

CONSIDERATIONS ON LEGAL PROVISIONS OF CRIMINAL OFFENCES UNDER THE COMPANIES LAW

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Abstract:

Companies Law no. 31/1990¹, a fundamental pillar of Romanian company law, gives legal provisions not only the establishment, operation and dissolution of commercial companies, but also a set of criminal offenses intended to protect corporate assets, public trust and the fairness of economic relations. Thus, in Title VIII „Contraventions and Offences”, a series of offenses are criminalized whose qualified or unqualified subjects are expressly provided for by the legal text. Thus, the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company, the censor, the judicial liquidator or other persons who are expressly targeted by the incrimination norm may have the quality of active subject of the offenses incriminated by the legal texts. The present work proposes an analysis of the legal regime of the offenses regulated by the Companies Law, in relation to the constitutive content of these offenses, from a doctrinal and practical perspective, taking into account the updated provisions of the law, correlated with the norms of the Criminal Code and related legislation.

1. INTRODUCTION

The provisions of corporate law offenses aims to protect the economic and legal values that underlie the functioning of the business environment: good faith, transparency, competitive loyalty and the security of the civil circuit. In Romania, the Companies Law no. 31/1990 (republished and amended successively, most recently by Law no. 299/2024) provides in Title VIII - Criminal Liability - a distinct set of offenses, some having the character of their own offenses, committed exclusively by persons with special capacity (administrators, censors, liquidators), and others with a common law character adapted to the corporate environment.

These provisions complement the general regime of economic offenses in the Criminal Code, ensuring specific protection for legal relationships arising from the acts of incorporation and operation of companies carrying out commercial activity.

Law no. 31/1990 has undergone numerous amendments, determined by the need to harmonize with European directives on corporate governance and combating economic and financial crime. In its current form, the main provisions criminalizing acts as crimes are contained in articles 271–280, grouped thematically as follows:

- Offences concerning the establishment of companies (art. 271–272);
- Offences concerning the operation of companies (art. 273–276);
- Offences concerning dissolution and liquidation (art. 277–278);
- Provisions concerning the liability of legal persons and complementary sanctions (art. 279–280).

This structure highlights a functional logic: criminal sanctioning of any conduct that violates the principles of transparency, fairness and good management of corporate assets.

2. OFFENCES COMMITTED BY PERSONS WITH MANAGEMENT OR SUPERVISORY POSITIONS WITHIN THE COMPANY (art. 271–272)

The provisions of art. 271 of the Companies Law criminalize several acts of persons with management and/or supervisory responsibilities within the company: in bad faith, in prospectuses, reports and communications addressed to the public, false data on the establishment of the company or on its economic or legal conditions or concealing, in bad faith, in whole or in part, such data; in bad faith, presenting to shareholders/associates an inaccurate financial situation or with inaccurate data on the economic or legal conditions of the company, in order to conceal its real situation; deliberate obstruction of experts in the exercise of their duties.

The active subject of this norm is qualified, being, as the case may be, the administrator, the general manager, the director, the member of the supervisory board or the board of directors or the legal representative of the company. When the administrator or member of the supervisory board is a legal person, the rules of criminal

¹ Republished in the Official Gazette Part I No. 33 of January 9, 1998

liability of the legal person shall apply². The penalty provided by the legislator is imprisonment from 6 months to 3 years or a fine.

The specific legal object of this offense, which can be committed in any of the ways listed in points 1-3, consists of that group of social relations that target the trust that the public, shareholders or associates and authorities must have in the reality and accuracy of the information that certain categories of documents emanating from companies must contain.

The doctrine³ emphasized that the passive subject is unqualified, in the case of the offense under letter a), and can be any natural or legal person. In the case of the offenses under letters b) and c), the passive subject is any of the associates/shareholders, respectively the company, as a legal person; the passive subject is not the state, because it is not harmed by these offenses, but remains in the position of a general passive subject⁴.

The form of guilt is intention, the acts can be committed exclusively in bad faith, which makes it particularly difficult to prove the commission of the act, the jurisprudence on the matter being poor⁵.

Article 272 incriminates specific abuses in the management of the company's assets.

The active subject of the crimes regulated by this article is qualified, being, as the case may be, the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company, including the *de facto* administrator⁶. If the acts are committed by employees of the company, as conventional representatives, they no longer fall under any of the hypotheses listed in art. 272 of Law no. 31/1990 but may possibly constitute the offenses provided for by the Criminal Code (such as embezzlement, fraudulent management, etc.). When the administrator or member of the supervisory board is a legal person, the rules of criminal liability of the legal person will apply.

The passive subject is the company, as a legal person, and not its associates, because the latter is prejudiced as a result of the act, by the diminution of its assets; the passive subject is not the state either, because it is not harmed by these offenses, but remains in the position of a general passive subject⁷.

According to paragraph (1), under penalty of imprisonment from 6 months to 3 years or a fine, the active subject (same professional classification) who commits any of the following acts is criminally liable for:

- Art. 272 (1) (a): Acquisition, on behalf of the company, of shares of other companies at a clearly overvalued price or sale of shares of one's own company at clearly undervalued prices, with the aim of obtaining personal benefit to the detriment of the company.

The special legal object of the offense provided for in art. 272 para. (1) lett. a) is the social relations that protect the assets of a company carrying out commercial activity against damaging acts committed intentionally by its management bodies.

The offense has no material object. The shares issued by another company, which the company managed or managed by the perpetrator acquires or disposes of at a clearly overvalued or undervalued value, represent the means used by the perpetrator to commit the offense⁸.

The objective side of the crime consists in the acquisition or alienation, by the company managed by the perpetrator, of shares issued by another company, and the purchase or sale price of these shares is clearly overvalued, respectively clearly undervalued in relation to the effective value of the shares that are the object of the purchase or sale operation. As a result, the acquisition or alienation of own shares, even at clearly overvalued, respectively clearly undervalued values, does not fall within the hypothesis of the crime, although the social danger is the same. The reason for incriminating the act was to protect the company from the risks of speculative operations that the management or control bodies can carry out through and with its money, assuming only the gains, but not the losses suffered by the company.

- Art. 272(1) (b): The use, in bad faith, of the assets or credit enjoyed by the company, for purposes contrary to its interests or for personal benefit or for the benefit of another company in which the defendant has interests. The text of the law that establishes a prohibition for the person who is the legal representative of a company to use

² Bodu, S., *Legea societăților comentată*, Ed. Rosetti International, București, 2023, p. 246

³ Bodu, S., *Legea societăților comentată*, ediția a II-a din 15-ian-2023, Wolters Kluwer, *Comentariu la articolul 271 din Legea societăților*, <https://sintact.ro/#/commentary/587240063/1/bodu-sebastian-legea-societatilor-comentata-editia-a-ii-a-din-15-ian-2023-wolters-kluwer?cm=URELATIONS>

⁴ Hotca, M.A., (coordonator), *Infrațiuni prevăzute în legi speciale. Comentarii și explicații*, ed. 3. Ed. C.H. Beck, București, 2013, p. 349.

⁵ Toader, Th., *Răspunderea penală a administratorilor în dreptul societății*, <https://revista.universuljuridic.ro/raspunderea-penala-a-administratorilor-in-dreptul-societar/>

⁶ Bodu, S., *Tratat de drept societății*, ed. 2., Ed. Rosetti International, București, 2019, p. 718

⁷ *Ibidem*

⁸ Sebastian Bodu, *op. cit.*, p. 53

its assets, directly or through intermediaries, for his own benefit or to favor another company in which he has direct or indirect interests.

It is the offense with the most applications in judicial practice among all the offenses regulated by Title VIII. The administrators or representatives of the company have the obligation to act loyally in the interest of the company. The norms of the company law (art. 144 ind. 4 paragraph (1) of Law 31/1990) require administrators to exercise their mandate with loyalty. Thus, the analyzed legal provision punishes abuse in the administration of the company's assets.

The special legal object of the offense provided for in art. 272 paragraph (1) letter b) is the social relations that protect the assets of a company against abusive acts of its management bodies or, in other words, the prevention and combating of the abuse of assets and the abuse of credit.

This offense has no material object, the goods not suffering a physical change through use; the same goes for credit, which is an intangible asset.

The objective side of the crime consists in the use, in bad faith, of goods and credit, in a way contrary to the interest of the company or in the interest and benefit of the perpetrator or of a company in which the perpetrator has a direct or indirect interest.

Paragraph (2) of the same article provides the exception to the rule and provides: "The act provided for in paragraph (1) letter b) does not constitute a crime, if it was committed by the administrator, director, member of the board of directors or the legal representative of the company in the framework of treasury operations between the company and other companies controlled by it or which control it, directly or indirectly."

In the case law, it has been held that the act of "bad faith use of the company's assets or credit, for a purpose contrary to its interests..." is held responsible for administrators who favored other companies or exploited the company's assets in their own interests. By way of example, in a decision in this case, the court held that the act of the defendant ##### consisting in the fact that, as the legal administrator of SC ##### SRL, between June 2008 and February 2011, he successively collected, in the performance of the same criminal resolution, monthly rents from SC ##### SRL, following the rental in his own name and claiming to be the owner, of the property owned by SC ##### SRL (located in Sălăjeni, no. 216/A), received in commodification from this company following the agreement with the defendant ##### (representative of the company), meets the constitutive elements of the crime of using, in bad faith, goods or credit enjoyed by the company, for a purpose contrary to its interests or for his own benefit or to favor another company in which he has direct or indirect interests, in the form continued, provided for by art. 272 paragraph 1 letter b) of Law 31/1990 with the application of art. 41 paragraph 2 of the 1968 Penal Code.

The material element of the objective side consists of the material acts by which the defendant used the real estate property of the company whose administrator he was, for personal purposes, renting the property after concluding the loan agreement with the company represented by the defendant ##### and collecting the monthly rents from SC ##### SRL.

The immediate consequence consists of the violation of social relations relating to the administration of a commercial company in its interest, the causal link resulting from the materiality of the act⁹.

• Art. 272(1) (c): Loans granted by the company (or affiliated companies) to the administrator, in an amount exceeding the legal limit (art. 144 ind. 4 para. 3) or the guarantee by the company of the administrator's own debts.

This offense falls under the category of offenses of abuse of office in the corporate field, aiming to protect the company's assets and public trust in the business environment.

The text of the law sanctions loans granted by the company to its own administrators, directors or representatives, in order to prevent the conflict of interest between the company's interest and the personal interest of its management bodies.

Its rationale is twofold: economic, on the one hand, to prevent the diminution of the company's assets through unauthorized "self-lending", and ethical and legal, on the other hand, to guarantee the management's loyalty to the company, avoiding the abuse of a dominant position within the company.

The offense provided for in art. 272 para. (1) letter c) is a separate offense (can only be committed by persons who hold the capacity required by law: founder, administrator, director, member of the supervisory board or of the board of directors or legal representative of the company). It is a dangerous crime, since the simple realization of the loan or the use of the company's assets is sufficient to attract criminal liability, without the need to cause actual damage¹⁰.

The active subject of the crime is limited to the persons expressly indicated in the text of the law. The capacity of administrator or representative must exist at the date of the commission of the act, and the lack of this capacity excludes criminal liability under this letter.

⁹ Decizia nr. 428/2015 pronunțată de Curtea de Apel Cluj în dosarul nr. 7093/337/2013, <https://www.rejust.ro/>

¹⁰ Popa, B., Aspecte penale privind utilizarea bunurilor societății de către administratori, Revista de Drept Comercial nr. 2/2022, pp. 73-85

The legal object is the social relations relating to the protection of the company's assets and ensuring the integrity of the corporate management.

The material object:

- in the case of a loan: the sums of money or goods borrowed;
- in the case of the use of goods: the movable/immovable property, assets or credit of the company used for personal purposes.

Regarding the objective side, the act consists alternatively of: borrowing in any form (directly or through an intermediary) from the company it manages and using, in bad faith, the company's assets or credit, for a purpose contrary to its interests or for one's own benefit/other persons. Therefore, the norm brings together two distinct conducts: "self-lending" (absolutely prohibited, with the exceptions of paragraph 2); "abuse of the company's assets" (for a purpose contrary to its interests).

Regarding the subjective side, the form of guilt required is direct intention, and sometimes bad faith is expressly provided. It presupposes the awareness of the active subject that he is acting contrary to the interests of the company and the will to obtain a personal benefit or to favor a third party¹¹.

Paragraph 3 of the same article provides for the exception to the rule and states: "The act provided for in paragraph (1) letter c) does not constitute a crime if it is committed by a company that has the status of founder, and the loan is made from one of the controlled companies or that controls it, directly or indirectly."

Therefore, internal loans between companies in the same group (for example, parent company and subsidiary) may be exempted if they are economically justified and made for treasury purposes, without bad faith.

From a jurisprudential perspective, the Constitutional Court analyzed the constitutionality of art. 272 paragraph (1) letter c), holding that the text is predictable and proportionate, since the legislator has the freedom to criminalize acts that affect the loyalty of the company management. The Court considered that "self-lending" represents a major risk for the company's assets and creditors.

As an example, the court held an administrator liable for transferring funds from the company's accounts to personal accounts under the pretext of "advances for travel", qualifying the act as bad faith use of the company's assets, within the meaning of art. 272 para. (1) c)¹².

In similar cases, it was held that simple temporary withdrawals of cash that are later returned do not remove the criminal nature of the act if fraudulent intent is proven¹³.

By Decision no. 108/2025, the High Court of Cassation and Justice established that the administrator of a limited liability company cannot be an active subject of the offense provided for in art. 272 para. (1) let. c) (unpermitted loans), since the incriminating provision refers exclusively to joint-stock companies. This solution reaffirms the strict delimitation of active subjects in the Companies Law.

- Art. 272(1) (d): Violation of the provisions regarding the company's reserve fund (art. 183).

The specific legal object of the offense regulated in art. 272 para. (1) letter d) is the social relations that protect the integrity of the share capital of a commercial company - regardless of the legal form - and, implicitly, the assets of the social creditors who trust in the general corporate pledge represented by the subscribed share capital.

This offense has no material object because the legal reserves are constituted by deductions in the accounting sense, so that, physically, there is no movement of money, the company's cash being recorded in its bank accounts or, within the limits of the law, in the company's cash. The legal reserves represent, like the share capital, a liability account in the balance sheet liabilities, while the money represents the company's assets, recorded in the related balance sheet asset items.

The objective side of the crime is represented by the passivity of the members of the competent administrative body to establish and maintain the reserve fund of the company they administer/lead, by not taking - although it is imperatively required - a quota of 5% of the annual profit, until it reaches a minimum of 20% of the share capital.

Most companies established in Romania are limited liability companies, in which case the Companies Law no longer provides for a minimum level of share capital, thus, the minimum level of the legal reserve provided for by law is completely insignificant (in most limited liability companies being approximately 20 lei).

3. CAPITAL MARKET MANIPULATION AND ILLEGAL DISTRIBUTION OF DIVIDENDS (art. 272¹)

The provisions of art. 272¹ criminalize the act of the founder, administrator, general manager, director, member of the supervisory board or of the management board or the legal representative of the company who:

¹¹ Udroi, M., Drept penal. Partea specială, vol. II, București: Editura C.H. Beck, 2023, p. 422-424

¹² Curtea de Apel Cluj, decizia nr. 44/2015, <https://www.rejust.ro/>

¹³ Curtea de Apel București, secția penală, decizia nr. 120/2020, <https://www.rejust.ro/>

a) spreads false news or uses other fraudulent means that have the effect of increasing or decreasing the value of the company's shares or bonds or other securities belonging to it, in order to obtain, for himself or for other persons, a benefit to the detriment of the company;

b) collects or pays dividends, in any form, from fictitious profits or which could not be distributed during the financial year based on the interim and annual financial statements, based on the annual financial statements, or contrary to those resulting from them.

The legal norm responds to several objectives:

a) Protecting the company's assets and equity between associates/shareholders, by sanctioning the manipulation of securities held by the company or of the titles belonging to it. Thus, letter (a) targets "market manipulation" practices internal to the company or in the value chain of shareholders.

b) Guaranteeing the legality and substantiation of dividend distribution, since letter (b) prohibits the payment/collection of dividends from fictitious profits or profits that could not be distributed - which protects creditors, associates and the capital market.

c) Strengthening the criminal-corporate liability of management bodies (administrator, director, board member, etc.) in companies with shares or bonds.

Therefore, art. 272¹ is a provision of "criminal diligence" in corporate law, which contributes to the discipline of the securities market and the prevention of internal abuses of the company.

The legal norm defines two distinct offenses, in letters a) and b) of the legal text:

- they are own offenses, that is, they assume the quality of the active subject (founder, administrator, etc.).

- they are criminal in nature, with custodial sanctions (1-5 years).

- they are, for the most part, offenses of result: in letter (a) the intended effect – the increase or decrease in the value of the securities is part of the offense; in letter (b) the payment/collection of illicit dividends is the result of the action.

They have as their special legal object the social relations that are located at the intersection of corporate law and capital market law.

The active subject of the offenses provided for in art. 272¹ is qualified, being, as the case may be, the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company, including the de facto administrator.

The passive subject is the commercial company, because the latter is prejudiced as a result of the act, by the diminution of its patrimony. In the case regulated in letter b), in addition to the company, the passive subject are also the social creditors or, if the illegal distribution of dividends benefits only some of the associates, the passive subject are the other associates; the passive subject is not the state because it is not harmed by these crimes, but remains in the position of a general passive subject¹⁴.

In the case law, it was held that the act of the defendant who, as administrator of S.C. P.P. SA Galați, paid the associates of this company (among which the defendant was also included), starting with May 31, 2000 and until October 2, 2000, the total amount of 100,000,000 lei ROL, as dividends for the year 2000 (the current year), before the closing of the year, the end of the financial accounting exercise, the preparation of the balance sheet and the verification and approval of the financial-accounting execution by the authorized bodies within the public finances, meets the constitutive elements of the offense provided for by art. 272¹ point 2 of Law no. 31/1990 with the application of the provisions of art. 41 paragraph (2) of the Criminal Code and art. 13 of the Criminal Code¹⁵.

4. OFFENCES RELATING TO SHARES AND SHARE CAPITAL (art. 273–275)

Art. 273 criminalizes illegal issuances and transactions of securities: issuing shares at a value below the legal value or not fully paid, before the full payment of the share capital, using shares not subscribed by the general meeting, granting loans/guarantees for shares under impermissible conditions or surrendering shares before the legal deadlines. The active subject is the administrator or persons with management responsibilities, and the punishment is imprisonment from 3 months to 2 years or a fine. The legal object is the integrity of the share capital and the protection of creditors and shareholders from operations that would illegally modify the capital structure.

The active subject of the crime is qualified, being, as the case may be, the administrator, general manager, director, member of the supervisory board or the board of directors or the legal representative of the company, including the de facto administrator. These persons, as members of a management body, are those in whose competence issues related to corporate securities fall. When, according to the form of management of the company, there are several levels of management (as in the case of joint-stock companies managed in a unitary system with delegation of management or managed in a dual system), the qualified subject is that member of such a level to

¹⁴ Hotca, M.A., (coordonator), *op. cit.*, p. 349

¹⁵ ÎCCJ, S. pen, dec. nr. 2091 din 27 mai 2010, www.scj.ro

whom the respective issue actually falls, according to the law and, where the law does not provide, according to the internal act of the company (the constitutive act, the decision of the general meeting, the internal regulations or the decision of the management body). When this is not provided for either, the qualified subject is the member of the management body (the director, respectively the member of the board of directors). Offences are regulated only for joint-stock companies, although certain acts are equally socially dangerous when they occur in connection with another corporate form, which represents a legislative handicap, possibly generating abuses. The incriminated acts present the risk of prejudice or lead to actual prejudice, as the case may be, to some of the associates, the social creditors and the company itself (as a legal person), which therefore represent the passive subjects; the passive subject is not the state, because it is not harmed by these crimes, but remains in the position of a general passive subject¹⁶.

Text of art. 274 criminalizes the act of the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company who:

a) carries out the decisions of the general meeting regarding the change of the form of the company, its merger or division or the reduction of the share capital, before the expiry of the deadlines provided by law;

b) carries out the decisions of the general meeting regarding the reduction of the share capital, without the members having been executed for making the payment due or without them having been exempted, by the decision of the general meeting, from paying subsequent payments;

c) carries out the decisions of the general meeting regarding the change of the form of the company, merger, division, dissolution, reorganization or reduction of the share capital, without informing the judicial body or in violation of the prohibition established by it, in the event that criminal proceedings have been initiated against the company.

This rule is part of the regulations on the criminal liability of management bodies in the context of capital changes of the company and reorganization procedures.

Art.274 has as its main objective the protection of the corporate and patrimonial order of joint-stock companies and limited partnerships by shares, as well as the prevention of criminal abuses in the process of changing the legal form, merger, division, dissolution, reorganization or reduction of the share capital:

a) Premature execution of the decisions of the General Meeting of Shareholders (lit. a), which could harm the company or third parties by executing decisions before the legal deadlines.

b) Reduction of the share capital without respecting the payments due (lit. b), which would affect the financial balance of the company and its creditors.

c) Execution of decisions in a criminal context without informing the judicial body or violating its prohibitions (lit. c), thus preventing fraud or damage in criminal proceedings.

Art. 275 (1) of Law No. 31/1990 of companies: Any administrator, general manager, director, member of the supervisory board or of the board of directors who:

a) violates, even through intermediaries or simulated acts, the provisions of art. 1443;

b) fails to convene the general meeting in the cases provided for by law (...);

c) begins operations on behalf of a limited liability company before the full payment of the share capital has been made;

d) issues negotiable securities representing shares of a limited liability company;

e) acquires shares of the company on its behalf in cases prohibited by law.

From the point of view of criminal law, this offense is the "guarantor" of the functioning of commercial companies, in the sense that decisions regarding the fate of the company are adopted in the general meeting of associates and there is always the possibility for the associate who is injured by being unable to exercise his rights as an associate, to file a criminal complaint against the manager who does not convene, under the terms of the law, the meeting of associates.

CONCLUSIONS:

The legal regime of the crimes analyzed in this article represents an essential component of the criminal law of businesses, with the role of guaranteeing the integrity of the economic activity and protecting the interests of the associates and creditors.

In a globalized economic context, characterized by complexity and interdependence, the need for a coherent criminal policy in the matter of companies carrying out commercial activity is obvious. At the same time, a better correlation between corporate, fiscal and criminal law is required, as well as the consolidation of internal compliance mechanisms within legal entities. The analysis highlights the fact that the sanctioning regime in the criminal matter of companies aims mainly to protect the social heritage, the subscribed capital and the integrity of the company's internal transactions. Each crime has as active subject persons with a management or control position in the company, and the sanctions provided (imprisonment and/or fine) aim to discourage abuses specific to the business environment. Integrating the relevant case law, we have illustrated how the courts interpret

¹⁶ Hotca, M.A., (coordonator), *op. cit.*, p. 349

the limits of these crimes. In conclusion, the legal regime of these crimes reflects a balance between facilitating commercial activity and strictly sanctioning fraudulent behavior in the management of companies.

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