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Criminal liability of legal entities in the legislation of Republic of Moldova

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Abstract

Despite their "vulnerable" existence, the nature of the legal entities, or, to say it in other words, their foundation have interested the doctrine and, separately, even the jurisprudence, different explanations being offered, some of them audacious, but, anyway, without saying that the discussion was finally closed. The legislation of Republic of Moldova recognizes legal entities as subjects of Criminal Law, the advantages and problems of this field we want to analyze. Thus, in the specialty literature there were emphasized a series of theories regarding the legal personality of a group. In this sense, there may be mentioned the theory of the fiction, which treats only the natural person as a veritable subject of law, the legal person being just an artificial form created by the legislator. Another vision is the theory of the precise reality, which supposes the fact that, both in the case of the natural person and in the case of the legal person there is present the formation of a will – the same as a characteristic of the subject of law – it is being realized and manifested. Thus, it is considered that the group of persons has a collective consciousness and, moreover, a collective will, different from that of its members, and which not a simple sum of wills is. A quite different direction is offered by the theory of the technical reality, which places at the basis of the legal person the "interest", and the group made in this way is nothing else than a "collective property", a "property of affectation", of goods "affected" by a purpose of general interest.

Keywords: Criminal Liability, Legal Entities, the Legislation of Republic of Moldova

1. Introduction

The designation of the legal person as a subject of the offence is a permanent contradictory theme in theory and judicial practice, that's why we propose an analysis of the phenomenon of committing of the crimes by legal persons, the sentences which can be applied and the effectiveness of the application of the sentences in these cases. None the less it does not mean that an issue of criminal liability of legal entities in Moldova shall exceptionally be settled in the light of corporate culture doctrine. There are no sample-models regarding application of criminal liability to legal entities, which would satisfy all countries. That's why our main goal was to describe the existing process which involves legal entities like a subject of the criminal offences.

Legal person is a real very special subject of criminal law, it is applied non specific rules of criminal law, also the validity of all signs of the composition of crime doesn't exist (guilt), and all other very difficult institutions of this subject will be analyzed in following article.

2. Literature

The Moldovan Criminal Code³ recognizes as a subject of the offence not only individual, but also the legal person, this is based on the recommendations of the European Council in this matter.

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³ Criminal Code of Republic of Moldova, adopted by Law nr.985 from 18.04.2002, published in the Monitorul Oficial nr.128-129 from 13.09.2002, entered into the force on 12.06.2003

The Criminal Code does not offer a definition of the legal person, but it may be derived from art. 55 of the Civil Code¹, which defines a legal entity as an organization which possesses a distinct heritage and respond to its obligations with this heritage, may obtain and exercise property rights in their own name and personal patrimonial, to assume bonds, may be the plaintiff and respondent in court.

Thus, the legal person may be the subject of the offence since the moment of awarding the capacity of exercise, i.e. from the date of its registration by the national authority. According to the Criminal Code, "legal person, with the exception of public authorities is punishable by criminal responsibility for a criminal offence prescribed by the law if any one of the following conditions is met:

1. the legal person is guilty of non-compliance or improper fulfilment of the provisions of the law, direct fixing duties or prohibitions to carry out a certain activity;
2. the legal person is guilty of carrying out an activity that does not match the constituent documents or declared goals;
3. the Act which causes or creates the danger of damage carries considerable proportions of the person, company or State was committed for the benefit of that legal person was permitted or sanctioned, approved, used by the person empowered with leadership positions of legal person.

At the same time the criminal liability of legal persons does not exclude the possibility to punish individuals guilty of actions/inactions; it will be a subsidiary liability. This is directly shown in art. 21. 5 of the Criminal Code of the Republic of Moldova.

The first condition refers to the non-fulfilment or improper fulfilment of the provisions of the legislation. In this case, the liability of a legal person may be committed through actions or omissions of any employee or organ in charge of the execution of the obligation in question, if such a person exists, regardless of its position in the hierarchy of the group, is it ranks higher, or employee. Moreover, the legal person remains responsible in the case of the enforcement of the obligation to transfer data to another natural or legal person.²

Another condition is related to the guilt of the person committing the criminal legal facts. The legal person is the Association of persons who assume the community of interest, directed toward achieving a common goal, be either intangible material. As a result, the legal person assumes a multitude of wills, of individuals of which it is composed.

In fact, the intention or negligence imputed to a legal person are in reality of individuals, any decision of the legal person not being anything other than the decision of some individuals who had gotten into a position where the will is considered to be the will of the collective entity.³

In our vision, this would be quite problematic to determinate in terms of technical, and practical it would certainly be impossible. The criminal responsibility affects the whole person; the consequences of acts of one person are supported by all members of the Organization. This might

¹ Civil Code of Republic of Moldova, adopted by Law nr.1107 from 06.06.2002, published in the Monitorul Oficial nr.82-86 from 22.06.2002, entered into the force on 12.06.2003

² Stela Botnaru, Alina Șavga, Vladimir Grosu, Mariana Grama, Drept Penal. Partea generală. Volumul II. Ed. Cartier, Chișinău 2006, p. 192

³ L. François, La responsabilité pénale des personnes morales, Colectiv, Le Corpus Juris au regard du droit belge, Ed. Bruylant, Bruxelles, 2000, p.85

be the situation when to a legal person was applied a criminal punishment, and all its employees need to be fired. It is precisely for this reason, guilt, and the causal link must be proven in relationship to each person, and the lack of guilt of a single person would make the impossibility of the criminal liability of the legal entity entirely.

Having regard to the problematic of guilt in the case of legal persons, we consider that it is inappropriate to treat this as a matter of criminal law. If criminal responsibility of legal persons is questioning the principle of guilt, considering that the criminal law does not apply to solidary liability.

Attracting liability of legal entities as a whole would mean nothing else than the establishment of solidary liability for the acts committed by the Executive Director or by certain employees of the legal person, to the employees of entire company. Doesn't matter who will be held accountable, is important to prove guilt and implication of each person within the organization, which is impossible in practical terms. For example, if the offense provided for 254 of the Criminal Code, the person would be guilty of illegal acts can be given both the Executive Director, as the person who puts into circulation or transport the goods of bad quality or not substandard. We consider that is not the case of the criminal responsibility of legal entities, but only the person responsible for committing of the concrete crime, otherwise it would not comply with any principle of guilt nor of individualization of liability and criminal punishment.

Guilt, so is the subjective intention of the liability, which is both necessary and mandatory for pulling the person responsible. There can be no single will of all the members of the legal person, regardless of the offense, as there can be no initiatives designed interests of the people which constitute this entity.

If we accept the legal person as a subject of the offense, probably we can violate the personal criminal liability tacit principle that assumes that criminal responsibility rests only person who committed or participated in the commission of a crime as instigator or accomplice. Criminal liability cannot intervene vicarious, as there can be collective, i.e. the act of a person to answer a collective group.¹ Personal criminal liability is determined by the purpose of the punishment, which requires rehabilitation measures by applying criminal sanctions to be taken only against the person who committed a crime.²

It should be noted that the Criminal Code allows drawing parallel criminal responsibility of individuals and legal entities during the same causes, which inevitably violates the principle of liability for criminal acts unique. The criminal procedural law and judicial practice, this principle is known as *res judicata*.

The majority of the doctrine³ is pronounced for the admission of liability overlapping individuals and legal entities. The offense is deemed representative of a legal person does not lose his

¹ C. Bulai, Manual de Drept Penal, Partea Generală., Editura All, București 1997, p.192

² A. Boroi, Drept penal. Partea generală, Editura All Beck, București 2001, p.107

³ R : Valeur, La responsabilité pénale des personnes morales dans les droits français et anglo – américains avec les principaux arrêts faisant jurisprudence en la matière, Ed. Marcel Giard, Paris 1931, p.69-71

R- M. Leroy Claudel, Le droit criminel et les personnes morales de droit privé, Teza, Nancy 1987, p.223

J. D Haenen, La responsabilité pénale des personnes morales, Annales de droit de Louvain, 1983, p.64

G. Dannecker, Reflexiones sobre la responsabilidad penal de las personas juridicas, Revista Penal 2001 , p.53-54

personality entirely within the group, being endowed with consciousness and will, engage the responsibility of legal persons, while assumes sole responsibility.

As a result, a legal entity is a subject of law wholly special, which is applied the rules nonspecific of the criminal law, not observing the validity of all signs of *corpus delicti* (guilt) inapplicable the important institutions of criminal law (cases eliminating the criminal nature of deed, release of liability and criminal punishment, criminal record).

3. Conclusion

In conclusion, we consider that it is indisputable that persons must answer for their crimes, including legal ones, not even discussing whether it is appropriate or not the presence as a subject of the offense of the legal person, we try only to analyze the legislation in correlation with the general principles of law. It would be welcome a more comprehensive description of the cases, conditions or factors that could influence cumulative criminal liability of legal entities and individuals for the same acts. Similarly, we advise to make the improvement of entire system of criminal law.

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