CONSIDERATIONS ON CORPORATE CRIMINAL LIABILITY.THE PENALTIES APPLICABLE TO LEGAL ENTITIES

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Abstract: *The article deals with the penalties set by the Romanian criminal law applicable to the legal entities, as a consequence and also an expression of the penal liability of the legal entities. The article analyzes first the fine - as an unique penalty among the principal legal penalties applicable to legal entities, but focuses especially on the secondary, complementary penalties, those sanctions that may be applied alongside the principal penalty, in order to complete the repression of the principal penalty - such as the dissolution of the legal entity or the suspension of the activity of the legal entity, going on with the closure of some work units and the placement under judicial supervision, until the display or the publication of the conviction sentence of the legal entity, penalties that have been specially conceived in order to correspond to the specific activity of the legal entities.*
Keywords: *legal entity, legal penalties, complementary penalties, dissolution of the legal entity, suspension of the activity of the legal entity*

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1. THE PENALTIES APPLICABLE TO LEGAL ENTITIES

1. The penalties applicable to legal entities

They are regulated in art.136 of the new Criminal Code and the first evident issue of that provision is that, among the principal penalties set by criminal law (life imprisonment, imprisonment and criminal fines), the fine is the only principal penalty that can be applied to a legal entity for committing a crime.

According to art.137 of the new Criminal Code, the fine represents a sum of money that the convicted person is obliged to pay to the state. The analysis of the new provisions - modified or newly introduced in the special part of the new Criminal Code - reveals a significant increase in the number of crimes for which the penalty is the fine as

the only principal penalty, and also an increment in the number of crimes for which the fine is provided as an alternative to imprisonment.

This fact reflects the adoption by the Romanian criminal legislator of the tendency that appeared for a long time in modern criminal legislation to increase pecuniary penalties to the detriment of the penalties depriving of liberty, as it is unanimously accepted that pecuniary penalties have many advantages, especially in terms of the expenses incurred by the State to ensure their execution.

Regarding the limits and the manner of calculation of the fine penalty in the new Criminal Code, the new criminal provisions do not provide for simple minimum and maximum limits of it, but there is a system, that of the "day-fine", for calculating its amount.

Concretely, the court shall determine, first, the number of days-fine that the accused legal entity is obligated to, taking into account the general criteria of individualization of punishment stipulated in art.74 of the New Criminal Code. Subsequently, the court shall determine the amount of a day-fine taking into account criteria such as turnover – in the case of the legal entity with lucrative purpose, respectively the value of the patrimonial assets in the case of other legal entities. The court will also take into account the other obligations - criminal, civil or administrative - incumbent and which are to be executed by the accused legal entity. Therefore, the amount of the fine that the legal entity will finally have to pay is the product of the number of days-fine and the amount of a day-fine.

For legal entities, the general limits on the days-fine are between 30 and 600 days, and the amount of a day-fine is between 100 and 5,000 lei. It follows that the general limits of the fine penalty for legal entities range from a minimum of 3,000 lei to a maximum of 3,000,000 lei, limits which cannot be exceeded regardless of the number and nature of causes for mitigation or aggravation that could appear in the case of the accused legal entity.

The law also provides for special limits of the days-fine, which vary depending on the gravity of the committed crime, as well as in the case where the fine penalty is provided alternately with imprisonment, in which case the number of days-fine vary depending on the limits of the alternative principal penalty.

Regarding the effective execution of this principal penalty, the convicted legal entity must pay the fine within three months of a final conviction. If the legal entity is unable to pay the fine in full in the period of 3 months, the appointed judge at the express request of the legal entity may order the payment rescheduling of the fine in monthly installments for a period not longer than two years (art.25 of Law no.253/2013).

In case of failure to observe the deadline for payment in full or of one installment of the fine, the execution of the fine penalty is done by compulsory enforcement, according to the provisions of the Fiscal Procedure Code.

One of the most important aspects regarding the payment of a fine by a legal entity, aspect connected to the ratio of the criminal liability of the legal entity and the personal liability of some employees of the legal entity (manager, agent or principal), is that the legal entity that has been applied the criminal fine may not bring a civil action in

recourse against the natural person who committed the act in its materiality, in order to recover the amount paid as criminal penalty.

2. **Complementary penalties applicable to legal entities**

Complementary penalties have been defined in the doctrine as being those sanctions that may be applied alongside the principal penalty, in order to complete the repression of the principal penalty. [2]

These measures are also justified by the fact that in many cases the individual who was responsible for the infringement cannot be identified, due to complex corporate decision-making mechanisms and the flux of managers and employees within the company. [3]

The essential feature of complementary penalties is their facultative character, the principle being that of their application when the court finds that, compared to the nature and the gravity of the crime and to the circumstances in which the crime was committed, these penalties are necessary and proportional with the aim pursued by the application of any criminal penalties.

The complementary penalties applicable to legal entities are: the dissolution of the legal entity, the suspension of the activity of the legal entity, the closure of some work units of the legal entity, the prohibition to participate in public procurement procedures for a period of two years, the placing under judicial supervision and the display or publication of the decision of conviction.

A. The dissolution of the legal entity

It is the most severe complementary penalty and it is applied to a legal entity convicted of a crime in any of the following hypotheses:

a) *the legal entity was established for the purpose of committing crimes:*

In this hypothesis the judicial authorities must have proved undoubtedly that the main reason for which the legal entity was constituted is that of committing crimes. As shown in the doctrine, in this case it should be considered the effective, concrete activity, conducted by the legal entity, and not the one stated in the constitutive documents of the legal entity, which can only be legal. [1] Criminal liability is not diminished and the application of the complementary penalty is not removed if the legal entity also carries out subsidiary legal activities, but its main activity is that of committing crimes. Naturally, in qualifying the activity of a legal entity as being carried out in order to commit crimes, there should be taken into consideration only the crimes committed with intent, simple or *praeter intentionem*, and not the crimes committed by recklessness or negligence. In the same sense, the doctrine emphasized that it is not relevant the gravity of the crimes intended to be committed in the activity of the legal entity, as the sanction of dissolution can be applied for the perpetration of crimes of lesser gravity.

b) the second hypothesis the complementary penalty of dissolution of the legal entity is applied is that when the object of activity of the legal entity has been diverted in order to commit crimes and the penalty provided by law for the committed crime is imprisonment exceeding 3 years.

In this hypothesis the legal entity initially conducted a licit activity, but this activity was later diverted, acquiring an illicit criminal character. Case law has shown that it is not necessary for the entire activity of the legal entity to have become illegal, but, as in the previous hypothesis, it is sufficient that the activity became only partially illegal. At the same time, to attract the incidence of this penalty, it is sufficient to commit one crime after the diversion of the activity of the legal entity. It is also worth mentioning that it would be considered only the crimes for which the law provides for imprisonment of more than 3 years.

c*) the third hypothesis is considering the case of not execution in bad faith by the legal entity of one or more complementary penalties - suspension of activity, closing of some work units, prohibition to participate in public procurement procedures, placement under judicial supervision - penalties that had been imposed by a previous definitive criminal judgment.*

In case of failure of the legal entity to execute the complementary penalty of display or publication of the decision of conviction, firstly it would be ordered the suspension of the activity of the legal entity for a maximum period of 3 months. If within this term the complementary display or publication of the decision of conviction is not executed, in bad faith, it is ordered the dissolution of the legal entity. Unlike the previous regulation, the new Criminal Code expressly provides that the complementary penalty of dissolution of the legal entity is not to be ordered in the case of public institutions, political parties, labor unions, employers' organizations, religious organizations or ethnic minorities' organizations, established according to law or the legal entities active in the media. Since dissolution is a complementary penalty, which applies in addition to the principal penalty of fine, dissolution will be made after the execution of the fine and possibly after other measures ordered by the court, such as confiscation of the assets.

B. **The suspension of the activity of the legal entity for a period of 3 months to 3 years or the suspension of one of the activities of the legal entity**

This complementary penalty consists in the prohibition of performing the activity or one of the activities of the legal entity, in the realization of which the crime was committed. The suspension of the activity or of one of the activities cannot be ordered in the case of public institutions and other institutions. After the decision of conviction is definitive, the judge delegated with the execution communicates a copy of the judgment to the authority that authorized the establishment of the legal entity and also to the authority that registered the legal entity, to the authority that established the institution not subjected to authorization or registration, as well as to the bodies having attributions of control and supervision of the legal entity, according to Art.34 of Law no.253/2013, in order for them to take the necessary measures to suspend the activity.

If during the term for which the suspension was applied, the competent authorities find it has not been respected - that is the legal entity has continued the activity – they will immediately notify the judge delegated with the execution who will take the necessary measures - eventually will notify the court for the application of the penalty of dissolution of the legal entity, as shown above.

The same institutions mentioned above, at the end of the period of suspension ordered by the court decision, expunge from registers the specific effectuated mentions.

C. **Closure of some work units of the legal entity for a period of 3 months to 3 years**

This complementary penalty may be ordered only in the case of legal entities with lucrative purpose and only on the work units in which took place the activity of the legal entity in the realization of which the crime was committed. The doctrine appreciated on this complementary penalty, that for its ordering it is important the dangerous nature of carrying out an activity in a specific work unit, and not the activity of the legal entity as a whole. The doctrine has shown that, unlike the complementary penalty of suspension of activity, which involves the inability to perform the activity that led to the committing of the crime during the suspension, the complementary penalty of closing certain work units enables the legal entity to open another work unit even in the same city in which to conduct the lucrative activity lawfully. [1]

It was also mentioned that it can be ordered on the same legal entity, both the complementary penalty of closing a work unit and the penalty of suspension of some of its activities, but it is not possible to have a cumulative suspension of all the activities and the closure of all work units. [1]

D. **The prohibition to participate in public procurement procedures for a period of 1 to 3 years**

Is consists of the prohibition to participate, directly or indirectly, in the procedures for awarding public procurement contracts provided by the G.E.O. no.34/2006 regarding the award of public procurement contracts and the contracts of services concession and it can be applied both to legal entities having a lucrative purpose and those without a lucrative purpose (associations, foundations). The doctrine stated about this complementary penalty, that it is a real "restriction of the exercise capacity" of the legal entity, and that it also concerns indirect participation in public procurement procedures, ie either by simulation through the interposition of entity, or if the legal entity acts as a subcontractor of another legal entity which participated in the public procurement. [1] If the legal entity has already public procurement contracts in progress, they can be maintained, as the complementary penalty applies *ex nunc*, ie only for the future, and not *ex tunc*, but there cannot be concluded additional acts to extend the procurement contracts concluded previously. However, the doctrine has shown that, exceptionally, if the crime for which the legal entity was convicted was committed in the execution of or in connection with the public procurement contract already concluded (eg. - a crime of giving bribes to officials who have awarded the public procurement contract) its cancellation will be ordered, as effect of restoring the situation previous to the crime.

E. Placement under judicial supervision

It is a complementary penalty introduced by the new Criminal Code and consists of the appointment by the court of a judicial trustee who will oversee, during a period of 1 to 3 years, the activity which gave rise to committing the crime. The purpose of this sanction is to prevent the recidivism into criminal activity of the legal entity. In the doctrine it has been showed that this institution corresponds to the sanction of suspension of the sentence under supervision, as a means of judicial individualization of the execution of the punishment in the case of a natural person. [1]

This complementary penalty cannot be ordered cumulatively to that of dissolution or suspension of the activity of the legal entity, as this would mean to deprive of object the judicial supervision.

The execution of this complementary penalty is done by appointment by the delegated judge of a judicial trustee chosen out of the insolvency practitioners or of the legal experts, specifying that it cannot be appointed as judicial trustee the insolvency practitioner who was entitled to representation of the legal entity in the criminal proceedings.

Regarding the judicial trustee's duties, they relate only to the supervision of the activity in connection with which the crime was committed. Thus the trustee is entitled to participate, without voting rights, at any meeting of the governing bodies of the legal entity in which the activity of the legal entity is discussed, has access to all work units where it takes place, but he does not have the right of decision in the management of the activity of the convicted legal entity and he is bound to respect the confidentiality of the data that he takes notice of in the exercise of his mandate.

If the legal entity precludes the judicial trustee's duties, the court may replace the complementary penalty of judicial supervision with that of suspension of the activity of the legal entity during a legal term.

F. The display or publication of the decision of conviction

This complementary penalty consists in the obligation, imposed by the court that convicted the legal entity, to display or publish or both a fragment established by the court containing the considerations for the decision and the full body of the conviction decision. The display is made in fragment in the place and in the manner established by the court, for a period between one month and three months. Publication is also done in the form prescribed by the court in print or audiovisual media or by other audiovisual means set by the court at the expense of the legal entity. The court decision also establishes the number of media appearances without exceeding 10 appearances and in the case of publishing by other means of audiovisual broadcasting, without exceeding a period of 3 months. The judge appointed with the execution periodically checks the fulfillment of the obligation to display - by police representatives - or to publish the conviction decision and, in the case of non-execution of this complementary penalty, he can notify the competent court for the replacement of this penalty with that of suspension of activity of the legal entity.

CONCLUSIONS

With the introduction of criminal liability of legal entities, the Romanian criminal legislator also implemented in the Romanian legislation the penalties that are involved by using this form of liability. However, considering the category of subjects of law that these penalties are applied to - namely legal, moral entities, they must be adapted to the legal entities' nature and specificity. Therefore, to the only principal penalty possible in the case of legal entities – the criminal fine, it had to be added a series of complementary penalties, which according to the nature and gravity of the committed crime, would nuance and make efficient the application of criminal law in the case of legal entities.

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