TITU MAIORESCU UNIVERSITY
DOCTORAL SCHOOL – LAW

DOCTORAL DISSERTATION

LEGAL LIABILITY OF THE DIRECTOR WITHIN THE JOINT-STOCK COMPANY

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A B B R E V I A T I O N S

Art – Article
ARV – Plea Bargain Agreement
Alin – Paragraph
B Of – Official Bulletin
CA – Court of Appeal
C civ – Civil Code
CCR – Constitutional Court of Romania
ECHR – European Convention on Human Rights
Civ – Civil
Com – Commercial
Cont adm fisc – Administrative and Fiscal Litigation
Cp – Criminal Code
Cpp – Criminal Procedure Code
Dec – Decision
Es – Spanish
Guv – Government
It – Italian
HCCJ – High Court of Cassation and Justice
PPD – Preliminary ruling for the settlement of points of law
Jud – Court of First Instance
J Of – Official Journal
Lit – Letter
M Of – Official Gazette
OECD – Organisation for Economic Co-operation and Development
GO – Government Ordinance
EGO – Emergency Government Ordinance
Cited above – Previously cited
Pt – Portuguese
AIM – Appeal in the Interest of the Law
RM – Republic of Moldova
SA – Joint-Stock Company
Sec – Section
Sen – Sentence
Trib – Tribunal
VAT – Value Added Tax
EU – European Union

INTRODUCTION

Genesis, Scientific Methods, Relevance, Objectives

The topic of this doctoral thesis emerged naturally as the subject of academic research, combining the doctoral supervisor's specialization mainly focused on commercial law with the candidate's expertise, particularly in the field of criminal law.

In this context, the study of the legal liability of the director arose as a logical step. Within corporate law, the concept of legal liability has sparked numerous debates and analyses, ranging from the liability of the company itself to that of the director specifically, the director within joint-stock companies.

The focus on this director’s liability was further prompted by the complex structure of joint-stock companies, especially after the major reform of 2006, which transitioned corporate governance from a traditional system to a more complex model. This reform introduced both the unitary system of administration and leadership, as well as the dualist system, inspired by the Anglo-Saxon model.

The director’s liability in joint-stock companies was approached through four dimensions: civil liability, financial-fiscal liability, administrative liability, and criminal liability. The order in which these forms of liability are presented in the paper is not accidental it reflects a gradual increase in the severity of the types of liability.

This scientific research does not aim to be exhaustive, nor does it claim such an objective. However, through the combination of historical, comparative, and systematic methods, we believe that the thesis offers an original perspective on the concept of the legal liability of the director within joint-stock companies.

At times, the research may briefly touch on other legal institutions, but the investigative path aims to create an open framework in which the topic of the director’s legal liability can be integrated.

Naturally, this is a niche topic, which made the research process quite challenging particularly due to the scarcity of jurisprudence on the matter and the fact that, generally, legal doctrine does not focus specifically on the liability of directors within joint-stock companies.

Nevertheless, by combining jurisprudential data, existing legal doctrine, legislation from European countries traditionally regarded as references in the legal field for our country, and even statistical data from relevant institutions, we managed not only to draw certain

conclusions regarding the current legislative framework but also to formulate legislative proposals of both theoretical and practical significance.

We believe that the chosen topic is highly relevant and of interest, both from a personal perspective and for legislative institutions, as well as for those responsible for enforcing legal provisions.

The central element of the conclusions is represented by the *de lege ferenda* proposals, which stem both from obvious legislative inconsistencies and from the need for even minor improvements to current legislation.

The legislator is constantly engaged in modifying the normative framework applicable to companies, which provides an opportunity for incorporating into legislation a series of proposals originating in the academic sphere proposals that emerge from such scientific research endeavors.

STRUCTURE OF THE THESIS

The thesis is structured into six chapters, includes conclusions and *de lege ferenda* proposals, and, of course, contains bibliographic references.

The first chapter is entitled *General Considerations Regarding the Joint-Stock Company*. Serving as an introduction, Chapter I presents a historical overview of the evolution of companies, which have undergone millennia of development from early and rudimentary forms of organizing economic activity to the contemporary, modern forms of association and organization.

Alongside the historical evolution, the chapter also presents the normative acts that have formed the legal foundation of companies acts that have themselves been in a continuous process of adaptation and evolution in response to political, economic, and social realities.

At present, in addition to Law no. 31/1990, the Civil Code represents the second major normative act that provides the legal framework for companies.

The thesis also approaches the topic of the legal liability of directors in joint-stock companies from a comparative law perspective, identifying, for instance, the legislation of the Republic of Moldova, which governs the activity of commercial companies both through the Civil Code and through special laws.

Law no. 135/2007 on Limited Liability Companies is dedicated to the establishment, operation, reorganization, and liquidation of limited liability companies, while Law no. 1134/1997 on Joint-Stock Companies governs the legal status of joint-stock companies.

In Portugal, the Commercial Companies Code serves as the legal foundation for commercial companies, regardless of their organizational form general partnerships, quota-based companies, joint-stock companies, or limited partnerships.

The Spanish Civil Code also provides a general yet succinct regulation of companies, which is complemented by the provisions of Royal Legislative Decree no. 1/2010, which approves the consolidated text of the Capital Companies Act.

In Italian legislation, the institution of the *company* is comprehensively regulated within the Italian Civil Code, Book V *On Labour*, Title V *On Companies*, and supplemented by certain special normative acts (decree-laws).

In the Belgian legal system, joint-stock companies also referred to as public limited companies (*sociétés anonymes*) are regulated under the Code of Companies and Associations, adopted by the Law of March 23, 2019, marking a significant and ambitious step in the reform of corporate legislation.

In addition to the two primary reference acts the Romanian Civil Code and the Companies Law there are also special regulations that govern certain economic activities specifically relevant to corporate operations.

Besides national legislation, due to Romania's status as a member of the European Union, legal norms of European origin are also relevant in this domain. Some of these have been fully or partially transposed into Romanian law. By way of example, we mention:

1. The Second Council Directive 77/91/EEC of 13 December 1976 on the formation of public limited liability companies and the maintenance and alteration of their capital, which was repealed by Directive 2012/30/EU of 25 October 2012.

2. The Third Council Directive 78/855/EEC concerning mergers of public limited liability companies, repealed by Directive 2011/35/EU of 5 April 2011.

3. The Eleventh Council Directive, 89/666/EEC of 21 December 1989 on disclosure requirements for branches, amended by Directive 2012/17/EU of 13 June 2012.

4. Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets, and exchanges of shares concerning companies of different Member States, repealed by Directive 2009/133/EC of 19 October 2009.

5. Council Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, amended by Directive 2009/109/EC of the European Parliament

and of the Council of 16 September 2009; Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012; and Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014.

As can be observed, company law legislation is quite extensive and does not operate within a unified paradigm at the European level.

While in Italy, company regulation finds its consistency directly within the Civil Code, in Spain, the legal rules governing capital companies are developed in a specific Capital Companies Act, and in Portugal, the legislator has enacted a comprehensive Commercial Companies Code. This last legislative act also contains criminal law provisions, resembling at least from this perspective Law no. 31/1990 on companies.

As for the Republic of Moldova, a state that has firmly committed itself to a European path, it has chosen to dedicate, from a legislative standpoint, an entire legal act to each form of company organization.

On the other hand, Spain and the Republic of Moldova have criminalized, in their respective Criminal Codes, certain acts with implications in the field of company law. However, as we shall see throughout this thesis, the criminalization of such acts remains relatively limited.

An unusual perhaps even innovative solution has been adopted by Italy, which criminalizes offences relating to corporate operations within the Civil Code itself.

Although it may seem impossible especially after the adoption of the current monist philosophy-based Civil Code it might be a worthwhile opportunity to more deeply reflect on the idea of creating a Companies Code: a stable normative act that would bring together legal provisions from the entire spectrum of company-related activities.

As an introductory chapter, it also addresses the definition of companies, their characteristics, and their types, with a particular focus on joint-stock companies.

The complexity of organizing a joint-stock company is also reflected in the mandatory stages of its life cycle namely, its formation, operation, and dissolution.

Although it is merely an introductory chapter, we have identified aspects that, in our opinion, could be subject to improvement through the adoption of certain *de lege ferenda* proposals some derived from the study of comparative law, and, perhaps paradoxically, even from the legislation of the Republic of Moldova.

For example, although Law no. 31/1990 on companies does not elaborate on the institution of trade secrets, we consider the current Moldovan provisions according to which information from the company's incorporation documents cannot be considered trade secrets

to be commendable. Such provisions could serve as a source of inspiration for the Romanian legislator in any future amendment of the framework legislation on companies.

Excluding information from incorporation documents from the category of trade secrets is necessary to ensure the transparency that should characterize company operations especially those organized as joint-stock companies.

Another shortcoming identified during the study concerns the list of offenses provided in the Companies Law that render a convicted person ineligible to act as a founder. In our view, there is no objective, logical-legal criterion justifying why the offenses listed lead to such incompatibility, while other offenses specific to the economic and financial environment do not carry similar restrictions.

Likewise, there is no objective justification for the fact that corruption offenses criminalized by the Criminal Code or special laws lead to incompatibility with the status of founder, while offenses of service, such as abuse of office or negligence in office, do not result in the same prohibition.

De lege ferenda, we believe the legal provision should be reformulated so that the incompatibility rule is regulated in a predictable and consistent manner, eliminating potential legal inequities resulting from the current legislative framework.

Such issues have been identified in the legislation of other countries as well, which is why any future improvement of the law should be original and bear a distinctive national character.

An innovative element could be the institution of the financial plan, a document required by the Belgian Code of Companies and Associations, which mandates its preparation based on the projected activity when establishing public limited companies.

In the context of the increasing professionalization of entrepreneurial activity, the requirement to draft a business plan could be a scenario worth considering for adoption into Romanian legislation as well.

The operation of a company involves defining the responsibilities of its statutory bodies, with the general meeting of shareholders being the supreme forum. This is achieved by clearly delimiting its powers from those of the other corporate bodies and by distinguishing the powers of the ordinary general meeting from those of the extraordinary general meeting, or even the special meeting.

An interesting issue concerns the possibility of the company's management bodies requesting the general meeting to resolve a matter that technically falls within their own competence but which they are, for some reason, unable to resolve themselves.

Although this type of provision is not currently found in Romanian legislation, it could prove useful in resolving corporate disputes that otherwise remain unsolved. In principle, such a mechanism may seem to contradict the principles of corporate governance, yet a procedure in which the general meeting resolves the disputed issue with the court's approval might represent an acceptable solution avoiding the problems arising from confusion of powers or potential conflicts of interest.

As with any life cycle, once a company reaches maturity, it also approaches its terminal point, the end of its existence.

In relation to the termination of a company's operations, we have considered it useful to introduce a new ground for dissolution, as a form of civil sanction specifically, when the company's activity contravenes public order, or when its stated object of activity has been diverted.

The amendment we propose would not be merely theoretical, but could have practical effects, particularly in situations where companies no longer bear criminal liability. This amendment is warranted by the fact that criminal liability requires stricter conditions than civil liability. As a result, a company might never be held criminally liable, and the complementary criminal sanction of dissolution might never be applied.

A legislative remedy would be the introduction of such a ground for dissolution as the one described above.

Thus, in cases where a company has engaged in acts that contravene public order, or its stated object of activity has been diverted, and the alleged acts no longer lead to criminal liability and dissolution as a complementary criminal sanction, civil dissolution as a sanction could be a satisfactory solution.

It is true that Article 1882, paragraph (2) of the Civil Code stipulates that every company must have a specific and lawful object, in accordance with public order and good morals, otherwise the nullity of the company may be declared.

By legislating the proposed amendment, the shortcomings and controversies surrounding the institution of the company's object of activity could be effectively addressed.

An interesting proposal, inspired by the Spanish Civil Code, refers to the dissolution of a company for illegal activities, in which case the remaining assets owed to shareholders, after all debts are settled, would be transferred to charitable institutions. This proposal aligns fully with our previously stated suggestion concerning companies whose activity violates public order or whose object has been misused.

Joint-stock companies, like other types of companies, are in fact legal fictions, and for the corporate will to be concretely fulfilled, for the decisions taken during general meetings to be put into practice, an administrator is needed a person responsible for translating those decisions into action.

The paper addresses the legal nature of the administrator's role, emphasizing its dual character, clarified both at the doctrinal level and in the case law of the High Court of Cassation and Justice.

In its original form, Law no. 31/1990 embraced a unitary vision of company management.

However, with the enactment of Law no. 441/2006, which amended and supplemented Law no. 31/1990, a profound reform of the management system of joint-stock companies was implemented, by aligning Romanian legislation with corporate governance principles and harmonizing it with EU regulations.

The rules of corporate governance were first developed in Anglo-Saxon countries, with the main objective of protecting both individual and institutional investors.

In Western legislation, systems of management and control vary from one legal system to another: for example, Spanish law only regulates the unitary system, and only for European companies (Societas Europaea) is there an alternative structure (either unitary or dual). In Italian law, joint-stock companies can be organized under three different systems of administration and control.

Portugal has adopted an alternative system, with three options:

1. Board of directors and supervisory board;
2. Board of directors composed of an audit committee and a statutory auditor;
3. Executive board of directors, general and supervisory council, and statutory auditor.

The Belgian Code of Companies and Associations recognizes both a monist system, where the company is managed by a board of directors, and a dual system, in which the company is run by a management board, while supervisory responsibilities lie with a supervisory board.

Finally, an original governance structure can be found in the legislation of the Republic of Moldova, which establishes two distinct bodies:

- The company council, on the one hand,
- And the executive body, on the other.

The council represents the interests of shareholders between general meetings and, within the limits of its powers, exercises general leadership and oversight over the company's activities.

On the other hand, the executive body of the company is responsible for managing its day-to-day operations, except for matters that fall under the competence of the general meeting of shareholders or the company council.

Uniquely, a company may have one or even two executive bodies operating simultaneously, which may be either collegial or unipersonal in structure.

Inspired by the French model, the unitary system provides that a joint-stock company is administered through a single tier the board of directors, which may delegate management responsibilities to company officers.

Up until the reform introduced by Law no. 441/2006, this was the only form of governance recognized under Romanian law.

The legal status of the administrator of a joint-stock company whether acting individually or as part of the board of directors remains essentially the same, except for certain specific rules applicable in cases involving multiple administrators.

In fact, the legal framework governing corporate administration has been structured by the legislator into three parts:

1. The first part is dedicated to the unitary system of administration;
2. The second part deals with the dualistic system;
3. The third part outlines the common provisions applicable to both systems, unitary and dual alike.

In the chapter dedicated to the legal status of the administrator, we analyzed the appointment, functioning, remuneration, duties, obligations, and termination of the administrator's mandate, differentiated according to the unitary or dualistic system of administration and management, as the case may be.

Following the research conducted in this thesis, several *de lege ferenda* proposals have emerged, among which we mention:

- The extension of the categories of offenses that render a person incompatible with the role of administrator. However, such a legislative amendment should be crafted in an original and tailored manner, as the legal systems of the reference countries analyzed throughout the study are not suitable to offer a universal legal solution;
- The introduction of a new requirement: professional competence. In our opinion, a person who previously managed a company that went bankrupt due to reasons attributable to

the administrator should not be qualified to acquire the status of administrator/director in another company especially not in a joint-stock company;

- Ensuring balance within the company and protecting minority shareholders: The Portuguese Companies Code stipulates that shareholders who voted against the appointment of administrators have the right to appoint at least one administrator, provided that this minority represents at least 10% of the share capital. This legislative solution seems balanced, particularly since the minimum share capital threshold is introduced to prevent vexatious actions;
- In the Portuguese legal system, company law also provides for the possibility of establishing a retirement regime for company directors due to old age or disability a form of compensation which could be transposed into Romanian legislation;
- The Spanish system includes the mechanism of proportional representation, which allows access to the board not only for representatives of the majority but also for those of the minority. To avoid majority abuse, a proportional representation system could also be adopted in Romanian law. However, this must be carefully drafted to avoid the opposite extreme: minority abuse;
- One *de lege ferenda* proposal put forth in the legal literature, which we fully endorse, is the mandatory registration in the Trade Registry of the scope of the administrator's mandate, specifying whether the administrators act individually, in order to assist third parties in determining whether an administrator is authorized to represent the company in a particular matter thus ensuring legal certainty in civil transactions.

Chapter III structures the civil liability of the administrator into three components:

- Liability towards the company under Law no. 31/1990;

The liability of administrators towards the company is the general rule and arises when administrators whether natural or legal persons breach the obligations initially laid down in the company's articles of incorporation, those subsequently established by the general meeting of shareholders, or those stipulated by Law no. 31/1990.

In analyzing this form of liability, the need to officially recognize the institution of the *de facto administrator* emerged an institution that also exists in European legal systems, but in a more refined form than that currently theorized in Romanian doctrine.

For example, unlike Professor Piperea, we believe that the definition of the "*de facto administrator*" provided by Spanish legislation is not only more complete but also closer to socio-economic realities. In Piperea's interpretation, the "*de facto administrator*" appears to be

someone who assumes such a role fraudulently, against the interests of the company an implication with which we respectfully disagree.

By contrast, the Spanish Law on Capital Companies includes in the concept of "*de facto administrator*"[1]even those individuals who, in good faith, perform management duties within the company without having been formally appointed to that role.

Enshrining such liability in legislation would not only facilitate the prosecution of those who are actively involved in the management of a company and responsible for any damage caused, but would also acknowledge the fact that legal norms must remain flexible and adaptable to the social relationships that become established within corporate structures.

Law no. 31/1990 includes a non-exhaustive list of examples of actions that may trigger the civil liability of administrators.

On the other hand, the administrator may also incur regressive (indirect) liability, when the company seeks reimbursement from the administrator for damages it has paid to a third party as a result of actions undertaken by the administrator outside the normal exercise of their entrusted functions, but still related to their duties.

Finally, the administrator also bears a vicarious liability, namely for the acts of directors and other employees.

Through Law no. 441/2006, a special form of vicarious liability was introduced, also referred to as guarantee liability, whereby administrators are liable to the company for damages caused by acts carried out by directors or employed personnel, if such damage would not have occurred had they exercised the supervision required by their office.

A form of indirect and subsidiary liability is thus established for the administrator, for the acts of others, including directors and members of the management board.

Article 144² paragraph (4) of the Companies Law introduces a special type of liability, namely the joint liability of administrators with their immediate predecessors; thus, administrators are jointly liable with their immediate predecessors if, having knowledge of irregularities committed by them, they fail to notify the censors or, where applicable, the internal auditors and the financial auditor.

This form of liability applies both to the unitary system of governance and to the dualistic system, including members of the management board.

[1] Persons shall be considered *de facto administrators* if, in practice, they perform administrative functions without legal title, under a void or extinguished title, or even under another title for example, when administrators act under their instructions. The liability of administrators shall also extend to *de facto administrators*.

Given that the administrator's mandate is a remunerated one, they are required to perform their duties with the diligence of a prudent manager, rather than merely with the diligence they would exercise in their own affairs.

Administrators must therefore ensure the sound management of the company's affairs, and their liability is assessed *in abstracto*, meaning based on an elevated standard of care; as such, they may be held liable even for the slightest degree of fault.

In this context, the concept of the business judgment rule, introduced into Romanian legislation by Law no. 441/2006, becomes highly relevant. With the adoption of this law, a significant reform was undertaken in the field of company law, aligning Romanian legislation with OECD corporate governance standards.

To recover the damages caused by administrators, the law provides companies with a procedural tool known as the liability action.

The liability action against administrators, as well as against members of the management board and supervisory board, finds its legal basis in Article 155 of Law no. 31/1990, yet this procedural remedy received formal legislative recognition with the adoption of the Commercial Code of 1887.

A significant innovation was introduced in Italian legislation through Law no. 262/2005, which, alternatively, grants the right to initiate the liability action not only to the general meeting of shareholders, but also to the board of statutory auditors, in the latter case requiring a two-thirds majority of its members.

De lege ferenda, such a legislative solution could be adopted in the Romanian system, as it provides greater security in protecting the interests of the company, particularly in corporations with a large number of dispersed shareholders, who often do not coordinate their actions. At the same time, in order to prevent abusive or vexatious use of such an action, the unanimous vote of the board of statutory auditors could be required to initiate a corporate liability action.

- Exceptional Liability Toward Third Parties for Exceeding the Scope of the Mandate;

As a general rule, administrators of joint-stock companies do not bear personal liability toward third parties with whom the company contracts, because the acts performed by the administrators are considered to be acts of the company itself. Therefore, it is the company that is liable to third parties.

However, the law does provide that even in cases where administrators exceed the corporate object, the company may still be liable, provided that the third party acted in good faith and with reasonable diligence.

The law also expressly recognizes two exceptions where exceeding the company's corporate object shall be enforceable against third parties, and thus the company will not be held liable:

a) when the third parties knew or should have known, based on the circumstances, about the exceeding of powers;

b) when the acts concluded exceed the scope of authority granted to the administrators.

When the unlawful acts committed by the administrator are unrelated to their corporate function, the administrator will bear direct and personal liability toward third parties, with no liability being incurred by the company for the damages caused. In such situations, the administrator's liability is clearly tort-based.

- Aggravated Liability under Law no. 85/2014 on Insolvency Prevention and Insolvency Proceedings;

Aggravated Liability under Law No. 85/2014 on Insolvency Prevention and Insolvency Procedures

The purpose of the law is to establish procedures for preventing insolvency, which may be used by debtors in financial difficulty, as well as collective insolvency procedures aimed at covering the debtor's liabilities, while offering the debtor, where possible, the opportunity to restructure and continue its business activity.

The legal foundation for this special form of liability is laid out in Articles 169–173 of Law No. 85/2014.

The liability regulated under article 169(1) of Law No. 85/2014 is a joint liability toward the insolvent legal entity, imposed because the state of insolvency was caused by the persons in question.

This special liability applies only to legal entity debtors, whose operations are, by definition, managed and supervised by individual or collective governing bodies. The members of such governing bodies may be held liable when they perform their executive or supervisory functions in a fraudulent or grossly negligent manner[2].

[2] R. Bufan, A. Deli-Diaconescu, M. Sărăcuț (eds.), *Practical Treatise on Insolvency*, Vol. I, 2nd revised edition, Hamangiu Publishing House, Bucharest, 2022, p. 847.

Romanian case law[3] has emphasized that this form of liability is not an extension of bankruptcy proceedings to the members of governing bodies, but a personal form of liability, applicable only when the individuals, through the acts listed by law, caused the company's insolvency.

This special tort-based civil liability[4] is not a novelty in Romanian insolvency legislation. It was previously regulated in a similar manner under Law No. 85/2006 on insolvency proceedings.

Furthermore, such liability provisions were also present in Law No. 64/1995 on judicial reorganization and bankruptcy proceedings the first post-1989 Romanian legal act to introduce the liability of board members who contributed to the debtor's insolvency[5].

- Liability under Article 169 of Law No. 85/2014 and the Financial-Fiscal Liability of Company Directors

The liability provided under Article 169 of Law No. 85/2014 applies to members of the management and/or supervisory bodies of a joint-stock company, regardless of whether the company is administered under a unitary or dualistic system.

The adoption of a dual-tier governance model raises questions regarding the division of responsibilities between management duties, assigned to the directorate, and supervisory duties, assigned to the supervisory board. This issue essentially narrows the analysis to the delineation between executive and non-executive roles, since, in principle, individuals vested with management and supervisory powers are the ones most likely to commit acts that could lead to the company's insolvency.

The chapter addressing financial and fiscal liability highlights the autonomous nature of this type of liability. Nevertheless, fiscal law remains deeply interconnected with constitutional law, administrative law, private law (both civil and commercial), as well as criminal law.

Given that it is a specialized form of liability, we considered it necessary to clarify certain fiscal law concepts, review both European and national tax principles, analyze

[3] Bucharest Court of Appeal, 6th Civil Division, Civil Decision no. 1288/2013 (see also V. Terzea, *The New Insolvency Code*, annotated with doctrine, case law, and explanations, Solomon Publishing House, Bucharest, 2014, p. 397); Gorj Tribunal, 2nd Civil Division, Civil Sentence no. 345/06.07.2016.

[4] On the legal nature of this liability, doctrine has revealed a dual character, depending on the nature of the breached obligation (see I. Turcu, *Law on Insolvency Proceedings. Article-by-Article Commentary*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2009, p. 672).

[5] Article 138: "Where individuals are identified as being at fault for the debtor's state of insolvency, at the request of the judicial administrator or liquidator, the syndic judge may order that part of the debtor's liabilities if a legal entity be borne by the members of its management and/or supervisory bodies, as well as by any other person who caused the insolvency."

the subjects of fiscal legal relationships, and outline the main taxes and duties borne by joint-stock companies as passive subjects within the fiscal legal framework.

A key focus in this chapter is the issue of fiscal liability, in particular the joint and several liability of administrators, as established by Article 25(2) of the Fiscal Procedure Code.

This form of joint liability is distinct from that regulated by Article 73(1)(e) of the Company Law, which governs the administrator's liability toward the company itself, rather than toward third parties or public authorities such as the fiscal authorities.

Thus, the joint and several liability of the administrator operates independently of the company's legal form, and the conditions for its application are identical across different company types.

On the other hand, the identity of the liable party - as a passive subject jointly liable with an insolvent debtor - is defined in varying terms depending on the context: in some situations, the law requires the status of administrator, partner/shareholder, or any other person, while in others, only the administrator qualifies as the subject of liability.

Given some of the controversies presented throughout the thesis and the considerations expressed, I have proposed that a future legislative amendment to the Companies Law should explicitly state that the decision to file the initial request to open insolvency proceedings falls under the exclusive competence of the board of directors.

This chapter does not conclude without reviewing the sanctions applicable in the event of fiscal liability, namely administrative fiscal sanctions on the one hand, contraventional sanctions, and criminal fiscal sanctions on the other hand.

The latter arise following the commission of acts of a criminal nature, but which violate legal norms with a prominent fiscal character.

In this context, Law no. 241/2005 holds paramount importance, and the analysis of the legislative limitations resulting from its implementation has generated *de lege ferenda* proposals, such as the amendment of Article 12 of the law, its correlation with Article 73^1 paragraph (1) and Article 6 paragraph (2) of the Companies Law, and the introduction of a ban on holding the positions of founders, administrators, directors, members of the supervisory board and of the management board, censors, or financial auditors. If such individuals have been appointed, they should be removed from their positions if they have been convicted of any of the offenses provided for by Law no. 241/2005, not just those related to tax evasion.

Contraventional liability, as a form of legal liability, has been theorized in Chapter V, where the general framework provided by Government Ordinance no. 2/2001 on contraventions was analyzed.

Special attention was given to contraventions with a qualified active subject, since in such cases only a person holding the specific status required by the contraventional norm can be held contraventionaly liable.

Thus, during the jurisprudential documentation, a case was identified involving the application of a contraventional sanction by the National Integrity Agency to a person holding a managerial position in a joint-stock company, who was required to submit a declaration of assets/interests.

Jurisprudence is quite limited with respect to contraventions that involve a qualified active subject, namely administrators within joint-stock companies.

Moreover, Romanian legislation does not include contraventional offenses in which the active subject is a qualified person, specifically one holding the position of administrator within a joint-stock company.

Although, at the time of its adoption, Law no. 31/1990 did not contain any contraventional provisions, later, under the influence of European legal schools according to which criminal liability constitutes the *ultima ratio* in the field of legal responsibility contraventional liability gradually began to make its way, albeit rather timidly in our view, into the commercial domain.

As previously noted, Law no. 441/2006 brought about a comprehensive reform in commercial law, during which several actions were criminalized under contraventional liability actions which, until then, had not been sanctioned either from a contraventional or a criminal perspective.

Several contraventions were introduced, such as the violation of Article 131 paragraph (4), the violation of Article 177 paragraph (1) letter a), and the violation of Article 178 of Law no. 31/1990 on companies.

The common denominator of these contraventions lies in the type of companies within which such acts can be committed specifically, joint-stock companies.

Following a critical analysis of how contraventional liability is currently regulated in commercial matters, a number of logical-legal deficiencies were identified. In essence, liability falls on administrators, who may be sanctioned with a contraventional fine; however, if deficiencies are not remedied, the complementary sanction of dissolution applies as a subsidiary measure a sanction that is imposed directly on the joint-stock company.

On this basis, we proposed a series of legislative interventions to amend the current content of Law no. 31/1990:

- On the one hand, it is necessary to introduce a provision regarding the legal liability of joint-stock companies, allowing them to be recognized as legal subjects that can bear responsibility as active subjects of contraventional offenses.
- *De lege ferenda*, it is also necessary to impose upon the company itself the obligation to maintain registers that ensure transparency and the right to information (such as the shareholders' register, the bonds register, and the register of general shareholders' meetings). A sanction can only serve as a corrective measure for noncompliant behavior; however, if the obligation to keep these registers does not legally fall on the company, it would be legally inconsistent to sanction it for failing to fulfill a duty that the law does not assign to it.

We repudiate the opinion that only administrators should be held liable for the already incriminated contraventional offenses. Assigning liability to the company itself is the most appropriate means of affirming the company's legal personality.

The company is a legal reality that cannot be ignored; it holds rights and, correspondingly, obligations. Resorting to contraventional sanctions would significantly discipline social relations in the commercial field. Furthermore, companies could no longer be used merely as a *front* by natural persons for illicit activities.

- We advocate for the introduction of primary sanctions applicable to the joint-stock company itself and, subsidiarily, the imposition of complementary sanctions, such as suspension or even dissolution. We believe that, *de lege ferenda*, complementary sanctions should follow a gradual approach for instance, the suspension of activity for a certain period, and only subsequently, if legal obligations (such as the establishment of statutory registers) remain unfulfilled, the most severe contraventional sanction the dissolution of the company should be applied.

In addition, the Companies Law incriminates four contraventions, three of which are applicable in the context of joint-stock companies, while it includes 13 articles that define various acts as criminal offenses each article containing multiple legal provisions. This results in a significantly higher number of criminal offenses compared to the number of contraventions incriminated in this area.

This situation raises the question of whether the principle that criminal liability should be the *ultima ratio* of legal liability is genuinely being respected.

Moreover, the next chapter is dedicated to the criminal liability of the administrator. It is primarily structured around three key areas.

The first issue addresses the theorization of the fundamental institution of criminal law namely, criminal liability as established by the Criminal Code.

Considering that the administrator of a joint-stock company may also be a legal entity, the criminal liability of legal persons is also discussed.

This latter institution of criminal law raises the issue of anticipated criminal liability for offenses committed in connection with the process of establishing a company.

Unlike Romanian legislation, Article 5 of the Belgian Criminal Code equates certain entities lacking legal personality under civil law such as joint ventures, civil partnerships, and companies in the process of formation with legal persons, and as a result, they may be held criminally liable.

The analysis of this type of liability has allowed us to identify what we consider to be the rather superficial manner in which the guilt of legal persons is examined in judicial practice.

Given the complex organizational structure of a company that may act as an administrator in a joint-stock company, the process of determining the subjective element with which an offense was committed by a legal person becomes all the more difficult.

There are numerous examples in case law where, although they address the criminal liability of legal persons, they fail to thoroughly examine the subjective element of the legal person being held liable.

However, the analysis of the subjective element in the case of a legal person defendant is actually more elaborate than in the case of a natural person. It involves establishing the organizational structure of the joint-stock company, the manner in which it is managed and governed, identifying the decision-making mechanisms within the company's bodies, the documents drawn up in the context of decision-making, any opposition to those decisions, omissions to act and their motivations, as well as the behavioral analysis of the natural persons who embody the will of the company.

In the absence of such an analysis of the subjective element, criminal liability begins to resemble objective civil liability for another's actions despite the fact that the rationale behind the two forms of liability is fundamentally different.

In light of the above considerations, it is imperative that the judiciary conduct a detailed analysis of the subjective aspect under which acts provided by criminal law were committed by legal persons. General or stereotypical expressions must be excluded, as they contradict both European legislation and case law in the field of human rights.

An interesting framework in this regard is proposed by the Spanish Criminal Code[6],[1] which provides for an analysis of the following:

a) whether the administrative body has adopted and effectively implemented models that include adequate supervision and control measures for preventing offenses or significantly reducing the risk of their commission;

b) whether the monitoring of the functioning and compliance with the implemented prevention model has been entrusted to a body within the legal person that has autonomous powers of initiative and control, or which is legally responsible for supervising the effectiveness of the internal controls of the legal person.

c) the individual perpetrators committed the offense by fraudulently circumventing the organizational and prevention models;

d) there was no omission or insufficient exercise of its supervisory and control functions by the body mentioned under point b).

This framework may serve as an analytical tool capable of supporting the initiation of criminal proceedings a perfectly valid hypothesis even in the case of holding companies criminally liable for tax evasion offenses. In our view, this model could be incorporated *de lege ferenda* into Romanian legislation.

A practical issue that has found an answer in the doctrine concerns the effects of a cause of nullity that arises in the process of establishing a legal entity specifically a company but is only discovered after the offense has been committed, and its implications for the criminal liability of the newly formed entity.

Legal doctrine has taken the view that, in the case of legal persons in the process of liquidation, criminal liability can still be engaged for offenses committed during this phase. The argument, similar to that in French doctrine, is that liquidated legal persons retain the legal capacity required to convert assets into cash and settle liabilities.

To prevent the circumvention of criminal liability through secret or apparent dissolution or structural transformation, the Spanish legislator presumed that an apparent dissolution exists when a company continues its activity and maintains the substantial identity of clients, suppliers, and employees, in cases involving the transfer of criminal liability to a new entity[7]. This legislative solution could also be adopted into Romanian criminal law.

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[6] Article 31bis of the Spanish Criminal Code.

[7] F. S. Calero, J. S. Calero Guilarte, *Principios de derecho mercantil. Tomo I*, 28th Edition, Ed. Aranzadi, Pamplona, 2023, p. 197.

With the new vision of the current Criminal Code, several offenses were included in this fundamental legal act for Romanian society, which, although they do not require the special status of "administrator" for the active subject, are most frequently committed by individuals in such positions.

To ensure coherence in the regulation of criminal offenses, it was concluded that certain offenses currently provided for in special criminal laws and which occur more frequently in judicial practice (such as offenses related to insolvency, corruption, etc.) should be included in the draft Criminal Code.

At the same time, the analysis of special criminal legislation highlighted the need to either amend or, where appropriate, repeal those offenses in special laws that either do not align with the new legal framework, fail to meet the requirements of proper criminalization norms, or duplicate provisions already included in the Criminal Code.

As an example, we point to Law no. 85/2006 on insolvency proceedings, which, although a non-criminal law, contained criminal provisions namely the offenses of simple bankruptcy and fraudulent bankruptcy. These offenses were incorporated into the current Criminal Code upon its entry into force on February 1, 2014.

In terms of legal elements, the provision transferred to the Criminal Code does not differ from the form of the offense in Law no. 85/2006. However, we consider that the inclusion of the offense in the Criminal Code grants it general applicability, as long as the constitutive elements do not specify that the prerequisite condition for all its legal variants is the state of insolvency of a professional debtor.

Nevertheless, although in practice the offense is usually committed by administrators, directors, executive directors, founders, or legal representatives of a company, the constitutive elements, as defined by the legislator, do not limit the offense to a qualified active subject, such as a "professional," as defined in Article 3 of the Civil Code.

Moreover, as we have already mentioned, since it is regulated in the special part of the Criminal Code a law of general applicability it appears that the offense, as it is currently positioned in the structure of criminal legislation, is not specific to insolvency proceedings.
A future legislative amendment would be necessary to introduce the prerequisite condition of the debtor's state of insolvency, in which case a clearly qualified active subject would emerge namely, the person holding the status of professional.

In the area of offenses against property, the main goal was to reassess the statutory penalty limits, with the aim of bringing them back to reasonable thresholds, as well as to simplify the legal framework by eliminating numerous aggravating forms.

At the same time, the regulatory framework was supplemented with new criminal offenses, such as breach of trust by defrauding creditors, insurance fraud, rigging of public auctions, and the financial exploitation of a vulnerable person.

The Criminal Code does not provide a classification of offenses based on the special status of the active subject, such as the capacity of administrator and even less so that of administrator of a joint-stock company. In fact, none of the offenses in the Criminal Code necessarily require the specific status of administrator, understood *in extenso*, within a joint-stock company.

In principle, an administrator can be held liable for any offense defined by the Criminal Code, provided that the offense was committed in connection with the exercise of their role as administrator.

The range of offenses that may be committed by administrators is extremely broad, spanning from crimes against the person, crimes against authority and state borders, crimes against the administration of justice, to corruption and public office offenses or crimes against property.

Although the Criminal Code does not regulate offenses that require the exclusive capacity of administrator as a condition for criminal liability, given the predominantly economic nature of the administrator's role, the most commonly encountered offenses in judicial practice where the active subject is an administrator are those defined in Title II *Offenses Against Property*, Chapter III *Offenses Against Property Involving Breach of Trust*.

These offenses do not require the status of administrator as a formal condition for the active subject, but when committed in a business environment, they are in fact most frequently perpetrated by the company's administrator[8].

The most frequently encountered offenses in judicial practice committed by administrators are fraud, fraudulent management, breach of trust by defrauding creditors, simple bankruptcy, and fraudulent bankruptcy.

Given the rise in economic crime, there is a sustained concern on the part of legislative bodies both domestically and at the European level to regulate in greater detail and with increased consistency the area of legal liability within companies.

Highlighting as criminogenic factors in this area the economic situation, lack of oversight by authorities, insufficient internal control by the management bodies of legal

[8] The Public Prosecutor's Office does not maintain statistics regarding the number of individuals indicted who hold special statuses, such as that of company administrator or other specific roles.

persons, the anonymous and complex nature of economic life, and the legal form of the enterprise, Recommendation No. (81) 12 on business crime by the Committee of Ministers to Member States also emphasizes the need to establish ethical rules aimed at eliminating unlawful conduct[9].

We further add that efforts to combat business crime could be supported by concrete amendments to the criminal provisions of the Penal Code through an honest and well-documented legislative approach. The legislator missed a valuable opportunity, with the adoption of Law No. 286/2009 on the Criminal Code, to reform the criminal legislation as it pertains to the business environment.

From a historical perspective, the Criminal Code was amended by Government Emergency Ordinance (GEO) No. 18/2016 to amend and supplement Law No. 286/2009 on the Criminal Code, Law No. 135/2010 on the Criminal Procedure Code, and to supplement Article 31(1) of Law No. 304/2004 on judicial organization.

On this occasion, Article 256^1 was introduced, with the marginal title *Acts that have caused particularly serious consequences*, which provides that if the acts stipulated in Articles 228, 229, 233, 234, 235, 239, 242, 244, 245, 247, and Articles 249–251 have caused particularly serious consequences, the statutory penalty limits prescribed by law are increased by half.

Therefore, the criminal policy of the Romanian state has pursued the tightening of criminal liability from a single perspective the protection of the victim's property.

However, we must not forget that the offenses regulated under Chapter III *Offenses Against Property Involving Breach of Trust* have as their subsidiary legal object the trust in the honesty that must govern patrimonial and economic relations. In such cases, the roles held by the active subject within economically significant organizational structures, and the influence they wield, are critical in shaping the relationship between debtor and creditor. This fully justifies that holding a decision-making position within the debtor's organization should entail a harsher form of criminal liability.

Thus, we believe that the assessment of offenses under Title II, Chapter III of the Criminal Code must not overlook the position held by the offender. Holding the position of administrator in a commercial company, regardless of its organizational form, should not be ignored.

[9] Recommendation No. (81) 12 on business crime of the Committee of Ministers to Member States, adopted at the 335th meeting of the Committee of Ministers, June 25, 1981.

We must not overlook the fact that administrators enjoy a form of "creditworthiness" at the time of their appointment, as trust is an especially important trait in the business world.

We recall that individuals who have been judicially prohibited from exercising the role of founder as a complementary penalty following a conviction for offenses against property involving breach of trust, corruption, embezzlement, forgery of documents, tax evasion, offenses under Law No. 129/2019 on the prevention and combating of money laundering and terrorist financing, or offenses under Law No. 31/1990 cannot be appointed as administrators in companies.

Therefore, the effort to combat economic and financial crime must continue by adapting criminal enforcement tools appropriately, and this can begin by criminalizing the aforementioned offenses from the perspective of the perpetrator's role as a company leader.

For broader protection against those who, through their actions, violate the trust that must govern patrimonial relations, we believe that the current legal texts should be amended possibly supplemented with aggravated normative variants targeting the active subject holding the position of administrator or director within a company.

We dare propose that, *de lege ferenda*, these aggravated variants should specifically target a qualified active subject namely, an individual holding the status of administrator or director within a joint-stock company.

The conclusion that such amendments are necessary stems from the significant economic activity of such companies and, consequently, from the substantial damage they may cause to contracting creditors in the event of insolvency or possible bankruptcy.

The cornerstone of this chapter refers to the subchapter dedicated to specific offenses committed by administrators, as regulated by Law No. 31/1990 on companies.

Law No. 31/1990 presents itself as an extrapenal law that also contains criminal provisions, because its primary purpose is to regulate the social relations arising from the organization of companies, and only secondarily does it define acts that constitute criminal offenses. On the other hand, it also functions as a special criminal law, since it primarily criminalizes certain acts, thereby complementing the offenses listed in the special part of the Criminal Code[10].

[10] Al. Boroi, M. Gorunescu, I. A. Barbu, *Business Criminal Law*, 5th edition, C.H. Beck Publishing, Bucharest, 2011, p. 34, referring to I. Schiau and T. Prescure, *Law on Commercial Companies. Analyses and Article-by-Article Commentary*, Hamangiu Publishing, Bucharest, 2007, p. 823.

As a framework legislative act, the Companies Law establishes the mechanisms for the formation, organization, modification, and dissolution of companies, also setting out, where applicable, various forms of liability in relation to the corporate domain whether civil, administrative, or even criminal liability.

From the perspective of criminal liability, the sanctioning of acts as offenses under Law no. 31/1990 is subject to the principle of subsidiarity, according to which the existence of a more severe criminal penalty for a particular act than that provided by Law no. 31/1990 leads to the application of the criminal norm that considers the act in question to be a more serious offense[11].

The offenses included in this law could be classified among those related to the performance of professional duties or connected to such duties, offenses concerning the legal regime of certain regulated activities, forgery offenses, as well as offenses relating to the regulation of specific economic activities all of which are already covered by the Criminal Code.

Nevertheless, these offenses are of particular relevance to this thesis due to the status of the active subject, as the analysis focuses on offenses committed by administrators of joint-stock companies.

As already discussed in the subchapter on criminal sanctions of a fiscal nature, we believe the time has come to officially recognize the institution of the "*de facto administrator*," at least in matters of criminal liability, as real-life situations have shown that individuals without official status often play a role in company management and, through their own actions, harm the social relationships within the commercial domain.

This vision is also shared by the Spanish Criminal Code[12], which criminalizes offenses committed by both de jure and de facto administrators[13].

Therefore, a future legislative amendment must mandatorily regulate the institution of the "de facto administrator," which would also eliminate any controversies or disputes regarding the special status of a person who *de facto* manages a company.

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[11] M. A. Hotca, M. Dobrinoiu, *Offenses Provided in Special Laws. Comments and Explanations*, C.H. Beck Publishing, Bucharest, 2008, p. 457.

[12] Title XIII *Offenses Against Property and the Socio-Economic Order*, Chapter XIII *Offenses Related to Companies*: Articles 292–297.

[13] Article 293: "De jure or de facto administrators of any company established or in the process of being formed who, without legal justification, deny or prevent a shareholder from exercising their legal rights to information, participation in the management or supervision of the company's activities, or preferential subscription of shares, shall be punished with a fine from 6 to 12 months."

Throughout this subchapter, several offenses were analyzed, the limitations of the current legal provisions were highlighted, and several *de lege ferenda* proposals were formulated.

These proposals, reiterated in the chapter *Conclusions and De Lege Ferenda Proposals*, address both issues of legislative technique such as the introduction of marginal titles for offenses or the elimination of excessive legislation through referral norms as well as more substantive matters, such as the reconfiguration of certain legal provisions that criminalize specific acts, the establishment of new offenses, or the decriminalization of some existing ones. In our view, there is an overabundance of criminal legal norms in commercial matters, which is not justified by judicial practice. The statistical data presented in the table below speaks for itself, and it is necessary to identify the most appropriate legal mechanisms to achieve a balance between criminalizing acts that fall within the sphere of criminal liability and using other, *softer* forms of accountability.

Criminal jurisprudence in the commercial domain is not particularly active, which does not mean that this niche criminal liability should be repealed. The low number of individuals prosecuted and convicted across the country is due more to the lack of willingness to report such acts than to the low social danger posed to the relationships protected by criminal provisions.

The statistical data recorded at the level of the criminal investigation authorities indicate two trends:

- A constant decrease in the number of cases involving offenses regulated by Law no. 31/1990;
- An extremely low percentage of cases resulting in indictments for such offenses.

As already mentioned, between 2020 and 2024, there was only one case in which an indictment was issued for an offense that necessarily requires a specific active subject, namely, an administrator within a joint-stock company.

The analysis of this trend leads us to the conclusion that it is necessary to temper the principle of officiality and to introduce a mechanism that allows criminal prosecution to be initiated only upon the prior complaint of the injured party. This would prevent the judicial authorities from being burdened with unnecessary workload, especially since judicial practice in this area is not particularly significant.

A legislative initiative aligned with the *de lege ferenda* proposal mentioned above would also target a new criminal offense concerning illicit activities involving *shell companies*.

The Moldovan Criminal Code already criminalizes such activity under Article 242, which defines the offense with the marginal title *Pseudo-entrepreneurial Activity*.

Judicial practice has demonstrated the necessity of regulating such conduct, especially in cases of tax evasion, where shell companies lacking any real existence were used by tax evaders to defraud the state budget.

Although this criminal mechanism has been widely employed within tax evasion networks, shell companies have also been used to commit other economic-financial offenses, such as fraud.

This necessity also arises in the context of insolvency, where the use of shell or fictitious companies creates significant difficulties for creditors, whose legitimate interests are compromised through the fraudulent use of such entities.

Hence, the need arises to criminalize such conduct within the sphere of penal illegality as a stand-alone offense representing preparatory acts for offenses that harm the social relations protecting economic and financial activity. Criminalizing the creation of *shell companies* as an independent offense responds to current practical needs.

We believe that in a future legislative amendment, the legislator should introduce a safety measure regarding the special confiscation of profits obtained from the commission of the offense, similar to corruption offenses. This is justified by the fact that commercial offenses have a distinct normative content, and a specific regulation on special confiscation would require clear, predictable, and precise norms to avoid extensive, incoherent, or even abusive interpretations.

Such a safety measure would also align with the European criminal legislative framework. For example, the Italian Civil Code, under Article 2641, mandates the special confiscation of proceeds from corporate offenses, as well as the assets used in committing the offense a provision that complements Article 240 of the Italian Penal Code.

The Belgian legislator has chosen to regulate offenses specific to corporate activities directly within the *Companies and Associations Code*, placing them at the end of each chapter dedicated to a particular corporate form.

In the case of public limited companies (*sociétés anonymes*), Article 7:232 governs offenses within the scope of criminal liability. It is relevant to note that these offenses have a qualified active subject, namely the administrator of the joint-stock company.

In conclusion, criminal liability arising from the operation of companies is inconsistently regulated across European legal systems. Some countries criminalize specific offenses within special laws such as Romania, Portugal, or Belgium while in others, such

offenses are addressed in the special part of the Penal Code, as is the case in Spain or the Republic of Moldova.

The final chapter, Chapter VII, entitled *Conclusions and De Lege Ferenda Proposals*, integrates the findings from the conducted research regarding the legal liability of administrators operating within joint-stock companies, analyzed from a multidisciplinary perspective.

The use of the comparative method throughout this work provided an opportunity to identify potential deficiencies in our national legislation. More importantly, it offered viable legislative solutions that can be adopted either in the form found in foreign legislation or with minor adaptations.

The regulatory approaches of European countries do not follow a unified paradigm, each having its own specificity. However, in some cases, they have served as a source of inspiration for possible legislative amendments in the Romanian legal system.

In conclusion, the scientific undertaking regarding the legal liability of administrators in joint-stock companies has proven to be both necessary and fruitful. It has offered us the opportunity to observe, from a broader perspective, the limits of the applicable legislation, and the proposed amendments may help reshape or at least refine the existing legal framework.
From a personal perspective, the completion of this research has only enriched the undersigned's understanding and interdisciplinary analysis in the field of law.

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