

Criminal liability in case of infringement of the rules on occupational safety and health and the occurrence of accidents at work – subjects of the offenses

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Abstract. This paper presents some specific aspects regarding criminal liability in case of infringement of the rules on occupational safety and health (OSH) and the occurrence of work accidents, referring to the object and subject of the offense according to the provisions of articles 349 and 350 of Law no. 286/2009 and of Law no. 319/2006. There are determined the active and the passive subjects involved in the occurrence of events, as well as their duties and obligations in terms of safety and health at work. Personal considerations were formulated regarding the classification of the employed staff in the category of active subjects, but also regarding the need for urgent clarification of the situation of the day workers who perform activities under Law no. 52/2011 and who can be involved in work accidents with different degrees of seriousness produced within the company.

1 Introduction

Legal liability is one of the fundamental institutions of law. The forms of legal liability are determined by: the type of the legal norm that is violated, the degree of social danger of the illicit deed, the perpetrator's fault and the social values affected. Therefore, liability can be: criminal, civil, contraventional, disciplinary, etc. For infringing the rules on occupational safety and health (OSH) and the occurrence of accidents at work, the guilty persons (natural or legal) shall bear the same types of liability.

In Romanian legislation, OSH-related offenses are danger offenses. In order to attract criminal liability, it is sufficient to create an imminent danger of injury, without being necessary for an accident at work or a professional illness to occur. The content of the offenses does not refer to the outcome, and the state of danger is deduced from the deed itself

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This criminal liability is regulated by Title VII – Offenses against Public Safety, Chapter IV – Primary offenses related to the regime established for other activities regulated by the law, Art. 349 – Failure to take the legal measures on safety and health at work, of Law no. 286/17.07.2009, on the Criminal Code of Romania (CCR) [1].

The constitutive content of offenses regarding OSH consists of: the object and the subject of the offense, the objective and subjective side of the offense.

The object of the offenses is the violation of the principles and provisions regarding OSH, established by: the Romanian Constitution, the Labour Code, Law no. 319/2006, the Collective and Individual Labour Agreements, the Internal or Organization and Operation Regulations, Own Instructions, the Job Description, mandatory measures ordained by labour inspectors, etc.

Offenses regarding OSH are not material [2], although there are authors who consider the body of the person suffering from a work accident or an occupational disease as being a material object. The authors of the paper do not support this view, motivated by the fact that these offenses are danger offenses, which do not involve the occurrence of an accident or an illness, but they favour the appearance of an imminent danger [3]. If, however, the work accident or the occupational disease occurs, then we are dealing with a concurrence of several offenses regarding the OSH related rules [4-7]. In case of bodily injury or manslaughter, the body of the victim became the material object by the criminal decisions no. 315/1974 and 1475/1979, the Supreme Court ruling that there was an ideal concurrence of several offenses between the offense to the legal regime of occupational safety and manslaughter

3 The subjects of the offenses regarding the rules on occupational safety and health

The subjects of an offense can be: persons involved in committing them – active subjects and persons who suffer the consequences – passive subjects.

3.1. Active subjects of offenses

According to Article 349 of the Criminal Code, the offense refers to the person who, although obliged, did not take the specific OSH measures for any workplace. The provisions of the Law no. 319/2006 provide that the persons responsible for taking the legal measures specific to OSH are those who lead, organize and control the labour processes. So the active subject of the offense is a qualified one. Art. 350, paragraph 1 of the Criminal Code indicates that the offense refers to the failure by any person to observe the obligations and the measures established in relation to OSH, and Art. 2 refers to persons who do not comply with the requirements imposed upon the recommissioning of installations, machinery and equipment, before removing any deficiencies for which it has been decided to stop them. Unlike the offense provided for in Art. 349 when the active subject was a qualified one, according to Art. 350 this can be “any person” who does not comply with the conduct imposed by the rule of incrimination.

Law no. 319/2006 [8] does not clearly list the persons (natural or legal) who can be active subjects of OSH-related offenses. However, by analysing several articles of this law one can infer the sphere of the active subjects of offenses. Thus, according to Art. 3 “the provisions of the law apply to employers, workers and workers' representatives”; other

active subjects of offenses can be inferred from the definitions and clarifications of some terms and expressions presented in Art. 5:

- a) worker – employee, including students and pupils during their apprenticeship period, as well as apprentices and other participants in the labour process;
- c) other participants in the labour process with the employer's permission, for the period of verification of professional skills before and with a view to being employed, persons carrying out activities for the benefit of the community or volunteering, unemployed persons during their participation in a form of vocational training and persons who do not have an individual labour agreement concluded but for whom the contractual provisions and the services provided can be proved through any other means of evidence;
- p) external services – legal or natural entities from outside the undertaking/establishment, authorized to provide protective and prevention services in the field of OSH.

According to the provisions of Art. 6 of Law 319/2006: 1) The employer has the obligation to ensure the safety and health of workers in all aspects related to their work; 2) When employing external services, the employer is not relieved of his responsibilities in this area; 3) Workers' obligations in the field of OSH do not bring prejudice to the principle of employer's liability.

According to Art. 8 of the law: 1) The employer shall designate one or more workers to carry out activities for prevention and protection against occupational risk, referred to as designated workers; 4) If preventive and protective activities cannot be organized due to lack of competent staff, the employer must employ external services. Article 22 states that “every worker must carry out his/her activity in accordance with his/her education and training, as well as with the instructions given by the employer, in such a way that he/she does not expose himself or herself, nor other persons who may be affected by his/her actions or omissions during the labour process, to the risk of injury or professional illness”, while Art. 23 states that “the obligations laid down for workers shall apply, as the case may be, to the other participants in the labour process, according to the activities they carry out”.

The texts of these laws show that active subjects of offenses related to OSH can be persons who, either legally or by virtue of work relationships or conventional relations regarding OSH, have the legal and/or contractual (conventional) obligation to take and fulfil or to comply with, as the case may be, the OSH related measures or obligations [9].

Construing the provisions of Art. 22 of Law 319/2006 and of Art. 349 and 250 of the Criminal Code, the question was raised whether only those persons with OSH duties established by a document (contract, decision, job description, regulation, etc.) or also those carrying out certain tasks only in practice, without having a formal quality or a valid written document, can be active subjects of offenses [10]. The practice of courts is not unitary. Some of them consider that those persons who carry out management, coordination and control activities only in practice should be removed from the sphere of active subjects, while others consider that those persons who carry out certain tasks only in practice, regardless of how they were invested, also have the quality of active subjects.

We agree with those who claim that the person who has a legal obligation, invested by a contract, decision, job description, regulation, etc., as well as the person who carries out in practice OSH specific duties, regardless of how he/she was invested, may have the quality of active subject of offenses regarding OSH [11].

It should be noted that an active subject may also be a person who occasionally carries out an activity at a workplace, or is, for whatever reason, in that workplace, even if he/she does not carry out a permanent activity in that workplace. It may also be an active subject. The person who, by exceeding his/her assigned job duties, has violated the OSH specific rules, may also be an active subject, regardless of whether he/she is part of the managerial or production staff, as it is considered that he/she actually carries out those duties [12].

3.2. Passive subjects of offenses

According to the definition of the job, the passive subjects of OSH related offenses are the persons who participate in the process of work or perform certain work duties. Passive subjects of offenses are: the state, as the main passive subject and the holder of the protected social value, but also any natural person injured or endangered by committing offenses – as a secondary passive subject. The quality of employee is not a necessary condition for the existence of an offense, although these are the most common situations. Any person who is imminently endangered during the work process or during the performance of his/her, duties may be a secondary passive subject.

4 The situation of day workers

A special issue is the situation of the day workers – persons who work under Law no. 52/2011 [13] on the exercise of occasional activities. According to Art. 3 of the law, by way of derogation from the provisions of the Labour Code, they carry out an activity on the basis of a work relationship established by the agreement of the beneficiary parties (beneficiary and day worker) without a written individual labour agreement being concluded.

The questionable situation refers to the quality of the day workers if an event occurs in the course of their activity or in relation to the activity carried out by them. By analysing the provisions of Law no. 52/2011 it has been found that both beneficiaries and day workers have obligations in the field of OSH, so they can be active or passive subjects of OSH related offenses.

In the case of day workers, the quality of employee is not a necessary condition for the existence of these offenses. In practice, on the occasion of the investigation of these events, it is difficult to determine which legal or conventional provisions have not been observed because Law no. 319/2006 does not apply in these cases.

We believe that the situation of the day workers, who carry out an activity without being insured within the public insurance systems, must be urgently clarified, as it could be considered a discrimination on the labour market given that, in case of occurrence of an event, the material and moral damages may remain partially or totally unrepaired.

5 Conclusions

1. The subjects of OSH related offenses can be: active subjects – persons involved in committing them and passive subjects – persons who suffer the consequences of the offenses.
2. According to the provisions of Art. 349 and 350 of the Criminal Code, only those persons having attributions in the field of OSH established by a document (contract, decision, job description, regulation, etc.) can be active subjects.
3. We believe that both the person with a legal obligation and the person actually carrying out OSH related tasks, can be an active subject of OSH-related offenses, regardless of how they were invested. This category includes a person who occasionally carries out an activity in a workplace, as well as a person who, by exceeding his/her assigned job duties, has violated the occupational safety and health rules.
4. Passive subjects of offenses may have the quality of: the main passive subject – the state, respectively the secondary passive subject – any person injured or endangered by committing the offenses.
5. A special situation is that of day workers – people who carry out occasional activities. Given that Law no. 52/2011 does not grant them the quality of persons insured in the public

insurance systems, it can get to discrimination on the labour market, given that in case of occurrence of an event: for these workers, the material and moral damages may remain partially or totally unrepaired. It is necessary to address urgently the issue of day workers through new legal provisions.

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