, 2010.

## I. Condition of the criminal responsibility engagement of the legal person

### 1. Legal personality

#### 1.1. Common aspects

One of the general conditions for the engagement of the criminal responsibility of the legal person is that the latter should have **legal personality**. The legal person is a form of organizing that, meeting the conditions required by the law, is holder of civil rights and obligations. Any legal person has to have a standalone organization and its own patrimony for the carrying out of a licit and moral purpose according to the general interest.

The legal persons that are subject to the registration have the capacity to have the rights and obligations since the date of their registration. The other legal persons have the capacity to have the rights and obligations, depending on the case, since the date of the setting up document, since the authorization date of the their setting up or since the date of any other requirement stipulated by law.

According to art. 219 of the new Civil code, the licit or illicit deeds committed by the organs of the legal person bind the legal person itself, but only if they are connected to the attributions and the purpose of the assigned functions. The illicit deeds draw also the personal and solidary responsibility of those that committed them both to the legal person and to third parties.

According to art. 220 of the new Civil code, the vicarious liability against the administrators, censors, directors and other persons that took action in their capacity of members of the organs of the legal person, for the prejudices caused to the legal person by these ones by violating their duties set in their charge, belongs, in the name of the legal person, to the competent management organ that will decide with the majority required by law and its absence, with the majority required by the statutory provisions.

With regard to the **entities under setting up** or those that **ceased their existence by dissolution**, these are not criminally responsible, because the entities under setting up and those that no longer belong to the category of the legal persons, because they did not obtain or lost their legal personality, do not have the criminal juridical capacity until the date admitted as the moment of obtaining the personality. Indeed, we appreciate that the legal persons under setting up are not

criminally responsible, if they commit deeds stipulated by the criminal law, even if a limited legal personality is recognized from the civil point of view, because this type of personality is recognized only for the valid setting up of the legal person in question.

In doctrine, it was considered that the criminal responsibility of **the legal persons in the liquidation phase** could be engaged for the deeds committed during this phase<sup>17</sup>, arguing as well as in the French doctrine, that the liquidated legal persons kept their legal capacity necessary for the turning of the assets into money and the payment of the liabilities<sup>18</sup>.

The criminal responsibility of the legal person is **direct and personal**, which means that the eventual right to sue for compensation of the legal person against its official in charge exceeds the criminal legal report of conflicts<sup>19</sup>. **The right to sue for compensation** of the legal person against the natural person that is responsible for the committing of the infraction is exercisable based on the tort liability.

Based on the territoriality principle of the criminal law, we must admit that the foreign legal persons that commit infractions of the territory of Romania will also be criminally responsible according to the Romanian criminal law<sup>20</sup>.

### 1.2. Particular aspects

The legal persons of private law obtain the legal personality based on its particularity, which are usually classified in two large categories: **legal persons with lucrative purpose** and **legal persons without lucrative purpose** (non-profit).

In the case of the trading companies, cooperative companies, agricultural companies, cooperative organizations, groups of economic interest, European groups of economic interest, national companies and autonomous administrations, the legal personality is obtained starting with the registration date with the trade register office.

The trading companies that are illegally set up, but registered with the trade register office, have a special situation. Considering that the illegally set up trading companies obtained the legal personality and that the eventual finding of its nullity according to art. 58 of Law no. 31/1990 produces effects only for the future, we consider that their criminal responsibility can be engaged<sup>21</sup>. In exchange, the legal person can not be subject of the criminal responsibility, because it has no legal personality, which is a condition that has to exist „in law” and not in facts when committing the deed stipulated by the criminal law<sup>22</sup>.

The legal persons of private law without lucrative purpose are legal persons set up with nonprofit finality and are set up in order to carry on certain activities of general non- patrimonial interest of some collectivities or some natural persons. That is associations, foundations, trade unions, employers, political parties, religious or ethnical organizations.

According to art. 8 paragraph (1) of Government Ordinance no. 26/2000, the associations and foundations obtain the legal personality since their registration in the association and foundation register of the court registry, and the federations since their registration in the federation register of the tribunal registry. The loss of the legal personality of these persons takes place at the dissolution.

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<sup>17</sup> A. Jurma, quoted work, page 122.

<sup>18</sup> Idem, 123.

<sup>19</sup> I. Poenaru, Problemele legislației în domeniul contravențiilor/ Legislation problems in the domain of contraventions, Lumina Lex Publishing house, Bucharest, 1998, pages 55-56.

<sup>20</sup> D.M. Costin, Răspunderea persoanei juridice în dreptul penal roman/ Responsibility of the legal person in the Romanian criminal law, Universul Juridic Publishing house, Bucharest, page 273.

<sup>21</sup> Idem, page 282. See also Gh. Piperea, Obligațiile și răspunderea administratorilor societăților comerciale/ Obligations and responsibility of the trading company administrators, All Beck Publishing house, Bucharest, 1998, page 51.

<sup>22</sup> For the same opinion, see M. Costin, quoted work, page 284.

We state that the **associations, foundations and other legal persons without lucrative purpose** are criminally responsible even if they were pronounced of public utility, because they do not become authorities or public institutions through this capacity.

According to art. 1 of Law no. 14/2003, the **political parties** are legal persons of public law. They obtain the legal personality since the resolution through which the registration petition is admitted remains irrevocably (art. 22). The political parties cease their legal existence through dissolution or through the order of the Constitutional Court or through a court order in the cases and under the conditions stipulated by law. Although, by law, the political parties are legal persons of public law, the legislator did not except them from the criminal responsibility, but it excluded only their application against certain complementary punishments, that is dissolution and activity suspension.

**The trade unions and the employers** obtain and lose the legal personality under the conditions stipulated by Law no. 54/2003 (of the unions) and no. 54/2004 (of the employers). As well as in the case of the political parties, neither the unions nor the employers can be applied the dissolution and activity suspension.

**The religious organizations and those belonging to the national minorities** have a criminal legal regime similar to that applied to the political parties, trade unions and employers, because the complementary punishment of dissolution and activity suspension can be applied neither in their case. The religious cults can be admitted as legal persons through a government resolution and the loss of this capacity takes place also through such a resolution in the cases and under the conditions stipulated by law (Law no. 489/2006). Except for the religious cults, it can be set up religious associations that obtain the legal personality at their registration in the Religious association register with the court.

**The legal persons that carry on activities in the media field**, no matter of the legal form [of public law (for instance, Societatea Română de Radiodifuziune – Law no. 41/1994) or of private law], are criminally responsible, but they can not be applied three of the complementary punishments: dissolution, activity suspension and shutting down of some bias points.

## 2. Legal capacity

**a) Preliminary explanations.** The second general condition for the criminal responsibility of the legal person to be able to be engaged is that this should not belong to the excluded category, because not all the legal persons are criminally responsible. **The state and the public authorities are not criminally responsible**, because they do not have the criminal legal capacity, so that they can not enter such reports of criminal responsibility in their capacity of passive subjects. The **public institutions** are also not criminally responsible for the infractions during the carrying on of an activity that can not be the object of the private domain.

We mention that it results from the legal text that the legal persons, except for those particularly excerpted, are criminally responsible no matter if they are of public or private law. Also according to art. 221 of the new Civil code, if not otherwise ordered by law, the legal persons of public law are bound for the licit or illicit deeds of their organs under the same conditions as the legal persons of private law.

**b) State.** The exclusion of the state from the sphere of the legal persons that are criminally responsible is justified by the fact that the state is among the only legal persons that can not be abolished and, on the other side, this is the only active subject of the reports of criminal responsibility. The state also can not be sanctioned, because in case of the fine, the only main punishment applicable to the legal persons, this would make a payment by itself<sup>23</sup>. Besides, neither

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<sup>23</sup> M. Basarab, V. Pașca, Gh. Mateuț, C-tin Butiuc, Codul penal comentat/ Commented criminal code, vol. I,

the complementary punishments can be applied when it comes to the state, because the activity of the state can not be suspended, this can not be dissolved, it does not participate to the public auctions etc.

Therefore, in our legal system, the state is not criminally responsible and there are no reasons to suggest *de lege ferenda* the instituting of such a responsibility, no matter of the deeds that it can be charged with. Still, the state can be responsible in the field of other branches of the (civil, international etc.) law.

Besides, except for Denmark, in the Criminal code of which, art. 27, it is stipulated the possibility of engaging the criminal responsibility of the state for infractions that were not committed while carrying out the attributions regarding the public power<sup>24</sup> and some states of *common law*<sup>25</sup>, the other legislations exclude *de plano* the criminal responsibility of the state.

The exclusion of the state from the category of the legal persons that are criminally responsible is based also on the provisions of the second Protocol of the Convention regarding the protection of the financial interests of the European Communities that stipulates in art.1 lit. d) that the „legal person” is any entity that has this statute based on the applicable national law, **except for the states** or other public entities in the exercise of their public power prerogatives and the international public organizations.

**c) Public authorities.** In the Constitution, there are important provisions regarding the public authorities. The fundamental law stipulates that the „public authorities” are: the Parliament (Chapter I, art. 61-79), the President of Romania (Chapter II, art. 80-101), the Government (Chapter III, art. 102-110), the Public administration (Chapter V, art. 116-123), the Judiciary authority (Chapter VI, art. 124-134).

The type of public authorities that belong to the central specialty public administration includes the ministries, the specialty organs organized in the subordination of the Government, the specialty organs organized in the subordination of the ministries, the specialty organs organized as autonomous administrative authorities, armed forces, Supreme Council of National Defense, Court of Accounts.

The local councils elected from communes, towns and administrative- territorial subdivisions of the municipalities (art. 120), the elected mayors (art. 121), the elected county councils (art. 122) and the prefect (the prefect’s office) appointed in each county and in Bucharest municipality that is the local representative of the Government and runs the decentralized public services of the ministries and other organs of the central public administration in the administrative- territorial units (art. 123) belong to the category of the public authorities that belong to the local public administration.

The courts of law (art. 126-130), the prosecutor’s offices that function with them (art. 131-132) and the Superior Council of Magistracy (art. 133-134) belong to the „judiciary authority”.

The expression of „public authority” is defined in art. 2 paragraph (1) lit. b) of Law no. 554/2004: „any organ of the state or of the administrative- territorial units that act in regime of public power for the satisfying of a legitimate public interest is assimilated to the public authorities, *in the sense of the current law (s.n.)*, the legal persons of private law that, according to the law, obtained the statute of public utility or are authorized to provide a public service in regime of public power”. Because the assimilation is made only in the sense of Law no. 554/2004, we believe that it can not be extended also to the domain of the criminal law.

**d) Public institutions.** According to art. 135 paragraph (1): „The public institutions are not criminally responsible for the infractions committed **while exercising an activity that can not be**

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Partea generală/ Generalities, Hamangiu Publishing house, page 104.

<sup>24</sup> S. Bacigalupo, La responsabilidad penal de las personas jurídicas, Bosch, Barcelona, 1998, page 336.

<sup>25</sup> For instance, in the Great Britain, the Crown (state, government and ministries) can be penal responsible in the case of the infractions created on the jurisprudential way and in other cases stipulated by law.



**the object of the private domain**". In the drawing of the previous Criminal code, it is stipulated that it is not criminally responsible the public institutions „that carry on an activity that **can not be the object of the private domain**". It is observed that the editors of the new Criminal code took into consideration the suggestion made in the specialty literature regarding the previous formulation that was not considered corresponding<sup>26</sup>.

The difference consists in the fact that, under the previous Criminal code, the immunity was determined by the capacity of the subject (personal immunity), while the new Criminal code connects the immunity to the particularity of the committed infraction (real immunity). Therefore, the public institutions – even those that carry on an activity that can not be the object of the private domain – will criminally be responsible for those infractions committed in the carrying on of an activity opened at the private initiative (for instance, a public institution that mainly carries on an activity excluded to the private domain will be criminally responsible for the infractions committed in the carrying on of a secondary activity allowed to the private domain – such as the activity of assuring the meals for the employed personnel).

Which are the public institutions that carry on activities that can not be the object of the private domain? They are those that carry on an activity excluded to the private domain, which means that they can not be carried out by natural persons or legal persons of private law<sup>27</sup>.

Basically, such institutions are relatively difficult to identify, because at least a part of the institutions that carry on activities that can not be the object of the private initiative can be included also in the category of the public authorities. We believe that, in every case, the judicial organs have to check the legal provisions applicable to the legal person in question and if it finds that the infraction was committed while exercising an activity that can not be the object of the private domain, it will exclude the possibility of the criminal responsibility and if the infraction was committed while exercising an activity that can be the object of the private domain, the judicial organ will consider the legal requirement as carried out and will order consequently.

It is public institutions, for instance, National Institute of Magistracy, „Mina Minovici” Institute of Legal Medicine, Institute of Forensic Expertise, National Institute for the Training and Improvement of the Attorneys, National Bank of Romania, Romanian National Bar Association, National Union of the Notaries Public from Romania, Institute of Public Health in Bucharest etc<sup>28</sup>. For instance, the state universities or other institutions of public law that carry on activities that can be the object of the private initiative is not in the sphere of the legal persons excluded from the criminal responsibility.

The autonomous administrations can not be included in the category of the public institutions, even if these have a mixed juridical nature (of private and public law), because art. 136 of the Constitution stipulates these distinctly, so that all the administrations can be responsible, no matter if they carry on or not the activity in a domain that is excluded to the private initiative. For instance, the administrations of local transportation, Autonomous Public Service Undertaking "State Mint of Romania", Autonomous Administration „Monitorul Oficial” etc<sup>29</sup>.

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<sup>26</sup> *Fl. Streteanu*, Câteva considerații privind răspunderea penală a persoanei juridice potrivit proiectului de lege pentru modificarea și completarea Codului penal/ A few considerations regarding the criminal responsibility of the legal person according to the bill for the modification and completion of the Criminal code, CDP no. 1/2005, page 42. See also *Fl. Streteanu, R. Chiriță*, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Second edition, C.H. Beck Publishing house, Bucharest, 2007, page 395.

<sup>27</sup> See also *Fl. Streteanu, R. Chiriță*, quoted work, page 395.

<sup>28</sup> According to the definition formulated by Univ. Prof. Dr. *D. Apostol Tofan*, the public institutions are: „the subordinated structures of some authorities of the public administration that function from budget incomes, but also from extra- budgetary sources” (Administrative law, vol. I, Second edition, C.H. Beck Publishing house, Bucharest, 2008, page 6).

<sup>29</sup> For this opinion, see *Fl. Streteanu, R. Chiriță*, quoted work, page 396-397.

On the other hand, **the legal persons of private law can be criminally responsible**, no matter of the type of activity that it carries on by observing the limitations set by the law. So, for instance, according to art. 141 of the Criminal code, the dissolution and suspension of the activity or of one of the activities of the legal person can not be applied to the political parties, trade unions, employers and religious organizations or to the organizations of the minorities set up according to the law and nor to the legal persons that carry on their activity in the media field.

They will be criminally responsible, if also the other conditions stipulated by law, for instance, the following categories of legal persons: associations, foundations, trade unions, trading companies, cooperative companies, agricultural companies, groups of economic interest, autonomous administrations etc. are met.

### **3. The committing of the infraction in the carrying out of the activity object or in the interest or in the name of the legal person**

A third general condition for the engaging of the criminal responsibility of the legal persons is that the infractions should be committed in the carrying out of the **activity object** or in the **interest** or in the **name** of the legal person<sup>30</sup>.

It is noticed that the Romanian lawgiver regulated the criminal responsibility of the legal person based on the **general clause (responsibility) system** or the **general responsibility model**, because especially in the *common law*, according to which the legal person can be criminally responsible for any infraction, without the exclusion *de plano* of some infractions. Of course, certain infractions, such as rape, false testimony, etc. can not conceptually be committed by the legal person.

Regarding this condition, it has to be solved the matter of the content of the connection between the natural person that performs the act of conduct of the infraction and the legal person, because, according to art. 135 Criminal code, in order to engage the criminal responsibility of the legal persons, it is necessary that the infractions should be committed during the carrying out of the **activity object** or in the **interest** or in the **name** of the legal person. The legal text does not contain the criteria based on which it should be identified the persons that commit infractions either for the turning into practice of the activity object or just for the use or in the interest of the legal person.

In order to commit an infraction in the carrying out of the **activity object**, we should understand that an **organ, official in charge<sup>31</sup> or representative** of the legal person committed an infraction while turning into practice the activities that the legal person could carry on according to the law or the constitutive deeds. For instance, to this category, belong the infractions at the competition regime, infractions in the work field, etc. In any case, as it was remarked in the doctrine, the evaluated deeds had to have connections to the „general policy of the legal person” or to the „main activities meant to carry out the object of the company, and not to the deeds resulted

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<sup>30</sup> In the judicial praxis, it was considered that the deed had been committed for the carrying out of the activity object, retaining the following: „regarding the license agreement for the program Autodesk Map 3D 2006, the indicted company had the right to install and use the program in discussion just for a computer with the possibility of activating (upgrading) to the latest annual version under the conditions of paying up the subscription. The defendant B.I. sustained that the programs identified on the occasion of the control by the police organs had been installed by him in order to test their functionality; he also showed that he had personally proceeded to the reproduction of the computer programs on the functional units inside the bias point. The defendant B.I. also sustained that he was the only one that was dealing with the management of the company” (High Court of Cassation and Justice, pen. s, dec. no. 4034/1999, [www.scj.ro](http://www.scj.ro)).

<sup>31</sup> According to art. 1373 paragraph (2) of the new Criminal code: „The principal is the one that, based on an agreement or on the law, carries out the direction, surveillance and control on the one that carries out certain functions or duties in its interests or the interest of the latter”.

from activities indirectly connected to this object”<sup>32</sup>. The official in charge is a person that carries out an assignment or position in the interest of the legal person and the legal person will be criminally responsible if the deed committed by it is connected to the attributions or the purpose of the assigned positions.

Starting from the **specialty rule of the usage capacity**, the Romanian lawgiver had in view only the activities specific to the activity object of the legal person, either that this was the main one or it was one of the secondary ones. For instance, if a legal person, the activity object of which is artistic business management, commits deeds of human trafficking for the purpose of prostitution practice.

An infraction is committed **in the interest** of the legal person in all the cases when the - material or moral – benefit obtained from the infractions comes, totally or partially, to the legal person, although the infraction is not committed for the carrying out of the activity object. With reason, it is considered that an infraction is committed in the interest of the legal person also when the benefit consists in preventing a loss<sup>33</sup>. Among the infractions that can be committed in the interest of the legal person, we mention drug trafficking, human trafficking, smuggling, money laundering, etc.

A problem of law raised already in our doctrine is that of the solution for the hypothesis when a natural person commits an infraction for the carrying out of the activity object, but **for the exclusive benefit of that natural person** (or of some other person) or even against the interests of the legal person<sup>34</sup>. Starting from the idea that the three hypotheses – the committing of the infraction for the carrying out of the activity object of the legal person in the interest of the legal person or in the name of the legal person – are not cumulative conditions, but they are three alternative situations, we consider that the criminal responsibility of the legal person can be engaged any time the conditions of at least one of the hypotheses are met, no matter of the circumstance that the deed was committed or not also in the interest of the legal person or if it was committed or not in its name, of course, by meeting the objective and subjective conditions stipulated by law for the charged infraction.

In the sense of the criminal law, an infraction is committed **in the name** of the legal person if the natural person that commits the material element of the deed acts in its capacity of official in charge or representative of the legal person, officially assigned without the deed to have been committed in the carrying out of the activity object or for the benefit of the legal person in question.

According to the project *Corpus Juris*, in order for the illicit activity of a natural person to engage the criminal responsibility of the legal person, it is not required the condition of an official appointment in a decision, representation or control position, it is enough that the natural person should act in the name of the legal person or it should have had such a legal or actual power.

Another problem of law is that of establishing the legal solution for the hypothesis when a natural person commits a deed stipulated by the criminal law in the name of a legal person, but contrary to this one’s interest. For instance, the committing of an infraction of money laundering exclusively in the name of a trading company by a representative of the company, without a direct connection to the carrying out of the activity object, in the interest of one of the shareholders of the trading company.

As far as we are concerned, because the three hypothesis stipulated by art. 135 are not cumulative, we appreciate that the legal solution is that that neither the lack of connection to the

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<sup>32</sup> Fl. Streteanu, R. Chiriță, quoted work, page 400.

<sup>33</sup> Idem, page 400. See also D.M. Costin, quoted work, page 356.

<sup>34</sup> A. Jurma, quoted work, page 138.

activity object, nor the circumstance that the deed was committed contrary to the interests of the legal person have relevance, as long as that deed was committed in the name of the legal person. But, we state that, even if a deed stipulated by the criminal law is committed in the name of a legal person, it is possible that this should engage exclusively the criminal responsibility of the natural person, especially when the interests of the legal person are damaged while committing the infraction, but not because the deed is against this one's interests, but because it is possible that the content of the subjective element should not be carried out, because the guilt, as we will see, is reported to the attitude of some natural persons within the legal person.

As a result of the analysis of the legal text, as it was already found in doctrine, it is noticed that the three categories of infractions – in the carrying out of the activity object of the legal person in the interest of the legal person or in the name of the legal person – interpenetrate<sup>35</sup>, because the deeds that are committed in the carrying out of the activity object in the interest and in the name of the legal person. For instance, the committing of an infraction of human trafficking by the director of a trading company, the object of which is the transportation of persons, is an infraction that can be included in any of the three categories.

#### 4. Criminal guilt of the legal person

For the engagement of the criminal responsibility of the legal person, art. 19<sup>1</sup> of the previous Criminal code stipulated that the deed had to be committed with the form of guilt stipulated by the criminal law. As we have already said it, the new Criminal code no longer resumed this mention, but not because the guilt was not a condition for the engaging of the criminal responsibility of the legal person, but because the mention would have been useless, because art. 16 paragraph (1) Criminal code established that the „deed – **no matter if it was committed by a natural person or a legal person** (s.n.) – was an infraction only if it had been committed with the form of guilt stipulated by the criminal law”.

The guilt of the legal person is reported to this one's organs and organization and it can be said that the establishing of the guilt of the natural persons that form the organs of the legal person is equivalent to the establishing of the guilt of the legal person in question. If the deed is not committed by the organs of the legal person, but by its representatives or officials in charge, the guilt of the legal person is established by reporting to the attitude of its organs. The existence of guilt or of its form or modality will result from the objective aspects of the way how the resolutions were adopted by the management organs of the legal person or from the existing known or tolerated practices within the activity of the legal person. Although, basically, it can be affirmed that the guilt of the natural person in the management of the legal person proves also the latter's guilt, nevertheless, we believe that the judicial organs have to establish the existing rules and practices within the organization and functioning of that legal person and, based on the findings, if it results that the organs of the legal person ordered, knew or did not prevent the committing of some infractions based on the instruments at hand, then it can be engaged the criminal responsibility of the legal person, if the form of guilt required by law for the examined infraction is carried out.

In the case of the deliberate deeds, it is necessary the preexistence of a decision of the legal person, based on which the deed stipulated by the criminal law was committed. In the case of the voluntary infractions, the guilt is established by verifying the way of carrying out the obligations of the legal person. For instance, if the infraction was determined by a not corresponding organizing. In the hypothesis of the criminal responsibility of the legal person for the voluntary deeds, it is considered that this is possible no matter if the guilt of a natural person is or is not

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<sup>35</sup> Fl. Streteanu, R. Chiriță, quoted work, page 401.

established, because the guilt is reported to the attitude of the organs of the collective entity in question<sup>36</sup>.

With regard to the infractions committed by **other persons than the organs of the legal person**, it is necessary for the existence of the infraction that the legal person should have known or should have had to know about the criminal activity carried on by the natural person. Therefore, the criminal responsibility of the legal person is excluded when the infraction is unexpectedly committed by an official in charge of the legal person or if the criminal deed does not belong to a practice tolerated or approved by the legal person. Also, if the legal person created a well organized system of surveillance and control that was able to prevent the committing of infractions in a responsible way, the liability of the legal person is excluded.

In doctrine, it is considered that, as long as the guilt of the legal person is an element distinct from the guilt of the natural person, which is separately analyzed, we have to admit that the guilt of the two persons can be the same (with the same form or modality) or different<sup>37</sup>.

It can be talked about the same form of guilt when both the legal person and the natural one act voluntarily or deliberately. For instance, if the members of the board of directors of a legal person made the decision to misappropriate the activity object for the purpose of carrying on activities of human trafficking and the same subjective attitude to this activity had also the natural persons involved in the putting into practice of the resolutions of the board of directors. Another example that can be retained here is that when, in a work accident that led to the death of more persons, both the natural person that operated the device that ran out of order and caused the accident and the management organs of the company that did not perform the training regarding the work safety had a guilty attitude.

In doctrine, there are also examples in the sense that the form of guilt with which the legal person and the natural person act can be different. For instance, the employee that constantly disposes with intention wastes that are polluting and the legal person for which this works does not know (through its organs) about the activity of its official in charge, but it is found a repeated negligence with regard to the surveillance of the activity of the employees.

In the cases presented above as examples, the material doer – the negligent employee or the dishonest one – will be criminally responsible in their capacity either of participants or of sole doer, depending on the case, because it is possible that the legal person should not be criminally responsible as well as the situation that the natural person in the management of the legal person should not be drawn criminally responsible. So, the criminal responsibility of the legal person can coexist together with the responsibility of the natural person that has the capacity of organ of the legal person and that of the natural person that performed the material element of the infraction, but the three categories of subjects can be also in other positions. For instance, the legal person is not criminally responsible, but the two natural persons are. Or, the legal person and the material doer are criminally responsible, without that the natural person that runs the legal person should be criminally responsible. It is also possible that only the legal person should be criminally responsible<sup>38</sup>.

Regarding the evidence of guilt, it is shown in doctrine that this is made indirectly by proving the guilt of the organs of the legal person.

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<sup>36</sup> D.M. Costin, quoted work, page 373.

<sup>37</sup> Fl. Streteanu, R. Chiriță, quoted work, page 403. In doctrine, it was expressed also the opinion according to which the guilt of the legal person was identical to the guilt of the natural person (M. Basarab, V. Pașca, Gh. Mateuț, C-tin Butiuc, Commented criminal code, vol. I, Generalities, Publishing house Hamangiu, page 126-127)

<sup>38</sup> Idem, page 406. The authors give as example the case in which the decision at the level of the legal person was made through secret vote, with majority of votes, and the identity of the persons that agreed to that decision can not be established.

## II. Correlation of the criminal responsibility of the legal person with the criminal responsibility of the natural person

We underline the fact that, by introducing the criminal responsibility of the legal person, the Romanian lawgiver did not want to make an „umbrella” under which the natural persons that had carried out the material element of the infraction should take refuge. On the contrary, in art. 135 paragraph (3) Criminal code, it is stipulated that the „Criminal responsibility of the legal person does not exclude the criminal responsibility of the natural person that contributed to the committing of the same deed”. Analyzing the hypotheses under which it is raised the issue of the criminal responsibility of the legal person and based also on the practice experience of other states, we find that, excluding certain exceptional situations, usually the natural person regarding which the objective aspects of the deed stipulated by the criminal law are met, while the legal person in connection to which the infraction was committed is sometimes criminally responsible and there are, very rarely, cases when the legal person is exclusively criminally responsible. The possibility of the exclusive criminal responsibility of the legal person results from the provisions of art. 135 paragraph (3) Criminal code according to which the criminal responsibility of the legal person does not exclude the criminal responsibility of the natural person.

Based on these legal provisions, it can be said that the criminal responsibility of the legal person can be cumulated to that of the natural person, but it does not presume it, so that there can be cases when the legal person is criminally responsible, although the judicial organs did not manage to retain the conditions of the criminal responsibility in the charge of a natural person. In such situations, in doctrine, it is discussed about the way how the existence of the conditions of criminal responsibility of the legal person can be established in the absence of referring to a natural person<sup>39</sup>.

As far as we are concerned, we appreciate that the establishing of the criminal responsibility of the legal person presumes in all case the reference to one or more natural persons that carried out the material element of the deed stipulated by the criminal law. Without such a reference, the engaging of the criminal responsibility of the legal person would be arbitrary. For instance, in case the decision belongs to a collective organ and it can not be established which of the natural persons took part to the decision making, the legal person is criminally responsible only if a natural person set into practice the resolution of the collective organ of the legal person. The „performer” – natural person – is criminally responsible only if it committed the deed with the form of guilt stipulated by law, but the legal person will be criminally responsible irrespective of the criminal situation of the natural person, because the deed was committed for sure with guilt. Also, if the decision of the collective organ carries out by itself the objective elements of an infraction, the material element of the deed is also attributed to some natural persons, so that the carrying out of the objective aspects of the deed are appreciated based on the natural persons participating to the decision making in question. In case the deed stipulated by the criminal law is attributed to a collective organ and it can not be established that at least a part of the natural persons that make this organ committed the deed with the form of guilt required by the law, therefore, the criminal responsibility of the legal person will be also excluded.

We mention that, although the criminal responsibility of the legal person can be engaged without retaining the criminal responsibility of at least a natural person, the subjective aspect has to be charged to at least one natural person every time, even if its identity can not be established (in the case of the collective organs, for instance).

Unlike other legislations that stipulate the exclusion of the plurality of the criminal responsibility of the legal person and of the criminal responsibility of the natural person, we

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<sup>39</sup> A. Jurma, quoted work, page 148.

believe that our legislation sets the rule according to which the criminal responsibility of the natural person and of the legal person are not excluded, but they are cumulated<sup>40</sup>.

Based on the principle of the personal character of the criminal responsibility, the legal person can not sue for compensation in order to ask for the payment of the paid criminal fine, but it will be able to request from the natural person does compensations based on the tort liability. The associates of the legal person also can not be made to be responsible for the criminal fines applicable to the entity in relation to which they have the capacity of associates, because the principle of the criminal responsibility personality may be broken, and the solution is the same including in the case of those legal persons within which the associates are unlimited or solidary responsible<sup>41</sup>.

## Conclusions

Comparatively analyzing art. 135 of the new Criminal code with the previous equivalent text introduced in the criminal legislation through Law no. 278/2006, we find that the **principles** of the previous **regulation were kept**. So, it was mentioned the concept of the liability of the legal person for any infraction, the existence condition of the legal personality as premises for the engaging of the criminal responsibility of the collective entities, the possibility of the plurality of the criminal responsibility of the legal person with the criminal responsibility of some natural persons, etc.

Compared to the previous regulation, the lawgiver operated the **restrain of the criminal immunity of the public institutions** that carry on an activity that can not be the object of the private domain and limited it to the infractions committed during the carrying on of such activities. There were also modifications with regard to the individualization of the sanctions applicable to the legal person determined by the introduction of the day- fine system for the natural person.

On the other hand, to the complementary punishments applicable to the legal persons, it was introduced a new such punishment, that is, **the placement under surveillance**, that can be applied to the legal person according to the conditions stipulated by law.

There are also other modifications that aim at the conditions of the criminal responsibility of the legal person. Firstly, we notice that compared to the previous regulation that was not clearly enough, in the new Criminal code, the types of the legal persons that are not criminally responsible are stipulated more clearly. Secondly, the new Criminal code did not resume the provision regarding the subjective element<sup>42</sup>, because it was set through art. 16 paragraph (1) of the new Criminal code that the „*Deed is an infraction only if it was committed with the form of guilt required by the criminal law*”. Therefore, such an explanation was useless.

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<sup>40</sup> In the Belgian law, for example, in the case of the voluntary infractions, the plurality of the criminal responsibility of the legal person is excluded, because in such a situation it is applied the exclusive rule of the person that has the severer guilt (for more data, see *A. Jurma*, quoted work, page 148). For instance, according to art. 5 of the Belgian Criminal code: „When the responsibility of the legal person is exclusively engaged as a result of the intervention of a natural person, only the person that committed the severer deed can be convicted. If the identified natural person committed the deed knowingly and advisedly, it can be convicted at the same time with the responsible legal person”.

<sup>41</sup> See also *Fl. Streteanu, R. Chiriță*, quoted work, page 408-409. The authors show that, as long as the associates in the case were also penal punished for that deed, the rule of *non bis in idem* would be violated.

<sup>42</sup> According to Art. 19<sup>1</sup> paragraph (1) of the previous Criminal code, in order to engage the criminal responsibility of a legal person, it is necessary the condition that the deed should have „*been committed with the form of guilt stipulated by law*”.

### References

- Jurma, Persoana juridică – subiect activ al infracțiunii/ Legal person - active subject of the infraction, C.H. Beck Publishing house, Bucharest, 2010
- N. Ilescu, Noul Cod penal/ New Criminal Code, pages 465-467
- Poenaru, Problemele legislației în domeniul contravențiilor/ Legislation problems in the domain of contraventions, Lumina Lex Publishing house, Bucharest, 1998
- D.M. Costin, Răspunderea persoanei juridice în dreptul penal roman/ Responsibility of the legal person in the Romanian criminal law, Universul Juridic Publishing house, Bucharest
- Gh. Piperea, Obligațiile și răspunderea administratorilor societăților comerciale/ Obligations and responsibility of the trading company administrators, All Beck Publishing house, Bucharest, 1998
- M. Basarab, V. Pașca, Gh. Mateuș, C-tin Butiuc, Codul penal comentat/ Commented criminal code, vol. I, Partea generală/ Generalities, Hamangiu Publishing house
- S. Bacigalupo, La responsabilidad penal de las personas juridicas, Bosch, Barcelona, 1998
- Fl. Stretianu, Câteva considerații privind răspunderea penală a persoanei juridice potrivit proiectului de lege pentru modificarea și completarea Codului penal/ A few considerations regarding the criminal responsibility of the legal person according to the bill for the modification and completion of the Criminal code, CDP no. 1/2005
- Fl. Stretianu, R. Chiriță, Răspunderea penală a persoanei juridice/ Criminal responsibility of the legal person, Second edition, C.H. Beck Publishing house, Bucharest, 2007
- M. Basarab, V. Pașca, Gh. Mateuș, C-tin Butiuc, Commented criminal code, vol. I, Generalities, Publishing house Hamangiu
- D. Apostol Tofan , Administrative law, vol. I, Second edition, C.H. Beck Publishing house, Bucharest, 2008
- [www.scj.ro](http://www.scj.ro)
- [www.coe.int](http://www.coe.int).