Criminal liability of commercial companies

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Abstract

The criminal responsibility of commercial companies is one of the innovations brought from the economic development of companies, creating the possibility of sanctioning legal entities due to the criminal offenses they could commit. Discussions related to the criminal responsibility of legal entities have existed since the first moment when the law recognized the possibility of creating (founding) legal persons. The dilemmas continue to be at the center of discussions not only in terms of the national aspect, but also in the international aspect.
In the framework of international law, the concept of criminal liability of legal persons constitutes an issue which continues to not receive a precise and definitive answer. None of the contemporary international criminal courts have explicitly jurisdiction over legal entities, they are mainly based on the principle of the individual criminal responsibility. The difficulties have resulted from the conceptually different approaches of the states, some of which have gainsaid the recognition of their criminal responsibility.
Despite all the difficulties, however, the International Criminal Court in the "New TV SAL" case for the first time envisaged the possibility of criminal responsibility of a corporation, affirming the jurisdiction over corporations of an international criminal court. Through this decision, it was testified that the criminal responsibility of corporations under international law is not conceptually impossible.

Keywords: Criminal liability, commercial companies, international law, EU, Albania.

Introduction

Apart from the aspect of international law, the criminal responsibility of legal persons is also problematic in terms of the internal law of the states. This issue was handled by the Romans, who, although they considered similarities between natural and legal persons, in terms of the criminal liability of legal persons, held the position that they cannot possess criminal liability, invoking the principle *societas delinquere non potest*. However, they developed later the concept of the corporation as a separate legal entity, with its own legal rights and obligations, separate from those of its own shareholders. Even some authors, such as Archille Mastre, claimed that the Romans considered legal entities capable for committing violations and as a consequence they could be punished, later during the 12th - 14th centuries, the concept of corporations was further developed, making Roman law clearly imposing the criminal liability on *the universitas,* but only when members acted jointly.
In the Middle Ages the general tendency was to accept that the legal person could have criminal liability, but nevertheless there were also arguments that a *universitas,* because it was a creation without a soul and without a body, which was not part of the Church, could not be punishable by the criminal provisions. This theory is based on the principle *societas delinquere non potest,* created by Pope Innocent IV.

The history, laws, economics, and specific policies of each country have had an influence on the implementation and development of the concept of corporate criminal responsibility. This influence has resulted in different models of corporate criminal liability. In the 14th century, the doctrine recognized that corporations had their own will and therefore, could be considered to have criminal liability. This theory dominated European continental doctrine until the end of the 18th century, excluding Germanic law which was still faithful to the old concept of collective (joint) responsibility. The criminal liability of legal persons was recognized in France in 1579, when the Ordonnance de Blois approved the criminal liability of corporations. However, after the French revolution, corporate criminal liability was no longer mentioned in the Penal Code of 1810. This only changed in 1992, when France officially recognized corporate criminal liability, through the new French Penal Code which entered into force in 1994.

The developments in France were followed by other European countries which recognized the criminal responsibility of legal persons, as happened with the Netherlands (1976), Belgium (1999) and Denmark (2002).

Unlike France, the opposite position was taken by Germany, which, believing that corporations do not have the ability to act and therefore cannot be guilty, also criminal sanctions are appropriate, by their nature, only for human beings and not for legal persons In Germany, corporate criminal liability is still governed by the principle *societas delinquere non potest* and corporate misconduct is subject to a highly developed administrative and administrative-criminal system. The German model was followed by other European countries such as Italy, Portugal, Greece and Spain, although the Italian doctrine itself argues that this administrative responsibility is actually criminal in nature.

Even in *common law systems* , the criminal liability of legal persons has not been recognized from the beginning, so England initially refused to accept the idea of corporate criminal liability. But in 1840, the first step in the development of corporate criminal liability was taken, as the courts-imposed liability on corporations for strict liability offenses. Whereas, in 1972, the "identification theory" was created, according to which the human body was compared to the corporation, and therefore the directors and managers represent the brain, intelligence and will of the corporation.

Also, the United States initially followed the English example, but the development of corporate criminal liability was developed much faster. Courts began to impose corporate criminal liability in cases of regulatory or public welfare criminal offenses that do not require proof of *mens rea-nuisance,* abuse of duty (malgeasance), nonfeasance and cases of delegated liability. By the early 20th century, the concept of corporate criminal responsibility was widely accepted by American society and was extended to *mens rea offenses.*

The patterns of application of criminal penalties to legal entities were also questionable. As punishments provided by the law are, for example, fines, dissolution, the prohibition of carrying out certain activities for a certain period. Regarding the sanctioning of corporate entities, the traditional treatment, and in most cases, has been through the imposition of a fine.

European Union initiatives and harmonization of legislation

The law of the European Union is increasingly focused on harmonizing the legislation of the EU member states with each other, aiming to minimize the differences between the legislations. As long as legal bodies will be primarily legal subjects of national law and only secondary subjects of EU law, their regulation by the Union will be limited by the harmonization of the regulation of certain issues or institutions that issue Directives.

The vast majority of Directives has been applied to limited liability companies. They usually include three types of partnership: stock corporations, limited liability stock corporations and (anonymous *commandities*) stock goods. The criminal liability of legal entities in the European Union has also been dealt with through special cases which are mainly presented in terms of unfair competition between corporations participating in the EU market.

The Intel case, which according to the commission had a dominant position in the market, significantly making it difficult for other companies to enter the market. This behavior of this company resulted in reducing the possibility of consumer choice and also in reducing the innovative initiatives of potential competitors in the market. Based on the 2006 Guidelines, the Commission decided to fine Intel for breaching competition rules.

Another case is the case of Microsoft, which had abused its dominant position, using two different types of behavior, for which the Commission decided to fine it due to the abuse of its dominant position, a decision which was also confirmed by the Court.

The response to the corporate criminal phenomenon was to create a legal regime which could deter and punish corporate misdeeds. The characteristics of criminal punishment of corporations are: prevention (*deterrence*), punishment, rehabilitation of criminal corporations, fulfillment of the principles of clarity, visibility and stability in accordance with the general principles of criminal law, efficiency, and the purpose of general justice (*general fairness*).

European countries have based their legal system on a long history of traditions that has forever marked the development of their laws. Germany continues to refuse to accept corporate criminal liability and remains faithful to the old principle *of societas delinquere non potest.* France has abandoned the old principle *of societas delinquere non potest* and adopted a comprehensive but still restrictive system addressing corporate criminal liability. The English-American legal system (common law) has applied the concept of corporate criminal liability as soon as/when it became necessary without thinking and re-thinking the old traditional doctrines and arguments as Germany or France did.

Albanian legal framework on the criminal liability of commercial companies

The sensitivity shown in international circles has accelerated the awareness of our legislator about a concrete intervention on the discipline of the responsibility of legal persons. The criminal responsibility of legal persons is affirmed for the first time in Albania in the Criminal Code of 1995 (law no. 7895, dated 27.01.1995), specifically in

Article 45 of the Criminal Code, abolished in 2001 and re-added several times in 2004. Albania, as a candidate country for integration into the European Union, has adopted its own system for the criminal liability of legal persons, which is dealt with more explicitly in Law no. 9754, dated 14.06.2007, "On criminal liability of legal persons".
Albania with the ratification of international Conventions and especially with the ratification of the "Criminal Convention on Corruption", by means of law no. 8778, dated 26.04.2001, caused our legislator on 14.06.2007 to approve law no. 9754 "On the criminal responsibility of legal persons for criminal offenses committed in their name and for their benefit", through which it is intended that for the first time the responsibility for the commission of the criminal offense of legal persons will be determined and legally regulated by providing the bases of the responsibility of legal persons, expressly the responsible persons, measures and types of penalties for legal persons. In the framework of this law, the legal person is responsible for criminal offenses committed by its bodies and representatives, during the violation of legal and statutory obligations, regardless of the fact that the legal person has benefited or would have benefited from illegal income for itself or for a third person, from committing a criminal offense.
As far as punishment policies are concerned, it has been determined that the main punishments according to this law are fines and forced termination of the legal person, while as complementary punishments are the closure of one or more activities or structures of the legal person, the imposition of legal entity under controlled administration, prohibition to participate in public funds procurement procedures, removal of the right to receive or use licenses, authorizations, concessions or subsidies, prohibition to publicly solicit funds and financial resources, removal of the right to perform one or more activities or operations and the obligation to publish the court decision.
Law no. 9754 "On the criminal liability of legal persons", expresses a relation between the law and the Criminal Code and the Code of Criminal Procedures. According to this law, the legal person enjoys the right to defense and the choice of a defense counsel, as well as all the rights and guarantees provided by the Code of Criminal Procedure for the defense of the defendant.
The law does not specify the types of criminal offenses for which a commercial company can be criminally responsible, thus are provided in the Criminal Code in section IV from article 163 to article 170/b. Criminal offenses committed by commercial companies are prescribed those illegal acts (actions or omissions) in the field of the country's economy, in different forms and ways committed intentionally and provided for as such by the criminal legislation. The types of criminal offenses provided for in the criminal code in this section are the preparation of false statements, abuse of competences, active corruption in the private sector, passive corruption in the private sector, forgery of signatures, irregular issuance of shares, unfair holding of of two qualities, providing false information, revealing company secrets, not making mandatory records, illegal employment as well as illegal competition through violence. The punitive measures taken in these cases of criminal offenses are fines or imprisonment.
According to Albanian legislation, in order for the criminal offense to be considered

to have been committed on behalf of the company, it is necessary that it was committed by those individuals who have a delegated power over the special field of its commercial activity, with which the possible criminal offense is related. Essential elements in this case are the powers of the person who commits the criminal offense to act on behalf of the company.

Criminal responsibility of the legal person according to international acts

The role of legal entities in illegal activities can be extended to the whole range/sphere of organized transnational/international crimes, from human trafficking, counterfeit medical products to corruption and money laundering. Thus, ensuring the liability of legal persons is an important component in the fight against organized crime in the international/transnational level.

Article 10 of the Convention on Organized Crime, through which the responsibility of legal persons is dealt with, is an important recognition of the role that legal persons can possess in the commission or facilitation of organized crime at the international/transnational level. It requires the states parties to define the liability of legal persons, also providing that, depending on the legal principles of the state party, this liability may be criminal, civil or administrative.

The legal regulation of the criminal responsibility of legal entities, not having a unique international regulation, has given the opportunity to states to determine the ways and models that they will implement in order to punish (sanction) legal persons whom do not respect the legal order. For analysis, we took the French model, the German model, the Italian and Hungarian practice, as well as common law countries such as Great Britain and the USA.

France , after the adoption of the new Penal Code in 1994, for the criminal liability of the legal person, according to which Article 121-2 provided that " *Legal persons, with the exception of the State, are criminally responsible for criminal offenses committed on their behalf of their bodies or representatives.* "The second paragraph of the article continues: "However, local authorities and their groups are criminally responsible only for acts committed during the performing of activities which may be the subject of public service delegation agreements".

The criminal liability of juridical/legal persons was introduced into the French penal code by Act 2004. This Act amended articles 121-1 of the Criminal Code as follows: "Legal persons, with the exception of the State, are criminally liable for crimes committed on their behalf by the bodies and their representatives, in accordance with the differences specified in articles 121-4 and 121-7. Based on Article 121-2 of the Criminal Code, any private or public entity other than the State, regardless of whether it is commercial or not, registered in France or abroad, must bear criminal responsibility for active corruption, influence trading and money laundering.

Germany applies a system according to which only natural persons can be criminally punished as offenders, while legal persons lack the capacity to act and the capacity to be criminally liable. But, despite this position, it is still possible to impose criminal sanctions on legal persons, such as the total loss of the right to use (*forfeiture)* as well

as confiscation against companies.

The first defense that a company can use is that there was no violation or administrative offense or that a violation was not committed by a person acting as a representative of the company. If the prerequisite of Article 30(1) of the Administrative Offenses Act is met, a fine may be imposed against the company. This means that it is at the discretion of the prosecution whether or not to impose a fine, as well as the amount of the possible fine.

Italy through the adoption of Legislative Decree № 231/2001 (art. 24 and 25) has established the administrative responsibility of the legal person for certain acts. Public institutions and organizations that perform management functions (for example, local governments) are excluded from the ranks of the subjects of responsibility.

The decree also defines the responsibility of the legal person, which is expressed only for the criminal offenses provided by the current legislation for profit, corruption of civil servants and money laundering. The implementation of presidential legislative decree № 231/2001 regarding the distribution of criminal responsibility in legal bodies is a short history in the Italian legal system, which over the centuries has traditionally respected the principle " *societas delinquere non potest* «.

Hungary, through the CIV Law of 2001 on Measures Applicable to Legal Persons under Criminal Law, has defined the criminal liability of legal persons, from which it has specifically excluded the State of Hungary, foreign countries, institutions listed in the Constitution of the Republic of Hungary, international organizations and any other body charged with governance, public administration and local government administration.

The determination of the criminal responsibility of the legal person is conditional on the conviction of a natural person, except in cases of death or mental illness of the natural person. As for the procedure, it is followed by the same criminal court that convicted the natural person.

The United Kingdom through the Interpretation Act 1978 has defined the general provisions on the criminal liability of companies, deciding to hold the legal person criminally responsible for the criminal offenses of corruption, money laundering and terrorist financing. According to the British model, the criminal responsibility of the legal person for bribery or money laundering will depend on the fact that the natural person who committed the prohibited act with the appropriate state of mind was part of the "controlling mind, or will" of the legal person. It is also of interest to note that the liability of legal persons does not exclude criminal proceedings against natural persons who have been announced guilty. This enables the legal person to be held criminally responsible even in cases where no natural person has been convicted.

The US has recognized corporate criminal liability at the federal level, where under federal law corporations or most other legal entities can be held criminally liable for the crimes of their employees and agents. However, in order to hold a corporation or legal person criminally responsible, certain conditions must be met, where first the natural persons who commit the criminal activity must be in a legal employment relationship with the corporation, also, it is required that the action they have undertaken is within the field of work they perform in that corporation.

American judicial practice related to the criminal liability of legal entities has started with a case against the "Ford" car company, this case brought to attention the criminal liability that corporations have in the case of placing unsafe products on the market, for which they, in addition to liability civil and administrative, will also face criminal liability.

Criminological overview of the criminal offenses of legal entities in the Republic of Albania

The principle of guilt is an essential element of criminal law. Doctrine of " *mens rea* « in international criminal law includes a host of standards that originate in common law jurisdictions and continental law. Mental attitude is of great importance to prove the commission of a criminal offense, since the absence of " *mens rea* " excludes the attribution of criminal responsibility.
The condition " *mens rea* " referring to the debate regarding the criminal responsibility of legal persons, refers to the narrow meaning, namely the psychological relationship of the offender in relation to the act. There are three main approaches: the regulatory model in which fulfillment of the " *mens rea* " condition is presumed in relation to legal persons; secondly, attributing the fault of the natural person to the legal person; identification of the fault of the legal entity (separated from the fault of the natural person).
According to the law no. 9754, dated 14.06.2007, "On the criminal responsibility of legal persons", one of the main conditions for a legal person to bear criminal responsibility is that the subjects indicated in its article 3 have committed the criminal offense in the name or for the benefit of the legal person. However, acting on behalf of a legal entity does not always mean the finalization of a benefit.
The subjective side is the inner essence of the crime. It represents the mental attitude of a person towards a dangerous social act committed by him, characterized by guilt, motive, intention and emotions. The essence of guilt lies in the subject's negative attitude towards the interests of society protected by the law and violated by it.
Concepts such as conduct (action or non-action), intent and negligence are typical of the criminal liability of natural persons, but cannot be applied in any way to a legal person. The responsibility of the latter, in the criminal plan, can only be identified with elements such as the lack of proper organization to avoid the realization of criminal offenses that are in his interest and bring him a benefit. Legal persons can be called to answer for those social activities which, being criminal offenses, give the opportunity to reprimand (the legal entity) because, having a weak organization, it could not avoid their realization.
The criminal responsibility of the legal person is parallel to that of the natural and autonomous person, in the sense that the legal person's criminal proceedings do not prevent the opening of civil or administrative proceedings. In this sense, the civil or administrative proceedings initiated against the legal entity are not suspended due to the fact that the latter has been subjected to a criminal proceeding.

Albanian jurisprudence on the criminal responsibility of legal entities

According to the Constitution of Albania, are defined the principles on the basis of which the criminal procedure is conducted. In principle, every constitutional principle during the criminal process also applies to the legal person, as it applies to the natural person, with the exception of those principles that in terms of manner, form and existence cannot also be applied to legal persons, as they are directly related to the natural person. Legal persons are also recognized with the procedural guarantees provided in the European Convention on Human Rights, including the practice of the ECtHR, which Albania is obliged to implement according to the legal acts in force. In accordance with the constitutional principles, during the criminal process, anyone (natural or legal person) has the right: to be informed immediately and in detail about the accusation against him, about his rights, and to be given the opportunity to notified his family or relatives; to have sufficient time and facilities to prepare his defense; to have the free help of an interpreter, when he does not speak or understand the Albanian language; to defend himself or with the help of a legal defender chosen by him; to communicate freely and privately with him, and to provide him with free protection, when he does not have sufficient means; ask questions to the witnesses present and request the appearance of witnesses, experts and other persons who can clarify the facts.

In implementation of the law on the criminal responsibility of legal persons, the Albanian courts have dealt with dozens of cases where persons were presented as subjects of the criminal process. According to official data extracted from judicial statistics, it results that from 2011 to 2020, 400 cases based on the law on criminal liability of legal entities were handled. From this number, the majority of cases (35%) were judged by the Court of the Judicial District of Tirana, while the Court of the Judicial District of Shkodër (18%), Durrës (12%), Vlorë (9%), and others with 20%. As for the type of decisions, in most cases it was decided to punish the legal (53%), a significant part were dismissed (27%), and in 17% of them, innocence was decided.

The policy of punishment of legal persons in Albania mainly refers to fines, which from practical cases have turned out to be of a low level, having no punishments that would significantly affect the economic power of legal persons convicted for committing criminal offenses.

ECHR standard on the guarantee of the basic rights provided by the ECHR in the criminal process against the legal person

The ECHR constitutes one of the most important acts in terms of human rights and freedoms for the member states of the Council of Europe. This act foresees the basic principles on which human rights are built and stands, for the violation of which the subjects have the possibility to seek protection from the ECtHR, after they have finalized the legal options in their country.

The principles defined by the ECHR, at first glance, seem to refer only to natural persons, but in reality, they are also recognized by legal persons, always in the context of their organic possibilities. In addition to recognizing the possibility of performing/

benefiting rights, according to Article 34 of the ECHR, corporations and other private legal entities are given the opportunity to present/submit an appeal on their behalf to the ECHR.

Returning to the content of the ECHR, we note that only one provision expressly recognizes legal persons as beneficiaries of fundamental rights, namely Article 1 of Protocol 1 of the ECHR on the right of property. While the other rights refer only to natural persons, however, since the ECHR has never been seen as a rigid act, but always as a living instrument which must be interpreted in the light of current conditions. In this spirit, the ECHR managed to expand the protection of legal entities, especially corporations.

If we are referring to the right to a regular process, the right to privacy, the principle of legality (*nullum crimen, nulla poena sine lege*), freedom of expression, religion and organization, the right to an effective solution, the right to property, the right to compensation for unjust punishment and the right not to be judged or punished twice (*ne bis in idem*). Indeed, many of these rights belong to legal persons, but do not necessarily apply under the same conditions that apply to natural persons.

From the judicial practice of the European Convention, it is really clear that legal persons enjoy extensive protection in the criminal justice system, referring to the right to an orderly process. The principle of presumption of innocence in Article 6 § 2 of the ECHR is also applicable to legal persons, also the right to a due process is guaranteed by Article 6 § 3 of the ECHR.

Article 2 of the Seventh Protocol of the ECHR is also important because it guarantees natural and legal persons the right to review a criminal conviction or decision of a higher court. It is also worth mentioning article 13 of the ECHR, according to which all persons (including legal persons) in criminal cases whose rights and freedoms are violated in this convention must be guaranteed an effective solution before a national body. Secondly, Article 4 of the Seventh Protocol of the ECHR guarantees that the "ne bis in idem" principle also applies to legal persons.

From the jurisprudence of the ECHR, the court following the principle of "autonomy of the criminal concept", defined for the first time in the case of Engel and others against the Netherlands, recognizing the application of the guarantees of Article 6 not only in the criminal process but also in the administrative disciplinary procedures that are essentially criminal in nature. The court clarified that the criteria of the Engel case are alternative and not cumulative. For the application of Article 6, it is sufficient that the violation has a criminal nature from the point of view of the Convention or that a sanction has been applied to the subject that, in terms of the nature and level of punishment, belongs to the criminal sphere.

In the case of Dubus SA v. France, the Court unanimously recognized a violation of the right provided in Article 6, paragraph 1 of the Convention in a disciplinary procedure conducted by the Banking Commission against an investment company. Similar in fact but not in 'the right' was the case of Fortum Corporation v. Finland. The court unanimously found that the nature of the fine was essentially criminal and the applicant's right to be heard had been violated. The same conclusion was reached in the case of Lilly France SA v. France.