# COMPANIES. LACK OF CONVOKING THE GENERAL ASSEMBLY

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**Abstract**

*The article examines extensively, the offense of non-convoking a general assembly by the administrator in the cases provided by law, and of exercising his right to vote in the deliberations of the shareholders' meeting regarding his contribution in kind or legal documents concluded between him and society.*

**Keywords:** *offense, administrator, contribution in kind, General Assembly.*

According to art. 275[1], para. 1, letter. b of the Law no. 31/1990[2] regarding companies, it constitutes a criminal offense the administrator's lack of calling the general assembly in the cases provided by law or his infringement of art. 193, para. 2 of Law no. 31/1990. The above mentioned provisions shall also apply to the liquidator, insofar as it relates to its obligations as part of his duties (art. 278 of the Law).

By the Law no. 76/2012[3], the title of the law was modified. The original title "Law no. 31/1990 on trade companies" became "Law no. 31/1990 on companies".

Following amendments to the Law no. 31/1990 by Law no. 76/2012, throughout the law , the terms " trade company " or, where appropriate, "trade companies" is replaced by "company" or, where appropriate , "companies".

We believe that in the current legal regulations in order to mark the individuality of companies regulated by Law no. 31/1990, they shall be designated by a circumlocution namely "companies regarding trading activity"[4].

**The generic legal object** is represented by the social relations whose normal existence and development is conditioned on compliance with legal dispositions regarding the company's activity.

**The special legal object** consists of social relations on the activity of companies whose normal existence and development is conditioned by the probity of certain categories of people entitled with right of decision in the company about the protection of interests of the company that he represents, probity manifested by the convocation of the general assembly in cases provided by law and in compliance with legal provisions.

**The material object**. The offense has no material object.

**The active subject** is qualified and can be only the administrator or the liquidator. Participation is possible in all its forms. For the existence of the co-author, a special quality is

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[1] It was introduced in its current form, in the Law no. 31/1990 by pt. 7 of art. 33 of Law no. 187/2012 published in the Official Gazette no. 757 of November 12, 2012.

[2] Republished in the Official Gazette no. 1066 of 17 November 2004 ,as amended and supplemented by Law no. 302/2005; Law no. 164/2006; Law no. 85/2006; Law no. 441/2006; Law no. 516/2006; O.U.G. no. 82/2007; O.U.G. no. 52/2008; Law no. 284/2008; Law no. 88/2009; O.U.G. no. 43/2010; O.U.G. no. 54/2010; O.U.G. no. 90/2010; Law no. 202/2010; O.U.G. no. 37/2011; Law no. 71/2011; O.U.G. 2/ 2012; O.U.G. no. 47/2012; Law no. 76/2012; Law no. 187/2012; Law no. 255/2013; Law no. 152/2015.

[3] Published in the Official Gazette no. 365 of 30 May 2012, as amended and supplemented by: O.U.G no. 44/2012; O.U.G. no. 4/2013; Law no. 2/2013; Law no. 214/2013; Law no. 138/2014.

[4] St.D. Cărpenaru, *Treaty of Romanian commercial law, ed. IV, V updated*, Universul Juridic Publishing House, Bucharest, 2014 , p. 122.

required by the standards of criminality and needs to be met for all persons who directly commit the act.

**The special passive subject** consists of an injured person by the offender's activity, in this case the company.

**The generic passive subject** of the offense is the state as guarantor and protector of the rule of law and also as proprietor of social value protected by law.

**The objective side**

*The material element* of the offense appears in alternative form of inaction and action. Thus it constitutes the material element of the crime committed by inaction, the deed made by failure of action, the administrator or liquidator's action of non-convoking a general assembly of the company in cases provided by law.

The cases provided by law for the general assembly to be convened raises two questions of interpretation, namely:

*1) cases where the general meeting is mandatory for administrator or liquidator;*

*2) case of a deadline until the general meeting should be convened, and above which constitutes an offense under Article. 275, para. 1 letter. b) of the Law no. 31/1990.*

1) Cases where it is mandatory for the administrator the convocation of the general assembly, are:

a) at least once a year, within 5 months of the financial year closing (art. $111^5$, paragraph 1 of Law no. 31/1990). The expression " at least " means that the general meeting can be convened several times a year, whenever a problem arises within the exclusive competence of the ordinary general meeting; However, once at least, it is mandatory to be convened.

For instance, the balance sheet, for the companies where the state holds at least 20% of the share capital may be submitted at any time, even during other times of the year; this means that an administrator or liquidator shall convene the General Meeting at other data, given that the balance sheet may be submitted to financial authorities before being approved by the General Assembly;

b) when the general assembly is convened by the Management Board or the Board, whenever necessary (art. $117^6$, para. 1 of Law no. 31/1990). These provisions should have been completed noting that the memorandum may stipulate mandatory convening of the general meeting at certain times;

c) when the board of directors or directorate, immediately call a general meeting at the request of shareholders representing, individually or together, at least 5 % of share capital or a smaller share if the articles of association so provide and if the request includes provisions which are the responsibility of the assembly (art. $119^7$, para. 1 of Law no. 31/1990);

d) when administrators are required to convene the meeting of associates at the social headquarters at least once a year or whenever necessary (art. 195, para. 1 of Law no. 31/1990);

e) when a shareholder or a number of associates representing at least a quarter of the share capital may request the convening of the general meeting, indicating the purpose of the convocation (art. 195, para. 2 of Law no. 31/1990).

Such provision refers only to the associates' right to ask for a general meeting, not to the obligation of the manager to convene it. To be complete, the text should also provide this obligation because a right must correlate to a corresponding obligation.

2) The deadline by which administrators and liquidators are obliged to convene a general meeting to avoid prosecution for the failure under consideration, this is covered in Law no. 31/1990 in a contradictory and vague manner, in our opinion, which will inevitably give rise to controversy

[5] It was introduced in its current form, in the Law no. 31/1990 by pt. 57, art. I of Law no. 441/2006 published in the Official Gazette no. 955 of 28 November 2006.

[6] It was introduced in its current form, in the Law no. 31/1990 by pt. 64, art. I of Law no. 441/2006 published in the Official Gazette no. 955 of 28 November 2006.

[7] It was introduced in its current form, in the Law no. 31/1990 by pt. 66 of art. I of Law no. 441/2006 published in the Official Gazette no. 955 of 28 November 2006.

and an obvious breach of the principle of legality of criminal offenses and punishment. When establishing this period it should be taken into account:

a) art. 117[8], para. 2 of Law no. 31/1990, according to which the term to be met for the first convocation can not be less than 30 days from the date of publication of the convocation in the Official Gazette of Romania, Part IV;

b) art. 118, para. 3 of Law no. 31/1990, according to which the term of assembly for the second convocation is 8 days from the publication of the convocation, a situation that must be anticipated and taken into account from the very first call.

In our opinion the settlement of this matter should be more precise, the legislator providing for a specified period by which the General Assembly should be convened in ordinary or extraordinary form during the financial year.

When convening the ordinary or the extraordinary general meeting takes place on request or on its own, the law is more precise, the board or the directorate, immediately call the general meeting no later than 30 days and they shall meet not later than 60 days since acknowledgement of the request (art. 119[9], para. 2 of Law no. 31/1990).

In judicial practice[10], it was concluded the case regarding S.M., manager of a company accused (suspect under current regulations) that he didn't convene the general assembly within 3 months[11] of the closing of 1996 financial year.

Prosecutor's office of Vrancea Court confirmed the proposal not to prosecute noting that although there was non action it was committed negligently and not intentionally, or the offense under Article .275, para. 1, letter b of Law no. 31/1990 is committed intentionally and not by misconduct.

The solution is questionable because in this case, in the task of the accused (the suspect under the current regulations) it was retained an offense of omission (art. 275, para. 1 letter b.). Or, according to art. 19, the last paragraph of the previous Criminal Code, the offense could be committed either intentionally or negligently; unless the law provides that it might be committed only intentionally (this reserve was raised by using the phrases "bad faith" or "knowingly" in addition to the criminalized omission).

As in the offenses referred to in art. 275, para. 1 letter b) there is no such a reservation, it operated the general rule of the conduct of inaction either wilfully or negligently.

According to the current Penal Code, in this case, the form of guilt can be just the intent, because the deed committed recklessly constitutes offense only when expressly required by law (article 16, paragraph 6, second sentence).

A second incriminating hypothesis is that of the acts of the administrator or liquidator violating art. 193, para. 2 of Law no. 31/1990.

According to art. 193, para. 2 of Law no. 31/1990, the administrator may not exercise his right to vote at the shareholders meeting regarding deliberations about his contribution in kind or legal documents concluded between him and the company.

The administrator will commit the offense both if he exercises his right to vote in the deliberations in the shareholders meeting regarding his contribution in kind or legal documents concluded between him and the company and when a shareholder exercises the same actions which he, as manager, is aware of and allows them to be .

*The immediate result* is to create a state of danger for the social value protected by law, namely, compliance with the law regarding the functioning and the convening of the general meeting of the company.

*Causation clearly results from the very commission of the incriminated offense.*

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[8] It was introduced in its current form, in the Law no. 31/1990 by pt. 64, art. I of Law no. 441/2006 published in the Official Gazette no. 955 of 28 November 2006.

[9] It was introduced in its current form, in the Law no. 31/1990 by pt. 66 of art. I of Law no. 441/2006 published in the Official Gazette no. 955 of 28 November 2006.

[10] .T. Manea, *Offences provided by the law of firms Solutions of judicial practice,* RDP no. 3/2000, p. 122.

[11] By Law no. 441/2006 for amending and supplementing Law no. 31/1990, specifically by art. 111, the term was increased to five months.

**The subjective aspect**. The offense is committed intentionally, directly or indirectly, in the manner of infringement of art. 193, para. 2 of Law no. 31/1990. The author, in this normative way has the representation that he does not comply with regard to the right to vote in respect of art. 193, para. 2 of Law no. 31/1990 regarding his contribution in kind or legal documents concluded between him and the company, and follows or accepts the consequences.

It is not required, as a constituent element of the offence, the existence of any mobile or purpose; but they will be taken into account in the sentence individualization. In the case of lack of convening the general meeting as provided by law, the form of guilt is the intention.

**Forms**. The preparatory acts and the attempt, although possible, in the manner of infringement of Art. 193, para. 2 of Law no. 31/1990, are not incriminated, the legislator considering them irrelevant in terms of criminal law[12]. In case of lack of convening the General Assembly, the preparatory acts and the attempt are not possible, being a crime of omission in its own. The offense is consumed when the provisions of art. 193, para. 2 of Law no. 31/1990 are infringed or at the time when the general meeting is not convened.

**Methods.** The deed is accomplished in two normative ways, respectively, the breach of art. 193, para. 2 of Law no. 31/1990 and the lack of convoking a general meeting, in the cases provided by law. Each normative way presents different factual ways of achieving in relation to the concrete circumstances of the offense.

**Penalties.**

The offense is punishable by imprisonment from one month to one year or a fine. If the deed constitutes a more serious offense it will be retained the latter offense.

[12] M.A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R.F. Geamănu, *Offenses under special laws*, 3rd ed., C.H. Beck Publishing House, 2013, p. 369.