

Forms of cooperation and subjects responsible for committing offences in commercial companies

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Abstract

Most of the offences envisaged under the Criminal Code and other specific laws can be committed by general subjects, while another part may be committed only by subjects that enjoy certain qualities. A special significance in commercial criminal law takes the detailed study and knowledge of the entities responsible for committing offences of an economic nature. As noted above, it comes to criminal offenses which can be committed not only by special subjects, but also by general ones. What appears problematic in the current case due to the highly technical nature of these offences is the knowledge and understanding of the distinctive features of particular subjects. The definition of responsible subjects constitutes an important problem for the configuration of these offences, due to the fact that we are dealing with special subjects, which are lined with special qualities, that charge them with clearly defined rights and duties. Such a formulation of these offences may give rise to no less important problems of interpretation, especially in the collaboration cases of foreign persons and the formal exercise of specific functions provided by law.

Keywords: *Criminal law, commercial companies, economy, cooperation, criminal liability.*

Introduction

Committing an offence implies the configuration of the four elements of the criminal offence: object, objective side, subject, subjective side.

The term 'object offense' refers to the existence of legal goods or important values to the person, society, or the State, affected or jeopardized by offences. We can mention some of these legal goods such as the right to life, health, honor and dignity, wealth, independence and constitutional order (Elezi, 2008, 16).

According to the doctrine, the claim of lawlessness of the offence stems from the fundamental principle of legality in the criminal law and it's in accordance with the nature of the latter, which due to the dangerousness of the offence, provides also more severe criminal sanctions (Elezi & Kaçupi & Haxhia, 2006, 45). Illegality has an objective and subjective character: the objective character relates to the fact that the act or omission is contrary to the criminal rate; the subjective character relates to the fact that the offence must be committed with guilt (mental fault).

In addition to the above elements, a great importance to the legal qualification of the offence gets the individualization of the offender or said otherwise of the active subject of the offence.

Subject of a criminal offense may be not only natural persons (also called physical persons) but also juridical persons (also called legal entities).

Under the construction of criminal norms, the subjects are divided into general subjects and special subjects.

The subjects are called general if when committing a criminal offense, the offender or offenders should not be in possession of a special quality, have reached the age of criminal responsibility and are responsible: e.g. the offence of Article 76 of the Criminal Code (Murder); the offence of Article 183 of the Criminal Code (Money counterfeiting).

Subjects are called special when for the legal qualification of the offence; they should enjoy some special concrete qualities. These qualities must be used when committing the offence, but also the criminal act carried out should require the use of these qualities: e.g. the offence of Article 175 of the Criminal Code (Smuggling done by employees that are linked to customs activities); the offence of Article 164 of the Criminal Code (Abuse of powers).

In general, the definition of the subject responsible for committing the offence does not constitute any major difficulties in practice. However, given the numerous cases verified in our reality, we will try to present below some problems related to the criminal liability of the subjects responsible for committing the offence.

The general subject that specifically exercises the functions of the special subject

It may happen that during the development of the trade activity, functions which under the law must be carried out by persons who enjoy special features, are specifically carried out by other subjects that do not have these features: e.g. a father that manages the commercial company, whose manager turns out to be his son formally.

In hypothesis of this kind, first of all a question naturally arises: is it possible for the person who concretely exercises the special functions to be prosecuted, although this person does not enjoy the special qualities required by law?

In our opinion, in such cases it is impossible the implementation of the legal criminal norm, because happening otherwise, there would exist a contrast with the principle of legality provided for by Article 2 of the Criminal Code: No one may be sentenced for an act, which is not already explicitly provided for by law as an offence or a criminal contravention. The basis for getting a person to criminal responsibility is the existence of the elements of a criminal offence figure provided for by criminal law: in case of the absence of one of the elements of the criminal offense, the prosecution shall not commence and, if it has commenced, it shall cease. (Elezi & Kaçupi & Haxhia, 2006, 88).

We believe that in such cases, the persons who concretely exercise specific functions, lacking the necessary qualities required by the law should not be prosecuted either as accomplice (in the role of a co-executor) entities that de jure exercise those functions: e.g., under Article 164 of the Criminal Code "Abuse of powers", the manager abuses his

powers with the intent of embezzlement or favoritism of another company where they have interests, will be prosecuted; if this illegal behavior would be committed by another person who de facto exercises the manager's functions, but that does not enjoy the qualities required by the law, then this person could not be prosecuted for violating Article 164 of the Criminal Code, not only as a direct charger of the violation of the criminal provision, nor as an associate of the real manager of the company.

This argument relies on the verdict of the United Colleges of the Supreme Court, no. 1 dated March 26, 2002, under which when being faced with specific figures offences (*delictum proprium*) in which the co-execution is possible only between persons who are holders of some special qualities, to be subject to certain criminal offences (special subjects), the offence committed by them shall be considered pursuant to the special section of the Criminal Code, the subject of which can only be persons who are holders of these special qualities.

In order to resolve such a problem that can be encountered in our jurisprudential practice, and in order for the persons not to remain unpunished (general subjects), against which a specific norm offence cannot be applied with a specific subject, it is worth noting as a possible solution the majority orientation of the Italian jurisprudence and doctrine, according to which the application of the criminal norm is allowed also in those cases where the illegal behavior is conducted by a general subject, which deals specifically with the management of the works belonging to the special entities set by law (Musco, 1999, 22).

Such a solution of this problem would charge with criminal liability (in the form of co-execution) also the special subject (the de jure manager) which by his inaction would facilitate the subject's illegal behavior commission, that specifically exercises the specific functions without enjoying the specific qualities required by law.

Nevertheless, the best possible solution to prevent abuse by means of this scheme is the legislator intervention and the regulation of these criminal norms, adding to the responsible entities also those entities that do not enjoy the qualities required by law, but that de facto exercise the functions of the special subjects.

The cooperation of the general subject (*extraneus*) in cases of *delictum proprium*

Another significant problem not only for offences in commercial companies, but also for all those offences that fall under the category of *delictum proprium*, concerns the criminal liability of the subject which enjoys no qualities required by the law in cases where the subject cooperates with the special subject for conducting an illegal behavior: e.g., the case of collaboration between the manager of the company and the certified accountant of a corporation, to present a false balance sheet (Giving false information, Article 168 of the Criminal Code).

There is no doubt that in this case the certified accountant shall be criminally liable for giving false information (Article 168 of the Criminal Code) committed in collaboration. Of such orientation are also the United Colleges of the Supreme Court, which by means of the verdict No. 4, dated 15.04.2011 concluded the unifying conclusion that when by

the objective point of view is proved that the offence was committed by two or more persons, the offence will be considered committed in collaboration. This applied both in the cases when the collaborators are not identified, as well as cases when the accomplice has no criminal liability because of the disability or the age of criminal responsibility. Special qualities that increase, reduce or exempt the sentence are considered only for the collaborator to which they exist.

The problem is whether the manager will or not be criminally responsible in the case of the offence provided for in article 168 of the Criminal Code, although he/she does not possess specific qualities required by law.

According to Article 25 of the Criminal Code, "*collaboration is the agreement of two or more persons to commit a criminal act* ", while according to Article 27 of the Criminal Code, "*Organizers, instigators, and helpers bear the same responsibility as the executors for the criminal act committed* ".

In our opinion, even in cases of *delictum proprium*, the collaborators who do not possess the specific qualities required by law (*extraneus*) will bear criminal responsibility in all those cases when they are aware of the special qualities that the special subject possesses (*intraneus*). This opinion is justified by the fact that according to our doctrine (Koça, 2005, 193) and jurisprudence (Verdict of the Criminal College of the Supreme Court, no. 394 dated July 8, 2009), for the configuration of the institute of collaboration the existence of a subjective position in relation with the actions of each in committing the offence is required, which is expressed by means of reaching agreement between them in its conducting.

This kind of collaboration will exist not only in the hypothesis when a *extraneus* subject gives a "material" contribution (e.g., the guard of the building where the offices of the company are located which together with the certified accountant reveal a secret that will affect the performance of sales of the products produced by this company, will bear criminal responsibility for violation of Article 169 of the Criminal Code "Revealing secrets of a company" but also when giving a "moral" contribution (e.g., the general director for sales through tips/recommendations incites the manager of the commercial company to refuse writing mandatory notes related to some special sales in violation of Article 170 of the Criminal Code "Refusing to write mandatory notes"). The same opinion is also stated by the Italian doctrine when expressing the view about the collaboration in the criminal cases with special subjects (Marinucci & Dolcini, 2004, 278).

Criminal liability of bodies composed of many subjects

In some commercial companies, the authority to act on behalf of the company is delegated to a specialized administrative body consisting of some people. Also the audit of the company's activity may be carried out by special bodies consisting of many subjects.

Thus according to Article 95 of Law no. 9901 dated 14 April 2008 "On entrepreneurs and companies "; the general meeting of the limited liability company shall nominate one or more natural persons as managing directors, while according to Article 158 (One-Tier System) and Article 167 (Two-Tier System) of the same law, the General Meeting or the Board of Directors shall nominate one or more natural persons as managing directors. In

case more than one Managing Director has been nominated, they manage the company jointly.

Whereas the first paragraph of Article 1 of DCM (Decision of the Council of Ministers), no. 150 dated March 31, 2000 (as amended) "On approval of rules for the organization of the profession of authorized accounting experts" the certified accountant exercises the profession of auditing the commercial companies, enterprises or other organizations, which are obliged by law for this inspection or request it themselves. Whereas under Article 4 of the DCM, the certified accountants can practice their profession independently or (individually), or grouped in a company, or as employees at another independent expert or at a company of authorized accounting experts.

Consequently, it's of special importance the distribution fact of criminal liability in cases of committing a criminal offence while exercising the specific tasks by the authorities with many people.

We should note that this is not the case when all members of the collegial body agree to commit an illegal behavior, because in this case they will all bear criminal liability for the violation of the norm in terms of collaboration: e.g., in case the managers of a joint-stock company agree not to write the mandatory notes prescribed by law, shall bear criminal responsibility under Article 170 and 25 of the Criminal Code.

The situation will be complicated in case one of the members of the collegial body does not participate in the discussion that precedes the making of an illegal decision by this body; or in another case when one of the managers did not understand that a decision was being made which constituted an offence.

Thus according to Article 164 of Law "On Entrepreneurs And Companies", Members of the Board of Directors and the Managing Directors are jointly and severally liable for the probity of all financial statements and of statements on other key-data, such as information on the company's risk management system, its business prospects, investment plans, technical, organizational and human resources and corporate governance structures and practices. Whereas according to Article 170 of the Criminal Code shall bear criminal responsibility all those managers who refuse to write mandatory notes.

Let us illustrate with an example: We're in a joint-stock company (JSC) that operates in the field of pharmaceutical industry: The management of this company is entrusted to a collegial body composed of five managers, two of whom have graduated in economics, two in law and one in chemistry. This body under Article 164 of Law "On Entrepreneurs And Companies", has the obligation to check the probity of all financial statements of the company. What will happen if the chemistry graduate manager fails to understand that the decision which is being taken regarding the probity of financial statements, it's illegal because the company statement of accounts is forged? Will this manager bear criminal liability for committing an illegal behavior on the part of the body, part of which he himself is?

In our opinion, to determine the criminal liability of the members of collegial bodies is very important to study the subjective aspect of each member of the collegial body regarding the making of an illegal decision.

Consequently, if on the basis of the investigation that will be conducted will result that the manager has acted negligently then against him will not be applied any criminal norm,

but he will have only civil liability to compensate the company or its creditors for the damages caused by this illegal action. But even in this case, according to the dominant doctrine, the civil liability would exist only when a member of the collegial body will not be able to prove the fulfillment of the duty of care that he owes company (Bachner & Schuster & Winner, 2009, 130).

On the other hand, if on the basis of investigations will result that the manager has acted willfully, then against his will be applied Article 170 of the Criminal Code, if there will be other elements composing the image of the offence.

Regarding the forms of intent, we believe that in these cases the intent can be found in both its forms: but if in the case of direct intent there is any problem for the implementation of the criminal norm, in the case of indirect intent the interpretation of the norm becomes more controversial, even for the similarity that exists between itself and the excessive self-confidence.

However, in our opinion, the member of a body with many entities will bear criminal liability even when committing an indirect intentional illegal conduct. Thus, the manager of a commercial company that does not participate in the vote for the probity of the financial statements of the company, would be criminally liable if it's evident that he knew that the vote would be illegal, but nevertheless didn't try to oppose, indirectly acknowledging the arrival of the illegal consequences to the company and its creditors; in other words, the manager predicts the consequences, doesn't want them but consciously allows their arrival.

Conclusions

As a conclusion, we can say that the recognition of the special characteristics of the special subjects that commit criminal acts represents a great importance to realize a more accurate legal qualification.

Foremost we should be careful when punishing those persons who specifically exercise the special functions though they do not enjoy the special qualities required by law. In our opinion, the best solution possible to prevent abuse by means of this scheme is the legislator intervention and the regulation of these criminal norms, adding to the responsible subjects also those subjects that do not enjoy the qualities required by law but that de facto exercise the functions of the special subjects.

Secondly but not less important, appears the criminal liability adjustment of the subject which does not enjoy the qualities required by law in cases when he/she collaborates with the special subject for committing an illegal behavior. In our opinion, this kind of collaboration will exist not only in the hypothesis when the *extraneus* subject gives a "material" contribution but even in the case of a "moral" contribution.

Finally, we should be careful also for determining the criminal liability of the bodies composed with many subjects. In our opinion, to determine the criminal liability of the members of collegial bodies it's very important to study the subjective aspect of each member of the collegial body regarding the making of an illegal decision.

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