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PROCEDURES FOR ADJUSTMENT THE NATIONAL LEGISLATION ON THE PUNISHMENT APPLIED TO THE LEGAL ENTITY IN CORRELATION WITH EUROPEAN UNION LEGISLATION

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Abstract

The economic base determines the social, political, cultural, and institutional superstructure. Therefore, the economic situation of a state tends to determine certain human behaviors, including criminal behavior at the level of companies. It is found both in areas of maximum prosperity and poverty [1].

Over the last two decades, the evolution of corporate criminality has moved from a niche technique to a global strategic priority, situated at the intersection of technology, economy, geopolitics, and civil society. Threats evolve faster than defense mechanisms. For the purpose of implementing the conditionalities of the National Regulatory Plan for 2025, in the context of aligning the legislation of the Republic of Moldova with that of the European Union, the main objective of the state is the consolidation and alignment of national legislation with relevant international standards. This represents an essential necessity for the integration of the Republic of Moldova into the European Union and for ensuring fair and efficient justice.

Keywords: legal entity, criminal liability of the legal entity, EU directives, national legislation.

PROCEDURI DE ARMONIZARE A LEGISLAȚIEI NAȚIONALE A PEDEPSEI APLICATE PERSOANEI JURIDICE ÎN CORAPORT CU LEGISLAȚIA UNIUNII EUROPENE

Abstract

Baza economică determină suprastructura socială, politică, culturală și instituțională. Prin urmare situația economică a unui stat tinde să determine anumite comportamente umane, inclusiv comportamentul infracțional la nivelul companiilor. Ea se regăsește atât în zone de prosperitate maximă, cât și de sărăcie [1].

În ultimele două decenii, evoluția criminalității corporatiste a evoluat de la tehnică de nișă la o prioritate strategică globală, aflată la intersecția dintre tehnologie, economie, geopolitică și societate civilă. Amenințările evoluează mai repede decât mecanismele de apărare. În scopul implementării condiționalităților din Planul național de reglementări pentru anul 2025, în contextul alinierii legislației Republicii Moldova la cele ale Uniunii Europene, principalul obiectiv al statului este consolidarea și alinierea legislației naționale la standardele internaționale relevante. Aceasta reprezintă o necesitate esențială pentru integrarea Republicii Moldova în Uniunea Europeană și pentru asigurarea unei justiții echitabile și eficiente.

Cuvinte-cheie: persoană juridică, răspunderea penală a persoanei juridice, directive UE, legislație națională.

Introduction. "The defining characteristic of the postmodern political era is the absolute domination of money as a principle of organizing human and international relations. Sometimes it seems that nothing else exists", said Jim Hoagland, quoted by David C. Korten in the book "The Post-Corporate World". Corporations support the political world, impose the laws that are adopted, and have individuals who lead intelligence, inquiry, and investigation services, as well as magistrates in key positions. It is clear that no one dares to initiate investigations and criminal inquiries. Victor Hugo stated that: "behind every great fortune lies a crime". The enormous fortunes held by only a few hundred or thousand corporations were obtained and amplified through financial speculation, direct or blatant theft, corruption, falsification of accounting records, fraudulent use of confidential information, and manipulation of capital markets. All these values were achieved by criminal structures operating within large and medium-sized corporations. Corporate criminality represents a special category in the extremely diverse landscape of criminality as a social phenomenon. It represents the most sophisticated form of illegal action conceived by the top structures of large corporations (super-elites) and implemented through refined strategies involving governmental and law-enforcement institutions. The fusion between corporate criminality and the political world has generated numerous financial benefits for the decision-makers of large corporations that control money, markets, technologies, and information [1, p.13-14].

The discussion of the criminal liability of the legal entity raises many essential aspects of criminal liability, some involving the reassessment or even reform of fundamental principles of criminal law. Among these, the most affected would be the principle of individual and personal criminal liability, the grounding of criminal liability on the principle of guilt, and the principle of equality before criminal law, principles from which major deviations would have to be accepted [2, p.29].

In legal doctrine, it has been shown that to establish the criminal liability of a legal entity means, in reality, engaging the criminal liability of all the individuals who compose it, sanctioning without distinction the guilty and the innocent, those who approved and those who disapproved of the criminal act, those who did not vote and those who decided upon its commission. The idea of such liability would lead to the admission of criminal liability for another, which is not accepted [3, p.59].

The necessity of sanctioning the legal entity derives from the usefulness of attracting it to criminal liability. For a long period of time, it was considered that the legal entity had a fictitious character, being only an instrument intended to satisfy the interests of its members, so that its criminal liability could not be discussed. Supporters of this conception stated that the legal entity cannot commit an offense on its own, directly, but only through a natural person, being incapable of its own action; that due to the specialty of its legal capacity it cannot commit offenses, this being contrary to the principle of specialty and exceeding the limits of the activity of the legal entity; that the lack of a subjective element in the case of the legal entity determines the impossibility of bringing it to criminal liability, guilt being an essential feature of the offense; that the personal character of criminal liability would also oppose the establishment of such liability upon the legal entity, which would in reality answer for the act of another; and that the technical difficulty of applying a punishment to the legal entity also militates against the introduction of such an institution into criminal legislation [4, p.656-657].

In the Criminal Code of the Republic of Moldova of 2002, for the first time among the legal provisions, the possibility of bringing the legal entity to criminal liability was included, unlike at least the legal provisions of the criminal law of the MSSR from 1961 [5].

The promoters of the idea regarding the criminal irresponsibility of legal entities traditionally invoked the impossibility of applying punishment to a legal entity. However, it can certainly be observed that some sanctions of a purely physical nature, which aim to produce suffering or eliminate the offender, by their nature, are not capable of being applied to legal entities. Such punishments are imprisonment or the death penalty. As regards the criminal liability of legal entities, and particularly the range of punishments, the basis of this argument has been seriously shaken by the experience of certain foreign legislations (France, the Netherlands, the USA, England, Belgium, etc.), which contain a whole arsenal of punishments and security measures applicable, not without effectiveness, to legal entities. According to the current regulations of the Criminal Code of the Republic of Moldova, the following punishments may be applied to legal entities: fine; deprivation of the right to carry out a certain activity; liquidation [6, p.67].

Methods and materials applied. The most important document adopted in this field by the Council of Europe is Recommendation R(88)18 concerning the liability of enterprises as legal persons for offences committed in the course of their activities. The purpose of the Recommendation is to encourage the adoption of legislative measures so that, on the one hand, enterprises may be declared liable for offences committed in the course of their activities, without however exempting the natural persons who committed the act from liability, and, on the other hand, to create a system of sanctions and measures adapted to enterprises, for the purpose of ensuring effective punishment of unlawful activity, preventing the commission of new offences, and repairing the damage caused by the offence [3, p.439].

The Recommendation — concerning public or private enterprises endowed with legal personality and carrying out economic activities — formulates several principles which should govern the regime of criminal liability of legal persons: a legal person may be liable for offences committed in the exercise of its activity, even if such offences are unrelated to the object of the enterprise and regardless of whether the natural person who committed them has been identified or not; the enterprise must be exempted from liability when its management was not involved in the commission of the offence and took all necessary measures to prevent its commission; engaging the liability of the enterprise must not lead to exempting from liability the natural persons involved in committing the offence. In particular, persons exercising management functions must be liable for omission in fulfilling their obligations, an omission which led to the commission of the offence; criminal sanctions should be applied only when required by the nature of the offence, the gravity of the enterprise's fault, the consequences for society, and the need to prevent other offences. For less serious acts, recourse to other forms of liability is indicated, such as, for example, administrative liability [3, p.440].

The Recommendation provides for a wide range of applicable sanctions, as principal or accessory, with or without suspension, to legal persons, including: closure of the enterprise; dissolution of the enterprise; publication of the decision by which a sanction or measure was imposed.

The criminal liability of legal persons is also addressed by Resolution No.1 concerning the civil, administrative and criminal aspects of the fight against corruption, adopted during the Conference of European Ministers of Justice (Malta, 1994).

Recommendation R(96)8 was adopted in 1996 and concerns criminal policy in a changing Europe, considering it appropriate for member states to adopt provisions establishing the criminal liability of legal persons or other measures having the same purpose. Likewise, Resolution (97)24 concerning the 20 guiding principles in the fight against corruption emphasizes the need to establish measures preventing the transformation of legal persons into shields for concealing offences.

Although the European Convention on Human Rights makes no reference to a possible criminal liability of legal persons, it is not incompatible with such liability. Consequently, when there is a criminal charge against a legal person, it benefits from the guarantees of a fair trial conferred by Article 6 of the Convention. This case-law is in line with doctrinal orientation, which considers that the provisions of Articles 6 and 7 of the Convention protect legal persons to the same extent as natural persons.

Under the auspices of the Council of Europe, the Criminal Law Convention on Corruption was also concluded in Strasbourg on 27.01.1999. The regulations of the Convention oblige member states to include in their national legislation sanctions applicable to legal persons committing the offences covered by the Convention. Among these, signatory states are obliged to adopt the necessary measures to allow the engagement of criminal liability of legal persons for offences of bribery, trading in influence, and money laundering committed on their behalf by a natural person. The condition of criminal liability must arise when the natural person acted in a management, control, or representation function, or participated as an instigator or accomplice in the commission of the offences covered by the Convention.

According to Article 26 of the United Nations Convention against Corruption (New York, 31 October 2003 – RM, 6 July 2007), the state adopts the necessary measures, in accordance with its legal principles, to establish the liability of legal persons participating in the offences established by the Convention [7, p.1284].

Regulations concerning the liability of legal persons are also found in Article 12 of the Convention on Cybercrime, adopted in Budapest on 23.11.2001, as well as in Article 10 of the Council of Europe Convention on the Prevention of Terrorism and respectively Article 22 of the Council of Europe Convention on Action against Trafficking in Human Beings, both adopted in Warsaw on 16 May 2005. These conventions impose on States Parties the obligation to ensure the imposition of effective, proportionate, and dissuasive sanctions, whether criminal or otherwise, on legal persons responsible for the offences provided by the convention [3].

Discussions and results obtained. On 26 July 1995, the Convention on the protection of the financial interests of the European Communities was adopted. The Second Protocol to the Convention, signed on 19.06.1997, concerns the repression of money laundering and the liability of legal persons. According to it, states are obliged to adopt the necessary measures to ensure the possibility of holding legal persons liable. Article 4-1 provides that: "each Member State shall take the necessary measures to ensure the application, in the case of a legal person declared liable under Article 3-1, of effective, proportionate and dissuasive sanctions, including criminal or non-criminal fines and possibly other sanctions" [3, p.450].

Regarding the conditions for engaging the criminal liability of the legal person, the drafters opted for the indirect model, which presupposes that the liability of the legal person derives from the conduct of the natural person who, according to the regulation, has the capacity to bind it criminally. It is considered that the possibility of establishing the direct model in the case of negligent offences may still be discussed, which would imply that the guilt of the legal person be founded directly on the attitude or policy promoted by it. At the same time, it would be possible for this differentiated treatment to be developed through case-law, under the control of the Court of Justice of the European Communities.

The sanctions applicable to legal persons provided by the Convention are principal penalties (the fine) and complementary penalties (publication of the conviction decision; exclusion from the benefit of subsidies for a certain period; confiscation of goods produced or obtained through the commission of offences). We note that the drafters did not regulate as a penalty the dissolution of the legal person or the suspension of its activity, sanctions known in numerous legal systems.

During the process of ratification of the Convention, difficulties arose in introducing criminal liability of legal persons into the domestic law of all Member States of the European Union. This was because liability of the legal person was also to be applied by states which had initially rejected this idea. According to the synthesis reports related to the Convention project, only Italy and Greece considered that implementation of these provisions would raise constitutional problems. Austria and Germany also invoked gaps related to the compatibility of the project with their legal tradition, the legal systems of these countries not recognizing at that stage the actual criminal liability of the legal person. The entry into force of the project represented the etymology of the evolution of Community legislation and case-law, being an important step in the direction of generalizing criminal liability for legal persons in Continental European law [7, p.456].

The United Nations Convention against Transnational Organized Crime (New York, 15 November 2000 – RM, 17 February 2005) calls on states to adopt the necessary measures, in accordance with their legal principles, for establishing the liability of legal persons participating in serious offences involving an organized criminal group and committing the offences provided by the Convention. According to the same article, states must ensure in particular that legal persons held liable are subject to effective, proportionate and dissuasive sanctions of a criminal or non-criminal nature, including monetary sanctions [7, p.1284].

Nowadays, modern digital society is exposed from ordinary citizens and companies to governments, armies, and critical institutions. Failure to adapt leads to systemic failure — organizations that do not innovate will quickly become vulnerable to attacks they can no longer understand, prevent, or control. We live in an era in which Artificial Intelligence is no longer a science-fiction concept, but a real catalyst of digital transformation in all fields — from healthcare and transport to education, commerce, and security.

Organizations now generate tens of millions of security events and logs daily, while attacks become increasingly sophisticated, rapid, and polymorphic; the human capacity to manually detect and respond to all these signals is, quite simply, exceeded.

Policies and regulations adapted to the new digital reality. International examples: European Union — proposals within the AI Act for regulating generative technologies. United States — laws against deepfakes in electoral campaigns. Criminal liability for the abusive use of AI. There is increasing discussion about introducing a legal framework that would establish the responsibility of actors involved in the development, distribution, and use of AI to be used or prohibited in: electoral campaigns, governmental communications, financial markets and stock declarations, and public health fields [8, p.159-160].

Currently, the national legislation is in the process of implementing the conditionalities of the National Regulatory Plan for 2025, in the context of aligning the legislation of the Republic of Moldova with those of the European Union. For the execution of the roadmap “Rule of Law”, Chapter 23 “Justice and Fundamental Rights”, adopted by GD No.275/2025: – Pillar: II. Combating corruption, Action 1.1 “Amending the Criminal Code for alignment with the EU acquis on combating corruption in the private sector in order to regulate the liability of legal entities for acts of corruption and related actions”, and Action 1.7 “Amending the regulatory framework for the purpose of regulating sanctions for violating international restrictive measures, in accordance with EU standards”. The main objective of this project is to consolidate and develop current regulations to ensure more efficient prevention and combating of criminal acts, and the alignment of national legislation with relevant international standards is an essential necessity for the integration of the Republic of Moldova into the European Union and for ensuring fair and efficient justice [9].

The European normative acts which jointly regulate new categories of penalties applicable to legal persons that need to be transposed into national legislation are: a) exclusion from the right to benefit from state benefits or aid – (Directive 2024/1226; Directive 2018/1673; Framework Decision 2003/568/JHA; Framework Decision 2008/913/JHA); b) exclusion from access to public funds, including public procurement procedures, grants and concessions – (Directive 2024/1226; Directive 2018/1673); c) disqualification from the right to carry out commercial activities – (Directive 2024/1226; Directive 2018/1673; Framework Decision 2003/568/JHA; Framework Decision 2008/913/JHA); d) placing under judicial supervision – (Directive 2024/1226; Directive 2018/1673; Framework Decision 2003/568/JHA; Framework Decision 2008/913/JHA); e) legal liquidation – (Directive 2024/1226; Directive 2018/1673; Framework Decision 2003/568/JHA; Framework Decision 2008/913/JHA); f) closure of the establishments that served for the commission of the offence – (Directive 2024/1226; Directive 2018/1673; Framework Decision 2008/913/JHA); g) publication in the public interest of the full text of the judgment – (Directive 2024/1226) [10].

Conclusions and recommendations. As part of the European integration process, the Republic of Moldova has undertaken a series of objectives related to the transposition into the legislation of the Republic of Moldova of certain directives and decisions. Thus, in order to achieve a high level of security and justice within the European Union, as well as to ensure the integrity of the European internal market, it is necessary to establish rules for aligning the sanctions and offences committed by legal persons. Following these considerations, the purpose of the amendments proposed by legal practitioners and the legislator is to harmonize the Criminal Code of the Republic of Moldova through:

1. Adjustment of the institution of the legal person as a subject of the offence. This will exclude from the circle of legal persons liable to criminal punishment the following subjects: states, public bodies exercising state authority and public international organizations, where appropriate by amending Article 23 of the Criminal Code of the Republic of Moldova.

2. Transfer of criminal liability in the case of the reorganized legal person. This mechanism presupposes preventing the possibility of legal persons evading criminal prosecution or trial of the case through their reorganization. The transition of criminal liability must be made proportionally, depending on the value of the assets which the reorganized legal person absorbs from the dissolved legal person guilty of committing the act, where appropriate by supplementing Article 21 of the Criminal Code of the Republic of Moldova.

3. Establishment of criminal records and recidivism status of the legal person, as well as their transfer in the case of reorganized legal persons. The current wording of Articles 34, 110 and 111 of the Criminal Code of the Republic of Moldova does not clearly provide that a legal person may commit an offence in a state of recidivism or that it may have a criminal record. Thus, it is necessary to clearly establish that a legal person may commit an offence in a state of recidivism and that, in respect of such entities, criminal records may exist.

4. Adjustment of the system of penalties applicable to legal persons and the introduction of new sanctions such as: a) exclusion from the right to benefit from state benefits or aid; b) exclusion from access to public funds, including public procurement procedures, grants; c) disqualification from the right to carry out commercial activities; d) placing under judicial supervision; e) legal liquidation; f) closure of the establishments that served for the commission of the offence; g) publication in the public interest of the full text of the judgment. Transposition of EU legislation on combating money laundering through criminal law measures and combating corruption in the private sector. These proposals revise the system of sanctions applicable to legal persons, with the aim of creating a fairer, more efficient and more dissuasive legal framework. In the current wording of the Criminal Code of the Republic of Moldova, the penalty of liquidation of the legal person and deprivation of the right to carry out a certain activity may be applied, including as principal penalties, without being accompanied by a pecuniary penalty. This approach allows a legal person to avoid the direct financial consequences of its act, even when it is sanctioned with the penalty in the form of liquidation or deprivation of the right to exercise a certain activity, as principal penalties. Thus, it has been established that the only principal penalty shall be the fine, while the other sanctions shall be complementary penalties. The already existing complementary penalties (deprivation of the right to carry out a certain activity and liquidation of the legal person), as well as the newly introduced ones, in order to have sufficient dissuasiveness must accompany the penalty in the form of a fine. This amendment will eliminate situations in which a legal person, by committing an offence, causes damage to the state or other persons, but is independently subjected only to a penalty in the form of liquidation or in the form of deprivation of the right to carry out a certain activity.

5. Transposition of Directive 2024/1226 on the definition of criminal offences and penalties for the violation of Union restrictive measures. Among these being primarily criminal liability, as well as administrative liability, as an option for Member States in relation to the value of the "funds or economic resources". In particular, criminal liability is to be applied in the following cases: making funds or economic resources, directly or indirectly, available to a designated person, entity or body or for their benefit, in breach of a prohibition constituting a Union restrictive measure; failure to comply with the obligation to freeze funds or economic resources belonging to, owned, held or controlled by a designated person, entity or body, in breach of an obligation constituting a Union restrictive measure; carrying out transactions or continuing transactions with a third country, with bodies of a third country or with entities or bodies owned or controlled directly or indirectly by a third country or by bodies of a third country, including the award or continued performance of public procurement contracts or concession contracts, where the prohibition or restriction of such conduct constitutes a Union restrictive measure; defining international restrictive measures and the total turnover (from 1% to 5%) applied to legal persons [11].

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