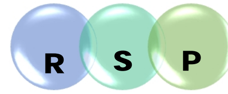
RSP • No. 45 • 2015: 173-185



ORIGINAL PAPER

The Impact of the Current Criminal Law upon the Offences Related to the Company's Law No. 31/1990

Lavinia Elena Stuparu*

Abstract
The new Criminal Code and Criminal Procedure Code have caused changes with a major impact on the entire Romanian legal system, influencing also the commercial sector here and there. In this sense can also be enlisted the adjustments made within some of the Articles from the Company's Law No. 31/1990 through the provisions of the Article 33 from the Law no. 187/2012 implementing the Law no. 286/2009 regarding the Criminal Code. The invoked amendments regard mainly under different aspect the offences regulated by the L aw no. 31/1990 and are substantiated, if applicable, by the introduction of new offences, by the rewording or repealing of the current offences. The offences previously mentioned in the Article 6 (1) from the Law no. 31/1990, which determine for a person not to hold the title of founder or member within a company's management, administration and control bodies were adjusted to the new types of offences from the current Criminal Code.

***Keywords*:** offences, companies with legal personality, Law no. 187/2012, Law no. 31/1190

* Lecturer, PhD, University of Craiova, Faculty of Law and Social Sciences, Phone: 0040351177100, E-mail: laviniasmarandache@yahoo.com.

Current stage of the criminal legislation

Within the current study, one of the regulations relevant for the interferences of the commercial law with the criminal law is Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code (in force since February 1st 2014). Within the national legal system this legislative act is a component of the major changes occurred in the criminal sector and in the criminal procedure sector. The current legislation bursts with novelty elements which concern numerous specific legal institutions. Among these, we can remind as examples: a new definition of the crime; the introduction of some new crimes, the annulment of some crimes or only the amendment of the integrant content; changes of perspectives in the sector of crimes (main, complementary or applied to legal entities), the causes which preclude the criminal liability and the causes which preclude or modify the execution of the punishment; the set-up of four procedural phases within the criminal trial; the acknowledgement of the justice of peace as legal body; the establishment of new defence rights and obligations; the disappearance of the appeal means against the judgements pronounced by the Court of First Instance (Antoniu, 2011:6-13; Răducanu, 2014: 112-115; Toader et al., 2014; Volonciu et al., 2014; Toader, 2014).

Concretely, certain breaches of some norms regulating social relations in the commercial sector are incriminated as crimes and consequently punished through norms of the criminal law. Such norms are present both in the criminal legislation, and also in the commercial one. Both the general principles of the criminal law, and also the particularity of the breached legal provisions are to be taken into account also for the implementation of the criminal sanctions for the breach of some norms regarding the commercial activity.

Coming back to Law no. 187/2012 we keep in mind that amendments of the provisions from Article 6 and Article 271 – 280 from the Companies Law no. 31/1990 are made through the Article 33. Mainly, the invoked amendments regard under different aspects the crimes regulated by Law no. 31/1990 and are materialized, if applicable, in the introduction of new crimes, in the reformulation or annulment of the existent crimes. The crimes previously nominated at Article 6 of the Law no. 31/1990, which determine that a person should no longer hold the title of founder or member of the management, administration and control bodies of any company, were adjusted to the new types of crimes from the current Criminal Code.

Amendment Article 6 paragraph (2) of Law No. 31/1990

Article 6 paragraph (2) reads: Persons that according to the law are not able or that were convicted for dishonesty offences against the patrimony, for corruption, embezzlement, forgery, tax evasion, crimes provided by the Law no. 656/2002 for the prevention and punishment of money laundry, and also for the set-up of some prevention and controlling measures related to the financing of terrorism acts, republished, or for the crimes provided by the Law no. 31/1990 cannot be founders.

Article 6 paragraph (2) from the Companies Law regulates two of the conditions which any person must observe in order to attain the title of founder at any company which has the regime determined by the this legislative act (Smarandache, 2010: 41). According to the reference provisions of Article 73[1] from Law no. 31/1990 the conditions are maintained also for the administrators, managers, members of the Board of Supervision

and Managing Board, the auditors or financial auditors of any company (Găină and Smarandache, 2010: 71, 74, 76).

One of the conditions is that of having full competence and the second one is identified by the literature as the conditions of honorability (Cărpenaru, 2012: 207; Popa, 2014: 113; Mihăilă, Dumitrescu, 2013: 83) or the special use incapacity regarding the right to become associates or to found companies (Cărpenaru, Piperea and David, 2014: 102), namely to acquire the above mentioned functions. On this occasion we approach only the condition of honorability out of the two mandatory conditions, such condition being thus targeted by the established amendments of the criminal law.

Practically, any natural person, namely the natural person representative of any legal person will be able to acquire the title of founder or any of the above nominated titles only if he/she was not convicted through a final sentence for the crimes restrictedly nominated by Article 6 of Law no. 31/1990. Practically, in the case of the founders, in default of honorability no person will not be able to sign as founder the company's Articles of association. For the other qualities targeted by the legislator, the election or appointment of any person who does not fulfil the condition of honorability is punished by the termination of rights.

The change made to the Article analysed through the provisions of the Article 33, paragraph (1) from Law no. 187/2012 sees the crimes themselves taken into account to determine if a person is honourable to hold the titles of founder, administrator, director, member of the supervision and management board, auditor or financial auditor within a company. The current version reveals that, if applicable, some crimes were dropped, some crimes were maintained as such or by using the group of crimes to whom new crimes belong in the present, namely were introduced.

Perjury can only be included in the category of the crimes which were dropped. Starting with the 1st of February 2014 the conviction of any person for such a crime does not affect her/his possibility to be founder of any company or to acquire and maintain the title of member of the company's management or control bodies.

Being different to the previous case, the absence of the crimes related to fraudulent management, misappropriation and fraud, and also the crimes from the Insolvency Law no. 85/2006 out of the restricted enlisting from the Article 6 paragraph (2) of Law no. 31/1990 is explained by its correlation with the current terminology from the New Criminal Code. More exactly, all these crimes are renamed in the New Criminal Code as "crimes against the patrimony by dishonesty". But this new phrase covers also other crimes, leading practically to the extension of the number of crimes in relation with what the current honorability of any person is analysed. Newly introduced crimes justified by the contemporaneous social-economic realities are the following: breach of trust by committing fraud against creditors, insurance frauds, embezzlement of public tenders and the real estate exploitation of a vulnerable person.

The previously exposed reasoning is valid also for the crimes of giving bribe and taking bribe. The formula established by the New Criminal Law, in order to designate the category of crimes into which the two are included, is that of *corruption crimes.* Also this time Article 6 paragraph (2) of the Law no. 31/191 is provided with the extension of the sphere of crimes motivated by the fact that the traffic of influence and influence peddling are also to be found into the category of corruption crimes.

For the crimes of forgery and use of forgery contained in the previous version of Article 6 paragraph (2) from the Companies Law, the legislator follows the same

mechanism to impose a terminological correspondence. More exactly, the two crimes were replaced with the phrase “crimes of forgery in deeds”.

The introduction of new crimes into the content of Article 6 paragraph (2) was achieved both by using phrases which currently define groups of crimes (above described) and also by distinctively nominating a new crime. We consider the crime of tax evasion (for the structure and judicial content of the crime, Tudor, 2014: 1-88), previously absent but more than necessary in the present. The diversity and complexity of the causes for such crime (Cârlescu, 2012: 13-16), the method of committing it (Florescu, Bucur, Mrejeru, Pantea, Martinescu and Manea, 2013: 75-141), its implications and consequences justified its nomination in the sphere of crimes which determine the elimination of honorability for certain persons with statuses targeted by the Law no. 31/1990.

Not at last, there were mentioned certain crimes which within the context of the reform related to the criminal law either were not subject to any redenomination (which is the case of the embezzlement crime), or continued to be governed by special legislative deed not targeted or partially targeted by the amendments in the analysed legislative deed (which is the case of the crimes provided by Law no. 656/2002, namely those from Law no. 31/1990).

Amendments of Article 271 – Article 281 from the Law No. 31/1990

Through the Article 33 paragraph (2) - (15) from the Law no. 187/2012 most of the crimes regulated by Law no. 31/1990 was amended. Practically among the crimes contained in the Title VII of the last legislative deed, amendments intervened only regarding Article 276.

The amendments made by the current criminal law consist in synthesis in the introduction of new crimes, abolition or reformulation of the previously existing crimes, the acknowledgement of the status of active subject qualified for new persons, the reduction of the minimum and maximum punishments. Their analysis will reveal that the crimes from the Companies Law, although they are not the beneficiaries of some radical amendments, cannot be ignored in relation with their implications. The founder, administrator, general manager, manager, member of the supervision or management board or the legal representative of the company that (Article 271): a) present dishonestly untrue data on the set-up of the company or on the economical or judicial conditions of the company or hide dishonestly all or part of such data in the leaflets, reports or communications to the public; b) present dishonestly to the shareholders/associates an inaccurate financial status or with inaccurate data on the economical or judicial conditions of the company in order to hide the real status; c) refuse to put at the disposal of experts, in the cases and under the circumstances provided at Article 26 and 38 the necessary documents or prevent dishonestly to fulfil the assigned tasks are punished with prison between 6 months up to 3 years or with a fine.

The Law no. 187/2012 brought two amendments and an addition to Article 271 from the Companies Law. The amendments target the extension of the constituents from the category of the qualified active subjects of the crimes regulated by Article 271 and the criminal punishment which can be applied for their commission, while the addition targets the text of two of the three crimes established by the analysed Article.

Regarding the first amended aspect, the legislator practically corrected a lacuna existing in the previous text of Article 271 from Law no. 31/1990. Therefore, the possibility of being an active subject of the three crimes incriminated by this Article and

the members of the management bodies from the joint stock companies with a two tier corporate model was recognized. It is about the members of the supervision board and the members of the management board whose exclusion was lacking motivation. Moreover, a difference related to the judicial treatment lacking any grounds in relation with the members of the management body from private companies with a one tier corporate model was set up at the legislative level. In comparison with the previous version of the text, the phrase "general manager" was also replaced with the phrase "managing director". The intervention of the legislator is timely motivated by the fact that the Law no. 31/1990 did not regulate the title of managing director, but the executive title under the name of general manager (Gheorghe, 2013: 392-394; Angheni, 2013: 186-190) characteristic for the one tier corporate model of the private companies.

Regarding the second aspect amended, we keep in mind the reduction of the maximum limits (from 5 years to 1 year) and the minimum limit (from 1 year to 6 months) and also the introduction of the fine as an alternative punishment for the crimes established by the Article 271. The manner in which the criminal punishment is approached, including in the case of committing the analysed crimes, is one of the components from the reforming vision outlined by the current criminal legislation. This is obvious both in the case of some crimes regulated by the Law no. 31/1990 (Article 272, Article 272 , Article 273, Article 277, Article 279, 280 and Article 280), and also in the case of many crimes from the Criminal Code or from other special laws. If in the past the increase of the punishment limits provided by the law was seen as one of the main solutions for the increase of the criminal phenomenon in different areas, with the occasion of the recent amendment in the criminal law the legislator selected an antithetic mechanism of diminishing the punishing regime. As it was presented also in the doctrine, the preventive criminal policy (with the specific strategies and measures which are included in it) can have a stronger impact than the punitive criminal policy regarding the reduction of the crime rate and represents a more efficient solution in relation with the cost of the crime (Muțiu, 2013). The amendment of the legislative policy was based both on the failure of the inhibitor effect of increasing the criminal punishments, and also the significant difference determined to exist between the special maximum limit of the punishments for certain crimes, as they were provided by the law, and the quantity of the penalties applied in fact by courts of law, which was most often well below this maximum limit. Therefore, the new Criminal Code and its implementation law enable a customization mechanism of the more proper punishing treatment by reducing the minimum and maximum punishment limits, but also correlated with other efficient instruments for the customization and sanction of the punishments. Within this context, the judge has acquired more freedom of assessment related to the effective establishment of the punishment.

Regarding the addition made to Article 271 from Law no. 187/2012, this targeted out of the three regulated crimes only those incriminated by the letter a) and b). If applicable, the action or non-action which forms a significant element of the integrant content of those crimes has starting with the 1st of February 2014 a wider, but not necessarily clearer object. We have in mind the phrase "judicial (…) conditions".

Therefore, the qualified active subject provided by the law will be able to be convicted for the crimes from Article 271 letter a) – b) also when he/she presents or hides in bad faith untrue data in the documents and/or to the persons nominated by the legislator, including those which concern both the company's economic conditions and also its judicial conditions. In absence of an official approval on the phrase "judicial conditions" it is clear that the courts of law will be the ones which will assess the existence of such

conditions if they are pointed out. According to Article 272, the founder, administrator, general manager, director, member of the supervision and management board or the company's legal representative that: obtains on the account of the company shares of other companies for a price which obviously knows to be higher than their actual value, or sell on the account of the company shares owned by his/her for prices which he obviously knows to be lower than their actual value, for the purpose of obtaining any benefit to the prejudice of the company on his behalf or for other persons; uses in bad faith assets or the credit which the company benefits of, for a purpose contrary to its interests or for his/her own purpose or in order to favour another company in which he/she holds directly or indirectly interests; borrows under any form directly or through an intermediary from a company managed by him/her, from a company controlled by it or from a company controlling the company managed by him/her, the amount borrowed being higher than the limit provided at Article 444 paragraph (3) letter a), or determines one of these companies to grant him/her any warranty for own debts; breaches the provisions of the Article 183 is punished with prison from 6 months up to 3 years or with fine. No deed provided at the paragraph (1) letter b) will represent any crime if it was committed by the administrator, manager, member of the management board or the company's legal representative within some treasury operations between the company and other companies controlled by it or which control it directly or indirectly and no deed will provided at paragraph (1) letter c) will represent any crime if it is committed by a company which has the title of founder, and the loan is taken from one of the controlled companies or which control it directly or indirectly.

The analysed Article reveal two amendments to Law no. 187/2012. On the one hand, the components of the category related to the active qualified subjects of the crimes regulated in Article 272 paragraph (1) – (2) are extended and on the other hand, the punishment with imprisonment has the limits decreased and is doubled by the option concerning the punishment with penalty.

In the case of the first amendment, the legislator has done nothing else but to continue the undertaking initiated once the Article 271 was changed. We are witnessing therefore an extension of the category related to the persons that can be qualified active subjects of the crimes incriminated by Article 272 paragraph (1). If in the past only the founder, administrator, manager or the company's legal representative were punished, in the current version also the general manager, member of the supervision or management board have become subject to punishment. Due to identity issues, the argumentation exposed at Article 271 for this type of legislative amendment remains valid. The reformulation started at paragraph (1) is continued also in paragraph (2) of Article 272, the member of the management board being added up to the series of persons excluded from punishment when the deed is committed under certain circumstances.

The second amendment reveals a new materialization of the reformatting vision on the current criminal law. Practically, the punishment with imprisonment benefits of a recalibration of the minimum limit (from 1 year to 6 months) and of doubling it with the option for the penalty also for the crimes from the Article 272 paragraph (1). The founder, administrator, general manager, director, member of the supervision or management board or the company's legal representative that: a) spreads false news or uses other fraudulent means which result in the increase or decrease of the value for the company's shares or liabilities or any other titles which he/she hold, for the purpose of obtaining for himself/herself or for other persons any benefits to the prejudice of the company; b) collects or pays dividends under any form out of fictitious profits or which cannot be

distributed, in default of the annual financial statement or contrary to the results therein is punished with prison from one year up to 5 years.

Mostly, as in the case of the previously analysed Articled, the legislator continued both the extension of the components of the category for the active qualified subjects for the crimes incriminated by the Article 272 (by adding up the member of the supervision or management board), and also the reduction of the minimum limit (from 2 years to 1 year) and the maximum limit (from 8 years to 5 years) for the punishment with imprisonment. Therefore, the argumentation for this aspect, exposed in the analysis of the Article 272 preserves its validity also for the Article 272.

A new particularity is highlighted by the text from letter b) in the sense of adding the word "annual" to the phrase "financial statement". The statement proves useful considering the possibility of distributing the profit of a company also during the fiscal year based on the mid-term balance sheet and the monthly trial balance, by keeping a part of the profit which can be distributed, in order to cover the possible losses which might be registered until the completion of the fiscal year (Cărpenaru, 2012: 139, and for a contradictory opinion Mircea, 1999: 109). As a practical consequence, the current wording can be interpreted also in the sense of restricting the distribution of a company's profit based on the possible monthly or mid-term financial statements.

According to Article 273, the administrator, general manager, director, member of the supervision or management board or the company's legal representative that: issues shares with a value lower than their legal value or for a price lower than the nominal value or issues new shares in exchange of cash contributions before the previous shares are fully paid up; uses within the general assemblies the shares which are not subscribed or distributed to the shareholders; grants loans or advance payments based on the company's shares or sets up guarantees under other circumstances than the ones provided by the law; hands over to the holder of the shares before the term or hands over shares issued entirely or partially except for the cases determined by the law or issues shares to the bearer without them being fully paid up; does not observe the legal provisions regarding the cancelation of the shares not paid-up; issues bonds without observing the legal provisions or shares without comprising the mentions required by the law is punished with prison between 3 months up to 2 years or with a penalty.

As a whole, Article 273 regulates more criminal actions regarding the shares and bonds issued by the private companies (Cîrcei, 1992: 16-23; Duțescu, 2012: 23-34; Schiau, Prescure, 2009: 246-295, 494-503; Cucu, Gavriș, Bădoi, Haraga, 2007: 161-207, 398-406). The active qualified subjects for which a criminal liability can be involved are significant in this sense. And in the case of this Article, the Law no. 187/2012 brought a series of amendments which highlight a coherent approach of the legislator within the context of the crimes contained in the Law no. 31/1990 (Cărpenaru, David, Predoiu, Piperea, 2009: 1007-1048).

On the one hand, the members of the management and supervision board were introduced into the category of active subjects for all the crimes provided at the Article 273. As in the case of the crimes analysed above, we are facing another materialization of the policy to reduce the limits of the punishment with imprisonment and to introduce the penalty as an alternative punishment. In this sense, the punishment with the imprisonment from 3 months up to 2 years or with penalty replaced the previous punishment consisting in imprisonment from 6 months up to 5 years.

On the other hand, a new crime was added in letter c) Article 273. Presently the deed of the administrator, general manager, director, member of the supervision or

management board or the company's legal representative that [...] sets up guarantees under circumstances other than those provided by the law has this regime and is punished consequently. This addition made to the Article 274 letter c) is justified by the complexity of business transactions which occur in reality between the company and the members of its management bodies. As a matter of fact, Law no. 3/1990 stipulated the regime of the operation for the set-up of warranties with the regulation of certain interdictions through Article 106 and Article 144 (Cărpenaru, Piperea and David, 2014: 339-340). Article 274 specifies that the administrator, general manager, director, member of the supervision or management board or the company's legal representative that: fulfils the decisions of the general assembly regarding the amendment of the company's form, its merger or division or the reduction of the registered capital before the expiry of the terms provided by the law; fulfils the decisions of the general assembly regarding the reduction of the registered capital without the members enforcing to perform the owed payment or without them to be exempt from the payment of the subsequent duties through the decision of the general assembly; fulfils the decisions of the general assembly regarding the amendment of the company's form, merger, division, dissolution, reorganization or reduction of the registered capital, without informing the judicial body or by breaching the interdiction established by the latter, in case a criminal proceeding was initiated against the company is punished with prison from one month up to one year or with a penalty.

Mainly, Article 274 highlights two amendments, namely: extension of the component parts for the category of the active subjects for the crimes which are regulated also by the introduction of a new crime at letter c).

The first amendment is nothing else but a new materialization of acknowledging the members of supervision and management board (management and controlling body at private companies with a two tier corporate model) as active qualified subjects of the crimes regulated by Article 274 from the Companies Law. As in the case of the other crimes already analysed, for which this type of amendments has occurred, the exposed argumentation maintains the identity validity of the reasoning.

The second amendment consists in recognizing and punishing as crime the deed of the administrator, general manager, director, member of the supervision or management board or the company's legal representative to fulfil the decisions of the general assembly regarding the amendment of the company's form, merger, division, dissolution, reorganization or reduction of the registered capital without informing the judicial body or by breaching the interdiction established by the latter, in case the criminal proceeding is initiated against the company. The grounds for the regulation of this new crime, different through its material element from the other two maintained, seem to be to avoid the fraud against persons entitled to capitalize some rights on the company's asset. Therefore, the legislator tries to anticipate the possible options which a company which is already under criminal proceeding, might access through its management and controlling body.

Secondly, we keep in mind also a small reformulation made in the text of the letter b) from Article 274. It is about the replacement of the term "associates" existing in the previous wording with the term "members". The intervention of the legislator is easy to explain considering that the correct title for the persons that can perform payments upon the set up and/or during the operation of the company is "associates" (for partnerships and limited liability companies), namely "shareholders" (for capital companies). The notion of member is rarely used by the Romanian legislator in order to designate the persons described previously within some entities which have the legal regime of the companies

(for example at credit unions). In most case the title of member is specific for the non-profit legal entities, but also for some profit legal entities (for example in unions, economic interest groups) and even for some associations of natural entities (for example family enterprise). The administrator, general manager, director, member of the supervision or management board is punished with prison from one month up to one year or with a penalty if he: a) breaches even through intermediaries or through fake deeds the provisions of Article 144; b) does not summon the general assembly in the cases provided by the law or breaches the provisions of the Article 193 paragraph (2); c) initiates operation on behalf of a limited liability company before the full payment of the registered capital is performed; d) issues negotiable instruments representing shares of a limited liability company; e) acquires shares of the company on its behalf in the cases forbidden by the law (Article 275). Furtheremore, the associate that breaches the provisions of the Article 127 or Article 193 paragraph (2) is also punished according to the paragraph (1).

In this case the criminal legislator limits his/her amending intervention only to the persons that ca be active subjects of the crimes nominated in the provisions of the Article 275 from the Law no. 31/1990. If in the past only the associate and the administrator (management body in partnerships, limited liability companies and capital companies with one tier corporate model) could be active subject of such crimes, presently the title was acknowledged also for the general manager, director, member of the supervision and management board. Therefore, the other components of the controlling and/or management body from the one tier corporate model and two tier corporate model of the capital companies have become subject to criminal punishment determined by Article 275. As in the case of the other crimes above analysed, the current legislative approach eliminated in a justified manner the discriminatory treatment previously existing between these controlling bodies. According to Article 277, the person that accepted or maintained the assignment as auditor contrary to the provisions of Article 161 paragraph 2 or the person that accepted the assignment as expert by breaching the provisions of the Article 39 is punished with prison from 3 months up to one year or with penalty. Furthermore, the decisions made by the general assembly based on a report of an audit or expert assigned by breaching the provisions of Article 161 paragraph (2) and Article 39 cannot be cancelled due to the breach of the provisions contained in these Articles. At the same time, the founder, administrator, director, executive manager or auditor exercising his/her functions or assignments by breaching the provisions of the present law regarding incompatibility is also punished according to paragraph 1. The intervention made upon the text of the Article 277 from Law no. 31/1990 is reduced, targeting only the extension of the criminal punishment. More exactly, if in the past the crimes established by this Article involved the criminal liability under the form of prison from 3 months up to 3 years, in its current form the legislator established the limits of the imprisonment punishment between 3 months and 1 year and introduced the penalty as an alternative punishment. Practically, the crimes determined by Article 277 objectify also the re-setting of the punishing treatment within normal limits as part of the vision of the current criminal legislation (Article 278 paragraph 2: the liquidator that perform payments to the associates by breaching the provisions of Article 256 is punished with prison from one month up to one year or with penalty).

Previous to the amendment introduced by Law no. 187/2012 the legislator used a reference norm for the identification of the criminal punishment which was applied to the liquidator as the company's legal representative during the stage of its liquidation. In its current form, the legislator maintained the same criminal punishment but preferred to

mention it expressly in the wording of the text from Article 278 paragraph (2). According to the provisions of Article 279, the shareholder or the holder of bonds that: transfers his/her shares or bonds on the name of other persons for the purpose of forming a majority at the general assembly to the prejudice of other shareholders or holders of bonds; votes at the general assembly in the case provided at the letter a) as owners of shares or bonds which in reality do not belong to him/her; in the exchange of an inappropriate material benefit undertakes to vote in a certain manner at the general assembly or not to take part in the voting process is punished with prison from 3 months up to 2 years or with penalty. Even more, determining a shareholder or holder of bonds to vote in a certain manner at the general assembly in the exchange of an inappropriate material benefit or not to take part in the voting process is punished with prison from 6 months up to 3 years or with penalty.

In the case of Article 279, the legislator resorts to adjusting the criminal punishment for the incriminated crimes and to reformulating some phrases within the content of the text. Regarding the first novelty element we keep in mind the reduction of the minimum limit (from 6 months to 3 months) and the maximum limit (from 3 years to 2 years) for the imprisonment punishment. The approach is explained by the current legislative trend regarding the reduction of the maximum punishment limits. Regarding the second element, in the current wording version the phrase “inappropriate material benefit” is preferred in exchange of the phrases “material benefit” and “amounts of money or other material benefit”. In our opinion, the current form of the text has a wider understanding which makes it to cover more the previous phrases and leaves open the possibility to qualify as such also other cases with criminal potential which might occur within the judicial existence of a company. Article 280 regulates that the fictitious transfer of the shares or bonds held at a company for the purpose of committing a crime or for the purpose of circumventing the criminal prosecution or for the purpose of hindering the criminal prosecution is punished with prison from one year to 5 years.

And in the case of this Article the legislator preferred to diminish the penalty which will be applied to the incriminated criminal deeds, the punishment with prison from 2 up to 8 years being replaced with the one from one year up to 5 years. Additionally, an addition regarding the factual cases which will be able to be qualified as crimes based on this Article was introduced. Similarly to the other crimes which benefited of such amendment, the crime from the Article 280 also reflects the current legislative vision based on the fact that the previous praxis proved that not the excessive increase of the punishment limits is the efficient solution for fighting against crime. Thus, presently crimes is represented by the fictitious transfer of the shares or bonds held in a company including when this is performed for the purpose of committing a crime. At the same time, according to Article 280, the conscious use of a deregistered company for the purpose of becoming legally binding represents a crime and is punished with prison from 3 months up to 3 years or with penalty.

In comparison with the text previously regulated by Law no. 31/1990, the current Article 280 benefits of a simplified wording. One of the component parts from the deleted fragment referred to the method in which a company whose deeds were used in an incriminating manner, namely following the non-fulfilment of the obligations provided by the law, is deregistered. A company thus deregistered ceases to be a legal subject and its conscious use also for the purpose of becoming legally binding is punished according to the criminal law, being deemed a form of fraud against the contracting partners (Cărpenaru, David, Predoiu and Piperea, 2009: 1046). The second component of the

deleted fragment used a reference note to the Article 280, namely the conscious use of a company's deeds elaborated in the manner provided at the Article 280 was deemed a crime. To summarize it, the current version of the Article 280 punishes according to the criminal law the use of a deregistered company's deeds without any delimitation and the abrogation of the Article 280 justifies the deletion of the previous reference to the deeds resulting from the commitment of the deeds incriminated by this Article.

Presently the minimum limit (from 2 years to 3 months) and the maximum limit (from 8 years to 3 years) are reduced for the imprisonment punishment. Additionally, for the crime provided by the Article 280 the optional punishment with the penalty is set up.

The actions provided in the present title, if according to the criminal Code or some special laws they represent aggravating crimes, they are punished as such (Article 281). Regarding Article 281 from Law no. 31/1990 just one re-arrangement of the text can be kept in mind, its meaning remaining unchanged. We practically witness just to an improvement of the legislative technique, the meaning of the Article being that of maintaining the subsidiary character of the indictments from the Companies Law.

In other words, although the criminal provisions from the Companies law present the legal form of some criminal special norms which in collaboration with the provisions of the general law should be mainly applied, the Article 281 provides as clearly as possible that in case the same deeds as those determined as special crimes by the Title VII from the Law no. 31/1990 according to the general law will be punished as aggravating crimes, the provisions of the latter legislative deeds will be applied mainly and exclusively (Voicu, et al., 2008 : 36). Taking into consideration the context generated by the analysed Article, the idea according to which the implementation of the principle regarding the specialty of the criminal law (*lex specialis derogat legi generali*) should be performed more expressively, meaning to take into account first of all the principle of subsidiarity provided by Article 281 from Law no. 31/1990, is also expressed in literature (Manea, 2000: 116-117). Whereas the special law is declared subsidiary in relation with the provisions from the Criminal Code or from the special laws, the principle regarding the specialty of the criminal law is also explicitly removed, acknowledging that a more serious law should belong to the common law (Corlăţeanu, 2008: 48).

As in the past the effective method of implementing the text contained in the Article 281 generated a controversy in literature and led to a non-unitary judicial praxis (Kádár, 2011: 10-20), we agree that the legislator's intervention on this Article is not unfortunately made to lead to the settlement of the indoctrinating discrepancies and to an uniformization of the courts' praxis.

In conclusion, we keep in mind the abrogation of the Article 280 and Article 280 from the Law no. 31/1990 (Cărpenaru, David, Predoiu and Piperea, 2009: 1044-1046). Presently, during the existence of a company the circumstances which previously were incriminated by the two Articles abrogated, can represent at most criminal deeds punished according to other legislative acts.

References:

Angheni S. (2013). *Drept comercial. Profesioniștii-comercianți,* Bucharest: C. H. Beck Publishing House.

Antoniu G. (2011). Unele observații cu privire la noul Cod Penal. *Analele Facultății de Științe Juridice*, Valahia.

Cărpenaru, S. D. (2012). *Tratat de drept comercial român. Editia a III-a revizuită conform noului Cod civil*, Bucharest: Universul Juridic Publishing House.

Cărpenaru, S. D., Piperea, Gh., David, S. (2014). *Legea societăților. Comentariu pe articole*, 5th edition, Bucharest: C. H. Beck Publishing House;

Cărpenaru, S. D., David. S., Predoiu C., Piperea Gh. (2009). *Legea societăților comerciale. Comentariu pe articole.* 4th edition, Bucharest: C. H. Beck Publishing House.

Cîrcei, E. (1992). Regimul juridic al acțiunilor și acționarilor potrivit Legii nr. 31/1990. D*reptul*, 2.

Cârlescu, N. (2012). *Evaziunea fiscală. Comentarii și exemple practice*, Bucharest: C. H. Beck Publishing House.

Corlăţeanu, S. (2008). *Drept penal al afacerilor. Curs universitar*, Bucharest: Pro Universitaria Publishing House.

Cucu, C., Gavriș, M. V., Bădoi C. G., Haraga C. (2007). *Legea societăților comerciale nr. 31/1990. Doctrină, jurisprudență, decizii ale Curții Constituționale, adnotări,* Bucharest: Hamangiu Publishing House.

Duțescu, C. (2012). *Drepturile acționarilor*, 3rd edition, Bucharest: C. H. Beck Publishing House.

Găină, V., Smarandache, L. E. (2010). *Drept comercial român*, Craiova: Alma Publishing House.

Gheorghe, C. (2013): *Drept comercial roman*, Bucharest. C. H. Beck Publishing House.

Florescu, D. A. P., Bucur, D., Mrejeru, T., Pantea, M., Martinescu, A., Manea V. (2013). *Evaziunea fiscală,* Bucharest: Universul Juridic Publishing House.

Kádár, H. (2011). Unele aspecte controversate referitoare la infracţiunile prevăzute de Legea nr. 31/1990. *Scientia Iuris*, 3-4.

Manea, T. (2000). Infracţiuni prevăzute de legea societăţilor comerciale. Soluţii din practica judiciară. *Revista de Drept Penal*, 3.

Mihăilă, Ș., Dumitrescu, A. D. (2013). *Drept comercial român*, Bucharest: Universul Juridic Publishing House.

Mircea, V. (1999). Distribuirea dividendelor – aspecte teoretice și practice. *Revista de Drept Comercial*, 2.

Muțiu, F. O. (2013). Politica penală de prevenire a criminalităţii. Principii. *Analele Universității de Vest. Secțiunea drept*, Timișoara, 1.

Popa, S. (2014). *Drept comercial. Introducere. Persoană fizică. Persoană juridică.* Bucharest: Universul Juridic Publishing House.

Răducanu, R. (2014). Câteva considerații de doctrină și practică judiciară privind răspunderea penală a persoanei juridice în lumina noului Cod penal. *Revista de Științe Juridice*, 1.

Schiau, I., Prescure T. (2009). *Legea societăților comerciale nr. 31/1990. Analize și comentarii pe articole,* 2nd edition, Bucharest: Hamangiu C. H. Beck Publishing House.

Smarandache, L. E. (2010). *Societăți comerciale*, Craiova: Sitech Publishing House.

Toader, T. (2014). *Noul cod penal. Noul cod de procedură penală și legile de punere în aplicare*, 2nd edition, Bucharest: Hamangiu Publishing House.

Toader, T., Michinici, M. A., Crișu-Ciocîntă, A., Dunea, M., Răducanu, R., Rădulețu, S. (2014). *Noul cod penal. Comentarii pe articole*, Bucharest: Hamangiu Publishing House.

Tudor, Ș. (2014). *Evaziunea fiscală. Practică judiciară recentă*, Bucharest: Hamangiu Publishing House.

Voicu, C., Boroi, A., Molnar, I., Gorunescu, M., Corlăţeanu, S. (2008). *Drept penal al afacerilor*, 4th edition, Bucharest: C. H. Beck Publishing House.

Volonciu, N., Uzlău, A.S., Moroșanu R., Văduva V., Atasiei D., Ghigheci, C., Voicu, C., Tudor, G., Gheorghe, T. V., Chiriță, C. M. (2014). *Noul Cod de procedură penală comentat*, Bucharest: Hamangiu Publishing House.

Article Info

Received: January 9 2015
Accepted: February 26 2015