

## SANCTIONS ENFORCEABLE ON LEGAL PERSONS

Dorina COSTIN\*

**ABSTRACT.** *The controversial Criminal Law problem of whether and how the legal person is criminally liable and punishable, which revolves around the *societas delinquere non potest* theory, seems to have been abandoned to history, as foreign specialty literature of the past centuries mostly gravitates around the identification of optimal and efficient mechanisms of punitive sanction. If initially, in choosing and applying sanctions the non-repressive ones were prioritized, these have proved insufficient and inefficient in the face of the increasingly more elaborate unlawful activities of legal persons, and thus the necessity to identify more energetic and legally restrictive measures. Recent legal literature seems to have accepted the idea that respect for the law under threat of sanction (punishment) is accomplished independently of its recipient. The retributive and intimidating or inhibitive of deviant behavior effect is also achieved in the case the legal person. The mediated purpose (to prevent commission of offences by incriminating dangerous acts and to provide appropriate punishment), and the immediate purpose of punishment (special and general prevention by correct enforcement of punishment) are attainable in the case of the legal person as well. Under threat of fine the legal persons will repress unlawful behavior, a legal person once sanctioned will attempt not to break criminal law again, and shareholders will determine the legal person to organize its activity in accordance with the law.*

**KEYWORDS:** *legal persons, fine, dissolution, suspension of one or all activities, closing down branches, interdiction to participate to public acquisition procedures, display or broadcast the conviction order, placement under legal surveillance.*

**JEL CLASSIFICATION:** *K 14, K 22.*

**1. Preliminaries.** The controversial Criminal law problem of whether and how the legal person is criminally liable and punishable, which revolves around the *societas delinquere non potest*<sup>1</sup> theory, seems to have been abandoned to history, as foreign specialty literature of the past centuries mostly gravitates around the identification of optimal and efficient<sup>2</sup> mechanisms of punitive sanction. If initially, in choosing and applying sanctions the non-repressive ones were prioritized, these have proved insufficient and inefficient in the face of the increasingly more elaborate unlawful activities of legal persons, and thus the necessity to identify more energetic and legally restrictive measures. Enemies of criminal liability of the

\* Assistant professor, "Dimitrie Cantemir" University of Tîrgu-Mureş, Romania.

<sup>1</sup> For an ample and in-depth analysis in Romanian legal literature, valorizing a vast foreign bibliography that refers to the foundations of the adage *societas delinquere non potest* and the arguments that led to its gradual abandonment, see Florin Streteanu, Radu Chiriță, *Răspunderea penală a persoanei juridice*, Second Edition, C.H. Beck Publishing House, Bucharest, 2007, pp. 72-151, and doctrinaire and jurisprudence milestones. Special reference to punishment liability of legal person, pp.104-108.

legal person, invoked among other reasons, its inability to suffer the effects of criminal sanctions, and based their theory on the statement that criminal punishment possesses a strong repressive, afflictive character that cannot be perceived by the legal person, and the very scope and functions of punishment (general and special prevention, constraint, re-education, exemplarity and elimination of the offender) cannot be attained. On the other hand, the critics of criminal liability of the legal person invoke the absence of adequate sanctions and affirm that it cannot be sentenced to confinement, which is specific to criminal law.

Recent legal literature seems to have accepted the idea that respect for the law under threat of sanction (punishment) is accomplished independently of its recipient<sup>2</sup>. The retributive and intimidating or inhibitive of deviant behavior effect is also achieved in the case the legal person. The mediated purpose (to prevent commission of offences by incriminating dangerous acts and to provide appropriate punishment), and the immediate purpose of punishment (special and general prevention by correct enforcement of punishment)<sup>4</sup> are attainable in the case of the legal person as well. Under threat of fine the legal persons will repress unlawful behavior, a legal person once sanctioned will attempt not to break criminal law again, and shareholders will determine the legal person to organize its activity in accordance with the law. The reeducation function is achieved when application of punishment is meant to restructure and reorganize the legal person activity; the elimination function can be achieved by suspending all activities or one activity, and permanent elimination can be achieved by dissolution. Undoubtedly, the legal person cannot be sentenced to prison, but in contemporary Criminal law there is the tendency to shift the center of gravity from imprisonment sanctions to pecuniary or restrictive sanctions even in the case of private individuals. If, in the case of private individuals general and special prevention is achieved through pecuniary sanctions, the same thing is achieved in the case of the legal person. Since in the commercial field there is much talking about the “brand image” of the company, its credibility, criminal sanctions

<sup>2</sup> In the Anglo-Saxon legal system debates on the identification of efficient sanctioning models and mechanisms that are adapted to the nature of the legal person intensified in the beginning of the 60s reaching climax in the USA with the United States Sentencing Guidelines (1991) and are still far from conclusion. Partial liability of corporations was legally given shape starting with the second half of the 19th century, first as practice that was later theoretically grounded. Beginning with the United States Sentencing Guidelines, 1991, North-American doctrine seems to have woken up and started to thoroughly analyze corporative guilt and optimal corporation sentencing. See Richard Gruner, *Corporate Criminal Liability and Prevention*, “Law Journal Press”, 2005, pp.2-3; Jennifer Arlen, Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, NYU Law Review, 1997, vol. 72, passim; in Europe legal theoretical debates on the topic are still at an embryonic stage and even the most interesting continental-doctrine propositions (Klaus Volk, *Zur Bestrafung von Unternehmen*, “Juristen Zeitung” nr.9, 1993, pp. 429- 435; Bernd Schünemann, *Plädoyer zur Einführung einer Unternehmenskuratel*, in III Deutsche Wiedervereinigung, *Unternehmenskriminalität*, Heymanns, Köln, 1996; Günter Heine, *Sanctions in the Field of Corporate Criminal Liability*, „Eser/Heine/Huber”, “Criminal Responsibility of Collective and Legal Entities”, Freiburg, *Ius. Crim.*, 1999) only mirror points of view taken over from North-American doctrine. (e.g. Law Decree no. 231 of 8 June 2001, through which the Italian law-maker instituted administrative-criminal liability of the legal person, partially took over the United States Sentencing Guidelines philosophy); this determined some authors to affirm that we are witnessing an Americanization of Criminal law of the legal person. See Adrn Nieto Martin, *La responsabilidad penal de las personas jurídicas: un modelo legislativo*, Iustel Publishing House, Madrid, 2008, pp. 19, 262-263.

<sup>3</sup> Gomez Jara, *La culpabilidad en el derecho penal de la empresa*, Marcial Pons, Madrid, 2005, p.296; Adrn Nieto Martin, *op.cit.*, p.265; Florin Streteanu, Radu Chiriță, *op.cit.*, pp.105-106 and bibliography references of the authors.

<sup>4</sup> See Constantin Mitrache, Cristian Mitrache, *Drept penal, Partea generală*, Seventh Edition, Universul Juridic Publishing House, Bucharest, 2009, pp.189-191.

that would affect its image can be identified (such as negative publicity). Criminal sanctions enforceable on legal persons can be adapted to the specificity and nature of the respective company, thus compelled by criminal sanctions to obey the law, and to analyze the consequences of criminal sanctions upon the activity of other legal persons; and special prevention: the legal person sanctioned will try not to break the law in the future.

## **2. Theoretical perspectives regarding sanctions enforceable on the legal person.**

The problem of identifying an efficient sanctioning system that is characterized by flexibility and diversity, adapted to the nature, organization and functioning of the legal person, that would allow for the most appropriate measures to prevent and fight illicit activities committed by legal persons, has been a priority for doctrine and national legislations of the last years, and a preferred topic for international organizations and reunions<sup>5</sup>. Legislations that regulate the criminal liability of legal persons include a wide range of sanctions<sup>6</sup>. Depending on their object there are: pecuniary punishments, punishments that deprive of or restrict certain rights, punishments that concern the very existence of the legal person, moral punishments (which imply public disapproval of the legal person and of its offense); but in fact, all punishments deprive the legal person of or restrict rights and liberties. Depending on every state's constitutional order and criminal policy they are regulated either as principal punishments,

<sup>5</sup> For an analysis of criminal policy aspects and of types of criminal sanctions applicable to the legal person in different legal systems, see: Cristina de Maglie, *L'Etica e il mercato. La responsabilità penale della società*, Giuffrè Publishing House, 2002, UK p.161, Australia p.171, Canada p.180, The Netherlands p.183, France p.212; Florin Streteanu, Radu Chiriță, *op.cit.*, France p.338, Belgium p.356, The Netherlands p.361, Finland p.362, Norway p.362, Portugal p.363, Brazil p.364, S.U.A. p.367, Canada p.377, Australia p.378. At European Union level, framework decisions have initially been rather reserved, allowing the member states to make their own decisions regarding sanctions (there were recommendations concerning the setting up of legal person sanctions) and their types; beginning with the Framework Decision of 29 Mai 2000, on setting up criminal or other nature sanctions against currency forgery, applicable sanctions are specifically provided, although states are free to choose their criminal or non-criminal nature. Consequently, the above-mentioned Framework decision provides four types of sanctions: a- exclusion from public benefits, b- temporary or permanent prohibition of commercial activity, c- legal surveillance and d- legal liquidation. These four sanctions make up the standard list of sanctions provided by most subsequent framework decisions. It was only in 27 January 2003, through Framework decision concerning criminal means environmental protection, that further sanctions were added: specific measures to avoid and repair the consequences of the offence, and legal liquidation sanction is termed dissolution. The fine is not provided in any framework decision before the Framework Decision of 12 July 2005, which includes (art. 6) for the first time the specific obligation to apply as sanction the (criminal or administrative) fine. See Adán Nieto Martín, *op.cit.*, pp.264-265, note 539.

<sup>6</sup> The range of sanctions suggested by doctrine and regulated in Criminal Law of different countries is quite varied. Among pecuniary sanctions, the fine is present in almost all legal systems, and seizure of property (and of debts in some systems), laying d restraint on property, deposit of bail, are regulated in most part of legal systems. Dissolution, as a punishment that refers to the very existence of the legal person, is frequently regulated by national legislation. Other rights-restrictive or -depriving sanctions or those that inflict upon the legal person a strong infamous character, or result in the strengthening out and reorganization of the legal person, have been regulated depending on the particularities of national legal systems. As a result, there are sanctions such as: suspension or prohibition of activities or of a professional (social in some systems) activity, publication of sentencing decision, or negative publicity sentencing (display or broadcast of decision), legal surveillance placement, or probation, closure of premises that served in the commission of the offence, denial of the right to benefit from subsidies or financial aids from public authorities, withdrawal of the right to benefit from fiscal facilities, to contract with the state or public authorities, interdiction to issue checks or use other payment instruments, withdrawal of the functioning license, interdiction to activate on certain markets or to place bonds, shares by public offer, exclusion from negotiation of collective employment contracts at different levels (applicable to trade unions), interdiction to participate to sport competitions (applicable to sport associations), obligation to perform community service, to repair the effects of the offence, obligation to take measures meant to put an end to an illegal, potentially dangerous state of facts and to enter into legality).

or as complementary or accessory punishments, or security measures, or as trial measures enforceable either to all legal persons or to certain categories of legal persons, either as criminal sanctions, or as administrative-criminal sanctions.

Doctrinaire debates with regard to sanctions applicable to the legal person are grounded on jurisprudence and North-American doctrine, and even the most interesting propositions of European legal literature or of continental legislations only reflect or are inspired from the North-American model. Without going into details that would go beyond the limits of this study, foreign doctrine differentiates the purpose of sanctions enforceable on the legal person from the purpose of criminal sanctions enforceable on the private individual. Increasingly more foreign legal literature voices support the idea that the specific and sole purpose of legal person sanctions (the function of punishment regarded as means of attaining a purpose - prevention), through which prevention, reeducation and re-socialization are achieved, is or it should be "self-regulation", "self-organization" or restructuring of the legal person. In terms of this specific function of legal person sanctions, differences of opinion only concern the modality to achieve it, as legal literature outlines different methods<sup>7</sup>. Followers of the economic model<sup>8</sup>, affirm that the fine is the infallible means to stimulate self-organization, while the followers of the structural model<sup>9</sup>, believe that besides the fine, and even separately and more importantly, limitation of the freedom of organizing the legal person is necessary, as well as a restriction on rights other than patrimony. Supporters of the economic theory of corporative criminality state that the fine punishment should be the queen punishment, since the cost of the justice act is minimal compared to the cost of punishments that involve depriving of liberty, and the productive capacity of the accused is not affected. Nevertheless, a part of the economic theory followers<sup>10</sup>, admit that using fine as the sole answer to corporative criminality is adequate only in the case of lucrative legal persons which are only after making a profit. If the purpose of sanctions is for legal persons to be organized in such a way that criminal offences are prevented, than the fine is capable to efficiently fulfill this function, as the objective of these entities is to maintain and maximize profits. Thus, a threat of diminishing profit would inhibit antisocial conduct. But, in order to achieve the self-organization purpose legal individualization of the fine is required, by reference to benefits obtained or expected from commission of the offence, and by taking into account a coefficient which represents the probability of discovery. The higher the black criminality figure for an offence is, the higher the fine provided by law for that offence should be. The carefully legally individualized fine would motivate partners to encourage

<sup>7</sup> See Christopher Wray, *Corporate Probation Under the New Organizational Sentencing Guidelines*, "Yale Law Journal", vol. 101, 1992, p.2019 cited by Adán Nieto Martín, *op. cit.*, p.267.

<sup>8</sup> See Gary Becker, *Crime and Punishment: An Economic Approach*, "Journal of Political Economy", 1968, no.76, p.169-217, formulates the economic theory of tort; another follower of the economic theory, Richard Posner, *Optimal Sentences for White-Collar Criminals*, "American Criminal Law Review.", 1980, no. 17, p.409-418; For a synthesis of debates on this topic, see: Cristina de Maglie, *op. cit.*, p.39-40; Adán Nieto Martín, *op. cit.*, p.267.

<sup>9</sup> See Christopher Stone, *Where the Law Ends, The Social Control of Corporate Behavior*, New York, Harper & Row, 1975, p.179; John Coffee, „No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, "Michigan Law Review", 1981, p. 431; John Coffee, Richard Gruner, Christopher Stone, *Standards for Organizational Probation: a Proposal to the United States Sentencing Commission*, Whittier Law Review, vol. 10, 1988, p.82.

<sup>10</sup> See Richard Posner, *op. cit.*, p.409; Jeffrey Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, "American Criminal Law Review", 1989, pp.513-604.

administrators to prevent anti-social acts. The application of fines would compel the legal person to reorganize, restructure and straighten out by itself, as it knows best what are its strong and weak points<sup>11</sup>.

This ideal image of the fine and its ability to stimulate self-organization is not one that lacks criticism<sup>12</sup>: firstly, the so-called *deterrence trap*, refers to the fact that the general preventive effect of the fine is inexistent when the legal person is insolvent or unable to pay it. The second objection is based on the analysis of groups and legal persons behavior and sociology. If Posner imagines the legal person as a black box where on the one hand we have the *in put* – sanction, and on the other hand the *out put* –self-organization, the functioning of the motivating process is based on the idea that the partners and capital-holders under threat of fine determine administrators to improve organization of activity so that sanctions are avoided. However, in the contemporary world, at least in large corporations and open societies, there is a clear-cut distinction between capital and management, and interests of capital-holders do not always overlap with those of administrators. In such corporations capital-holders are not interested and do not possess the ability to constrain the managers to obey the law. Shareholders may approach fine as an extra tax, and if the final results are positive, it is possible that they do not perceive any illegal act, and therefore have no reason to intervene in the management of the corporation. Another disadvantage of the fine is the so-called *overspill*, which refers to collateral effects, negative consequences on third parties. The fine may generate important negative consequences for “innocent” shareholders, suppliers, and most importantly employees, whose jobs may be endangered by, or even for the social environment. The above-mentioned criticism has generated proposals for removing or diminishing fine side-effects and traps.

One of the solutions suggested, *equity fine*<sup>13</sup>, is to enforce the fine – once it has been settled on - by replacing it with the obligation of the legal person to increase its social capital by issuing shares to match the amount of the fine; thus sacking of employees is avoided and this measure would only affect the legal person members existent at the time of commission of offence/sentencing, who are guilty of not having exercised control over the legal person management. In this way, capital-holders would be compelled to determine managers to respect the law (stimulate self-organization). This solution has however the disadvantages of not achieving its purpose, as the legal person could foresee risk and approach it as capital expenditure.

Some propositions tend to promote new brand-injurious, prohibitive or rights-restrictive sanctions. Others suggest different intervention forms that are mainly based on sanction which would reorganize the legal person, as it is the case with the *structural reform model*, inspired from the probation regime enforceable on private individuals and adapted to legal

<sup>11</sup> See Adán Nieto Martín, op. cit., pp. 267-268.

<sup>12</sup> See Cristina de Maglie, op. cit., p.40; John Coffee, Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, “American Criminal Law Review”, 1980, vol. 17, p.420; John Coffee, “No Soul to Damn no Body to Kick”, pre-cited, p.386; John Coffee, Richard Gruner, Cristopher Stone, Standards for Organizational Probation, pre-cited, p.77; Christopher Kennedy, Criminal Sentences for Corporations: Alternative Fining Mechanisms, “California Law Review”, 1985, vol. 73, p.443-482; Cristopher Stone, Structural Crime and Institutional Rehabilitation, “Yale Law Journal”, 1979, vol. 89, pp.353-360.

<sup>13</sup> Suggested by John Coffee, „No Soul to Damn no Body To Kick”, pre-cited, p.413; also see Florin Streteanu, Radu Chiriță, op.cit., p.333.

persons (*corporate probation*)<sup>14</sup>. The reaction models against legal person deviant conduct, which are original and inventive, some revolute, other shared by minorities or majorities, are said to originate in North-American jurisprudence that in the early 70s started to enforce probation as an alternative to fine; that is, to oblige corporations to rethink their organization, make internal changes in order to prevent new offences. This intervention in the organization and running of the corporation has two major advantages: on the one hand, collateral effects caused by the fine to innocent third parties are avoided, and on the other hand, the fine has an intimidating effect on the legal person board, limiting its power and organizational freedom. If the fine is intimidating for the corporation, it appears that probation has a dissuasive effect upon managers, without perturbing its activity<sup>15</sup>.

Between the economic and the structural model, but closer to the latter crystallized the *Accountability Model (taking responsibility for one's actions) or the Enforcement Pyramid* (pyramidal sanctioning system), built by Braithwaite, Ayres and Fisse<sup>16</sup>. These authors start from the controversy on corporative criminality between interventionist, classic, repressive policy and participative policy or restorative justice<sup>17</sup> and favor the latter. Restorative justice brings together offenders, victims and community, placing the former in a situation where they have to take responsibility and repair the damages caused by their antisocial behavior. The previously mentioned authors suggest changing the way corporative criminality is approached, from a purely repressive way of handling it, to a preventive-repressive one, by implementing ethics and law-breaking prevention programs and focusing on preventive-educative measures, enforced either as independent sanctions, or as conditions for punishment individualization. In the view of the pyramidal sanctioning system authors the commission of an offence by the legal person would have as a consequence an obligation on its part to reform its structures, its management and internal policy in order to carry on its activity in accordance to the law. They believe this to be more acceptable and beneficial for everybody, than the enforcement of pecuniary, prohibitive or rights-restrictive punishments. Therefore, on the first step of the pyramid there should be sanctions that raise awareness of and warn the corporation, on the second step there should be administrative sanctions, on the third an agreement between the offender and its victims mediated by legal bodies, on the fourth criminal sanctions such as: fine, community service and negative publicity, and on the last step there should be more serious sanctions such as imprisonment, withdrawal of rights or dissolution<sup>18</sup>. This progressive modality of intervention is considered to efficiently

<sup>14</sup> See Adán Nieto Martín, op.cit., pp.270-273.

<sup>15</sup> Ibidem.

<sup>16</sup> The following are representative for the presentation and analysis of these ideas: John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, „Michigan Law Review”, 1982, vol.80, p.1466-1507; Ian Ayres, John Braithwaite, *Responsive Regulation, Transcending the Deregulation Debate*, Oxford Socio-Legal Studies, Oxford University Press, 1992; John Braithwaite, Brent Fisse, *Corporations, Crime and Accountability*, Cambridge University Press, 1993, p.141.

<sup>17</sup> The term restorative justice has been used for the first time by psychologist Albert Eglash, who approaches the justice act by means of three paradigm-concepts: retributive justice, distributive justice, and restorative justice. Retributive justice emphasizes the sanctioning of the offender, distributive justice focuses on its rehabilitation, while restorative justice is based on repairing the prejudice created for the victim, which is not limited to payment of damages, but refers to general reparatory measures. For a comparison between restorative and traditional justice see Brândușa Gorea, Dorina Costin, *Medierea în dreptul penal*, University Press Publishing House, Tîrgu Mureș, 2009, pp.72-78.

<sup>18</sup> See Adán Nieto Martín, op.cit., p. 276.

stimulate self-organization, by modifying criminal factors that generated or favored violation of social values. This model is in close connection to the game theory, *tit for tat*<sup>19</sup>, or *carrots and sticks*<sup>20</sup>, which implies attracting the corporation into obeying the law by means of stimulants, such as less severe or exoneration from punishment if it cooperates for the prevention and discovery of offences (if the corporation presents credible prevention, discovery and report of criminal behavior) or, on the contrary, more serious punishment in case of lack of cooperation. These theoretical models and such philosophy of legal person sanctioning regime are to be partially found in the USA Sentencing Guidelines and have been taken over in Europe by the Italian administrative-criminal legislation. Among the favorite punishments of the structural model one can mention probation and negative publicity, and secondly fine and withdrawal or restriction of rights.

**3. Punishments enforceable on the legal person provided by the Romanian Criminal Code.** By instituting the legal person criminal liability (Law no. 278/2006 that modified and adds to Criminal Code<sup>21</sup>) the Romanian law-maker sets up a sanctioning system where the only important punishment is the fine – between 2.500 and 2.000.000 lei, which can be accompanied by one of the five complementary punishments: dissolution, suspension of one activity from 3 months to 3 years or all activity from 3 months to one year, interdiction to participate to public acquisition procedures from one to 3 years, and display or publication of the sentencing decision (art. 53<sup>1</sup> Criminal code), and the New Criminal Code of 2009<sup>22</sup> provides the same punishments, but legal surveillance was added to the complementary punishments (art. 136 and 144).

With regard to the fact that legal person sanctioning is regulated by a single principal punishment, in the bill on the Criminal Code project<sup>23</sup> the Legislative Council observed that in order to ensure a legal person sanctioning balance, both between principal and complementary punishments, and between these punishments and the sanctioning system enforceable on the private individual, it would be preferable for dissolution or suspension of one or all activity to be regulated as principal punishments. This point of view has both pros and cons. However, one must take into account the fact that dissolution as criminal punishment is followed by liquidation, and consequent to liquidation the legal person patrimony is divided among its partners proportionally to their share of social capital (unless there are other provisions); thus enforcement of dissolution as a punishment would make the fine unexplainable, and its effect would be limited. If the fine is provided as principal punishment and dissolution as complementary punishment, than the latter is executed previous to liquidation, allowing more complex effects and more extended finality. Most legislation

<sup>19</sup> For information on the connection between interventionism, cooperative regulation and the game theory, see John Sholz, Voluntary Compliance and Regulatory Enforcement, "Law & Policy", 1984, vol. 6, pp.385-404.

<sup>20</sup> Win Swenson, The Organizational Guidelines. "Carrot and Stick" Philosophy and Their Focus on "Effective" Compliance, „Corporate Crime in America: Strengthening the"Good Citizen" Corporation, Proceedings of the Second Symposium on Crime and Punishment in the United States“, September 7-8, 1995, Washington D.C., p.29, apud. Adfn Nieto Martin, op.cit., p. 277.

<sup>21</sup> Published in the Official Gazette of Romania, Part I, no. 601 of 12 JULY 2006, it came into force on 11 August 2006

<sup>22</sup> Law no. 286/2009 concerning the Criminal Code, published in the Official Gazette of Romania, Part 1, no. 510 of 24 July 2009.

<sup>23</sup> From 07.05.2003.

that regulates criminal liability of the legal person provides the fine as principal punishment, and dissolution is provided either as complementary punishment or it is not provided at all. As for the sanctioning system enforceable on legal persons that was instituted by the Romanian law-maker, legal literature and the author of this study as well, considers it regrettable that it does not include as punishment the interdiction to issue checks, promissory notes, and bills of exchange, or the interdiction to access financial resources by issuing shares or bonds, although they would be necessary in the context of increasing criminality phenomena in these fields<sup>24</sup>. With regard to enforceable punishments, their role and importance, the Romanian law-maker provides principal and complementary punishments, without providing accessory punishments, which derive from imprisonment punishments themselves that are incompatible with the nature of the legal person<sup>25</sup>. Although it is not specifically provided, security measures compatible with the nature of the legal person can be taken<sup>26</sup>, such as seizure of goods provided in art. 118 of the Criminal Code; this, through restriction of the right in property, can manage to prevent repetition of the offence. In agreement with opinions of doctrine the author believes that the other security measures regulated by the Criminal Code in force are not enforceable on the legal person, some of them simply being incompatible with it (e. g. obligation to medical treatment, interdiction to return to the family residence), while others, although they appear susceptible to be enforced on the legal person (e.g. interdiction to be in certain localities, expulsion), are exclusively enforceable on private individuals, when there are no contrary explicit provisions. Romanian doctrine underlined the fact that a divergent interpretation would be the equivalent of an analogy in favor of the accused, which would contravene criminal law.<sup>27</sup> According to the punishments degree of determination, in the case of the legal person the provided punishments are relatively determined, and there are maximum and minimum limits of enforceability, except for the case of dissolution, which is a determined sentence<sup>28</sup>.

In domestic law important rights of the legal person are not acknowledged: all patrimonial rights and a series of non-patrimonial rights, such as freedom of expression, right to integrity, the right to dispose of one's image and to oppose to its abusive use, the right to obtain compensation for moral prejudices, as well as complex rights such as intellectual property<sup>29</sup>. From our knowledge the Constitutional Court has not been directly apprised on the acknowledgment of legal person fundamental rights, but there is a decision<sup>30</sup> that testifies to the incidence of provisions of art. 17 of The Bill of Rights, according to which "any person has the right to property, both by itself and in association with others" and "no one can be arbitrarily deprived of his property". These principles are also provided in the Additional Protocol no. 1 from the Convention for the Defense of Human Rights and

<sup>24</sup> Viorel Pașca, *Modificările Codului penal*, Law no. 278/2006, *Comentarii și explicații*, Hamangiu Publishing House, Bucharest, 2007, pp.68-69.

<sup>25</sup> *Idem* p.66.

<sup>26</sup> For the same purpose, see Viorel Pașca, *Modificările Codului penal*, Law no. 278/2006, *Comentarii și explicații*, Hamangiu Publishing House, Bucharest, 2007, p.66; Florin Streteanu, Radu Chiriță, *op.cit.*, p. 428.

<sup>27</sup> Florin Streteanu, Radu Chiriță, *op.cit.*, p. 428.

<sup>28</sup> Viorel Pașca, *op.cit.*, p.65.

<sup>29</sup> See Gheorghe Piperea, *op.cit.*, p.26.

<sup>30</sup> Decision no. 450/2003 concerning constitutional challenge of art. 20 paragraph (1) and art. 24 paragraph (1) of Law no. 10/2001 on the legal status of real estates abusively taken over during 6 March 1945-22 December 1989.

Fundamental Liberties, ratified by Romania through Law no. 30/1994<sup>31</sup>, which provides in art. 1 paragraph 1 that “any private individual or legal person has the right to have its property respected. No one can be deprived of his property unless there is a public utility cause and under the conditions provided by law and by general principles of international law.”

Legal literature states that the attributes of the right to be a citizen and accountability form a two-term that is naturally combined.<sup>32</sup> Since criminal liability of the legal person is instituted in the Romanian criminal law, one has to accept that the legal person is expected to act as a good citizen. By enforcing criminal sanctions the legal person is limited in exercising certain rights or denied some others, such as the right to property, the right to organize its activity freely, the right to participate to tenders financed from public money, the right to an image, etc, and it is constrained by criminal sanctions to act as a good citizen. With regard to the nature of rights-depriving or –restrictive sanctions enforceable on the legal person, it is believed that they suffered “hybridization” between punishments and security measures. In order to illustrate this statement the following design is necessary: on a graphical line that has at one end mostly retributive punishments and punishments with general prevention function, and at the other end security measures created to prevent the state of danger and have special prevention function, sanctions that prohibit or restrict some rights are somewhere in the middle of this line<sup>33</sup>. It is easily noticeable that the Romanian lawmaker was also marked by this trend, as some of the complementary punishments provided for legal persons, are closer to safety measures than they are to punishments, and they possess an exclusively or mainly preventive character, completely lacking in retributive character (e.g. placement under legal surveillance).

**4. Fine**, the first punishment enforced by British and American courts of law on corporations is provided in almost all legislation that regulates legal person criminal liability<sup>34</sup> and it is the most frequent and appropriate form of punishment. Legal persons with lucrative purpose are set up in order to make a profit and by enforcement of this punishment profit is diminished and development opportunities are reduced. The fine has the advantage of affecting one of the legal person attributes – patrimony, in a direct manner, it implies minimal execution costs, but also presents a series of disadvantages such as: an estimate of the profitability of paying the fine if it is not sufficiently onerous, social, economic, etc. rebound effects that affect third parties or innocent members. Moreover, the legal person can reduce the drawbacks of fine by laying off employees, raising prices, not paying debts, closing down, etc.

The fine punishment provided in art. 53<sup>1</sup> paragraph 2 and regulated in art. 71<sup>1</sup> Criminal Code represents the amount of money that the legal person is sentenced to paying. In Romanian legislation the fine is regulated both as criminal sanction and also as administrative, civil, fiscal, procedural sanction. Criminal fine is a pecuniary sanction whose repressive

<sup>31</sup> Published in the Official Gazette of Romania, Part I, no. 135 of 31 May 1994.

<sup>32</sup> See Carlos Gomez Jara Diez, *La culpabilidad penal de la empresa*, Marcial Pons Publishing House, 2005, p.289 cited de Adàn Nieto Martín, op.cit., p. 106.

<sup>33</sup> Adàn Nieto Martín, *La responsabilidad penal de las personas jurídicas: un modelo legislativo*, Editura Iustel, Madrid, 2008, pp. 300-303.

<sup>34</sup> For France for example, see: Jean Pradel, *Droit pénal général*, 16th Edition 2006/2007, Editions Cujas, Paris, 2006, p.591; Jean-Claude Planque, *La détermination de la personne morale pénalment responsable*, L’Harmattan Publishing House, 2003, p.110; Thierry Dalmasso, *Responsabilité pénale des personnes morales, Evaluation des risques et strategies de defense*, Editions EFE, 1996, p. 71.; F. Streteanu, R. Chiriță, op.cit., p.339.

character results from forced decrease of patrimony of the accused, which is compelled by the criminal court of law to pay the amount of money it<sup>35</sup>. Because it is a patrimonial punishment that consists of the obligation to pay an amount of money which becomes an income to the state budget, it results in forced decrease of the patrimony of the one upon which it is enforced. The fine has both a repressive function by depriving or limiting the payer of the fine, and a preventive function by intimidating the possible offender. Fine as criminal punishment possesses all characteristics particular to criminal sanctions, but it is also endowed with specific characteristics. Paying an amount of money is specific to the fine, whereas other patrimonial sanctions can refer to other tangible or intangible assets (for example, seizure may refer to both property and sums of money). In the case of fine the state only has to recover debt from the prosecuted, while in the case of seizure the goods become property of the state. By its nature, the fine can be easily adapted, and thus it gives the possibility to individualize it and make it proportional to the offence committed; due to its divisibility it can be graded quantitatively depending of the necessities of repression, and in case of legal mistakes<sup>36</sup>, it is easily repairable, thus having the advantage of being both adaptable and remissible. As it is a principal punishment it can only be enforced by the court of law, by itself or accompanied by complementary punishments, and only as a consequence of criminal liability, once it has been legally established. The pecuniary fine sanction has an obvious intimidating function by threatening to damage the legal person patrimony, whose main purpose is making a profit.

The functions and scope of punishment is achieved if legal individualization is adapted to the generic social danger and to the generically assessed danger represented by the offender. The general limits of the fine enforceable on the legal person provided by art. 53<sup>1</sup> Criminal Code are higher than in the case of private individual, somewhere between 2.500 lei and 2.000.000 lei (less than 500.000 Euro), much smaller than in other countries<sup>37</sup>; consequently, it is possible that it does not possess the dissuasive force necessary for general prevention in the case of large corporations<sup>38</sup>. Although in the case of the private individual special punishment limits are provided for each crime in the very incriminating text, in the case of the legal person as well as the case of fine enforced on the private individual, minimal and maximal special limits are provided in the general part of the Criminal Code by reference to imprisonment punishment provided by law for the same act committed by the private individual<sup>39</sup>. Most legislation maintain a balance between the sanctioning regime of the legal person and that of the private individual; for the commission of the same crime the fine sanction for the legal person is viewed from the perspective of the imprisonment or pecuniary punishment enforced on the private individual.

<sup>35</sup> See Nicoleta Iliescu, coordinator Vintilă Dongoroz, *Explicații teoretice ale Codului penal român, Partea generală*, vol. II, Academia R. S. R. Publishing House, 1969, p.60.

<sup>36</sup> *Idem* p.61.

<sup>37</sup> In Belgium the fine can amount to 3,600,000 Euro, in Finland to 900,000 Euro, and in France to 3.000.000 Eur. See Jean Pradel, *Droit pénal general*, 16e Edition 2006/2007, Editions Cujas, Paris, 2006, p. 593.

<sup>38</sup> Viorel Pașca, *op.cit.*, p.67.

<sup>39</sup> According to art. 711 paragraph 2 of the Criminal Code “When the law provides up to 10 years imprisonment or fine for crime committed by private individual, minimum fine for legal person is 5,000 lei, and maximum fine is 600,000 lei. When law provides more than 10 years or life imprisonment for crime committed by private individual, minimum fine for legal person is 900,000 lei “.

The efficiency of a sanction is conditioned by a judicious and correctly completed legal individualization. In the current regulation the Romanian law-maker drew up two very loose individualization milestones between which lays a far too wide range of judicial individualization possibilities, and thus, the same limits comprise facts that pose very different dangers, creating the premises for heterogeneous practice of law and even for serious inequities<sup>40</sup>. The current regulation is also faulty because it does not establish punishment in relation to the nature of crime so that similar crimes are similarly punished, and it does not institute a conversion system from imprisonment into fine that would make the latter efficient, proportionate, and discouraging. It is illustrated by specialty literature<sup>41</sup>, suggested at the second Bucharest International Criminal Law Congress<sup>42</sup>, and provided or recommended by international legal instruments<sup>43</sup> that reference to the legal person turnover, active patrimony, and economic potential would represent a more efficient means of legal individualization. Although the Romanian law-maker is not a stranger to relating the amount of sanctioning fine to criteria that belong to the legal person financial status<sup>44</sup> it is regrettable that such criteria have not been taken over by Criminal Law as well. Economic force, patrimonial actives, turnover, profit or social capital are all criteria necessary and utilized by foreign legislation for the legal individualization of fine. The fact that legal text lacks such criteria may lead to derisory situations, when fines are enforced to the “benefit” of some legal persons, or when they indirectly throw others into bankruptcy or dissolution<sup>45</sup>.

Most legislation decides on the amount of criminal fine enforceable on legal person using the fine-days system which ensures a better individualization in terms of proportionality and parallelism between private individual and legal person liability expressed in the number of fine-days (equivalent to the number of days corresponding to months/years of prison), as well as in terms of efficiency, through the possibility to determine the value of a fine-day by taking into account the patrimonial situation of the accused. The number of fine-days expresses the gravity of the crime committed and the dangerousness of the criminal, irrespective of whether it is a private individual or a legal person, and is based on the punishment general individualization criteria, the value of a fine-day being established by

<sup>40</sup> For the same purpose, see Florin Streteanu, Radu Chiriță, *op.cit.*, p. 410.

<sup>41</sup> See Viorel Pașca, *op.cit.*, p.67; F. Streteanu, R.Chiriță, *op.cit.*, p. 332; Adm Nieto Martin, *op.cit.*, p. 279.

<sup>42</sup> J. Rădulesco, *La responsabilité pénale des personnes morales*, Actes du Congrès International de Droit Penal, București, 1929, *Compte rendu des discussions*, citat de: Viorel Pașca, *op.cit.*, p.67-68 ; Florin Streteanu, Radu Chiriță, *op.cit.*, p.332.

<sup>43</sup> Based on constitutive treaties and regulations and decisions issued by the Commission based on treaties (e.g. art. 1 paragraph 1 letter b of the Council Regulations no. 2988/74, of 26 November 1974), the Commission may decide enforcement of administrative sanctions, in case companies behavior breaks competition community laws, between 1.000 and 1.000.000 euro, and the fine can amount to 10% of the turnover of each company that took part in anti-competitive practices of the previous year. Proiect Corpus Juris, coordinated by prof. M.Delmas-Marty and J.A.E. Vervaele (available at [http://ec.europa.eu/anti\\_fraud/green\\_paper/corpus](http://ec.europa.eu/anti_fraud/green_paper/corpus); [www.intersentia.be](http://www.intersentia.be), Implementarea Corpus Juris in statele membre) in art. 14 letter h. he suggests that the principal punishment for organizations should be the fine amounting to 10 million Euro, and in art. 15 (3) he suggests to increase punishments by reference to the social and economic status of the organizations.

<sup>44</sup> E.g.: art. 276 of Law no. 297/2004 regarding the capital market, published in the Official gazette of Romania no. 571 of 29 June 2004, modified and added on by Law no. 208/2005, Government Ordinance no. 41/2005, Law no. 97/2006, provides fines between 0,5% and 5% of the social capital or between half and the totality of the transaction value that involved commission of facts incriminated by law.

<sup>45</sup> See Florin Streteanu, Radu Chiriță, *op.cit.*, p.410 .

the law-maker either in the form of a fixed amount or by reference to economic criteria such as turnover, profit, social capital, etc.

The above-mentioned shortcomings have been solved in the New 2009 Criminal Code, which uses such criteria in setting up the legal person fine<sup>46</sup>. According to art. 137 of the New Criminal Code, the amount of the fine is set up with the help of the fine-days system, and the amount of a fine-day is set up by reference to the turnover in the case of lucrative legal persons, to the patrimonial actives value in the case of other legal persons, and to other obligations of the legal person.. The number of fine-days is set up taking into account the general punishment individualization criteria and special limits are framed by five individualization criteria. The introduction of the aggravating state<sup>47</sup> in paragraph 5 of the respective article is salutary in the author's opinion, and it includes the pursuit or achievement of a patrimonial aim. In this situation the fine-days provided by law for the respective crime can increase by one third, but not exceed the general maximum fine.

**5. In Romanian law dissolution** can exist both as a modality or form of civil reorganization (voluntary dissolution), as a civil sanction<sup>48</sup> or complementary punishment enforceable on the legal person, according to art. 53<sup>1</sup> paragraph 3 letter a. According to art. 71<sup>2</sup> of the Criminal Code *“(1) Legal person dissolution, as complementary punishment is enforced when the legal person was created for the purpose of committing offences, or when its object of activity was modified to serve this purpose (2) If in bad-faith one of the complementary punishments provided by art 53<sup>1</sup> paragraph 3 letter b)-d) are not served, the court of law rules dissolution of the legal person.”* The New 2009 Criminal Code takes over this provision in art. 139 integrally. Dissolution as complementary punishment is the heaviest punishment enforceable on the legal person, and it triggers serious consequences that affect the very existence of the legal person and its employees, thus affecting the economic life of the region or community where it is located. Most legislation enforces the dissolution as complementary punishment only in restrictive conditions and for offences with high social risk. The finality of dissolution as complementary punishment makes it

<sup>46</sup> Art. 137 provides the following: *“(2)The amount of the fine is set up by fine-days system. The amount corresponding to a fine-day, between 100 and 5,000 lei, is multiplied by the number of fine-days that may be range between 30 and 600 days. (3) The court of law decides on the number of fine-days based on general punishment individualization criteria. The amount corresponding to a fine-day is determined by taking into account the turnover for lucrative legal persons or the value of patrimonial actives for other legal persons, or other obligations of the legal person. (4) Special limits of fine-days are situated between: a) 60 and 180 fine-days, when the law provides the fine punishment for the committed crime; b) 120 and 240 fine-days, when the law provides up to five years imprisonment, as sole punishment or as an alternative to fine; c) 180 and 300 fine-days, when the law provides over 10 years imprisonment; d) 240 and 420 fine-days, when the law provides up to 20 years imprisonment; e) 360 and 510 fine-days, when the law provides over 20 years or life imprisonment. (5) If the legal person attempted to fulfill a patrimonial benefit the special limits of fine-days provided by law for the offence committed can increase by one third, but not go over the general maximum of the fine. On deciding on the punishment the value of the obtained or desired patrimonial benefit will be taken into consideration.”*

<sup>47</sup> For a distinction between aggravated states (each of them produce effects on the punishment) and aggravating circumstances (which generate one aggravation, irrespective of the number of circumstances), see Constantin Mitrache, Cristian Mitrache, op.cit., p.383.

<sup>48</sup> According to art. 45 și 53 of Decree no. 31/1954, legal persons are dissolved if their scope or the means used in fulfilling it become contrary to the law or to the social cohabitation rules, or they try to achieve another purpose than the one declared, and goods left after liquidation belong to the state.; art. 56 of Government ordinance no. 26/2000 provides that the association is dissolved on request of any interested person, when its scope or activity have become illicit or contrary to public order.

similar to capital punishment, and it is considered to be the “civil death”<sup>49</sup> of the legal person. According to the legal test this punishment is enforceable in three situations: a) when the legal person was created for the purpose of committing offences; b) when the object of activity of the legal person was modified in order to serve to the commission of offences; c) when in bad-faith the legal person does not serve one of the following complementary sentences that were enforced on it: suspension of one or all activity connected to the committed offence, closing down of some branches, interdiction to participate to public acquisition procedures; and the 2009 Criminal Code also includes failure to respect the measures imposed by legal surveillance.

The exceptional character of dissolution as criminal sanction makes it possible to enforce it on criminal or terrorist organizations or in the case of extremely serious crimes, and in addition, in case of failure to serve other sentences previously enforced on the respective legal person. In some authors’ points of view, dissolution would not be a sanction aimed at legal persons but rather a sanction or a measure taken against organized criminal groups<sup>50</sup>. In the situation that the law provides for enforcement of dissolution, the legal person is used as a simple instrument in the hands of the organized criminal group.

The purpose referred to in art. 71<sup>2</sup> of the Criminal Code is not the same with the declared object of activity, which can only be a licit one, but is determined by reference to the real activity carried out by the legal person. Since the declared object of activity is always a licit one, it usually comprises a wider range of activities than the activity actually carried out by the legal person, including activities that are never done by it, and therefore evidence for the fact that the legal person was created for the purpose of committing offences or modified its object of activity in order to do so, is difficult to find. In such cases repeated commission of offences, and analysis of the activities carried out by the legal person may represent evidence. When *ab initio* the legal person was set up with the exclusive purpose to commit offences or when repeated commission of offences reveals that the legal person is used for this purpose, the enforceable sanction is dissolution, and the private individuals involved in the creation of such legal person, who assembled for the commission of conspiracy or were part of an organized criminal group are liable of crimes, depending on their contribution. The share of social capital in the case of these partners will not be distributed after liquidation, but it will be seized in accordance with art 118 letter b, as assets used in the commission of crimes.<sup>51</sup> With regard to the first situation, when the legal person was set up in order to commit offences, the intent to use it as a cover for criminal activity exists from its very creation<sup>52</sup>. In French doctrine<sup>53</sup> it is believed that for enforcement of the dissolution punishments it is not necessary for all partners to be aware of the fact that the legal person was set up in order for offences to be committed, or for the legal person to have as sole activity the commission of offences. As a consequence, the existence of an illegal activity which is also the principal activity of the legal person constitutes grounds for dissolution.

<sup>49</sup> Viorel Pașca, op.cit., p.103.

<sup>50</sup> Adân Nieto Martin, op.cit., p. 316.

<sup>51</sup> Florin Streteanu, Radu Chiriță, op.cit., p. 418.

<sup>52</sup> Viorel Pașca, op.cit., p.105; Florin Streteanu, Radu Chiriță, op.cit., p. 415.

<sup>53</sup> Cited by Florin Streteanu, Radu Chiriță, op.cit., p.415.

In case the legal person modifies its object of activity<sup>54</sup>, that is, its primary function is no longer totally or partially respected –French Law considers that this modification can also be partial- the legal person that carries out both licit and criminal activities can be sentenced to dissolution, if the majority of its activities are prevalingly criminal in character. Based on legislative debates on the bill that instituted legal person criminal liability in Belgium, the Belgian doctrine and jurisprudence opinionates that in order for dissolution to be enforceable, the modification of activity must be total, that is, the legal person must carry out activities which are exclusively contrary to its object of activity<sup>55</sup>. Romanian doctrine<sup>56</sup> expressed the opinion that the possibility to enforce dissolution when the legal person carries out both licit and illicit activities must not be excluded, and that it is necessary for courts of law to investigate to what extent the initial purpose of the legal person was modified to serve illegal activities. If licit activities still carried out by the legal person are nothing more than a cover for committing offences, than the enforcement of the dissolution punishment is necessary. Subjectively, both the hypothesis of the creation of the legal person for commission of crimes, and that of modifying the legal person object of activity to serve illicit purposes, intent is a necessary factor. A court cannot rule dissolution of the legal person unless there is intent when committing the offences, and therefore offences committed by negligence are not compatible with the purpose mentioned in the legal text – committing offences<sup>57</sup>.

With reference to the third hypothesis, when in bad-faith the legal person does not serve one of the complementary punishments that have been enforced on it, dissolution is the consequence of disregarding the ruling of a court of law<sup>58</sup>, and is seen as *sanction for delay* in enforcing complementary punishments that the legal person was convicted to<sup>59</sup>. If the convicted legal person does not serve the complementary punishment, which can be suspension of one or all activity, closing down branches, interdiction to participate to public acquisition procedures, the court of law rules the dissolution of the legal person (art. 71<sup>2</sup> paragraph 2 of the criminal Code); in the case of not serving the complementary punishment to display or broadcast the conviction decision, the court rules suspension of one or all activity until the sentence is served, but not later than in there months' time; if during this time the punishment has not been enforced, the court rules dissolution of the legal person (art. 71<sup>3</sup> paragraph 2 and 3 of the Criminal Code). With reference to the last hypothesis, legal literature states that non serving a complementary punishment in bad-faith does not effect in its repealing and replacement with another, but rather has a cumulative effect by bringing about the enforcement of another complementary punishment, and failure to serve both punishments cumulatively generates dissolution<sup>60</sup>. As Criminal law does not define bad-faith as a form of guilt, in doctrine failure to serve a sentence in bad-faith refers to

<sup>54</sup> E.G. the object of activity is no longer the one initially declared and carried out over the past years- tourism, but it is turned into human traffic.

<sup>55</sup> Florin Streteanu, Radu Chiriță, op.cit., p. 415.

<sup>56</sup> Idem p. 416.

<sup>57</sup> idem pp. 416-417.

<sup>58</sup> Viorel Pașca, op.cit., p.105.

<sup>59</sup> Constantin Mitrache, Cristian Mitrache, op.cit., p. 211.

<sup>60</sup> Viorel Pașca, op.cit., pp.109-110.

committing an offence with direct or indirect intent; and in this case it is about intentional lack of action of the legal person which excludes negligence.

**6. The following complementary punishments:** *suspension of one or all activities of the legal person and closing down branches of the legal person* imply taking into consideration the circumstances in which the activity that involved the commission of the offence took place. There must be an indissoluble connection between the suspended activity or the closed down branches, and the offence committed, or the activity or the branch must have provided the opportunity or the situation which led to the commission of the crime. Suspension of activity and closing down premises were provided as security measures by the Criminal Code of Carol the 2nd ( art. 85 and 84)<sup>61</sup>, which the doctrine of the time considered to have been eliminatory security measures<sup>62</sup> consisting of the withdrawal of rights for a period of time, which was the equivalent with the elimination of the dangerous element from social life<sup>63</sup>; this measure was taken only if there were doubts that without such intervention new offences would be committed as a result of the circumstances in which the legal entity carries out its activity.<sup>64</sup> Part of the doctrine of that time<sup>65</sup> believed that the measure of closing down premises operated *in rem*, thus no third concessionaire was entitled to activate in industry and commerce in the closed premises, but the trader could re-start commerce or industry in other premises. Jurisprudence of the time<sup>66</sup> stated that the measure of closing down premises maybe taken if it appears to be absolutely necessary for the prevention of new offences<sup>67</sup>.

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<sup>61</sup> According to art. 85 “when a crime or a civil wrong punishable by law with at least a year of prison, was committed by the directors or managers of a company, partnership, or corporation in the name of the legal person and by means of the legal person, the court of law can sentence both the private individual, and the legal person to suspension or dissolution as a security measure, depending on the danger that its activity represents for public order and morality. Dissolution is accompanied by liquidation of the legal person assets under legal person law. Suspension consists of the ceasing of any activity of the legal person, even of those conducted under another name and with other directors or managers. The suspension duration cannot exceed two years”; according to art. 184 “closing down of industrial or commercial premises can be ruled by a court of law in the situations provided by law and when this measure appears to be necessary in the prevention of new offences.”

<sup>62</sup> Mircea Georgescu, Măsurile de siguranță pentru apărarea socială și ocrotirea individuală organizate prin Codul penal și procedura penală Regele Carol al II-lea, Imprimeria Fondul Cărților Funduare, Cluj, 1938, p.201.

<sup>63</sup> Mircea Georgescu, op.cit., p.203.

<sup>64</sup> Vintilă Dongoroz, in Codul penal Carol al II-lea adnotat, Librăriei Socec & Co Publishing House, București, 1937, p.174

<sup>65</sup> E. Petit, C. Zotta, Viforeanu, I. Tanoviceanu, Codul penal adnotat, p.98.

<sup>66</sup> Cernăuți Court of Appeal S.I. Holiday Panel, criminal decision no. 620 of 6 September 1937 cited by E. Petit, op.cit., p.98.

<sup>67</sup> The court decided to close down a factory because it lacked “accident prevention equipment”, “the owners were punished for homicide and negligent injury”, but this measure could have been revoked if there had been evidence for the introduction of required equipment. The court of law observed that most of the problems signaled by the expertise have been removed and the factory exploited by the accused can now function normally without posing any dangers, and the measures taken against these can come to an end when there is no danger for public safety.

**7. The complementary punishment of interdiction to participate to public acquisition procedures** represents an innovative criminal sanction, forecasted by legislation on public acquisitions<sup>68</sup>. Participation to public acquisition procedures, free access to such procedures is regulated in both domestic legislation and community norms<sup>69</sup>, and proposals to limit this right have been the subject of international regulations<sup>70</sup>. Such punishment is provided in most national legislation and in international legal instruments, under different names and with different contents<sup>71</sup>.

According to art. 71<sup>6</sup> of the Criminal Code “*The complementary punishment that forbids participation to public acquisition procedures consists of the interdiction to directly and indirectly participate to the procedures where contracting for public acquisitions is established by law.*” This content of this provision reveals that the punishment discussed here effects in the restriction of the legal person capacity to exercise a certain right, that of contracting. This punishment imposes upon the convicted legal person the obligation to restrain from exercising the right to participate to public acquisition procedures. In principle the punishment has a facultative character, and by its nature it is enforceable on legal persons in case of intentional offenses related to the conclusion or execution of public acquisition contracts, although the law does not impose such relation. Doctrine opinionates that due to its specificity this punishment only refers to lucrative legal persons<sup>72</sup>, but the author of this paper is reserved in adhering to it. If the use of European structural funds – to which non-lucrative legal persons have access-are not included in the category of public acquisition procedures contracts than this allegation is correct, but the author believes that these financing sources represent a form of public acquisition. In order to correctly interpret and enforce the text quoted, a thorough explanation of the phrase “public acquisition procedures contracts” is necessary. Since criminal law does not define and explain this phrase, it is necessary to make use of the provisions of art. 3 letter ș of the Emergency Government Ordinance no. 34/2006, which defines the procedure as the totality of stages that have to be followed by the contracting authority and by the candidates/tenderers, so that the agreement of the parties on their engagement in the public acquisition contract is considered valid. The same text

<sup>68</sup> E.G.O. no. 34/2006 regarding public acquisition contracts, public works concession contracts, and public services concession contracts, modified and added on by Law no. 337/2006 (published in the Official Gazette of Romania, part I, no. 418 of 15 May 2006), modified and subsequently added on by Law no. 128/2007 and E.G.O. no. 94/2007, which provides in art. 181 the situations when the contracting authority can exclude a tenderer, if for example it did not fulfill its obligations, such as paying taxes and contributions to the state budget, and in art. 180 provides the obligation of the contracting authority to exclude from these procedures those tenderers that in the past 5 years have been convicted for participation in criminal organizations, corruption or money laundering.

<sup>69</sup> For details: D. D. Șerban, Participarea la procedurile de atribuire a contractelor de achiziție publică, Dreptul nr. 1/2008, p.132-152; D. D. Șerban, Poziția favorizantă a operatorilor economici la procedurile de atribuire a contractelor de achiziție publică, Dreptul nr. 7/2008, pp.178-190.

<sup>70</sup> E.g.: O.C.D.E., Convention on Fighting Corruption Acts, see D. D. Șerban, Participarea la procedurile de atribuire a contractelor de achiziție publică, Dreptul nr. 1/2008, p.151.

<sup>71</sup> For example France, art. 131-34 of the French Criminal Code provides withdrawal of the right to contract with the state or with the public authorities, art. 131.36.6 provides withdrawal of the right to benefit from public subsidies, including interdiction to issue shares or bonds, to participate to the stock exchange activities by applying for public subscription; in Italy, art. 9.2. letter d of Law decree no. 231/2000 provides withdrawal of the right to benefit from subsidies and public assistance, or rescission of those already obtained.

<sup>72</sup> Florin Streteanu, Radu Chiriță, op.cit., p.424.

provides that the procedures are the following: open auction, limited-access auction, competitive dialogue, negotiation, tender, solution contest. Without the intent to go into too many details on this topic, in order to make the meaning of the phrase<sup>73</sup> more unambiguous, further clarifications are necessary. Specialty literature<sup>74</sup> observes that the criminal law-maker has been superficial in approaching the complementary punishment that is under analysis here. There is no correlation of criminal regulations with E.G.O. no. 34/2006. In the opinion of the above-mentioned author, the use of the phrase “public acquisition procedures contracts provided by law” is equivalent with its inclusion in the provisions of public acquisition contracts and with placing public services and/or work contracts away from the incidence of criminal law. The same author observes that the law-maker disregards the principle of equality in front of the law by withdrawing the private individuals right to participate to such procedures for a period up to 10 years and (based on art. 53 pt. 2, letter a by reference to art. 64 paragraph 1 letter c of the Criminal Code), and in the case of legal persons for a maximum of 3 years (based on art. 53<sup>1</sup> paragraph 3 letter d, by reference to art. 71<sup>6</sup> of the Criminal Code)<sup>75</sup>. Another interpretation problem of art. 71<sup>6</sup> of the Criminal Code is the reference to direct or indirect participation to such procedures. The phrase “participant to a procedure” is not defined and E.G.O. no. 34/2006 uses terms such as: tenderers, contenders, and competitors, therefore the phrase “participant to the procedure” may be interpreted to include tenderers, contenders, and competitors, as defined by art. 3 of the previously mentioned normative act, but not to include sub-contractors. By using the phrase “direct or indirect participation” the Criminal Code seems to refer to sub-contractors<sup>76</sup> as well, but the majority opinionates that the criminal provision under analysis only includes

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<sup>73</sup> The types of public acquisition contracts are the following: works contracts, supply contracts, and services contracts. The public acquisition contract is defined as onerous contract, drawn up in writing between one or more contracting authorities and one or more economic operators, whose object is the execution of work, the supply of products or services. The public acquisition contract includes the category of Sectorial contract. The concession of public works contract is the contract with the same characteristics as the works contract, but it is differentiated by the fact that in exchange for the work done the contractor, as concessionaire is provided by the contracting authority with the right to exploit the result of its work for a limited period of time, or with this right and also a pre-established amount of money. The services concession contract is the contract that has the same characteristics as the service contract, but it is differentiated by the fact that in exchange for the work done the contractor, as concessionaire is provided by the contracting authority with the right to exploit the services for a limited period of time, or with this right and also a pre-established amount of money. The works contract is that public acquisition contract whose object is: the execution of works in relation to the established activities or the execution of construction works – design, planning, execution of a building, or creation by any means of a construction that corresponds to the necessities and objectives of the contracting authority. The supply contract is the public acquisition contract different from the works contract, whose objective is to supply one or more products, by sale, including installment plans, leasing. The public acquisition contract whose main object is to supply products and if necessary operations for their installation/ working is considered a supply contract. The services contract is that public acquisition contract, different from the works contract or supply contract, whose object is to provide one or more services.

<sup>74</sup> D. D. Șerban, *Participarea la procedurile de atribuire a contractelor de achiziție publică*, Dreptul no. 1/2008, p.147, suggests extensive interpretation, that is, extending interdiction over the manufacturers and intermediaries mentioned in the tender or over the legal persons that exercise a certain influence over participants (affiliated to participants) or over those who support the direct participants in terms of financial/technical resources/workforce.

<sup>75</sup> *Ibidem*.

<sup>76</sup> For this purpose see M.A. Hotca, *Codul penal, Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2007, p. 678.

direct participants, indirect ones including simulation by interposition of persons<sup>77</sup> or by association with other legal persons<sup>78</sup>; thus the subcontractor does not take part to the procedure but is only a third party. Restrictive interpretation is preferable because the persons that use the interposition methods with direct or indirect intent aim at becoming the beneficiary of a public acquisition contract, at accessing public funds, thus indirectly participating to the mentioned procedure. Another aspect that doctrine pointed out is the problem of the prospects of an on-going public acquisition contract when the legal person is irrevocably convicted. French doctrine supports the annulment of the contract whereas Romanian doctrine<sup>79</sup> supports withdrawal of the right to participate to future acquisitions. The author of this study believes that the prospects of such contract must be evaluated in light of the nature of the crime for which the legal person was convicted. If the conviction is for a corruption offence committed while trying to obtain the public acquisition procedure contract, and it was discovered subsequent to the conclusion of the contract but previous to its execution, it is only natural to annul the contract, not necessarily as criminal sanction because it can also be regarded as civil sanction (nullity of contract due to illicit causes).

**8. The punishment to display or broadcast the conviction order**, also known under the name of negative publicity, is a moral sanction with a dissuasive effect, and according to most opinions, it originated from North-American<sup>80</sup> doctrine, jurisprudence and regulations, and was then taken over by European<sup>81</sup> doctrine and legislation. Authors argue that the general preventive effect of this sanction is supported by the fact that under threat of losing prestige and one's image, the trader of the "consumers' age", which sees the sales volume and possibility of finding new partners endangered, will take organizational measures that would prevent the enforcement of such sanction. Informing the public on the circumstances that led to the commission of an offence would have an intimidating effect on both corporations and third parties. Followers of the economic model affirm that this type of punishment is more adequate in the case of offences whose victims are consumers, employees, or creditors. Using this as starting point there can be identified three types of negative publicity: the classical one – publication of the whole or of a part of the conviction order in a mass media instrument; a form of publicity limited to the victims of the offence; and a third form of publicity that involves raising awareness on the management and administrative

<sup>77</sup> Florin Streteanu, Radu Chiriță, op.cit., p. 425; D. D. Șerban, op.cit., p.149; the interdiction refers to both direct drawing up of public acquisition contracts and the drawing up of public acquisition contracts by means of intermediaries.

<sup>78</sup> Viorel Pașca, op.cit., p.116.

<sup>79</sup> Florin Streteanu, Radu Chiriță, op.cit., p. 425.

<sup>80</sup> The Committee proposed by Comisia Brown to reform federal law, and subsequently fiercely debated in North-American doctrine, see: Brent Fisse, John Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press, 1983, passim; John Coffee, "No soul to damn no body to kick", pre-cited, p.212; Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, „Melbourne University Law Review”, 1971, pp.107, 139-141. In these authors' opinion, if in the case of the private individual infamy-bringing punishments have a stigmatizing effect, which needs to be avoided as it brings prejudices to the person's dignity in case of legal persons they appear to be appropriate, and would motivate corporations to protect their status and reputation; apud. Adán Nieto Martín, *La responsabilidad penal de las personas jurídicas: un modelo legislativo*, Edtura Lustel, Madrid, 2008, p. 304, note 647.

<sup>81</sup> For information on the reluctance of continental doctrine to take over this form of thundering out against corporations, which according to some authors (Tiedemann) would be explained by the existence of memories about such Middle Ages punishments in our collective conscience, see Adán Nieto Martín, op.cit., p. 304.

mistakes<sup>82</sup>. It is noticeable that the law-maker chose the classical form of punishment, publication or broadcast of the conviction order in excerpt, “in the form and place established by the court of law”. Foreign legal literature, as well as the author of the study, are very reserved as far as this modality of punishment is concerned because the simple publication of the court ruling, using cumbersome technical and official language is difficult to understand for the ordinary citizen, and it is not capable to fulfill the purpose of this sanction<sup>83</sup>. The court of law must act extremely judiciously in selecting the place and the publication that would have the highest impact, and raise most interest in relation to the type of offence for which punishment was enforced. Publication of an official insertion on altered books of a company, in a tabloid might have no impact on the image of the legal person concerned. The sanction has facultative character, can be enforced on all legal persons that are criminally liable both for intentional offences and for those committed by negligence.

**9. Placement under legal surveillance**, provided by the 2009 Criminal Code as complementary punishment enforceable on the legal person, consists, in accordance with art. 144. “(1)... of the designation by a court of law of a legal administrator or of a legal trustee who will keep the activity that resulted in the commission of the offence. (2) The legal administrator or legal trustee has the obligation to notify the court of law when there he observes that the legal person did not take measures that could prevent commission of other offences. In case the court discovers that the notification was well-founded it must replace the punishment with the punishment provided in art. 140. (3) Placement under legal surveillance is not enforceable on the legal persons mentioned in art. 141”

The introduction of this new legal person complementary punishment is salutary to completion of the range of sanctions enforceable on the legal person, although the text is not very clear about the role, powers, and professional qualifications of the legal administrator or trustee or about who pays for the expenses generated by the surveillance of the activity that occasioned the commission of the offence. These problems will be probably dealt with in the enforcement law and the procedural norms. The text specifically states that the responsibilities of the legal trustee are limited to the “surveillance” of the activity and notification of the court when the legal person fails to take the measures necessary to prevent commission of new offences. Foreign legal literature states that legal surveillance, guardianship or probation (the different terms derive from the Anglo-Saxon and the continental legal systems) is a sanction that belongs to the structural model, which is more inclined towards re-structuring the legal person, as a form of re-socialization<sup>84</sup>. By reference to the sphere of competencies assigned to the legal trustee or administrator (termed commissary in Italia, probation official in the USA): to intervene in the running and management of the legal person, and depending on the purpose of its designation, different theoretical and legislative probation models can be identified. Whether its powers are more or less limited or unlimited is strictly connected to the need of the probation official to intervene in controlling or guiding the reorganization of the legal person. The purposes of this intervention can be summarized in the following way: to survey, to control or make the necessary changes for the legal person to avoid commission of new offences, or to take measures to ensure the repairing of the damages produced by the offence,

<sup>82</sup> Adán Nieto Martín, op.cit., p. 306.

<sup>83</sup> John Coffee, “No soul to damn no body to kick”, precit., p.212; Brent Fisse, John Braithwaite, The Impact of Publicity on Corporate Offenders, pre-cited, p.288; Adán Nieto Martín, op.cit., p. 308.

<sup>84</sup> Adán Nieto Martín, op.cit., pp. 287-299.

or the serving of the sentence by the offender. The duration of legal surveillance is determined by the subsistence of the state of danger that imposes it, which makes it more similar to security measures<sup>85</sup>.

USA Sentencing Guidelines regulates four situations in which the sentence could be probation: when the internal control systems are inappropriate; when the circumstances in which the offence was committed have not been clarified in an internal investigation; as a measure to ensure victims of the offence are receiving compensation; as an alternative to the fine punishment, compensation orders or any other pecuniary obligations that the corporation cannot perform. As for the allegation that the legal person internal organization is inadequate, doctrine opinionates that when this organization is partially responsible for the existence of illegal behavior, reoccurrence of the offence, involvement of a large number of employees in the commission of the offence, the running bodies attitude that refuse to give information necessary to clarify the offence circumstances, are all hints of inadequate organization<sup>86</sup>. The Sentencing Guidelines also regulates aspects regarding the possibility if a higher degree of involvement on the part of the legal trustee when the offence is committed by the board of the corporation, and a lower degree of involvement when committed by lower ranking employees.

In the continental law system, the Italian regulation, mainly inspired from North-American one, assigns wide powers to the probation commissary, which is compelled to intervene in the organization of the legal person and take measures that would prevent commission of new offences, the only limit being the intervention in the administrative documents of the legal person, when he needs authorization of the legal body<sup>87</sup>.

German doctrine proposes a form of legal surveillance where the legal administrator possesses minimal competences in the intervention in the running and management of the legal person<sup>88</sup>, which are limited to surveillance and notification of the legal bodies, when causes that led to the commission of the offence persist. It appears that this theoretical model has been liked and taken over by the Romanian criminal law-maker. In this model the legal administrator has no attributions related to proposing reorganization methods to the court of law, intervening in the management and administration of the legal person. Its only responsibility is to survey (keep under observation, guard, monitor) the activity of the legal person, without having any authority or control over it. This probation model is exclusively aimed at special prevention, its finality being to avoid repetition of the offence of commission of new offences by the convicted legal person. Schunemann comes with an interesting proposal that could also achieve general prevention through negative publicity; he suggests that all documents issued by a legal person under probation be individualized by an imprint reading "under legal surveillance!"<sup>89</sup>.

<sup>85</sup> John Coffee, Richard Gruner, Cristopher Stone, Standards for Organizational Probation., precit., p.88; Bernd Schünemann, Begründung und Entwurf eines Gesetzes zur Bekämpfung der Unternehmenskriminalität, in Schünemann, B. (Hrsg.), Unternehmenskriminalität, Deutsche Wiedervereinigung Band III, Köln, 1996, p.173.

<sup>86</sup> John Coffee, Richard Gruner, Cristopher Stone, Standards for Organizational Probation., pre-cited, pp.82-85.

<sup>87</sup> Adán Nieto Martín, op.cit., p. 298.

<sup>88</sup> Bernd Schunemann, Plädoyer zur Einführung einer Unternehmenskuratel, in: Schünemann, B. (Hrsg.), Unternehmenskriminalität; Deutsche Wiedervereinigung Band III, Köln, 1996, p.141; Bernd Schunemann, Begründung, pre-cited, p.177.

<sup>89</sup> Bernd Schunemann, Begründung, pre-cited, p.175, quoted by de Adán Nieto Martín, op.cit., pp. 296-297.