

## Some considerations on disciplinary liability overlapping criminal liability

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### **Abstract**

*Among the various forms of legal liability there are many points of contact reflected in their common goal - the encouragement of active members of society. Starting from the statement - the independent nature of the various forms of legal liability does not mean they are excluded - in what follows, given the legal autonomy of spheres of social relations protected by various laws, we will consider disciplinary overlapping with other forms of legal liability - criminal liability. Of course, this is possible only if the act committed by the employee is both disciplinary and criminal. This form of accumulation are possible without violating the principle of non bis in idem that since each of the envisaged legal rules protect different social relations. In addition of this applying the same principle prohibits two or more same kind sanctions for an unlawful action.*

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Among the various forms of liability there are many common goals as encouraging the society to have an active attitude, behaviour that contributes to the continuous protection of social values and social relations development<sup>2</sup>. Each form of liability meets both preventive and educational functions, but the way it influences people's behaviour is depending on the importance of the social values legally protected and their violation consequences.

Considering the autonomy of each domain of social relations, each one protected by a different law<sup>3</sup>, we are going to analyze the disciplinary liability overlapping with other forms of liability, starting from the following statement: the independent nature of the various forms of legal liability doesn't mean they exclude each other. This is possible only if the culpable act of the employee is a both disciplinary deviation (article 263 of the Labour Code), and harmful offence. Without violating the principle of *non bis in idem*, all these forms of accumulation are possible because the envisaged legal rules protect different social relations.

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<sup>2</sup> See Constantin Stătescu, Corneliu Bîrsan, *Civil Law. General theory of obligations*, Eighth Edition, All Beck Publishing House, Bucharest, 2002, pp. 137-138.

<sup>3</sup> Șerban Beligrădeanu, *Admissibility of overlapping disciplinary responsibility to criminal liability and misdemeanours* in „Law” Journal no 4/2006, pp. 171-173.

Moreover, the principle prohibits only the application of two or more similar penalties for the same act<sup>4</sup>.

Both disciplinary and criminal liability is a result of committing illegal acts that prejudice social values. Yet, there are some differences. The first one is based on an employment contract and defends a specific social order (employment and production level in units). The latter has a legal nature and defends primary values and relations: sovereignty, independence and unity of the state, the person rights, property and all rules of law. So, there is a similarity in terms of its generic nature – defending the predetermined social order in a certain area of activity. There is also a qualitative difference – the one regarding specificity and relative importance of the protected relations, as well as the extent area of application<sup>5</sup>.

Criminal liability is based on the principle of incrimination legality – liability exists only for those acts which are expressly provided as crimes<sup>6</sup>. As opposed to that, disciplinary liability is established when a disciplinary deviation is committed. Labour laws are limited in illustrating these cases. Both culpable crime and misconduct are illegal and they have antisocial consequences. The social danger degree and the jurisdiction is what differentiate them. So, same acts can be either disciplinary or criminal, depending on the importance of the protected object, the offence circumstances, the guilt type and intensity, the motive nature, the consequences, prevention possibility. These elements corroborated to crime characteristics establish the differentiated social danger and lead to final decision regarding the right form of liability and the right sanction<sup>7</sup>.

As a general principle, liability, whether criminal or disciplinary, is based on the guilt of the one who offender. If in criminal law the guilt's degree and its form are relevant to the legal classification of the act, in criminal law these are always criteria for sanction determination.

There is also a difference of regulation concerning the person's ability called to answer for their illegal disciplinary or criminal acts.

The accumulation of disciplinary and criminal liability<sup>8</sup> occurs when an injurious act committed by an employee about his work, prejudices relations protected by both criminal and labour law. This cumulus is based and justified by

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<sup>4</sup> In this way see, Alexandru Țiclea, *Labour Law treaty*, Second edition, C.H.Beck Publishing House, Bucharest, 2007, p. 764; Monna-Lisa Belu Magdo, *Disciplinary responsibility according to general system of labour law in „Romanian Journal of Labour Law”* no. 1/2005, pp. 59-60. Also see Dan Șerban D. Rădulescu, *Report of disciplinary and criminal law*, I. C. Văcărescu Publishing House, Bucharest, 1938, p. 105 et seq.

<sup>5</sup> Alexandru Țiclea, *Labour Law Treaty*, Fourth edition, Juridical Universe Publishing House, Bucharest, 2010, p.852.

<sup>6</sup> Constantin Stătescu, Corneliu Bîrsan, *cited work*, p. 139.

<sup>7</sup> See Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, *Replacement of criminal responsibility for certain offences with administrative or disciplinary liability*, Academy Publishing House, Bucharest, 1970, pp. 69-70.

<sup>8</sup> Such an overlapping of responsibilities was called overlapping of coercive liabilities - in this way, see Șerban Beligrădeanu, *Admissibility of...*, *cited work*, p. 171.

the autonomy of social relations protected by law<sup>9</sup> and by the absence of generic rules that forbid this<sup>10</sup>.

In this context, it's important to remember article 52 paragraph 1 letter c of the Labour code: *individual employment contract may be suspended by the employer (...) if he made a criminal complaint against the employee or this one was prosecuted for criminal acts incompatible with his position, until the final decision of the court*. So, the employer is the one who decides whether or not the individual employment contract is suspended<sup>11</sup>. The Constitutional Court was asked to trigger a constitutional control<sup>12</sup>. The intimation stated that these provisions are contrary to article 23, paragraph 11 of the Romanian Constitution, since it violates the innocence presumption and the right to restrict employment, even if article 52, paragraph 2 of the Labour code says that the innocent person receives compensation. The court noticed that employer's measure isn't a decision regarding the guilt or the innocence of the employee or a decision regarding criminal liability. This is judicial authorities' job. It was also pointed out that the innocence presumption is a protection measure of individual freedom according to article 23, paragraph 11 of the Romanian Constitution<sup>13</sup>. This rule is also applied in criminal law and criminal procedure law as it has a constitutional nature. So, the employer's option to suspend the employment contract doesn't break the innocence presumption. The court also observed that article 41, paragraph 1 of the Romanian Constitution doesn't contravene to employment right, because the employee can be hired on this period to another unit, on the other job.

So, in order to discuss the employment suspension as article 52 paragraph 1 provides, the following conditions must be fulfilled: a) the offence shall be in relation to work and shall be incompatible with the post, otherwise the contract suspension wouldn't be justified; b) the employer shall make a criminal complaint to the judicial authorities or the employee shall be sued, following victim's referral (other than the employer or ex officio). This measure isn't disciplinary, but a legal one which protects the unit from the illegal activity and further enlargement of its bad consequences<sup>14</sup>. According to article 52, paragraph 1, letter c of the Labour

<sup>9</sup> *Ibidem*, p. 173.

<sup>10</sup> Regarding the special status of public officials is expressly forbidden disciplinary overlapping with criminal liability by article 57 of the Statute policeman Law nr. 360/2002 (published in Official Gazette of Romania, Part I, no 440 of 2 July 2002, last modified by Government Emergency Ordinance no 153/2008 published in Official Gazette of Romania, Part I, no 769 of 17 November 2008). So disciplinary proceedings are only that facts which have been committed under such conditions that, according to criminal law, are not criminal offences.

<sup>11</sup> Șerban Beligrădeanu, *Admissibility of...*, cited work, p. 173.

<sup>12</sup> Constitutional Court rejected the exemption by Decision no 24/2003, published in Official Gazette of Romania, First Part, no 72 of 5 February 2003.

<sup>13</sup> By the provisions of the constitutional text that states that until a final court decision of conviction, that person is considered innocent of the accusation of committing a criminal offence.

<sup>14</sup> As the Constitutional Court decided the text referring to similar previous legislation Decision no 354/2001 (published in the Official Gazette of Romania, Part I, no.16 of 14 January 2002) and Decision no 200/2002 (published in the Official Gazette of Romania, Part I, nr.566 of 1 August 2002).

code, the employment contract suspension takes until the final court decision. This involves prosecutor's decisions during criminal investigation. The reason which caused the suspension disappears when the employee is convicted. This is the moment when the employer resumes his disciplinary powers<sup>15</sup>. Article 52, paragraph 2 of the Labour Code<sup>16</sup> provides that the innocent employee resumes his job and receives as compensation the salary and other rights that he had been leaked by during the suspension. The theory<sup>17</sup> mentioned that it isn't about any innocence, but about its inexistence. The law purpose is that of compensation by cash equivalent, for the entirely damage caused to the employee.

Article 52, paragraph 1 of the Labour code must be interpreted as applying not as denying like the good faith and good intention rules<sup>18</sup> say (*actus interpretandus est potius ut valeat quam ut pereat*). Hence the idea that the employer can take only one measure against his employee, who has committed criminal acts, is that of employment suspension. Concluding, a disciplinary sanction can't be imposed before the employee's guilt is proven by court's decision. So, the criminal law holds back disciplinary law<sup>19</sup> as it does with the civil law<sup>20</sup>.

The judicial practice<sup>21</sup> decided that if criminal liability is triggered, it's impossible to cumulate it with other liability forms in the same time. Subsequently

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<sup>15</sup> For details, see Alexandru Țiclea, *Treaty...*, Fourth Edition, *cited work*, p. 575.

<sup>16</sup> Modified and completed by Law no 40/2011.

<sup>17</sup> Alexandru Țiclea, *Treaty...*, Fourth Edition, *cited work*, p. 576.

<sup>18</sup> Costică Voicu, *General theory of law. University course, Revised and actualized Edition, Juridical Universe Publishing House*, Bucharest, 2006, p. 244.

<sup>19</sup> See Constantin Flitan, *Employees Disciplinary Liability*, Scientific Publishing House, Bucharest, 1959, p. 87; Sanda Ghimpu, Petre Marica, *Labour contract dismissal according to article 20 f of the Labour Code and article 13 of Law no1/1970* in "Romanian Journal of Law" no 6/1972, p. 65; Sanda Ghimpu, *Some aspects of the discipline dissolution of labour contract in light of Law regarding Labor and Discipline Organization in socialist state units* in "Romanian Journal of Law" no 7/1970, p. 35. Regarding the disciplinary responsibility of magistrates, the principle is enshrined in article 47 expressly no 317/2004 paragraph 5 of Law on the Superior Council of Magistracy (republished in the Official Gazette of Romania, Part I, no 827 of 13 September 2005 with the latest changes and additions to the Government Emergency Ordinance no 59/2009, published in the Official Gazette of Romania, Part I, nr. 439 of 26 June 2009), which provides that the disciplinary investigation against the judge or suspended when prosecutor had sought to put the criminal action for the same offence.

<sup>20</sup> According to Article 19 paragraph 2 Criminal Procedure Code, *trial in civil court is suspended until final resolution of the criminal case*. The new Code of Criminal Procedure - Law nr. 135/2010 by article 27 paragraph 7 brings a new element in the criminal principle holds in place in that civil trial *in civil court is suspended after moving the criminal action pending resolution of the criminal case in the first instance, but no more than a year*.

<sup>21</sup> In this case, the court found that although the unfolding criminal investigation against the employee, it does not amount with establishing his guilt, especially since the employee's guilt has been finally determined only after three years. In this context, the nature of the legality of the contested decision can not be completed within 3 years from the date of issue, the employer being able to rely on the outcome of criminal proceedings only after its completion. Otherwise it would lead to a situation contrary to the presumption of innocence of the employee - see Court of Appeal Pitesti, Civil Division, labour disputes and social security causes, decision no 203/R-CM/2006 in "Romanian Review of Labour Law" no 2/2007, pp. 168-173.

and fulfilling some conditions, the employer can suspend the employment contract during the trial. Only after its end, when the guilt is established, the employer can cumulate these two forms of liability. It was recently expressed<sup>22</sup> that if the criminal liability wasn't established, the dismissal decision is thoroughly issued as long the two forms of liability have a different source (criminal liability under criminal law violation and disciplinary liability under employment contract breaking).

In literature<sup>23</sup> it was expressed the idea of a subsequence, derivation and inter-relationship, between the two forms of liability. So, once triggered, criminal liability produces a suspension of the disciplinary one – the employer can't initiate disciplinary proceedings. Consequently it takes place the suspension or the interruption of the limitation period of 30 days and 6 months within the penalty shall be issued, provided by article 268, paragraph 1 of the Labour code<sup>24</sup>.

Thus, if during the trial the employee is remanded for more than 30 days under Criminal procedure code, the employer may order resignation due to the worker, as article 61, letter b provides. We can't talk here about a disciplinary resignation.

If the employee isn't sent to court<sup>25</sup>, the employment is maintained and the employer is entitled to impose disciplinary sanctions for those who committed disciplinary violations. There is no case of overlapping criminal and disciplinary liability.

Depending on the court's decision, the disciplinary part will be solved as follows:

1. If the court decides that the offence exists, that it's a crime and it was committed by the defendant, it's pronounced a sentence<sup>26</sup> and we distinguish the following situations:

- The employee is sentenced to prison and the employment contract is automatically ceased as article 56, paragraph 1, letter g of the Labour code provides. This solution is a logical and an efficient one<sup>27</sup>.

<sup>22</sup> Court of Appeal Bucharest, seventh department of civil, labour disputes and social security causes, decision no 6307/R/2009 in „Romanian Review of Labour Law” no 1/2010, p.118-122.

<sup>23</sup> Sanda Ghimpu, Alexandru Țiclea, *Labour Law*, Third Edition, „Chance” SRL House of Publishing and Press, Bucharest, 1998, p.392-393; Alexandru Țiclea, *cited work*, pp. 762-763. Also see Ion Traian Ștefănescu, *Theoretical and practical treaty of labour law*, Juridical Universe Publishing House, Bucharest, 2010, p.707.

<sup>24</sup> Șerban Beligrădeanu, *Admissibility...*, *cited work*, pp. 175-182.

<sup>25</sup> Under Article 10 and Article 11 item 1 of the Code of Criminal Procedure, as amended by Law nr.202/2010 on measures to accelerate the settlement process (published in the Official Gazette of Romania, Part I, no. 714 of 26 October 2010), during prosecution, the prosecutor may order the closure, removal or cessation of criminal prosecution proceedings. The new Code of Criminal Procedure - nr. 135/2010 Law, Article 17, and the legislature is talking about fighting during the criminal prosecution by filing or waiver of prosecution.

<sup>26</sup> See article 345 of Criminal Procedure Code and article 396 of the new Code of Criminal Procedure Law nr. 135/2010. The new regulation provides that the court may waive the penalty or punishment may defer under articles 80-90 in the new Penal Code - Law nr. 286/2009.

<sup>27</sup> See Alexandru Țiclea, *Treaty...*, Fourth Edition, *cited work*, p. 612.

• When the employment contract ceases, the employee is prohibiting from exercising a profession or a post as a safety measure<sup>28</sup> and or as an additional punishment<sup>29</sup>, by the date of final court decision, as article 56, paragraph 1, letter i of the Labour code provides. The Constitutional Court analyzed the exception of unconstitutionality regarding these legal texts in relation with the principle of human rights equality, and concluded that this means equal treatment for equal cases. The Court mentioned the difference between additional and accessory penalty. One of these is the execution period: while the first one is executed after prison sentence is executed, after pardon (total or partial) or after imprisonment prescription, the latter starts when the prison sentence is final and both end in the same time (by full pardon or execution prescription). These differences are related to various reasons that the legislator had by imposing these penalties: the complementary ones to protect general or particular interests according to article 53 of the Constitution. Considering these arguments, is obvious the critics groundlessness regarding to constitutional provisions that enshrines the right to work, especially when article 56, paragraph 1, letter i of the Labour code, corroborated with article 64, letter c of the Criminal code provide a post, a profession or an activity “like the one used to commit the offence”.

• The employee is guilty by a crime in connection with its work and he’s convicted by a final decision, without making it to fall into any of the situations discussed above. In this case, the literature<sup>30</sup>, which we rally, said that the employer also has the right to apply, by cumulus, disciplinary dissolution of the employment contract according to article 61, letter a of the Labour code, for committing a serious disciplinary offence. This is the only situation when we can talk about this cumulus of liabilities, but the disciplinary one shall be applied only after the court establishes the criminal one, as a consequence of it.

2. Criminal procedure code justifies the situation when the employee is acquitted, based on the existing reasons<sup>31</sup>. If the employee is acquitted because the

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<sup>28</sup> Banning an office or profession as a safety measure may be taken against the offender who committed an offence under the criminal law because of the inability or other causes rendering him unfit to occupy a certain position or to perform a profession, trade or other occupation in order to prevent the commission of other acts in the future - Constantin Mitrache in Costică Bulai, Filipas Avram, Constantin Mitrache, *Penal institutions. Selective course for licensing exam 2006-2007 with latest amendments of the Criminal Code*, Three Publishing House, Bucharest, 2006, p. 248.

<sup>29</sup> Additional penalty of prohibition of certain rights, including the right to hold office, to exercise a profession or trade or to engage in activity that was used to commit crime, constitutes a restrictive of rights punishment, since a temporary ban involves the exercise of the rights referred to the sentence, without thereby to produce permanent loss of ability to acquire these rights - Alexandru Boroî, *Criminal Law. General part according to the New Criminal Code*, C.H.Beck Publishing House, Bucharest, 2010, p. 385.

<sup>30</sup> See Sanda Ghimpu, Alexandru Țiclea, *Labour Law. Revised and completed Edition*, „Chance” SRL Publishing and press house, Bucharest, 1995, p. 342. Same point of view was expressed in recent literature - Ion Traian Ștefănescu, *Theoretical and practical treaty...*, cited work, p. 707; Alexandru Țiclea, *Treaty...*, Fourth Edition, cited work, p. 853.

<sup>31</sup> For cases in criminal court acquittal of the defendant, see Article 10 lit. a-e Criminal Procedure Code, Article 16 lit. a-d the new Code of Criminal Procedure - Law nr. 135/2010.

act doesn't exist<sup>32</sup> or it wasn't committed by him, if there aren't proves that a person committed the crime (as the article 16, letter c of the New Criminal procedure code), the employee can't be disciplinary sanctioned and the criminal court decision has force of *res judicata*. The same solution is required when there is a situation that removes the criminal nature of the act<sup>33</sup>: legitimate defence, necessity and others. Conversely, if the act was committed by the employee, but it doesn't have the constitutive elements of a crime – it's not provided by criminal law –, it isn't a social danger or it isn't guilty as required by law, he can be disciplinary liable<sup>34</sup>.

3. If the criminal court pronounce the end of the trial of causes provided by article 10, letters f-j of the Criminal procedure code, and article 16, letters e-j of the New Criminal procedure law<sup>35</sup>, the employee may be disciplinary liable if the act is a misconduct committed by him. If the employee's death occurs, the employment contract is ceased under article 56, paragraph 1, letter a of the Labour code.

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<sup>32</sup> We can not talk about *res judicata* where the prosecutor is the one who ordered the closure for that lack of facts, rightly, whenever is the guilt of the employee in terms of duties and obligations remain - High Court of Cassation and Justice, Department of Administrative and Fiscal, decision no 65/2005, [www.scj.ro](http://www.scj.ro).

<sup>33</sup> The new Penal Code - Law nr.286/2009 classifies these cases in *supporting reasons* (Article 18 et seq) and causes unattributable (Article 23 et seq).

<sup>34</sup> See Sanda Ghimpu, Petre Marica, *Dismissal of labour contract under article 20 and article 13 letter e letter f of Law nr.1/1970* in „Romanian Journal of Law” no 6/1972, p.67.

<sup>35</sup> These causes are: lack of complaint of the victim, authorization or referral to the competent body or other conditions provided for by law, necessary for the criminal action, amnesty, prescription or death of the perpetrator or, where appropriate, removal of the legal person when has the status of the offender, the complaint was withdrawn or the parties have concluded a peace agreement or mediation under the law, the offences for which the withdrawal of the complaint or criminal liability reconciliation, replacement of criminal liability, *res judicata*. The new Code of Criminal Procedure - Law no 135/2010 gives up the case of replacing waive criminal liability and brings up the situation of a transfer of proceedings to another state, according to law.

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