

## GENERAL THE CRIMINAL LIABILITY

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### **Abstract:**

*In the Insolvency Law there is provisioned a series of crimes that can have as authors either one of the following : the debtor-natural person , the managers of the directors of the debtor-legal person, the judicial administrators, the liquidators or even the creditors. All these persons have the status of active circumstantiated subject.*

*The crimes provisioned by the Insolvency Law are result crimes. The result of the abusive act is a material loss. The insolvency state is a premise of the fraudulent bankruptcy offence, without which the crime dose not exist.*

**Key words:** *insolvency, criminal liability, result crimes, active circumstantiated subject*

**JEL classification-K-22**

### **Introduction**

The Insolvency Law regulates a number of crimes which can have as perpetrators the debtor as individual or the administrators or directors of the debtor, as legal entity, or judicial administrators or liquidators or, in general, the lenders, demanding in their own name or through intermediaries, registration of a non-existent claims on wealth of debtor. As a historical we recall in this material the idea which is presented by authors Sabău, Uher and Nagy C. M. (2015, p. 11) about the origin of insolvency „the origin of insolvency proceedings since ancient times are found in Roman law, as an instrument of public law, imagined and developed by jurisconsults of the time where it materialize in the procedure named „venditio bonorum,, later became „distractio bonorum,, as a remedy to extremely severe sanctions adopted by „ Law of the 12 table” .

Currently in case the illegal acts that may attract liability governing bodies of the debtor legal entity, also coated criminal nature, perpetrators of these crimes are not only legal representatives of the debtor but even members of its collegial bodies, management or supervisory, and also persons who, usurping the functions, determined the occurrence of insolvency. Insolvency is regulated by Law no. 85/2014, published in Official Gazette no. 466/2014 and replacing the old Law no. 85/2006 on insolvency proceedings.

### **Materials and methods**

With regard to legal entities which may be held liable, we emphasize that the most controversial issue is the criminal liability of public institutions, the exception in the existing Criminal Code, these public institutions engaged in an activity not subject to the private domain.

With regard to offenses that may be committed by a legal entity, in cases involving criminal liability of legal entities, existing until now, these entities were convicted of

negligent injury, offense regarding health and safety at work, copyright offenses, deception, tax evasion or prosecuted for supporting an organized criminal group also for involving in drug trafficking, fiscal evasion, giving bribe, money laundering and in aggravated form of manslaughter.

We note that most of these acts are crimes whose immediate result is the production of material injury at the expense of the injured party. Can attract such liability acts committed by organs, representatives and trustees, suspects or persons not officially work for the entity, but acting under its authority or of whose acts that legal entity received, as can engage the criminal liability of legal entities for offenses committed by the administrator.

### **Results and discussion**

The manager may be considered the model of the active subject of these crimes. The criminal sanctions applicable to the managers can't be extended over the in debt company. Still, when the offence that causes damage is committed during the exercising of his duties, the company may be made liable as a civil responsible party. The loss of the manager's reputation due to his criminal punishment may lead directly or indirectly to the loss of reputation and credibility on the market for the company. The company suffers an important prejudice from this diminution of its credibility.

The commercial legislation regulates certain interdictions and terminations, related to the managers who committed criminal offences that apply in time or after executing penal sanctions. Thus, according to the companies' law, persons who cannot be founders cannot be administrators, managers or company representatives either, and if chosen their rights have been withdrawn. The companies' law also stipulates that founders (or administrators) cannot be persons that were condemned for fraudulent management, breach of trust, forgery and use of forgery, deception, false testimony, bribery (giving or receiving), or for the crimes stipulated in the companies' law, the insolvency law and the corruption sanctioning laws. Therefore, the rights of being administrators of such persons that are convicted for the above mentioned crimes have been terminated.

At the request of the judicial administrator or liquidator, the syndic judge can decide that part of or the entire assets of the debtor, the legal person that is in insolvency, without exceeding the prejudice that is caused by the respective deed, be paid by the members of the board of management and/or supervision of the company, as well as by other persons that contributed to the insolvency of the debtor, by one of the fact mentioned under Art. 169 Paragraph 1 of the New Insolvency Code.

In case of plurality, the personal liability of the members of the board of management and/or supervision of the company or of any other members that contributed to the debtor's insolvency is in agreement with the condition that the occurrence of insolvency be contemporary or previous to the timeframe in which they exercised their mandate or during which they had the position in which they contributed to the insolvency.

The personal liability of these persons cannot be entailed if, in the management boards of the legal person they were against the act that contributed or led to insolvency or if they were absent from the decision-making process and after the decision was made, they opposed to this decision.

Personal liability can also not be entailed if, in the month precedent to stopping payments, payment were made in good faith for an agreement with the creditors that was concluded as a result of extra-judicial negotiations, provided that the agreement led to the financial recovery of the debtor and did not bring prejudice or discriminate one of the

creditors. These provisions will also be applied to the agreements that are concluded during the procedures of preventive deed of agreement.

If a decree has been given, by means of which the syndic judge decided to entail the patrimonial liability of the statute administrator, this shall be communicated to the National Register of Commerce. The person against which the decree for entailing personal liability has been given can no longer be appointed administrator in other companies. This right shall be withdrawn for a period of ten years since the date the decree remained final.

This action of entailing personal liability has a prescription term of three years, beginning since the date the person that contributed to insolvency has been known, but no later than two years since the court decision of opening the insolvency procedure. The amounts paid as personal liability by the members of the boards of management and/or supervision or by any other persons that contributed to the debtor's insolvency will be taken in the debtor's wealth and will be destined, in case of reorganization, for the payment of debts according to a payment schedule, for fulfilling the necessary funds for continuing the activity or – in case of bankruptcy – for covering the liabilities.

When this personal liability is entailed, the judicial administrator or the liquidator or – if applicable – the committee of creditors may ask the syndic judge to take insurance measures from the wealth of the board of management and/or supervision of the company as well as from any other persons that led to the debtor's insolvency. A guarantee of up to **10%** from the value of the claims is mandatory.

The foreclosure against the members of the board of management and/or supervision as well as against any other persons that contributed to the debtor's insolvency is performed by the syndic judge, according to the Civil Procedure Code. After the bankruptcy procedure is terminated, the amounts resulting from the foreclosure will be distributed by the court executor according to the final liabilities chart provided by the judicial liquidator.

The crimes provisioned by the Insolvency Law are result crimes. The result of the abusive act is a material loss. The guilt is expressed through the bad faith form (qualified intent), the negligence being excluded. The fraudulent bankruptcy offence is regulated, in present times, jointly with the simple bankruptcy offence, exclusively in the Insolvency Law. At present, the new Penal Code regulates simple bankruptcy in Art. 240 and fraudulent bankruptcy in Art. 241.

### **Conclusions.**

The introduction of the penal liability of the legal person in the Romanian legislation must not lead to the impossibility of enforcing the law based on incompetence, lack of correctness, convenience or other situations. Penal liability of the legal person must thus represent an additional tool to protect the lawful rights of persons as well as the society fundamentals values.

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