GENERAL ASPECTS ON THE REGULATION OF CRIMINAL LIABILITY OF THE LEGAL ENTITY IN THE PRESENT ROMANIAN CRIMINAL LAW. THE REFLECTION OF THE MITIGATING AND AGGRAVATING CIRCUMSTANCES REGARDING THE CRIMINAL LIABILITY OF THE LEGAL ENTITY

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Abstract: *This document aims at providing an overview on the institution of the legal entity's criminal liability as it is regulated in the (new) Romanian Criminal Law, by mentioning the main coordinates of this relatively new institution in the Romanian legislation. It also approaches certain problematic, controversial issues which can generate controversies in interpreting and implementing the legal provisions, making a critical analysis of the present normative stage at some points. It also aims at emphasizing and briefly commenting on the manner of reflecting of the mitigating or aggravating circumstances of punishment regarding the criminal liability of the legal entity, raising objections to certain doctrinaire interpretations and formulating de lege ferenda proposals meant to clarify or improve the manner in which some legal provisions in the field are or are going to be understood in the criminal doctrine and practice.*
Keywords: *the criminal liability of the legal entity; The Criminal Law of Romania; mitigation circumstances of the legal entity's penalty; aggravating circumstances for the legal entity's penalty.*

1. REGULATORY FRAMEWORK: GENERAL ASPECTS CONCERNING THE PRESENT REGULATION OF THE LEGAL ENTITY'SCRIMINAL LIABILITY IN THE ROMANIAN CRIMINAL LAW

The Romanian criminal law has been familiar with the regulation of the institution of the legal entity's criminal liability for a (relatively) short period of time, this issue not being established *ab initio*in the previous Criminal Law (Law no.15/1968, entered into force since January 1st1969), being only indirectly approached in the Criminal Law preceding this one ("Carol al II-lea" [Charles II] Criminal Law of 1936, entered into force in 1937), under the form of providing specific safety measures only for the legal entities (for more details, see also: Guiu, in Antoniu *et al.*, 2011: 373; Stănilă, 2012: 46;

Mitrache & Mitrache, 2014: 151). It was not until 2004 that exceptional provisions (which lacked practical implementation) to a special law – Law no.299/2004 – stipulated the first regulatory provisions to allow the criminal liability of a legal entity, but with very limited coverage (as it comes out of the name of the law creating the institution, the provisions under question were limited to the criminal liability of legal entities for counterfeiting foreign currency or other values). In 2004 as well, the legal act which should have been the new Criminal Code of Romania (Law no.301/2004, enacted and published in the Official Gazette no.575/2004, but repealed before its entry into force) provided by general regulation the institution of the legal entity's criminal liability, according to the special criminal clause system (an express provision included in the incrimination norms was necessary for the criminal liability of the legal entity, the latter being unable to behave as active subject of the crime and be held liable under criminal law except for a certain incriminating provision being stipulated by law expressly and limitedly).

Subsequently, by Law no.278/2006, the previous Criminal Law (from 1968) was modified – among other things – by (also) including a general regulation about the institution of the criminal liability of the legal entity, complying with the system of general liability according to which, as a rule, the legal entity may be held responsible under criminal law for any act described within the criminal law, without any special express provision in this respect. These provisions (little implemented initially, limited to a reduced number of concrete causes) were in force until February 1st 2014 when a new general criminal law was implemented: the new Criminal Code of Romania (Law no.286/2009).

The new regulatory frame has perpetuated the final tendency of the former regulation concerning the criminal liability of the legal entity, meaning that the institution finds its express regulation (as an institution generally regulated within the basic criminal law) within the new Code (Title VI from the general part, art.135-151), being made according to the system of general liability, as well as direct liability. So, as concerns general liability, at least theoretically, the moral (collective) entities with legal entity may be held responsible under the criminal law – according to the present Romanian legislation – for any alleged fact that was committed (the model of absolute incriminating similarity) if there is evidence that it was committed for achieving one's object of activity, in the interest or in the name of the legal entity. It has been rightly noted that there are certain incriminations incompatible with their being committed by the legal entity (*e.g.*: rape, incest, bigamy, desertion, etc); yet, this incompatibility is to be kept (at least theoretically) only in relation with the perpetration of those deeds by the legal entity from the author's position, but not from the instigator's or accomplice's position. (Streteanu & Chiriţă, 2007: 397; Paşca, 2011: 147; Stănilă, 2012: 163-171; Hotca, in: Pascu *et al.*, 2014: 687; Mitrache & Mitrache, 2014: 153)

As concerns the direct liability, it is inferred from the text formulation, art. 135 par. 3 of the Criminal Code, according to which: "The criminal liability of the legal entity does not exclude the criminal liability of the natural person that has contributed to the perpetration of the same deed"; *per a contrario*, although it is possible to hold responsible under the criminal law both the legal entity and the natural person who

committed the deed within the legal entity's object, in its interest or in its name, this is not a prerequisite for holding the legal entity responsible under the criminal law, but just a hypothesis that does not exclude itself. Consequently, the legal entity is liable on its own behalf, even separately from the natural person, for the crime committed when achieving its object of activity or in its interest or name, (only) if we establish the existence of these circumstances related to the crime concerning the connection between the collective, moral entity and the individual – natural person – who actually committed the crime. (Streteanu & Chiriţă, 2007: 398-401; Guiu, in: Antoniu *et al.*, 2011: 388, 389; Paşca, 2011: 148-150; Hotca, in: Pascu *et al.*, 2014: 687-691; Răduleţu, in: Toader *et al.*, 2014: 235; Lefterache, in: Bodoroncea *et al.*, 2014: 302-304; Mitrache & Mitrache, 2014: 154, 155; Streteanu & Niţu, 2014: 274; the doctrine also included the opinion that the statement according to which the Romanian legislator chose the direct responsibility of the legal entity "has no legal basis", but this point of view is in a minority position, also contested by the same source in which it was formulated – see: Guiu, in: Antoniu *et al.*, 2011: 378, 388).

The category of legal entities exempt from the possibility of being held responsible under criminal law has been limited (better said, it was seen in context) through the present regulation as, by February 1st 2014 there was no criminal liability of the state, the public authorities and (none of) the public institutions which were carrying out an activity that could not be the object of activity of the private domain (whether the crime had been committed or not by the latter while carrying out that activity outside the private field of activity). Yet, according to the provisions in the present article 135 of the Criminal Code, the criminal immunity (the lacking of criminal capacity) is a benefit for– apart from the state and the public authorities (a notion whose scope is stipulated in art.240 of Law no.187/2012,for implementing the new Criminal Code, as being limited only to those authorities expressly mentioned in Title III of the Romanian Constitution and in art.140 and 142 herein, namely: The Parliament; the Institution of the Romanian President (not the person of the President itself, but the Presidency as institution, regardless who occupies the office at a certain point in time); the Government; the specialized central public administration and the local public administration; the judicial authority; the Court of Auditors; The Constitutional Court of Romania) – only those public institutions carrying out activities which cannot be the object of the private domain, and only (the latter) if the deed (of course, we consider only the hypothesis of committing incriminating deeds) was committed in relation with that field of activity, inaccessible for the private field. Or – as it has been mentioned in the specialised literature – namely, if the legal entity, a public institution, carries out several types of activities, of which only one (some) cannot be the object of the private domain, and the incriminating deed would be carried out within the scope of an activity as inherent part of a different domain than this one (these ones), found in the scope of domains where that public institution can function, its criminal liability shall not be removed. (Guiu, in Antoniu *et al.*, 2011: 386-388; Paşca, 2011: 144-147; Stănilă, 2012: 83, 84; Hotca, in: Pascu *et al.*, 2014: 684-686; Vlăşceanu & Barbu, 2014: 302, 303; Răduleţu, in: Toader *et al.*, 2014: 235, 236; Mitrache & Mitrache, 2014: 152, 153)

As concerns the criminal penalties applied to a legal entity which took on criminal liability, the Romanian legislator provided the fine as single main penalty, setting up a number of specific additional penalties (different from those provided for the natural person), regulated according to a heterogeneous range, varying from an intensity usually higher than that of the main penalty (we consider here the additional penalty of the legal entity's dissolution) and reaching extremely reduced stages of severity (the case of the complementary penalty of making the conviction public by posting it or disseminating it thru the media). According to provisions in art.136 par.3 of the Criminal Code, these additional penalties applied to the offender – legal entity (in descending order of their gravity) are: dissolution; suspension of activities or of an activity (from 3 months to 3 years); closing down certain working points (from 3 months to 3 years); prohibition to participate to procedures of public procurement (from 1 to 3 years); placing under judicial supervision (from 1 to 3 years); display (from 1 to 3 months) or publication of the conviction penalty (maximum 10 times published in the newspaper or broadcasted on TV or radio or 3 months of publication through other audio-visual media at the most). Although, as a rule, their regime of establishment and implementation is optional, the legislator also provided a mandatory regime, either when there are special express provisions in this respect or – just for some of them (dissolution, adjournment of activity) – in the case of non-execution in bad faith, under certain circumstances, of some of the other additional penalties that had been applied. Although these additional penalties are incidental, as a rule, in relation with any legal entity who has acted as active subject of a crime, the law also establishes some exceptions; thus, the public institutions, political parties, trade unions, associations of employers, religious organisations or national minority organisations (legally created) only additional penalties can be imposed, such as closing down working points, being prohibited to take part in procedures of public procurement and display or publication of the conviction (of which the first two only if they are compatible with each of the two types of legal entities); the legal entities working in the mass media field can only be imposed the additional penalties of being prohibited to take part in procedures of public procurement and to display or publish the conviction.

As concerns the main penalty, under the form of a fine (the money that the legal entity is going to pay to the state as an effect of committing the crime), it is regulated, like in the case of the offender – natural person, according to a new system for the Romanian legislator, namely the system of day-fine, which has the advantage of allowing for a double coordinate at the level of the judicial individualisation of penalty. Therefore, according to provision in art.137 par.3 of the Criminal Code, the number of the day-fine shall be established taking into account the general criteria of penalty individualisation provided in art.74 of the Criminal Code, the same, both for the natural person and for the legal entity(within the limits of their compatibility with the legal entity). Without any doubt, in individualising the number of day-fine applied to the legal entity for committing the crime, the objective criterion of the severity of the offence shall be found in relation with (according to art.74 par.1 let.a)-c) of the Criminal Code): the circumstances and manner of committing the crime, the means used, the state of danger created for the value protected by the criminal law, the type and severity of the result or of other crime

consequences. We consider questionable the way in which we can set out the criterion of judicially individualising the penalty for the legal entity, through subjective aspects related to how dangerous the offender is, some aspects included in the provisions of art.74 par.1 let.d)-g) of the Criminal Code being (where appropriate, obviously or realistically) incompatible with the condition of the legal entity; it refers to: the reason for committing the crime, the purpose (here the discussion can mention those points talking about the degree of reality in the projection of the subjective side – *mens rea* – on the type of legal entity); the offender's criminal record (this personal issue is considered perfectly compatible with the offender's point of view – as legal entity); the conduct after committing the crime and during the criminal proceedings (in fact, this criterion would be compatible with the offender's hypothesis – as legal entity); the level of education, age, health, family and social status (we consider the criterion incompatible with the situation of the offender's position – legal entity).

In terms of measuring the value of each day-fine, the legislator expressly sets down a main individualisation criterion taking into account the position of the legal entity. Thus, if art.61 par.3 of the Criminal Code sets out that the amount for a day-fine is established in Court taking into account the material situation of the natural person (and his legal obligations towards the dependants), art.137 par.3 of the Criminal Code provides that the amount of a day-fine is established by considering the turnover in the case of the profit legal entities, and depending on the value of the total assets in the case of the non-profit legal entities (to which the criterion of complying with the other obligations of the legal entity is being added).

The amount of the penalty shall be obtained by multiplying the two results of the individualisation operation as such: the number of the day-fine, namely the value of each day-fine. In fact, this does not regulate only the procedure of the judicial individualisation of the penalty, but also the legal individualisation, as the criminal fine penalty applied to the legal entity is a relatively determined one, which consequently overlaps the imperative to be included within certain minimum and maximum limits, both general and special, stipulated by the legislator. Or, the present Romanian criminal law has not directly stated (neither concerning the limits of fines applied to offenders – natural persons nor in the case of the limits of fines applied to offenders – legal entities) the amount of these limits, but has stated them indirectly, providing the minimum number, namely the maximum possible number of the day-fine, as well as the least possible amount, i.e. the highest allowed amount that can represent the value of a day-fine. This is in relation with the general limits of the fine penalty, as well as in determining the special limits. Thus, by appealing to this procedure, the legislator sets indirectly the general limits (impossibly to be exceeded, irrespective of the number of mitigating or aggravating circumstances considered in any particular test case – according to the fundamental principle of criminal law sanction lawfulness art.2 par.3 of the Criminal Code) of the fine penalty applied to the legal entity; in conformity with art.137 par.2 of the Criminal Code, the minimum number of day-fine for the legal entity is 30, and the maximum one is 600; the minimum amount of a day-fine for the legal entity is 100 and the maximum amount is 5000 lei. It comes out that the general minimum of day-fine in the case of offenders – legal entities is 3000 lei and the general maximum is 3,000,000 lei, these limits being

different from the incidental ones in the case of the criminal fine applied to offenders – natural persons (300 lei to 200,000 lei – values that were inferred starting from the regulation in art.61 par.2 of the Criminal Code, where the number of day-fine for the natural person ranges from 30 to 400, and the amount of one day can be established between 10 and 500 lei).

This gap between the general limits of the fine penalty in force for the legal entities and the natural persons is mainly based on two reasons: the necessity to compensate, by the amount, the fact that this is thesole main sanction for the legal entities, so the inexistence of alternatives to it (unlike the case of the natural person); the management (in principle) of increased financial resources by the legal entity, unlike the natural person, imposes the necessity of setting higher fine amounts in order to keep the balance between the punitive and the intimidating effect of a penalty on the entity suffering from the application of penalty (in this respect, see also: Guiu, in Antoniu *et al.*, 2011: 393-397; Vlăşceanu & Barbu, 2014: 308).

The law acts similarly when indicating the special limits of the incidental fine penalty for the legal entities, with the specification that in this last case the system includes an additional variable, sending to certain legal limits of penalties provided by law (as penalties applied to offenders – natural persons) within the incrimination rules; depending on the category to which they belong, there are relevant types of special limits of the fine penalty for the legal entity (art.137 par.4 of the Criminal Code). We should note that, in establishing the special limits, the legislator shows only the minimum and maximum number of the day-fine, it being the changed coordinate of the calculation by comparison with the operation establishing the general limits of the criminal fine. As concerns the other coordinate, the limits of values for the amount of each day-fine, they are the general ones (namely, for the legal entity: between 100 and 5000 lei / day-fine). Starting from this conclusion, it is inferred that in the case of producing the effect of mitigating or aggravating circumstances, the modification of the penalty special limits for the legal entity's fine (reduction or increase) takes place only in relation with the incidental number of day-fine, without raising the question of changing the limits (the minimum or maximum value) of the amount to be established for every day-fine.

In view of these aspects, we can consider that the special limits provided by law for the fine penalty, which would be incidental if the offender were a legal entity, are as follows: from 6,000 lei to 900,000 lei (between 60 and 180 day-fine), when the prescribed punishment in the indictment rule (therefore for the crime, if it was committed by a natural person) would be just the fine (art. 137 par. 4 let. a); from 12,000 lei to 1,200,000 lei (between 120 and 240 day-fine) when the prescribed punishment in the indictment rule would be 5 years of imprisonment at the most – namely, less or equal to 5 years – either as single punishment or as an alternative to the fine penalty (art. 137 par. 4 let. b); from 18,000 lei to 1,500,000 de lei (between 180 and 300 day-fine) when the prescribed punishment in the indictment rule would be 10 years of imprisonment at the most - namely, less or equal to 10 years (art.137 par.4 let. c); from 24,000 lei to 2,100,000 lei (between 240 and 420 day-fine) when the prescribed punishment in the indictment rule would be 20 years of imprisonment at most - namely, less or equal to 20 years (art.137 par.4 let.d); from 36,000 lei to 2,550,000 lei (between 360 and 510 day-

fine) when the prescribed punishment in the indictment rule would be more than 20 years of imprisonment (so, by excluding an equal value to that of 20 years) or life imprisonment – any of them as sole or alternative sanctions (art.137 par.4 let.e) (in this respect, see also: Vlăşceanu & Barbu, 2014: 309, 310).

We should also mention that the decision to integrate the legal penalty within the indictment rule referred to in art.137 par.4 of the Criminal Code, as set under a certain limit indicated by law, equal or superior to it, is made only by observing (if there is no other express legal provision, which is not the case here) the maximum value of the repression expressed in abstract, namely by relating to the maximum penalty value provided by law as reference benchmark (for a sole sanction) and by relating to the maximum of the more serious type of penalty from those stipulated by law for alternative penalties (of the same category – in this case, main sanction). In fact, this procedure has been consistently similar to the operations of deciding the category to which the prescribed penalty being referred to belongs and in the context of other general criminal institutions (such as re-offences in the case of the natural person – art.41 of the Criminal Code – or establishing hypotheses when the double incrimination condition is or is not required in order to make possible the implementation of the Romanian criminal law, in its application by space criterion, in accordance with the principle of personality –art.9 of the Criminal Code – etc.). Moreover, in conformity with the provisions in art.187 of the Criminal Code, by referring to "penalty provided by law we understand the penalty provided in the draft law which incriminates the act as being done without taking into consideration the circumstances of reducing or increasing the penalty".

2. THE REFLECTION OF THE MITIGATING AND AGGRAVATING CIRCUMSTANCES ON THE CRIMINAL LIABILITY OF THE LEGAL ENTITY

The Romanian criminal legislation in force includes several provisions (general or special) referring to – directly or indirectly – the relation between the institution of the legal entity's criminal liability and what we can generally call: the set of circumstances having a mitigating or an aggravating effect on the penalty.

In accordance with art.137 par.5 of the Criminal Code, as concerns the determination of the main fine penalty for the offender – legal entity, it is provided that acknowledging the circumstance that the offender, by committing the crime, aimed at obtaining patrimonial benefit, opens the possibility of aggravation of the legal entity's criminal liability, by increasing the special limits of the legally established penalty by one third. Thus, a general cause of optional penalty aggravation is established, as the law does not necessarily indicate aggravation, only giving the Court the opportunity to increase the penalty limits under that circumstance. On the other hand, the fraction of the applied addition is fixed, the court lacking the possibility to exceed it or to get an amount under reduced limits than the legal ones: one third (the only exception shall be indicated throughout the exposure). In other words, the court shall give effect to the aggravation circumstance and shall apply the penalty within the corresponding limits, increased exactly by one third of their own value, or shall not give effect to the aggravation circumstance and shall apply the real penalty within the unchanged special limits of the

law – *tertium non datur*. We must note that the addition aims at the two special penalty limits, the maximum and the minimum, not just the superior limit. As we have already shown previously, the addition shall aim only at the minimum and maximum number of the applied day-fine, without affecting the minimum and maximum values of the amount for each day-fine.

If this aggravating circumstance is to be used, the law suggests complementing the usual criteria of judicially individualising the penalty, disposing that (at the end of the text in art.137 par.5 of the Criminal Code) "when establishing the fine, we shall take into account the value of the obtained or desired patrimonial benefit", hence we conclude that in order to retain and use this aggravating circumstance it is not necessary that the patrimonial benefit, sought after by the legal entity by committing the crime, should have been obtained in fact, it is enough to determine that it has been something integrated into the dimension of the crime subjective side. Given that, as a rule, the specificity of the crime categories displaying at the highest level the ability to involve the criminal manifestation of a legal entity, we believe that this aggravating circumstance shall usually check, within the judicial practice, the necessary conditions for its limitation. However, we think that the formulation to which the legislator appealed – namely: "when by the committed crime the legal entity wanted to get a patrimonial benefit" – can limit the effect of this aggravating circumstance only if the crimes have been committed on purpose (possibly of those committed by praeter intentionem, if desiring the material benefit implied committing the *primum delictum* –in itself illicit from the criminal point of view –set at the base of the committed deed) by the legal entity. We should whatsoever exclude the situations where, even in search for a patrimonial benefit, the legal entity would commit non-intentional crimes, as we could state by these hypotheses that only by committing the *deed* (lawful in itself or at least not unlawful from the criminal point of view), the legal entity wanted to get a patrimonial benefit, which was not desired by committing the "crime", meaning that the legal entity knew the unlawful nature of the deed, from the criminal point of view, which was committed in view of getting the desired patrimonial benefit.

The legal provision to which we refer here also includes the express mention that the indicated increase in the limits of the fine penalty applied to the legal entity shall not exceed the general maximum of the penalty under question. Although pertinent and exact, we appreciate the provision as redundant, because not only the concept of "general limits" of a certain type of penalty imposes accepting the fact that the values thus determined will not be exceeded (unlike those featuring the special limits of penalty)but, furthermore, the legislator of the present Criminal Code expressly provided this natural rule at the beginning of the regulation, within the fundamental principle of sanction legality, disposing, in accordance with art.2 par.3, that "no penalty can be established and applied outside its general limits". Consequently, even without the express emphasis within art.137 par.5, by the (possible) increase by one third of the special limits of the legal entity fine penalty, on the grounds that the offender aimed at getting a patrimonial benefit by committing the crime, it would not have been possible to accept exceeding the general maximum for that category of penalty. In the event that, by increasing the special penalty maximum by a third, the mathematical calculus would lead to an amount over the

value of the penalty general maximum, the increase shall not be in fact by one third, but less (the only exception from the fixed character of the addition under question), being clearly limited up to the amount of the general maximum value of the punishment.

As concerns the aggravation of the criminal liability of the legal entity, the legislator introduces a distinct regulation of re-offence in art.146 of the Criminal Code, when the active subject was the legal entity, compared with the offender's similar hypothesis –natural person. Apart from other peculiarities relating to the circumstances and types of re-offence (for example, while the re-offence in the case of the natural person is relative, the Romanian law in force has established absolute re-offence for the legal entity), it can be seen that the legislator has appealed to a different regulation for the legal entity in comparison with the natural person, as concerns the sanction of the post-conviction unserved re-offence. Thus, if in case of post-conviction served re-offence, the special limits of the legal penalty are increased by half, irrespective of the type of active subject of the crime – natural or legal entity – in case of post-conviction unserved re-offence (committed until the first penalty has been executed) the sanction rules are different. The penalty for the new crime is not aggravated in the case of the natural person, making appeal to the arithmetical addition, by adding it to the penalty (or the rest of the penalty to be served) definitively applied for the first crime part of the re-offence. However, in the case of the legal entity, irrespective of the type of re-offence, the penalty for the new crime is established within the special limits, increased by half, of the legal penalty for that crime; as a result, the penalty established as such is added to that standing for the first crime part of the re-offence (or to what is left of it for serving) if this first penalty has not been served or considered as served. Apart from any reserve or possible debate, we can state that, in the case of the legal entity, the re-offence condition, under any form, is a real general cause of (compulsory) aggravation of the penalty. The previous observations are still valid: the increase refers only to the number of day-fine, not to the limits of the amount for each day-fine; the aggravation affects both special limits of the penalty, the minimum and the maximum; after the increase, it is natural (and redundant the special express provision referring to) to limit the aggravating effect to the general maximum of the type of penalty (such mention is missing from art.43 par.5 of the Criminal Code, relating to the increase by half of the special penalty limits in case of post-imprisonment re-offence committed by the natural person, this express mention in art.146 par.2 of the Criminal Code being a case of miscorrelation in relation with the aggravation of the penalty in case of re-offence for the legal entity), this case being the only exception possible form the rule of compulsory aggravation by half of the special maximum of penalty provided by law in case of re-offence of the legal entity.

It should be noted, as criticism to the distinct regulation of re-offence in the case of the legal entity, the fact under this form (able to lead to controversy and to non-unitary position of the doctrine and judicial practice) that the express provision concerning the natural person (art.43 par.2 of the Criminal Code) is not applied as concerns the situation of the legal entity who would commit multiple crimes under post-conviction re-offence, yet nothing against this idea is stipulated for that hypothesis. We are talking about the way in which the contemporary Romanian legislator understood to regulate expressly, (only) for the natural person, the situation in which, after a final conviction complying

with the conditions of the first part of the re-offence, several competing actions would be committed before or after being served or considering the applied punishment as being served, of which at least one would meet the conditions of the second part of the re-offence. In this case, according to the legal text previously indicated, the present Criminal Code has adopted a solution considered to (for reasons which go beyond this topic) digress from a natural way of solving such multiple crimes (which would have meant giving priority during sanction to re-offence or intermediate multiple crimes, depending on the crimes which do not comply with the conditions of the second part of the re-offence), namely: the multiple crimes have been sanctioned first, consequently the penalty for competing crimes was to be additional to the penalty applied definitively before committing the competing crimes (or to what is left for execution). The specific character of this solution, in relation with the (opposed) natural way someone would have acted, except for another express legal provision in this respect, allows us to state that the provision under question is strictly exceptional as concerns its interpretation and application, which cannot be applied to any other situation, except for those to which it expressly relates. For example, even under re-offence of the natural person, when the multiple crimes are committed after having executed the first punishment, but before rehabilitating the former convict, if the re-offence conditions are met (which will be a post-imprisonment re-offence), the lack of a provision similar to that at par.2 in art.43 of the Criminal Codemakes us state that the re-offence condition will be solved first, followed by the sentencing regime for the multiple crimes (see: Michinici & Dunea, in: Toader *et al.*, 2014: 112, 113). Or, in the absence of any provision similar to that in art. 43 par. 2 of the Criminal Code in regulating the re-offence committed by a legal entity (to which we add a reason concerning the different partial system of sentencing this type of re-offence when the legal entity is active subject of multiple crimes), we are entitled to think that in this case too, it is natural to apply the common way of solving such combination of multiple types of crimes (the re-offence having priority, followed by the multiple crimes), unlike (difficult to explain from the point of view of coherence and symmetry expected from the new criminal legislator) the similar hypothesis in which a natural person would be. The doctrine has already retained the possibility of controversy in this respect, where an express legislative intervention would be necessary (Mitrache & Mitrache, 2014: 355, 356).

Following the regulation, art.147 of the Criminal Code is expressly dedicated to issues on mitigating and aggravating the criminal liability of the legal entity, as its marginal name shows it. This legal text expressly refers to the hypothesis in which the legal entity would be active subject of multiple crimes or included in multiple intermediate crimes or of crimes to which other aggravating or mitigating circumstances of criminal liability would be incident. The lack of express reference to the situation of the legal entity under re-offence (cause for aggravating the penalty) can be explained through the separate provisions included in the preceding article (art.146), as previously emphasized. Consequently, we can establish that the text in art.147 of the Criminal Code refers to the possibility of a legal entity under one of the following general causes for mitigating or aggravating the punishment: the attempted crime; the crime has been committed and mitigating circumstances have been retained; multiple crimes have been

committed either all at once or in turns; the crime has been recurrent; the crime has been committed and aggravating circumstances have been retained (also see: Hotca, in: Pascu *et al.*, 2014: 724). Furthermore, we consider that the text also includes the special situations of mitigating or aggravating circumstance (formulated in the special part of the Criminal Code or in other special incriminating provisions, set outside the Code), such as the special circumstances of reducing or increasing the penalty whose provisions are effective on the criminal liability of the natural and legal entities to an equal degree, to the extent that the express conditions provided by law are checked for compliance.

The provision from art.147 par.1 of the Criminal Code decides that, in the indicated (or inferred) mitigating or aggravating circumstances of its criminal liability, "the legal entity is fined according to the law regime provision for the natural person". We emphasize that the correct and logical interpretation of the legal statement in question is based on the distinction between the *fining regime* (stipulated in the law for the natural person) and the *fining limits* (stipulated in the law for the natural person). The fining regime, incidental in case of mitigating or aggravating circumstances, refers to the abstract effects produced upon the special penalty limits, irrespective of their particular value, namely the intensity of reduction or increase of the penalty limits, (usually) expressed under the form of fraction or percentage, calculated by relating to the special limits of the incidental punishment in each case. The regime of penalty existing in the case of a mitigating or aggravating circumstance is a legal rule set in the abstract, with possible use to many types (categories) of penalties (imprisonment or fine).

So, by saying that "the legal entity is fined according to the law regime provision as the natural person" if there may be mitigating or aggravating circumstances, the legislator wanted to explain that (according to the principle of equality and parity system) for the legal entity there will be the same mitigating or aggravating circumstances as well in such cases, just like for the natural person, namely that the mitigating or aggravating effect shall act accordingly, and using the same type of calculus, any reduction or mitigation by the same percentage or fraction of the legally indicated penalty being incidental, in relation to the penalty (and its specific limits) specific for the legal entity. The opposite interpretation, according to which the reference to the "fining regime for the natural person" would suppose taking over, in these cases, the fining penalty limits incidental to the natural person (intrinsic, specific) and their use in the case of mitigating or aggravating the criminal liability of the legal entity cannot apply, as such interpretation would lead to absurd and illogical solutions and – as such – unacceptable, which should be rejected according to the *ubi cessat ratio legis, ibi cessat lex* interpretation rule (for a point of view criticising the regulatory provision in art.147 par.1 of the Criminal Code, in the light of this interpretation – on the grounds that "the analysed text sends to… the provisions in art.61 of the new Criminal Code", aiming only at establishing the fine penalty for the natural person, see: Guiu, in: Antoniu *et al.*, 2011: 421, 422; also, for the statement: „Basically, considering these hypotheses, the provisions in art.61…shall be applied", see: Hotca, in: Pascu *et al.*, 2014: 724). Such a meaningless consequence would be that, under certain circumstances, by applying to the legal entity the mitigating or aggravating regime provided by law in certain rules of basic regulation on the situation of an offender –natural person, including the special penalty limits provided by law for the

natural person, we could set penalties outside the general limits for the legal entity, more precisely under its general minimum. Or, such a hypothesis is excluded by the very fundamental principle of criminal law sanction legality in respect of its extension which excludes the possibility to set or apply penalties without complying with their general limits (art.2 par.3 of the Criminal Code).

We do not believe that, in representing the legal legislator, there has ever been such intention of interpreting the provision, as it is more rational to appreciate that, from the start, the statement (as previously indicated) "the fining regime provided by law for the natural person" was considered to exclude the reference to "the penalty limits stipulated for the natural person", simply making reference to the intensity of the mitigating or aggravating effect of the penalty in relation with the legal entity's own penalty limits.

Consequently, we think that the text in art.147 par.1 of the Criminal Code disposes that, by relating to the intrinsic (special) limits of fining, incidental in a clear case – and, of course, by complying with the general limits of the fine penalty – the same degree is being applied to the legal entity (yet, deriving from its special limits of fine penalty) the mitigating or aggravating effect of circumstances which lead to such result, such as: in case of multiple crimes, the application *mutatis mutandis* of provision in art.39 (par.1 let.c) of the Criminal Code, namely the compulsory increase of the main penalty within the multiple crimes by one third of the other applied penalty or of the sum of the other applied penalties for the rest of the concurrent crimes; the same applies in case of intermediate multiple crimes (application *mutatis mutandis* of provisions in art.44 of the Criminal Code); in case of singular consecutive crime, the application *mutatis mutandis* of provision in art.36 (par.1, the final thesis) of the Criminal Code, namely the possibility of increasing the penalty by applying a penalty which should exceed by maximum one third of its value, the special maximum stipulated by law for the committed crime (of course, the special penalty maximum for the legal entity); the same applies in the case of aggravating circumstance crime (the application *mutatis mutandis* of provisions in art.78 par.1, final thesis of the Criminal Code); in case of punishable attempted crime, the application *mutatis mutandis* of provisions in art.33 par.2 of the Criminal Code, for the purpose of setting the concrete penalty between the half-reduced limits of it stipulated by law for the committed deed; in case of mitigating circumstance crime, the application *mutatis mutandis*of provisions in art.76 par.1 (and 3) of the Criminal Code, for the purpose of setting the effective penalty between the one third-reduced limits of penalty stipulated by law for the committed deed; the application *mutatis mutandis* of provisions in art.79 of the Criminal Code relating to solving the conjuncture of the mitigating and aggravating penalty causes (in this respect, also see: Vlăşceanu & Barbu, 2014: 320; Răduleţu, in: Toader *et al.*, 2014: 248). We underline again that the provisions in art.147 par.1 of the Criminal Code cannot be and must not be interpreted as making reference to the provisions in art.61 of the Criminal Code., which aim exclusively at the fine penalty applied to natural persons!

2. SPECIFIC CONCLUSIONS AND *DE LEGE FERENDA* PROPOSALS

As it results of everything previously stated, the new Romanian criminal legislation has emphasized both a series of continuous points and innovation points in terms of regulating the institution of the criminal liability of the legal entity, by comparing it with the previous regulatory stage. Unfortunately, this does not necessarily mean that the new solutions have always been and in all aspects clearly stated, so as to convey for sure the legislator's strict intention, there still being controversial aspects or aspects able to generate controversies. Of course, sometimes misunderstandings are not the legislator's fault, but are imputable to the tendentious or obtuse way of conveying and perceiving the message; beyond these situations, we can identify formal inconsistencies, even essential ones within the new regulation.

Among them, we mention (in our turn): the difficulty of pre-determining clearly enough the public institution area carrying out activities (too) that cannot be the object of the private domain; the existence of a certain opacity about the issue of determining the subjective aspects specific for the legal entity's guilt apart from finding out the guilt of those natural persons who have generated the criminal liability of the legal entity; the insufficient clarification of those categories of people who can generate, by their deeds, the criminal liability of the legal entity; the lack of clear reference of incident solutions under certain determined circumstances for the case of the offender –legal entity, to similar deeds committed by the offender –natural person (*e.g.*, the case of several crimes committed under the post-conviction unserved re-offence) etc.

As concerns this last issue, we resume the proposal of the legislator's express intervention to clarify the order of the sanction priority of the post-conviction (unserved) re-offence with multiple crimes in the case of the legal entity. Personally, we believe that, depending on the specific way of applying sanction to the post-conviction re-offence in the case of the legal entity (different, as shown, from the way of applying sanctions for the post-conviction unserved re-offence in the case of the natural person), the necessary solution is to come to the natural way of solving things by giving priority to the re-offence sanction and then to the multiple crimes. In this respect, the legislator should expressly indicate that the rule in art.43 par.2 of the Criminal Code does not include the legal entity. We also appreciate that in the text of art.79 par.2 of the Criminal Code, relating to the order of giving solutions in the case of multiple aggravation circumstances, it should be expressly shown – following the pattern in par.1 referring to the multiple mitigating circumstances – the position held within such multiple circumstances by the incidence of a special circumstance in the aggravation of penalty (this aspect would aim both at the criminal liability of the natural person and – by means of art.147 par.1 – of the legal entity), the present provision taking into account and establishing the order of application only for the multiple general aggravation circumstances.

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