UNIVERSITY OF TIMISOARA
FACULTY OF LAW

UNIVERSITY OF PÉCS
FACULTY OF LAW

JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
No. 2/2015

Edited biannually by courtesy of the Criminal Law Departments within the Law Faculties of the West University of Timisoara and the University of Pécs

2015

The journal is indexed in databases SSRN, EBSCO, HeinOnline

UNIVERSITY OF TIMISOARA
FACULTY OF LAW

UNIVERSITY OF PÉCS
FACULTY OF LAW

JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW

Universul Juridic Publishing House
Edited by Universul Juridic Publishing House

Editorial office: **Phone/fax:** **021.314.93.13**
Phone: **0734.303.101**
E-mail: **redactie@universuljuridic.ro**

Distribution: **Phone:** **021.314.93.15**
Phone/fax: **021.314.93.16**
E-mail: **distributie@universuljuridic.ro**

www.universuljuridic.ro

ISSN 2360–4964

CONTENTS

I. UNIVERSITY EVENTS

LAUDATIO Magistri YE QING *et operum suorum* 9

Dr. Ye. Quing – A Discussion on the Provisions of the Exclusionary Rule Against Illegally Obtained Evidence in China's Criminal Procedure Law 13

II. FORMS OF ECONOMIC CRIME

Dr. Roberto E. Kostoris – A European Public Prosecutor Office against Euro-financial Crimes: Which Future? 27

Dr. László Kőhalmi, Dr. Kitti Mezei – The Concept and Typical Forms of Economic Crime 33

Dr. István László Gál – The Criminal Law Protection of the Stock Market in Hungary 43

Dr. Magdalena Roibu – All Eyes on Market: Abuse, Misuse and Insider Dealing 50

Dr.Vid Jakulin – Money Laundering in the legal instruments of the European Union and Council of Europe 61

Dr. Raimundas Jurka – Combating Money and Property Laundering in Lithuania: Fundamental issues of Economic Crime Prevention 70

Dr. Zoran Pavlovic, **Dr. Aleksandar Bošković** – Place of the Crime of Money Laundering within the Criminal Law of Serbia 81

Dr. Endre Nyitrai – Money Laundering and Organised Crime 92

Dr. László Schubauer – Modifications of the Provisions of the Hungarian Criminal Code Related to Money Laundering and Compliance with International Requirements of Combating Money Laundering 101

Dr. Yuri Pudovochkin, **Dr. Nikolay Pikurov** – Criminal Law Nature of Criminal Incomes Legalization 111

Dr. Wei Changdong – The Strategic Choice of Criminal Legislation of Anti-bribery in the Transition Countries 120

Dr Osman Jašarević – Strategic Planning and Directing the Fight against Economic Crime 138

Dr. Lucija Sokanović – Subsidy Fraud in Protection of Financial Interests of European Union: Achievements and Challenges 142

Dr. Laura Stănilă – The Legal person and the Tax Evasion Offences. From Theory to Practice 153

Dr. Zoltán Nagy, Drd. Dávid Tóth – Computer related Economic Crimes in Hungary 165

Dr. Flavius Ciopec – Follow-the-Money! Criminal Confiscation in Economic Crime 175

Dr. Melinda Mátyás – The Edge of Rationality: Permitted Risk in the Criminal Law 182

Drd. Darian Rakitovan, Drd. Aleksandra Dabić – Criminal Offense of Embezzlement in the Criminal Code of the Republic of Serbia. Specifics of Detection and Proving 191

Dr. Silvia Signorato – ICT, Data Retention, and Criminal Investigations of Economic Crimes 204

Dr. Snezana Mojsoska, Dr. Nikola Dujovski – Recognizing of Forensic Accounting and Forensic Audit in the Southeastern European Countries 212

FOR THE FOLLOWING YEARS

With its fourth issue, the ***Journal of Eastern-European Criminal Law*** has already become widely spread, a fact which is proven by the rising number of contributors and the diversity of the countries to which they belong.

We have intended that the Journal, edited semesterly, to be open to all researchers in the academic area from the Central and Eastern-European countries, to professors and PhD students, as well as to judges, prosecutors and other professions concerned about the evolution of criminal legislation and the more intransigent response that needs to be given to the new forms of crime.

For the future, in addition to the unifying topic dedicated to each issue of the Journal, a separate section will contain articles and studies that are closely connected to the research activity of each contributor, thus offering researchers an opportunity to have their scientific findings disseminated, in order to generate a forum of debate of current issues of European Criminal Law.

We propose that the main topic of the next issue of the Journal be the following: "***Migration, Trafficking in Persons, Terrorism and Criminal Law***".

BOARD OF EDITORS

WEST UNIVERSITY OF TIMISOARA

DOCTOR HONORIS CAUSA
LEGUM SCIENTIAE

Prof. Dr. ***YE QING***
Rector of East China University of Political Science and Law
Vice-President of Shanghai Academy of Social Science

LAUDATIO
***Magistri* YE QING**
et operum suorum

Honoured Members of the Presidium,
Distinguished Members of the Senate of the West University of Timişoara,
Dear esteemed guests,
Dear colleagues, dear students,
Honoured audience,
Highly esteemed Professor Ye Qing,

I am extremely honoured to deliver the *Laudatio* Speech in honour of Professor Ye Qing, one of the most renowned experts in criminal law and criminal procedure law of China, a leading figure of the Chinese academic world, on the occasion of his being awarded the honorary degree of *Doctor Honoris Causa Legum Scientiae*, the highest honorary award of the West University of Timişoara, upon proposal of the Faculty of Law.

The career of Professor Ye Qing has developed, first and foremost, by his accessing all ranks of academic studies within the East China University of Political Science and Law, starting with the LL.B. (1981-1985), the LL.M. (1989-1992) and the LL.D. (2005-2008), all obtained in the area of criminal procedure law, to which he later on dedicated all his scientific work. In 2003, he was promoted to the academic degree of Full Professor, and since 2009 he has been coordinator of PhD theses in criminal procedure law, at the same university. Between 2006 and 2011 he was Vice-President of the East China University of Political Science and Law, and starting with 2012 he has been Vice-President of the Shanghai Academy of Social Sciences, a leading institution of social sciences research in China, and Director of the Institute of Law of the former academy. Presently, Professor Ye Qing holds the office of President of the East China University of Political Science and Law, while also maintaining the office of Vice-President of the Shanghai Academy of Social Sciences.

Professor Ye Qing is a remarkable exponent of the new generation of jurists in China. The economic growth and social progress of the last 20 years, as ingredients of a genuine "Chinese model", could not be achieved without the essential contribution of jurists, who have established and improved the normative framework necessary for the society's stability and welfare.

The most important value promoted to this end in China's recent history is the reinforcement of the rule of law, as a governing principle according to which society and all its members, with no exception, are equal before the law and must obey it. Good governance is incompatible with the arbitrariness, the abuse, the lack of transparency, and the rule of law is the only solution able to assure the necessary framework for the development of market economy and the protection of investors, key objectives of the Chinese society of the last years. One of the major components of the rule of law is an efficient and fair criminal justice.

A promoter of the rule of law values in a criminal trial, Professor Ye Qing has dedicated his academic career to criminal procedure law, and since 2002, he has published more than 30 books in the area of the organization of the judicial system, criminal procedure and evidence law in China. The most recent volumes authored by the distinguished Professor are: *Criminal Procedure Law: Cases and Illustrations*, Law Press, 2015; *On Criminal Procedure Law*, Shanghai Renmin Press, third edition, 2013; *Case Study of Criminal Procedure Law*, China Legal Publishing House, 2013; *Evidence Law*, Peking University Press, 2012; *On Empirical Investigation and Countermeasures of Open Trial in China*, Law Press, 2011; *Criminal Procedure Law: Issues and Elaboration*, Shanghai Renmin Press, 2009. Additionally, he is the author of the *Annual Report on Development of Rule of Law in Shanghai*, published by Social Sciences Academic Press between 2012 and 2014. His books systematically address the most sensitive topics of the criminal trial reform, and currently represent reference works in China.

Starting with the year 1995, the distinguished Professor Ye Qing has also completed more than 100 legal studies in his area of expertise, that were published in *Legal Science Monthly* (the best legal journal in Shanghai and the third, according to its relevance, from China) *Law and Social Development*, *Tribune of Political Science and Law*, *Chinese Lawyer*, *Exploration and Free Views*, *Theoretical Horizon.* At the same time, his academic profile is shaped out by his constant presence, during the last years, at prestigious higher education institutions on four continents, where he was invited to deliver lectures and hold conferences: Columbia College of Macaulay University, Australia, Law School of University of San Francisco, USA, Law School of University of Wisconsin, USA, Law School of Toronto University, Canada, Aoyama Gakuin University, Japan, Law School of the National University, Singapore.

Confirming and enhancing his professional skills, Professor Ye Qing has taken part in more than 20 projects financed by the National Social Science Foundation, Supreme People's Procuratorate or Shanghai Society of Law, whose object was the reform of the criminal trial and its implementation.

All these scientific achievements have increased the reputation of Professor Ye Qing, as one of the most renowned experts in the field of criminal procedure. As acknowledgement of such merits, Professor Ye Qing has been appointed Vice-President of the China Society of Criminal Procedure Law, Vice-President of the Shanghai Law Society, and of the Shanghai Society of Education Law, while being, at the same time, accredited as expert consultant of judicial authorities from Shanghai, Jiangsu Province, Wuxi People's Procuratorate, Jiangsu Province, Changzhou People's Procuratorate and Anhui Province, Chuzhou People's Procuratorate.

The reputed Professor is not only a remarkable expert in law, but also a talented mentor, given the more than 20 awards granted to him for his teaching and education in the domain of legal studies. In this context, we mention but a few of the awards granted to Professor Ye Qing, such as: The Leading Talent of Shanghai (2013), Shanghai Distinguished Teacher (2009), Shanghai Outstanding Young and Middle-aged Jurist (2006), Second Prize of National Excellent Teaching Material and Academic Achievement of Law awarded by the Ministry of Justice (2009), First Prize of Shanghai Higher Education Teaching Achievement Prize, (2009), Second Prize of National Teaching Achievement (2009).

In 2013, the Faculty of Law within the West University of Timişoara has initiated a partnership with the Institute of Law of the Shanghai Academy of Social Sciences. Professor Ye Qing has then held a series of conferences at the Faculty of Law in Timişoara that he visited with a delegation of professors and researchers from the institute where he serves as a director. On that occasion, Professors Viorel Paşca, Lucian Bercea and Flaviu Ciopec were integrated, as associate researchers, into the Research Centre for European Criminal Law, affiliated to the Institute of Law of the Shanghai Academy of Social Sciences.

The further attendance of professors from the Faculty of Law within the West University of Timişoara to international conferences in China (*International Symposium on Sino-European Economic Criminal Law*, Shanghai, 2014; *World Forum on China Studies*, Shanghai, 2015), and, respectively, of professors and researchers from the Shanghai Academy of Social Sciences and East China University of Political Science and Law to the first edition of the *Journal of Eastern-European Criminal Law Conferences* (taking place on this very day in Timişoara) stands as proof that academic exchanges between the two legal spaces continue to be promoted.

Today, there also becomes effective the project of the Faculty of Law within the West University of Timişoara consisting of the translation and publication by *Universul Juridic* publishers, of the Criminal Law and the Criminal Procedure Law of the Peoples' Republic of China, aimed at reaching Romanian experts, who will now have a useful instrument for their research into comparative criminal law and criminal procedure law. Professor Ye Qing is the main promoter of the project, authoring the preface to the volume with a study that analyses the essential evolutions of the above-mentioned laws during the last years, a period when China has chosen to reinforce the rule of law.

The honorary degree that is today awarded to Professor Ye Qing is yet another concrete example of the relationships that the West University of Timişoara has with similar academic institutions on an international level, as well as a proof of the fact that science is a bonding instrument and becomes the most important element to coagulate mankind. Criminal law, in which today's laureate is an expert, can serve individuals not only by its punitive side, but also by its preventive attitude.

We are honoured that, by awarding this honorary degree, we can contribute to the strengthening of relations between our peoples and to a better mutual understanding, because, beyond the particular features that make us unique, we share common principles of respect for the human being. We are glad that we can thus honour the professionalism of an expert who is famous in China and in the international academic community.

Starting today, the West University of Timişoara will have a skilled ambassador in China, and we hope that he will efficiently contribute to enlarging the area of cooperation between our institutions. We address Professor Ye Qing the request to be

the conveyer of an academic message of mutual trust, of exchange of information and experts, of closeness through communication.

Taking into account the above-mentioned, we consider that the proposal submitted by the Faculty of Law within the West University of Timişoara, as to the awarding of the honorary degree of *Doctor Honoris Causa Legum Scientiae,* is fully justified.

Distinguished Professor Ye Qing,

We are glad that today you are in the middle of our academic community in order to receive this honorary title that the West University of Timişoara grants upon you in recognition of your special merits of developing a cooperation-based partnership between our institutions.

The *Laudatio* Academic Board appointed to award the honorary degree of *Doctor Honoris Causa*

President,

Professor Marilen-Gabriel Pirtea – Rector of the West University of Timişoara

Members

Professor Lucian Bercea – Dean of the Faculty of Law within the West University of Timişoara

Professor Tudorel Toader – Dean of the Faculty of Law within the "Al. I. Cuza" University of Iaşi

Professor Florin Streteanu – Dean of the Faculty of Law within the "Babeş-Bolyai" University of Cluj-Napoca

Professor Gheorghiță Mateuț – Faculty of Law within the "Babeş-Bolyai" University of Cluj-Napoca

Professor Viorel Paşca – Head of the Doctoral School of the Faculty of Law within the West University of Timişoara

A discussion on the provisions of the exclusionary rule against illegally obtained evidence in China's criminal procedure law

Prof. dr. YE QUING
President of the East China University of Political Science and Law
Vice-President of the Shanghai Academy of Social Sciences

Abstract:

On March 14, 2012, the exclusionary rule against illegally obtained evidence was incorporated for the first time into the Criminal Procedure Law of the People's Republic of China, marking the establishment of an important criminal evidence rule in the Chinese legal system that guarantees judicial impartiality and respects human rights. However, the practical effect of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Case coming into force in 2010 has exhorted us to reconsider this evidence rule in a more rational and scientific way. Through clarifying and analyzing the current legislation in this regard in China, this article discusses the relationships among the prosecution, the defense and the judge under the exclusionary rule from the perspective of the distribution of rights and obligations. In addition, it proposes that the transformation of the exclusionary rule from "the law in books" to "the law with life" requires further development and improvement with respect to local adaptation, supporting measures, provisions refinement, and ultimate goals.

Keywords: *Exclusion of Illegally Obtained Evidence; Current Legislation on the Exclusionary Rule; Obligation of Legal Exclusion*

As the "centerpiece" of a criminal trial, evidence provides the basis for proving and confirming a criminal fact and determines the capacity for justice in law. The exclusionary rule prohibiting the use of illegally obtained evidence (hereinafter referred to as "the exclusionary rule") is one of the most basic evidentiary rules commonly adopted in modern countries with adequate legal systems, serving as a benchmark for the level of democracy, justice and rationality in the criminal law system of a nation, as well as a touchstone for the nation's status in human rights protection and the adequacy of its legal system. The provisions on evidence contained within the current *Criminal Procedure Law* of China are too much of a general and theoretical nature and lacking in the systematic and comprehensive evidence rules necessary in juridical practice. In particular, a large number of coerced confessions and misjudged cases have been uncovered in the criminal judicial system in China and have been reported on by the media, seriously undermining the authority and credibility of the Chinese rule of law, and leading, in a converse effect, to accelerated progress in constructing and improving the exclusionary rule in China. In response, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice of the People's Republic of China jointly promulgated, on May 30, 2010, the *Provisions on Several Issues Concerning the Exclusion of Illegally Obtained Evidence in Criminal Cases* (hereinafter referred to as "the *Illegal Evidence Provisions*").

As compared to previous legal and judicial interpretation in this area, the *Illegal Evidence Provisions* more clearly define, from the varied perspectives of relevant entities and procedures, the connotation and denotation and specific operating procedures for excluding illegally obtained evidence applicable to public security and judicial authorities when handling criminal cases,[1] preliminarily strengthening the exclusionary rule in China. On March 14, 2012, the 5th Session of the 11th National People's Congress (NPC) adopted the *Decision of the National People's Congress on Amending the Criminal Procedure Law of the People's Republic of China* (hereinafter referred to as "the new *Criminal Procedure Law*"), which added five provisions directly addressing the exclusionary rule, marking the first exclusionary rule with Chinese characteristics established through NPC legislation. However, as Oliver Wendell Holmes, Jr., Acting Chief Justice of the United States, put it: "The life of the law has not been logic; it has been experience." Since the exclusionary rule established by the new *Criminal Procedure Law* is only "the law in books", whether it can be given "life" in juridical practice depends on how rational and complete it is, how it conforms to the Chinese judicial practice now and in the foreseeable future, and whether it can achieve the desired legal effect in juridical practice. This is currently the most pressing issue that needs to be urgently addressed by the Chinese legal community and judicial practice departments.

I. Current Legislation on the Exclusionary Rule in China

(i) Definition of Illegal Evidence

Illegal evidence is defined in the new *Criminal Procedure Law* as "confessions of a criminal suspect or defendant extorted by torture or other illegal means, testimonies of witnesses and statements of the victim collected by violence, threat or other illegal methods" and "physical evidence or documentary evidence obtained in violation of legally prescribed procedures, which may severely impair judicial impartiality". Therefore, the scope of illegally obtained evidence identified in Chinese legislation includes confessions of the criminal suspect or defendant, testimonies of witnesses, statements of the victim, physical evidence and documentary evidence.

First, it is a distinctive approach to incorporate witness testimonies and victim statements within the scope of illegal evidence. In the relevant provisions of the United Nations criminal judicial conventions and in the legal systems of other countries, illegal evidence generally refers to evidence collected by an investigation institution by any means that are in violation of the rights of the person subject to criminal prosecution.[2] For example, Article 15 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* stipulates that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." But it is a realistic and rational approach for China to extend the scope of illegal evidence to include witness testimonies and victim statements, because testimonies of a witness or victim coerced by violence, threat or

[1] Ye Qing, Reflections About Illegal Evidence Exclusion Procedures, *Political Science and Law* 6 (2011).

[2] Yang Yuguan, Amendment of China's Criminal Procedure Law Highlights Human Rights Protection: on the Privilege Against Self-Incrimination and the Exclusionary Rule, *Law Science Journal* 5 (2012).

other illegal methods do unfortunately exist in Chinese juridical practice. The evidence collected by such methods can hardly ensure its authenticity and objectivity, easily leading to misjudged cases and that is why the new *Criminal Procedure Law* includes testimonies of witnesses and statements of the victim collected by violence, threat or other illegal methods within the scope of illegal evidence. However, the procedure for excluding illegal evidence in a foreign country is normally initiated by the criminal suspect or the defendant rather than the witness or the victim. According to some scholars, since evidence illegally obtained from a witness or victim usually does not violate the rights of the suspect or the defendant, the defendant is not entitled to seek the exclusion of relevant evidence so obtained.[3] The author believes, however, that the underlying purpose for establishing the exclusionary rule is to deter violations of the law, i.e., to deter law enforcement officers from engaging in unlawful acts by eliminating any improper benefit they might gain from their illegal activity, and is, therefore, prophylactic in nature. In a criminal proceeding, the defendant, as the only party confronting the prosecution, shall be entitled to cast doubt on and cross-examine the evidence presented by the prosecution. To question the validity of the prosecution's evidence, the defendant can either seek application of the exclusionary rule or exercise his/her rights of cross-examination against the credibility of all the evidence. In the context that witness testimonies and victim statements have been incorporated as illegal evidence in the new *Criminal Procedure Law*, a defendant's application to invoke the exclusionary rule against illegally obtained witness testimonies and victim statements conforms to the deterrent purpose of the exclusionary rule and is in line with the reality that the present Chinese system of criminal procedure is structured on the confrontation between the defense and the prosecution, which makes it necessary and possible for the defendant to request exclusion of illegally obtained evidence. In particular, the newly added Articles 187 and 188 in the new *Criminal Procedure Law* contain the procedures for compulsory witness testimony, including, conditions for compelling a witness to attest in court, sanctions for refusal to testify in court and relevant remedies. These rules ensure that the judge is better able to evaluate witness testimonies under the illegally obtained evidence exclusion procedure.

Second, the rule authorizing relative exclusion of illegally obtained physical and documentary evidence is defined. The inclusion of physical and documentary evidence within the definition of illegal evidence is a historically significant step forward, breaking away from the previous legal or judicial interpretation in China of illegal evidence as referring only to illegally obtained oral evidence. The new *Criminal Procedure Law* provides in Article 54 that, "where any physical or documentary evidence is obtained contrary to the legally prescribed procedure, which may severely impair judicial impartiality, corrective actions shall be duly taken or reasonable justification provided, otherwise such physical or documentary evidence shall be excluded", thus setting forth three prerequisites for application of the relative exclusionary rule: 1) failure to follow established legal procedures in collecting physical or documentary evidence; 2) the possibility of material damage to judicial justice; and, 3) failure to take corrective actions or provide reasonable justification. Only when the aforementioned three prerequisites are fully met, shall the judge be legally authorized to decide at his/her sole discretion whether to exclude the physical or documentary evidence in question. In practice,

[3] *Ibid.* Supra note 2.

however, despite the allowance for the judge's sole discretion, the provision is too much of a general principle to apply to specific cases, leaving the judge little room to contest the validity of the corrections or justification provided by the prosecution, thus making it virtually impossible to exclude illegally obtained physical evidence.[4] Furthermore, in order to curb unlawful seizure of evidence by investigation authorities, illegal evidence once excluded is in principle no longer admissible despite any corrective actions or reasonable justification. The relative exclusionary rule against illegally obtained physical evidence, as a legislative creation in the new *Criminal Procedure Law*, is in fact a trade-off choice made by Chinese lawmakers between crime control and human rights protection, with the latter appearing as a more important consideration in the determination of the competency and weight of evidence. On one hand, the stability and reliability of physical evidence add to the weight of evidence to prove the *factum probandum*, thus contributing to the establishment of substantive truth; on the other hand, due to inadequacies in the relevant provisions of law, the investigation authorities in China enjoy considerably more discretion in the collection and preservation of physical evidence than their foreign counterparts governed under the writ system, making only a small extent of physical evidence identifiable as illegally obtained. Moreover, established against the background of alarmingly increasing occurrences of coerced confessions and misjudged cases in current judicial practice in China,[5] the exclusionary rule against illegal evidence is primarily aimed at controlling the illegal collection of oral evidence by the use of torture. However, the absolute exclusionary rule is not applicable to physical evidence due to the absence of public acceptability of an exclusionary rule which may let the "criminal go free because the constable has blundered" and the social demand for substantive truth. The rule authorizing relative exclusion of illegal physical or documentary evidence at the sole discretion of the judge is, therefore, a remarkable creation that aptly handles practical concerns. The only inadequacy derives from the overly abstract criteria for exclusion which leave too much discretionary power in the hands of the judge and may easily lead to relative "non-exclusion" of illegal physical evidence in China's litigation structure, which is not trial-centered. Therefore, a more detailed judicial interpretation of the relative exclusionary rule is needed to enhance its applicability.

(ii) Implementation of the Exclusionary Rule

According to the applicable provisions in the new *Criminal Procedure Law*, the exclusion of illegal evidence shall be implemented in either of two ways, as described below.

1. Implementation by execution of authorized powers, which includes the following three situations: 1) at the end of the investigation stage, the investigation institution shall, upon discovery of evidence eligible for exclusion, exclude such evidence in accordance with applicable legal provisions. In such case, the evidence in question shall not be used as the basis for recommending prosecution; 2) in the stage of review and prosecution, the prosecution institution shall exclude the illegally obtained oral evidence in accordance with applicable legal provisions and shall not use such evidence

[4] *Ibid.* Supra note 1.

[5] Chen Guangzhong, A Research on Several Theoretical and Practical Issues of Criminal Evidential System Reform, *China Legal Science* 6 (2010).

as the basis for a public prosecution; and 3) during the court trial, the judge, upon discovery of possible illegal evidence, shall initiate a court investigation concerning the legality of said evidence.

2. Implementation upon request for exclusion of illegally obtained evidence, including a request made by: 1) the criminal suspect prior to the closure of investigation; 2) the criminal suspect at the stage of review and prosecution; and 3) the defendant during court trial.

However, with regards to both of the first two circumstances of implementation by execution of authorized powers and of implementation upon request, no specific methods, prerequisites and procedures for the implementation of the exclusionary rule are explicitly provided in the new *Criminal Procedure Law*. In addition, the new *Criminal Procedure Law* follows the provision of Article 5 in the *Illegal Evidence Provisions* that designates the court trial stage as the period open for application by the defendant for illegal evidence exclusion, which means the defendant and his/her defender are entitled to such application from the beginning of the trial stage till the closure of court debate.[6] Such provision is of great practical significance against the background that under the new *Criminal Procedure Law*, the defense lawyer is not allowed to access, extract and copy any material stating the facts of the crime provided by the prosecution until acceptance of the case by the court, which leaves the defense insufficient time to prepare its trial strategy and arguments and to apply for exclusion of illegal evidence. To prevent such occurrence, the *Illegal Evidence Provisions* stipulates that the defense is allowed to request exclusion of illegal evidence starting from the beginning of the trial stage until the closure of final arguments. As a step further, the new *Criminal Procedure Law* provides in Article 38 that the defense lawyer is allowed to access, extract and copy any case material as of the date of the beginning of the examination and prosecution stage, while Article 37 explicitly recognizes the right of the defense lawyer to meet with the criminal suspect or the defendant by presenting three types of legally required licenses, thus providing the defense with reasonable opportunities to access the information necessary for determining the legality of the evidence provided by the prosecution prior to trial. However, the extension of the period allowed for application by the defense for illegal evidence exclusion until the closure of court debate, despite its effectiveness in protecting the lawful rights of the defense, may disturb the normal substantive trial procedure, and still fail to resolve the problem that the judge's free evaluation of the case through inner conviction may have already been tainted by illegal evidence. Moreover, the focus of the court debate is on identifying the legal provisions applicable to the case in question, rather than the legality of evidence and the fact finding procedures. Even during the court investigation dedicated to fact finding, an application for illegal evidence exclusion made by the defense may disturb the substantive trial proceeding as well because the prosecution may require adjournment of the trial to allow for sufficient time to gather relevant evidence, thus leading to a prolonged, inefficient litigation process. The new *Criminal Procedure Law* stipulates in Paragraph 2, Article 182 that, "prior to the court session, the judge may convene the public prosecutor, the litigants and their defenders or representatives to solicit opinions on trial-related issues, such as the recusal list and the list of witnesses to attend court as well as exclusion of illegal evidence." This provision, in the author's opinion, has set up a

[6] The Office for Criminal Law under the Legislative Affairs Commission of NPC Standing Committee. *Interpretation of and Guidelines for Action under the Criminal Procedure Law of the People's Republic of China.* Press of Chinese Democratic Legal System, 2012, p.140.

preliminary procedure for pre-trial evidence disclosure during criminal proceedings in China, which allows for the exclusion of illegal evidence at the most opportune time for improving litigation efficiency, and stands as the best solution under the current unitary trial system to ensure the free evaluation of the case by the judge through inner conviction without interference by illegal evidence (therefore, the judge can concentrate on the continuous trial proceeding after the beginning of the court session, ensuring the consistency and integrity of the judgment under minimized impact of the illegal evidence found in the pre-trial stage). However, in case the defense discovers any new evidence or fails to request pre-trial exclusion of illegal evidence due to reasons not attributable to the defense, they shall have the right to apply for exclusion during the court trial. After all, the establishment of an effective pre-trial evidence disclosure system is by no means an overnight process, but requires step-by-step improvement in various aspects, such as increasing the number of qualified criminal defense lawyers and ensuring sufficient disclosure by the court of the right of application for illegal evidence exclusion.

(iii) Bearer of the Burden of Proof

According to Paragraph 2 of Article 56 in the new *Criminal Procedure Law,* which provides that "[w]here exclusion of illegally obtained evidence is applied for, relevant information or materials about the illegal practice shall be furnished" and Article 57, which further provides that "[i]n the court inquisition on the validity of evidence collection, the people's procuratorate shall bear the burden of proof that the evidence collection was legal", there is no question that the burden of proof in a hearing to determine allegations of illegally obtained evidence rests upon the prosecutor. However, perceptions differ in academia regarding the nature of relevant information or materials provided by the defendant. Some scholars hold that by initiating the statements, the defendant is exercising his/her right of defense as an important procedural right, which should not be confused with the burden of proof, or anything like the inversion of burden of proof.[7] Other scholars believe that the burden of proof should be on the defendant, with the use of "shall" rather than "may" in the provisions indicating that this practice is obligatory.[8] In the author's view, the initial burden of proof should be on the defense in providing relevant information or materials, because the defendant as witness to illegally obtained evidence at least remembers the scene (of torture or extortion particularly) and his/her own confessions therein. If the defendant and his/her lawyer claim only in general terms that "he/she had been tortured" without providing detailed information concerning the specifics of the torture, the judge is not able to make a judgment on whether the torture did likely occur, nor initiate further investigation.[9] Moreover, in the absence of the defense providing specific information and materials related to the illegally obtained evidence, even if the judge were to start the exclusion procedure, the prosecutor would not be able to determine for which particular evidence obtained it needs to provide proof of legality, thus making it impossible for the exclusion proceeding to go forward. It also helps to prevent the abuse of procedural rights on the defense's part if the defense carries the burden of proof in providing relevant information or materials.

---

[7] Fan Chongyi, No Substantive Impartiality Without Procedural Impartiality, *Law Science Journal* 7 (2010).

[8] *Ibid.* Supra note 6.

[9] *Ibid.* Supra note 6.

(iv) Legal Standards for Burden of Proof

As specified in Paragraph 1 of Article 56 in the new *Criminal Procedure Law*, "[i]f, during a trial, the judge deems that a circumstance of collecting evidence by illegal means as prescribed in Article 54 of this Law exists, a court inquisition on the validity of the evidence collection shall be conducted", the defense's initial burden of proof is fulfilled only when the judge believes there is the possibility of illegally obtained evidence, or in a case of reasonable doubt. Reasonable doubt is within the judge's own discretion, and cannot be quantified in numbers or ratios. The defendant is at an obvious disadvantage during the investigation, with no right to identify or preserve the evidence. Furthermore, the lawyer's right to be present during an interrogation has not been incorporated in Chinese law. Therefore, the judge may not impose unduly high requirements on proof of relevant information or materials – information associated with evidence verification is acceptable even if no materials can be produced by the defendant.[10] As long as the information provided by the defendant is reasonable to some extent, the judge shall immediately start the exclusion procedure to determine claims of illegally obtained evidence.

Article 58 of the new *Criminal Procedure Law* stipulates that "[w]here, after the court hearing, the illegal collection of evidence as specified in Article 54 hereof is confirmed or cannot be ruled out, the evidence concerned shall be excluded." Compared with the "authentic" and "sufficient" criteria set forth in the *Illegal Evidence Provisions*, this article obviously provides for a lower standard than the burden of proof borne by the prosecutor, only requiring a showing of reasonable doubt concerning the evidence allegedly collected by illegal means in order for such evidence to be excluded. The pilot studies on the exclusionary rule indicate, however, that proving the legality of the evidence is a challenging task for not only the defendant but also the prosecutor,[11] for the following reasons: 1) the prosecutor is not directly involved in the collection of the evidence, which is primarily conducted by the police as the investigation agency;[12] 2) the investigation process is always kept confidential without on-site participation of anyone other than the investigators; 3) the case materials submitted to the prosecution are all prepared by the investigation agency itself and therefore by no means would they contain any information regarding illegal methods of evidence collection; 4) notwithstanding the mandatory requirement for audio or video recording of the entire interrogation process concerning a serious crime that may lead to a death sentence, or life imprisonment, or of other nature as specified in Article 121 in the new *Criminal Procedure Law*, such recording is not mandated in all cases in China, thus making it difficult to obtain a truthful representation of an evidence collection process that was not recorded in audio or video form; 5) even if the investigator agrees to testify in court, he/she is generally not willing to confess participation in the illegal collection of evidence, leading to a standoff between the defense and the prosecution; and, 6) from a logical point of view, it is always far more difficult to prove a negative fact (*i.e.,* the evidence was not obtained illegally) than a positive fact (*i.e.,* the evidence was obtained illegally).

---

[10] *Ibid.* Supra note 7, p. 141.

[11] Xu Qingyu, Practical Obstacles to the Implementation of the Exclusion of Illegal Evidence and the Solutions: Reflections on the Illegal Evidence Exclusion Pilot Programs, *Political Science and Law* 6 (2011).

[12] *Ibid.* Supra note 1.

(v) Remedies for the Exclusionary Rule

In the chapter on rules of evidence, the new *Criminal Procedure Law* does not prescribe special remedies to be used for the illegal evidence exclusion procedure, nor does it specify the type of adjudication a judge shall adopt in deciding whether to dismiss the application for initiating the exclusion procedure or to exclude/not exclude the illegally-obtained evidence. Compared to Article 12 of the *Illegal Evidence Provisions*, which specifies that,

"If the first-instance people's court fails to examine the opinions submitted by the defendant and his/her defender alleging that the pre-trial statements of the defendant were illegally obtained, and such pre-trial statements of the defendant are used as a basis for deciding the case, the second-instance people's court shall examine the legality of the means by which such pre-trial statements of the defendant were obtained. Where the procurator fails to provide evidence proving the legality of the statements, or the evidence provided is not reliable or sufficient, said statements of the defendant cannot serve as a basis for deciding the case.

The new *Criminal Procedure Law* has left much room for argument on both the type of adjudication for conducting an illegal evidence exclusion procedure and whether to establish special remedies.

A well-known legal proverb states that, "a right without a remedy is no right at all". If the illegal evidence exclusion procedure fails to safeguard the rights of the defendant, especially when the extortion of a confession by torture severely harms the defendant's health, personal freedom and other constitutional rights, will offering the defendant special remedies serve to provide a more reliable means of protecting the defendant's rights? Or is it appropriate to address a claim of illegally obtained evidence and provide a remedy together with the remedies available in an appeal of the substantive trial results? Just like with the two-tier trial system utilized in China, in designing a system, not only the full guarantee and remedy of rights but also the cost and efficiency of the system should be taken into account. Just as the exclusion procedure itself results from the balancing of two concepts - crime prevention and human rights protection – the necessity of providing remedies for violations of rights and the efficiency of proceedings should both be taken into account in designing the approach to remedies for the exclusion procedure. China's illegal evidence exclusion procedure mainly targets confessions of the criminal suspect or statements of the defendant obtained through extortion by torture or other illegal means. Due to the viciousness of the improper and illegal methods adopted, the importance of the rights infringed, and the difficulty of offsetting the consequences, establishing remedies for the exclusion procedure is of great urgency and necessity. Moreover, the exclusion procedure is a separate procedure independent from the substantive trial procedure. As mentioned above, it would be preferable for the exclusion procedure to take place during the pre-trial evidence disclosure period. In addition, the exclusion procedure should also have precedence over the substantive trial and the results of the exclusion procedure be a prerequisite for initiating the substantive trial procedure. That is why the author thinks it inappropriate to combine the remedy for the illegal evidence exclusion procedure with the remedy for the substantive trial, and even more inappropriate to address the two kinds of remedies together after the substantive trial. In other words, special remedies should be built into the exclusion procedure, and the initiation of the procedure should have the effect of stopping the substantive trial so as to prevent situations where the remedies resulting from the exclusion procedure make waste of the substantive trial. The deadline should

also be clearly defined in order to encourage the beneficiary of the remedy to decide as soon as possible after learning the result of the exclusion procedure whether to apply for the remedy so as not to impede the normal process of trial.

II. Distribution of Rights and Obligations in the Exclusionary Rule in China

To clarify the distribution of rights and obligations in the exclusionary rule in China, the respective rights and obligations of the prosecution, the defense, and the judge stipulated by the Chinese exclusionary rule should be sorted out first. Such clarification will enable us to clearly identify the relationships among the three parties in the illegal evidence exclusion procedure adopted by the current Chinese legal system, and better understand what needs to be improved in the current exclusionary rule.

Distribution of Rights and Obligations of the Prosecution, the Defense and the Judge in the Trial Stage		
Defense	**Judge**	**Prosecution**
Initiation of the right to apply for the exclusion procedure	The obligation to examine the defense's application	
Initial burden of proof	The obligation to examine related information or materials	Disprove the defense's application right
Special remedy right	The obligation to initiate/ dismiss the defense's application for the exclusion procedure	
The rights of cross-examination and debate on the evidence provided by the prosecution	The obligation to examine the evidence provided by the prosecution in court	Burden of proof
The right of cross-examining the investigator or other parties concerned	The right to notify the investigator or other parties concerned to testify in court	The right to request the court to notify the investigator or other parties concerned to testify in court
No special remedy right	Responsibility to decide on exclusion or non-exclusion of such evidence	No remedy right

The above table clearly shows that the rights of the defense and the prosecution at two specific points in the procedure are inexplicit. First, the new *Criminal Procedure Law* doesn't clarify what remedial measures the defendant can pursue when the judge rejects the defendant's application for the exclusion procedure, or what types of adjudication the judge shall adopt to dismiss the application. Second, the new *Criminal Procedure Law* doesn't clarify what remedial measures the defense and the prosecution can take when the judge makes a decision on whether to exclude the evidence, or what types of adjudication the judge shall adopt.

Since the new *Criminal Procedure Law* doesn't design remedial approaches specially for the illegal evidence exclusion procedure, according to the conventional unitary trial system of substantive hearing in China the results concerning the credibility of illegal evidence and whether such evidence can serve as a basis for adjudicating the case are usually not reflected by a specific adjudication type, but elaborated in the adjudicative document following the substantive trial. Based on this adjudicative document, the defense and the prosecution can institute an appeal or protest in accordance with provisions on the second instance procedure in the new *Criminal Procedure Law*. As the basis for determination of the facts of a case, the evidence, and any decision to exclude it or not, will significantly affect the determination of facts and hence the conviction and sentencing. As a result, if the defense and the prosecution hold different opinions, a second instance procedure will certainly be initiated even though a judgment is made, resulting in the waste of judicial resources. Therefore, some scholars advise setting up an intermediate appeal procedure to allow the defense and the prosecution to institute an appeal against the adjudication made during the proceedings.[13] The author believes that it is both necessary and practicable to set up special remedies for the illegal evidence exclusion procedure for the following reasons. First, the importance of the rights infringed due to illegally obtained evidence and the viciousness of the means adopted in coerced confessions make it pressing to regulate judicial acts and protect human rights. When the illegal evidence exclusion procedure fails to achieve a remedial effect, the party concerned shall be entitled to appeal to the court at the next higher level to seek a remedy. Second, the procedural priority and independence of the illegal evidence exclusion procedure serve to separate the exclusion procedure from the substantive trial procedure, while the former is logically prior to the latter, i.e., the initiation of the substantive trial procedure of a case depends on the results of the exclusion procedure, which is also the basis for determination of the case facts. The two procedures should not be combined. Therefore, the remedies for the exclusion procedure shall precede the substantive trial procedure and may effectively stop the latter. Third, if a concerned party is not satisfied with the results of the exclusion procedure, a second instance procedure will certainly be initiated and the case will be sent back for retrial, which will waste the judicial resources previously expended in the first substantive trial. Finally, the Chinese *Criminal Procedure Law* stipulates three types of adjudication – decision, ruling, and judgment. The decision is not appealable, which means it cannot be remedied judicially or even administratively;[14] the judgment is the result of the substantive trial; and the ruling is the only adjudication type that can both deal with procedural and substantive problems, and can be remedied through appeal or protest. In conclusion, the author believes that it is appropriate to adopt the ruling approach as the result of the exclusion procedure, allowing the defense and the prosecution to institute an appeal or protest regarding the ruling.

In addition to the trial stage, the new *Criminal Procedure Law* also generally sets out in its two Articles the obligations of illegal evidence exclusion in the investigation stage and the stage of review and prosecution: Paragraph 2 of Article 54 states that, "[a]ny evidence which is found eligible for exclusion in the stages of investigation, review and prosecution, and trial shall be duly excluded in accordance with applicable legal

[13] Yang Yuguan, and Yang Ke, A Research on the Remaining Problems of the Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases, *Political Science and Law* 6 (2011).

[14] Xu Mingmin, From Decision to Ruling: on the Development of Procedural Remedies after the First Instance in China, *Chinese Criminal Science* 8 (2012).

provisions and shall not be used as the basis for any proposal for prosecution, prosecution decision, or judgment"; and Article 55 prescribes that "[i]n case of receipt of any complaint, claim, or charge against or discovery of illegal collection of evidence by any investigator, the people's procuratorate shall make proper investigation to verify such complaint, claim, charge, or discovery. Where the illegal collection of evidence is confirmed, the people's procuratorate shall require proper implementation of corrective actions. Should such illegal conduct constitute a crime, legal proceedings shall be initiated to determine possible criminal responsibility."

Rights of the Defense and Obligations of the Investigation Institution in the Investigation Stage	
Defense	**Investigation Institution**
Defense lawyer's right to state opinions (Article 159)	Obligation to hear and document the opinions (Article 159)
Remedy right undefined	Obligation to exclude illegal evidence (Article 54)

By establishing an obligation for the investigation institution to exclude illegal evidence and prohibiting the use of such evidence as a basis for proposal for prosecution, the new *Criminal Procedure Law* aims to: 1) enhance self-supervision of the investigation institution to ensure early exclusion of illegal evidence from the proceedings and thereby minimize waste of litigation resources; and, 2) strengthen the awareness and recognition by the investigation institution of the importance of lawful collection of evidence.

Distribution of Rights and Obligations of the Defense, Prosecution Institution, and Investigation Institution in the Stage of Review and Prosecution		
Defense	**Prosecution Institution**	**Investigation Institution**
Right to claim illegal collection of evidence during investigation	Obligation to investigate the claim	Obligation to assist in investigation and to be subject to supervision
Remedy right undefined	Responsibility to decide on exclusion or non-exclusion of such evidence	Right of remedy undefined

The legislative creation of the obligation of illegal evidence exclusion by the prosecution institution in the stage of review and prosecution is grounded on the constitutional positioning of the investigation institution as a supervisory body in China and its diversified functional roles. The prosecution institution has its important role to play in illegal evidence exclusion in the following three aspects: first and most directly, review of and decision on the legality of evidence in the stage of review and prosecution and exclusion of evidence obtained by illegal means including torture and extortion; second, effective prevention of illegal evidence collection through full execution of its diverse functions to address the root causes of such conduct; third and lastly, addressing the problem that the court's motion might be affected by illegal evidence due to the structure of trial in China, through effective execution of the prosecution in the

prevention and exclusion of illegal evidence.[15] Furthermore, the full execution of the roles of the prosecution institution in illegal evidence exclusion is also compliant with the current criminal litigation structure in China, which features separated powers and duties for the investigation, prosecution, and adjudication institutions and less powerful mutual constraints compared to the judicial review system in Western countries. The empowerment of the prosecution institution with such defined roles in the stage of review and prosecution to increase its confrontation with the plaintiff is of great significance for increasing litigant participation in the proceedings and improving China's litigation structure. However, the relevant provisions in the new *Criminal Procedure Law* are quite general and broad in nature without specific provisions on the implementation of the exclusionary rule, burden of proof, legal standards for the burden of proof, and the exclusion procedure, which all require further explicit judicial interpretation.

III. Reflections on How to Improve the Exclusionary Rule

Two years after the *Illegal Evidence Provisions* were implemented, the exclusionary rule was established in the new *Criminal Procedure Law* for the first time in China in the form of NPC legislature, marking a definite milestone in Chinese rule of criminal law and demonstrating Chinese lawmakers' determination in regulating public rights and safeguarding human rights. However, the *Illegal Evidence Provisions* were far less effectively enforced than what the public had expected when they were first promulgated – very few typical cases were found applicable to the exclusion of illegally obtained evidence nationwide.[16] The gap between the juridical practice and the legislation has commanded the attention of the legal community and justice departments and, as Roscoe Pound says "The life of the law lies in its enforcement", the primary enforcement issue they need to address is how to legally exclude illegally obtained evidence.

Firstly, the Chinese exclusionary rule should be improved by taking into consideration the Chinese national conditions and making full use of China's own resources. Relying on its own resources, the Chinese rule of law must be enforced in line with the traditional legacy of Chinese legal culture and the social reality.[17] While the United States has undergone a process of shifting from exclusion of physical evidence to that of verbal evidence in its development of the exclusionary rule, China will perhaps go the opposite way, starting with containing verbal evidence produced by torture or extortion to protect the defendant's basic human rights of health and wellbeing and, along with the development of society, rule of law, economy and culture, leading to the full protection of individual property, privacy and other civil rights. Furthermore, the exclusionary rule in the United States was enforced first for the purpose of judicial regulation and later for deterring law violations, while the rationality and purpose of the Chinese exclusionary rule seem to lay more emphasis on the guarantee of the substantive justice of a lawsuit. This is evident in that an absolute exclusionary rule applies only to false verbal evidence that may be easily obtained through torture while a

---

[15] Bian Jianlin, and Li Jing, Criteria for Illegal Evidence Exclusion by the Prosecution Institution from the Perspectives of Prevention and Exclusion, *Political Science and Law* 6 (2011).

[16] *Ibid.* Supra note 16.

[17] Su Li, *Rule of Law and its Local Resources*, China University of Political Science and Law Press, 2004, p. 6.

relative exclusionary rule applies to true and reliable physical evidence, allowing corrections to be made or justifications provided by the prosecutor. The ambiguous and less enforceable exclusion criteria reflect how Chinese laws had relied on the physical truth and tolerated its being overrun by procedures. Therefore, the author proposes that the judicial interpretation of the exclusionary rule established by the new *Criminal Procedure Law* should be further refined and improved by taking into account the specific Chinese national conditions and real situations, including the Chinese tradition of law enforcement, the public's psychological expectations, the actual criminal occurrences, and available technologies in criminal investigation, to make the exclusionary rule more practical and easier to enforce rather than simply copying the provisions of laws in other countries.[18]

Secondly, provisions on supporting measures of the exclusionary rule should be refined to enhance its operability and feasibility. In no country is the exclusionary rule established groundlessly – its formulation and development would have been unattainable, like a castle in the air, without the collaboration of supporting measures. The new *Criminal Procedure Law* explicitly specifies that the investigator is obligated to testify in court, which is of historical significance in terms of enhancing confrontation in a court trial and protecting the defense's right of cross-examination. However, to what extent this provision can achieve the fact-finding purpose is still questionable. In judicial practices, even if being present at court, investigators tend not to admit that they have extorted confessions by torture in order to obtain evidence, while the defendant, being in a vulnerable position, is hardly able to preserve the evidence in a closed interrogation space. Thus an embarrassing scenario is very likely to occur in which the investigator and the defendant each stick to his/her own argument, making it hard to tell what actually occurred during the interrogation. At the very root of this is the inadequacy of supporting measures in China at present. For instance, it is still difficult for audio and video recording of the interrogation process to be widely adopted. In the meantime, the defense lawyer doesn't have the right to be present at the interrogation, and the place of custody is still under the control of the public security authorities. Additionally, while the legislators hope to curb the illegal obtaining of verbal evidence by investigators through the establishment of the exclusionary rule, under the current circumstances in China, where the equipment and investigative skills of the police are inadequate and the investigative model still remains "from confession to evidence", establishing and refining supporting measures is still indispensable for effectively curbing the unlawful obtaining of evidence, such as by the use of torture.

Thirdly, the specific provisions of the exclusionary rule need to be more detailed and should gradually evolve from the present "extensive" model to an "intensive" model.[19] To begin with, the definition of illegal evidence still lacks clarity. The questions have yet to be answered as to how to define the phrase "other illegal means" in "extorted by torture or other illegal means" and the extent to which violence and threats would constitute obtaining evidence illegally, and how to differentiate it from appropriate measures and skills adopted in actual investigation practice. Moreover, in the new *Criminal Procedure Law*, regulations giving investigators compulsory powers to obtain physical and documentary evidence and other tangible evidence are relatively primitive. Searching, sealing-up evidence or crime scenes, and detaining suspects can be

[18] *Ibid.* Supra note 1.
[19] *Ibid.* Supra note 1.

carried out by self-empowered investigation authorities, who are given much flexibility when executing actual investigations. Therefore, how to determine whether the investigation is illegal is still subject to more detailed provisions on relevant investigative measures. Another problem is that, if the evidence provided by the prosecution is identified as unlawful in the trial, there are no specific words in the provisions defining how the court should rule. Aside from the aforementioned issues, quite a few provisions in the exclusionary rule in China need to be more detailed because an explicit exclusionary rule is essentially necessary, especially in the Chinese judicial context where statutory law is a historic tradition and law-related professions are not broadly recognized.[20]

Last but not least, the success of the exclusionary rule lies in its declining application in judicial practices, instead of the exclusion of an increasing amount of illegal evidence. As a procedural sanction measure, the acknowledged executional purpose of the exclusionary rule is to deter investigators from unlawful seizure of evidence through depriving them of the benefits they may gain from such action, while at the same time functioning as a remedy for violations of the rights of defendants.

Nevertheless, just as former Chief Justice Benjamin Nathan Cardozo remarked, the exclusionary rule contains its own deficiency in terms of protecting the benefits of society and the victim, as it would often "let the criminal go free because the constable has blundered". Even in the United States where the rule originated, doubts and disputes about the exclusionary rule have never fully died down over the past century. In the Chinese judicial system, in order to give full play to the major function of the exclusionary rule, which should be to curb the illegal obtaining of evidence, including extorting evidence by torture, the judicial authorities need to strictly implement regulations related to the rule, so that the rule can fully play its role of deterring investigation authorities, who would in this way better understand the legality of the appropriate means for obtaining evidence and, eventually, the illegal obtaining of evidence by investigation authorities can be prevented in general.

[20] *Ibid.* Supra note 1.

A European Public Prosecutor Office against Euro-financial Crimes: Which Future?

Prof. dr. ROBERTO E. KOSTORIS
Dean of PhD School of Law
University of Padova
Vicepresident of the Italian Association of Scholars of Criminal Procedure

Abstract:

The establishment of a European Public Prosecutor's Office for the fight against the crimes affecting the financial interests of the Union constitutes a complex and rough path. The article focuses on the fundamental steps of this route until now, from the provisions of the Treaty of Lisbon, to the Commission's proposal, to its redrafts, above all that one of April 2014 under the Greek Presidency. What emerges is a too complex and elephantine body, ill-suited to an efficient fight against euro-financial crimes. However, some slender lights seem to appear in the more recent developments of this path.

Keywords: *European Public Prosecutor's Office; European prosecutions; European investigations; euro-financial crimes; rules of evidence; college; Chief Prosecutor; Permanent Chambers; European prosecutors; European Delegated Prosecutors*

1. The idea to establish a EPPO

As in this Congress we are talking about economic crimes, we have to remember that some of the most important economic crimes are committed against European economic interests, and that there is the idea to establish an European Public Prosecutor's Office (EPPO) to fight them.

It is indeed an ancient idea: it was born almost twenty years ago, when a group of scholars, by request of the European Commission, elaborated in 1997-2000 a project, the *Corpus juris,* to protect the economic interests of the Union.

Now the possibility to establish such an office is explicitly provided by art. 86 of the Treaty on the functioning of the European Union (Treaty of Lisbon), which points out that the structure and the functioning of such a body must be referred to a specific regulation. And, for this purpose, on 17th of July 2013 the European Commission have elaborated a proposal of regulation.

2. Arguments against and for the establishment of a European Public Prosecutor

Before considering the actual state of play, let's see which reasons can arise in favor or against the establishment of such a body.

The critical issue is, as usual, politic and it is firstly linked to the fact that the European Union has been conceived as an incomplete entity. The European Union is, indeed, structured as an autonomous legal system, but not as a federal State, to which the individual States are subjected. A State therefore provided with an autonomous and complete judicial system for the prosecution and punishment of "federal" crimes. Namely, with its own prosecutors, its own law enforcement agencies, its own judges. The Member States of the European Union have certainly given part of their sovereignty to the Union; they have created centralized bodies, including even the Court of Justice, which however has a competence limited to assure the compliance and the homogeneity of the Union law by the Member States. However, the crucial step hasn't been taken: precisely, the federal one. Under this point of view, there could be a substantial objection to the establishment of an EPPO, lacking a federal structure. If the Member States haven't taken that step, it means that they don't want interferences in their sovereign prerogatives, first of all in the administration of justice. In this view, a European Public Prosecutor's Office should appear as an unjustified para-federal body.

It is surely a coherent objection. And, as we will see, this purpose to maintain the control on the power to punish by the States is heavily influencing the path of the proposal of regulation of the Commission.

On the other hand, we can oppose to this objection a pragmatic approach, less respectful of the purity of the architectures. We can affirm that euro-financial crimes affect, together with the financial interests of the European Union, also the interests of all the Member States, both as such, and as Member States of the European Union. That these crimes bring enormous damages to the European Union funds and consequently to all European citizens. And that these economic damages are much less acceptable in the present difficult economic times. And, above all, that the individual States haven't shown to efficiently fight with their own resources this type of crimes. And that it should be therefore encouraged the idea to establish for prosecution of these crimes a European Public Prosecutor's Office, which could move easily in all the European area, have a united strategy, and, for this reason, could presumably achieve much better results. Moreover, history proves that the steps forward in the path of European integration have often been realized through initiatives brought out of the usual patterns: it would be a good reason for looking forward with confidence even in this case.

Unfortunately, the history of the proposal of regulation on EPPO of July 2013 so far shows that the jealousies of the States, which heavily brake on this project, prevail.

And here I connect with the title of my speech: which future can we imagine for such a body if the assumptions are those which I have outlined? We can reveal the answer in advance: we cannot expect a lot if the EPPO will be established according to the approach that arises in the rewritings of the proposal of regulation. And on the contrary, we will have to be careful that the establishment of a "weak" body don't rebound on the path of the development of the criminal judicial cooperation. A body not enough efficient and strong wouldn't be respectful of the principle of subsidiarity[1]. The States could easily object that its activity wouldn't realize the necessary qualitative leap compared to the prosecution that States already carry out. It would represent the end of the EPPO's project and an impasse for the development of judicial cooperation. We

[1] See Roberto E. Kostoris, *The Perspective to Establish a European Public Prosecutor's Office, Lights and Shadows of a Work in Progress*, in *Toward Scientific Criminal Law Theories. CCLS Tenth Anniversary Anthology of Papers fro International Academic Partners*, Beijing, Law Press – China, 2015, p. 784

would remain bound to the former vision of cooperation between individual States, with just the coordination of centralized bodies as Europol and Eurojust.

Perhaps, some lights however come from the very last developments of this path (drafts of May/October 2015).

3. Art. 86 TFEU and the Commission's proposal of regulation of 17 July 2013

Let's try to summarize the main stages of this path.

a) We shall start from art. 86 TFEU, as we said. It provides the possibility to establish an EPPO in order to investigate and prosecute euro-financial crimes, referring with regard to powers and structure of this body to a regulation which will have to be adopted unanimously by the Member States, or, otherwise, at least by nine States with an enhanced cooperation.

Art. 86 already put a precise limit: while the investigations will be carried out at Union level, the trials will be held at national level, in front of the national judicial authorities of the Member States. It is the logical consequence which I mentioned at the beginning about the lack of an autonomous judicial system of the Union.

b) On this basis, on 17 July 2013 the Commission presented a proposal of regulation and establishment of EPPO[2].

The general framework of this proposal was good.

The territory of the various European States was considered a unique common area for EPPO's investigations. Then, EPPO is deemed as a body with a light centralization. At the central level there is a Chief Prosecutor, and his Deputies. Then, there is a decentralized level with the Delegated Prosecutors allocated in the various Member States, that could also have the role of national prosecutors: so they are bodies that can have two hats. The EPPO is set up as an independent body, which is accountable to the European Parliament, the Council and the European Commission of its general activities, in particular by producing an annual report of them. The competence of this body is exclusive for the euro-financial crimes. It was however provided that – with regard to rules of evidence – the rules of the State (or the States) in which the investigations of EPPO should be carried out should be applied. Therefore, the proposal hadn't provided for common rules of evidence, but for the possible application of rules even very different, depending on the State in which each investigative act is carried out.

Apart from that, that structure showed a slim organization, had the virtue of a common directorial mind and ensured with its hierarchical structure a strong chain of command.

The weakness – besides evidence rules – was that it didn't have its own autonomous investigative structure, because the Delegated Prosecutors, which have the concrete management of the investigations, wouldn't have been able to carry out them alone, but they would have had to rely on the national investigative authorities, that, furthermore, would have applied national rules.

c) Many Member States criticized this model, because it was deemed as not respectful of the principle of subsidiarity, since it wouldn't have shown a better capacity to fight euro-financial crimes compared to the Member States. After these criticisms, the Commission states to maintain the proposal, but to rethink it. Hence various drafts have followed.

[2] COM (2013) 534 final 17 July 2013.

4. The EPPO's structure in the draft of 14 May 2014: a bureaucratic tool

The draft that changes more the proposal of regulation was written under the Greek Presidency on 14 May 2014[3].

It was established an extremely complex structure. It remains the idea of a two level structure of EPPO, one centralized and one decentralized. However, the centralized level doesn't concern only the Chief Prosecutor and his Deputies, but a double body.

This central level should be based no more on a hierarchical structure but on a collegial one. On the one hand, there is the College, which is constituted by the Chief Prosecutor, his Deputies and the European Prosecutors, one for each Member State, so that each State is represented in the college. On the other hand, Permanent Chambers are established: each one includes the Chief Prosecutor or one of his Deputies and some permanent members.

The decentralized level remains. Its structure is composed of the Delegated Prosecutors, at least two for each State, that are located in their respective Member States. The relationship between the College, the Permanent Chambers and the European Prosecutors, which not only are members of the college, but act also as individual organs, as transmission belt between the Delegated Prosecutors and the Permanent Chambers, is extremely complex and confused.

On the one hand, the College has only the task of general monitoring of the activities of the Prosecutor's Office and to take strategic decisions on policies concerning the prosecution. But it isn't involved in the investigations. On the other hand, the Permanent Chamber directs and monitors the investigations and prosecutions, ensure the coordination and implementation of the strategic decisions adopted by the College. So the Chambers deal with the cases that are assigned to them by the Chief Prosecutor. It is appointed by them a rapporteur who follows the dossier, reports it to the Chamber and, after consultation with the Prosecutors of the States concerned, proposes the adoption of decisions to the Chamber. The Permanent Chambers are competent for the single case; European Prosecutors supervise investigations and prosecutions involving their Member States on behalf of the permanent Chamber competent for the case and according to its directives. However, the specific activity of investigation and prosecution is not up to the Chambers but to the Delegated Prosecutors, under the supervision of the competent European Prosecutors. These Delegated Prosecutors refer to the competent European Prosecutor and to the Permanent Chamber designated for the case and make proposals concerning the decisions that the Chamber will have to adopt. For their part, the European Prosecutor of the involved State represent the transmission belt between the Delegated Prosecutors and the competent Chamber. Hence the Chambers are decision-making bodies on investigations and prosecutions, but they do not carry out them directly; the Delegated Prosecutors which are responsible instead of manage them cannot take decisions independently in key fields.

As we can see, the relationship between these bodies is very complex. This situation affects the efficiency and timeliness. There is no more a strong chain of command, as in the original proposal of regulation of 2013.

There are also new issues: for example, with which criteria a case shall be allocated to a Permanent Chamber and how, if necessary, it moves. In the idea which inspires this

[3] Council of the European Union, 14 may 2014, doc 9478/1/14 REV 1.

structure it's not hard to note the will of the member States not to be passively subjected to the management of prosecution and punishment on their territories by a European prosecutor. So, some mechanisms of cross-control are provided in EPPO and, through its own European Prosecutors, the States can have their say on investigations and actions that are carried out inside their boundaries.

The offset is really heavy, because these mutual controls and this allocation of roles between the Chambers, the European Prosecutors and the Delegated Prosecutors realize an elephantine structure that does not seem able to ensure prompt and effective investigations.

Moreover, the competence of the EPPO is no longer considered exclusive, but concurrent, and the law applicable to the investigations is no longer that of the State in which the single investigative act is carried out, but that of the State where is located the European Delegated Prosecutor responsible for the investigations and prosecutions. But this seems to be an improvement compared to the normative fragmentation that characterized the draft proposed by the Commission.

5. Some slender lights above the horizon?

The subsequent drafts laid down under the Italian and Latvian Presidencies aims to coordinate the structural statement given by the draft of the Greek Presidency with the rules of investigation and prosecution.

We have nevertheless to focus on last evolutions, precisely on the document 12621/15 of the Luxembourgish Presidency of 5 October 2015[4], where some advances indeed seem to be made.

In the frame of the same structure of the body, the Presidency has elaborated a compromise package on some key provisions covering investigation measures, cross border investigations and evidence, that aims to ensure both more efficiency of the Office and the safeguard of the rights of the suspects and accused persons. A compromise which has been welcomed by the delegations of Member States and that the Presidency considers could be agreed upon by them.

In particular, in this context, in the cases where the offence is punishable by maximum penalty of at least four years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request some important investigative measures, like search, freezing, including freezing of assets, interception of electronic communications, preservation of traffic data and production of any relevant object and document. In addition, the Delegated Prosecutors shall also be entitled to request or to order any other measure in their Member State which are available to prosecutors under national law in similar national cases.

It is indeed not so much: the EPPO's structure as definite under Greek Presidency remains, but this shows that something is moving, even if, perhaps, it isn't still sufficient to be quite optimist on the future of EPPO's building.

Bibliography

M. Böse, *Ein Europäischer Ermittlungsrichter- Perspektiven des präventiven Rechtsschutzes bei Errichtung einer Europaischen Staatsanwaltschaft,* in *Rechtswissenschaft. Zeitschrift für rechtswissenschaftliche Forschung*, 2012, 172;

[4] See CUNCIL OF THE EUROPEAN UNION, Presidency, 5 October 2015, doc. 12621/15 REV 1.

L. Camaldo (ed.), *L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione Europea*, 2014;

A. Damaskou, *The European Public Prosecutor's Office.A Ground-Breaking New Institution of the EU Legal Order,* in *New Journal of European Criminal Law,* 2015,5, 126;

M. Delmas Marty and J.A.E. Vervaele (eds.), *The implementation of the* Corpus Juris *in the Member States: Penal provisions for the Protection of European Finances* (four vol.), 2000;

J.M. Fernando Aparicio, *El nascimento del fiscal europeo,* in *Revista de derecho comunitario europeo,* 17, 2004, 231;

G. Grasso, G. Illuminati, R. Sicurella, S. Allegrezza (eds), *Le sfide dell'attuazione di una procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni,* 2013;

L. Hamran and E. Szabova, *European Public Prosecutor's Office – Cui Bono?,* in *New Journal of European Criminal Law*, 1-2, 2013, 23;

R.E. Kostoris, *The Perspective to Establish a European Public Prosecutor's Office, Lights and Shadows of a Work in Progress*, in *Toward Scientific Criminal Law Theories. CCLS Tenth Annicersary Anthology of Papaers fro International Acaemic Partners*, Beijing, Law Press – China, 2015, 784;

R.E. Kostoris, *Pubblico ministero europeo e indagini nazionalizzate,* in *Cassazione penale*, 2013, 4738;

L. Kuhl, *The future of the European Union's financial interests,* in *Eucrim,* 2008, 186;

K. Ligeti (ed.), *Towads a Prosecutor for the European Union,* vol. I, *A comparative analysis*, 2013;

K. Ligeti and. M. Simonato, *The European Public Prosecutor's Office: Towards a true European Prosecution Service?*, in *New Journal of European Criminal Law,* 2013, 1-2, 19;

H.G. Nilsson, *Judicial cooperation in the EU. Eurojust and the European Public* Prosecutor, in E. Guild, S. Carrera, A. Eggenschwiler (eds.), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges Under the Stockholm* Programme, 2011, 73;

J.R. Spencer, *Who's afraid of the big, bad European Public Prosecutor?,* in *Cambridge Yearbook of European Legal* Studies, 2012, 363;

C. Van Den Wyngaert, *Eurojust and the European Public Prosecutor in the* Corpus Juris *Model: Water and Fire?* In N. Walker (ed.) *Europe's Area of Freedom, Security and Justice*, 2004, 231;

S. White, *Towards a Decentralizated European Public Prosecutor's Office*, in *New Journal of European Criminal Law,* 2013, 1-2, 23;

J.A.E. Vervaele, *"Quel statut pour le Ministère Public? European Enforcement Agencies in the Area of Freedom, Security and Justice",* in Cour de Cassation (ed.), *Quelles Perpectives pour un Ministère Public Europèenne?*, 2010, 171;

M. Zwiers, *The European Public Prosecutor's Office: Analysis of a Multilevel Criminal Justice System*, 2011.

The concept and typical forms of economic crime

Associate Professor Dr.Ph.D. habil LÁSZLÓ KŐHALMI*
Head of Criminology and Penal Law Department
University of Pécs, Faculty of Law

Ph.D. Candidate Dr. KITTI MEZEI**
University of Pécs, Faculty of Law
Department of Criminology and Penal Law

Abstract:

There are different concepts of economic crime by each sciences and it shows resemblances with other types of crimes. The colloquial definition embraces every crimes, infringements, unethical attitudes, which results in gaining unlawful economic benefits by the economic actors. The Criminal Code gives a guide for the criminal law's definition. In criminology it has a wider range than in the criminal law. The vernacular often use "white-collar crime" as a synonym for it. Distinguishing economic crime from crime against property is extremely hard since both types of crime violate the financial relations.

Keywords: *economic crime, crime against property, white-collar crime, corruption.*

1. The definition of economic crime

It is an extremely hard task to define economic crime, since the term is used with a different meaning not only by each social sciences (sociology, economic etc.), but also by different branches of criminal sciences, and the colloquial language also uses it differently.

The colloquial definition of the economic crime embraces every crimes, infringements, unethical attitudes, which results in gaining unlawful economic benefits by the economic actors.

The public opinion considers – besides the actual criminals – the following people as economic criminals for example a millionaire businessman who takes advantages of loopholes, and also a buffet entrepreneur who offers beer above the market price at a holiday resort, even though none of them can be called to account for criminal liability, since their conducts don't accomplish a crime.[1]

The Criminal Code gives a guide for the criminal law's definition of economic crime.[2] Since the new Hungarian Criminal Code came into effect in 2012[3], the regulated offences against the economic interests are spread and placed in different Chapters within the Code. There are statement of facts with economic nature in the Chapter XXXI

* E-mail: *kohalmi.laszlo@ajk.pte.hu.*
** E-mail: *mezei.kitti@ajk.pte.hu.*

[1] Pusztai László, *A gazdasági bűnözés*, [Economic crime] In: Kriminológiai ismeretek – bűnözés – bűnözéskontroll, Gönczöl Katalin - Korinek László - Lévai Miklós (editors), Corvina, Budapest, 1996. 186. p.

[2] Varga László, *Gazdasági rendszer – gazdasági bűnözés*, [Economic system – economic crime] Belügyi Szemle, 2002/10. p. 7.

[3] Act C of 2012 on Criminal Code.

(Criminal offences against economic sanctions imposed under international commitment for reasons of public security) and besides this in the Chapter XXXVI among the offences against property there has been appeared expressly economic statement of facts such as economic fraud. There are several separated Chapters where the former specifically economic crimes can be found: criminal offences relating to counterfeiting currencies and philatelic forgeries (Chapter XXXVIII), criminal offences against public finances, money laundering (Chapter XL), economic and business related offences (Chapter XLI.), crime against consumer rights and any violation of competition laws (Chapter XLII). Eventually, illicit access to data and crimes against information systems (Chapter XLIII) have become also separated. In a wider sense, the renewed crimes of corruption (Chapter XXVII) also belong to the economic crime.[4]

The definition of economic crime in criminology has a wider range than the criminal law's concept. It is realized in the economic process or closely related crime form to this process which violates or endangers the prudent management, fair and legal frames of economy.[5] Among crime against property the following crimes can be mentioned: embezzlement, fraudulence, misappropriation, and among the corruption crimes: bribery and influence peddler.

Economic crime also shows resemblances with crime against property. The crime against property violates a static state, the current property relations, (for example when a passer-by's money is stolen), while economic crime does violence to a dynamic process, which is committed in the course of utilizing property[6] (for example when a bank manager gives loan for an entrepreneur for a certain percentages of the required loan amount (15-20%) while he violates loan granting and property management regulations and knows that the entrepreneur doesn't have proper credit standing hereby he causes particularly large pecuniary disadvantage.

Distinguishing economic crime from crime against property is extremely hard, since both violate the financial relations, but economic crime is related more to the economy and especially to the production process, while crime against property breaches the actual property relations.[7]

The vernacular often use "white-collar crime" as a synonym for economic crime. The "white-collar crime" as a teminus technicus[8] derives from American criminology in the 1930s. According to Edwin H. Sutherland, who is the father of this term, it is a crime committed by a person of respectability and high social status in the course of his occupation.[9] The name seems appropriate because it grabs a formal feature (white collar), which indicates the underlying content „dazzlingly". The white-collar criminals

---

[4] Tóth Mihály, *A fehérgalléros bűnözés; a gazdasági bűnözés*, [The white-collar crime; economic crime] In: Kriminológia – Szakkriminológia, Gönczöl Katalin - Kerezsi Klára - Korinek László - Lévay Miklós (editors), Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2006. p. 406.

[5] Tóth Mihály, *Gazdasági bűnözés és bűncselekmények*, [Economic crime and offences] KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2002. p. 22.

[6] Gál István László, *Gazdasági büntetőjog közgazdászoknak*, [Economic criminal law for economists] Akadémiai Kiadó, Budapest, 2007. p. 86.

[7] Tóth (2006) Op. cit. p. 405.

[8] Kránitz Mariann, *A „fehérgalléros bűnözés" Magyarországon az ezredfordulón*, [The white-collar crime in Hungary] In: Kriminológiai és Kriminalisztikai Tanulmányok XXXVI., (Irk Ferenc – editor), Országos Kriminológiai és Kriminalisztikai Intézet, Budapest, 1999. p. 39.

[9] Adler, Freda.- Mueller, Gerhard O.W. - Laufer, William S.: *Kriminológia*, [Criminology] Osiris Kiadó, Budapest, 2000. p. 419.

commit crimes with their own economic, social or economic and social means of power, perpetrate behind these „bastions", consequently these means and „bastions" are perfect for covering up their actions.[10]

Distinguishing economic crime from white-collar crime might encounter difficulties, since both types of crimes might play well for each other, but they might also mix with other crimes. Fraud is the most common form of white-collar crime for example typically credit and insurance fraud belong to the white-collar crime concept. Although not every types of frauds are considered to be white-collar crime like it is also a fraud when a bijou seller sells a common ring as a golden ring for an inexperienced old lady with good faith. Furthermore, not even every committed crimes by a white-collar criminal with high social and wealth prestige are regarded as white-collar crime – for example when a bank manager murdered his spouse because of jealousy. A crime is considered to be white-collar one when it is committed in the course of someone's occupation, profession for financial gain or in connection with them.

There are two conceptual criterions for determining white-collar crime: firstly, the perpetrator is disposed of public trust and social-financial legitimacy[11] (such as executive of a multinational company, high government officer etc.), secondly, the offender make use of his economic, social, political or professional power for committing a crime thus he is able to gain more favourable financial-power position for himself.[12]

2. The typical forms of economic crime

The state wants to control and regulate the economic processions with legal means. Although the legal regulation is often in a delay, since it might take some time (it could be years) till an economic solution is proved to be a violation against interests of the state such as in 1990s there were several pyramid games promised 300-500% profit and due to these pyramid games their investors went on bankruptcy. Legislator has enacted „organizing pyramid game" as a crime in the Hungarian Criminal Code only in 1996.

Economic is threatened by that the state wants to correct its defective economic policy with expanding the range of economic criminal law. This could reach a phase, when the largest risk is abiding by the law from the point of view of profitability, while the illegal conduct guarantees large income with small risk like after the change of regime some entrepreneurs accounted for the most absurd expenses as the costs of the undertakings.[13]

Economic crime is continually undergo a transformation as a very flexible crime form. It is always renewed and trying to find the loopholes. Economic crime is typically found in these areas:

---

[10] Kránitz Mariann, *A "fehérgalléros bűnözés"*, [The white-collar crime] Főiskolai Figyelő, 2/1995. p. 145.

[11] Korinek László, *Bűnözési elméletek*, [Crime theories] Duna Palota és Kiadó, 2006. p. 298.: „...the while-collar crime means the committed offences by people with high social status. There are also high and higher within this, since they need executers and other assistants."

[12] Kránitz Op. cit. p. 145.

[13] Finszter Géza, *A büntetőjog alkalmazásának csapdái*, [The traps of applying criminal law] Magyar Tudomány, 2001/8. p. 3., http://www.matud.iif.hu/01aug/finszter.html

2.1. Security related crimes

The regulations applied to security (or in other words investment papers) regulate the registry, the issue and the personnel and material conditions of the securities. The most typical crimes are the following ones: insider dealing and capital investment fraud.

The point of insider dealing is any person could gain unlawful financial benefits with the use of private financial information for example if somebody gets confidential insider information with regard to companies he could strike a very profitable deal thanks to these information.

Capital investment fraud (alias stock manipulation) is widespread on the prompt markets such as the exchange market. The brokers, who are interested in strengthening a certain stock, might influence their clients with misleading or even false statements and give them to believe that the price of the stock is going to rise or fall. Herewith they create artificial demand or supply for the specific stock and when it is turned out the change of the price index was only a false alarm the brokers has gained already a significant profit for themselves.

2.2. Misleading consumers

Misleading consumers is a conduct[14], when they defraud consumers with misleading or fake representation of essential feature of the goods for example a food product company bought semi finished products from South-Africa, Peru and red pepper's grist from Spain, which they sold as „red pepper from Szeged" and also used „Hungarian Product Award" and „Excellent Hungarian Food" labels on the packages with this they misled the consumers.[15]

2.3. Fraudulent bankruptcy

It might happen that the executive officer of business association diminishes the association's assets in case of imminent insolvency[16]. He might actually or fictitiously

---

[14] Act C of 2012 on the Criminal Code Misleading Consumers "*Section 417*(1) Any person who conveys misleading information in a product presentation on the availability of special discounts or price reductions, or on a chance of winning is guilty of a misdemeanor punishable by imprisonment not exceeding one year. (2) Any person who before the public at large states false facts, or true facts in a deceptive way, or provides deceptive information on any essential feature of the product for the purpose of promotion, or if it involves goods of substantial quantity or value, is guilty of a misdemeanor punishable by imprisonment not exceeding two years. (3) The penalty shall be imprisonment not exceeding three years for a felony if the act defined in Subsection (2) is committed in connection with certain features or properties of the goods relating to its impact on health or on the environmental, or whether it is considered hazardous, dangerous or risky. (4) For the purposes of this Section: *a)* essential feature of the goods covers, *aa)* the components an specifications of the goods, and their suitability for a given function, *ab)* the place of origin, *ac)* the way they are controlled or tested and the results *b)* 'product presentation' shall mean retail sales activities carried out under travel arrangement or an event organized for this purpose."

[15] http://www.kisalfold.hu/szeged_hirek/_milliora_buntettek_a_szegedi_paprika_zrt-t/2031706/

[16] Act C of 2012 on the Criminal Code Fraudulent Bankruptcy "*Section 404* (1) Any person who, in connection with the imminent insolvency of an economic operator covered by the Act on Bankruptcy Proceedings and Liquidation Proceedings, actually or fictitiously, diminishes the economic operator's assets: *a)* by concealing, disguising, damaging, deteriorating or destroying, or by making unusable such assets or any part thereof; *b)* by concluding a fictitious transaction, or recognizing a doubtful claim; or *c)* by other means, in contradiction to the requirements of prudent management; and thereby prevents the satisfaction of his creditor or creditors in part or in whole is guilty of a felony punishable by

reduce the assets of the association and thereby prevents the satisfaction of his creditor or creditors in part or in whole like when they sell company owned car of a great value at a very low price for an outsider.

2.4. Tax evasion

Any person, who makes a statement with untrue facts in order to encumber the establishment of his tax liability or conceals such facts (data) from the authority and with this misleading conduct he diminishes the taxation of the state. Most of the criminal procedures are launched because of the value-added tax refund[17] for example when a trader, who sells materials for constructors, makes out fictive receipt for a private person, then he claims back the value-added tax of the materials from the tax authority.

2.5 Credit and insurance fraud

The credit and insurance frauds cause substantial or particularly considerable damage, are generally related to financial institutions and insurance companies.

The essence of the credit fraud is that the contractor provides fake or forged documents in order to get a favourable verdict for his credit grant, termination or changing the credit's conditions like when the contractor forges the company's balance data or hands in false document from the court registration.

Insurance fraud is when the insurance premium is paid without actual or legitimate damage claim for example when they imitate a car crash and then they claim more money than the actual damages from the insurance company.

2.6. Credit card fraud

The spread of the modern payment methods obviously brought that the criminals would manipulate cash-substitute payment instruments (such as cheques, credit cards

---

imprisonment between one to five years. (2) Any person who, in connection with an economic operator covered by the Act on Bankruptcy Proceedings and Liquidation Proceedings: *a)* engages in either of the conducts referred to in Subsection (1) to artificially induce the economic operator's insolvency, or to cause the perception of insolvency; or *b)* in the case of the economic operator's insolvency, engages in either of the conducts referred to in Subsection (1); with intent to prevent the satisfaction of his creditor or creditors in part or in whole is punishable in accordance with Subsection (1). (3) The penalty shall be imprisonment between two to eight years if: *a)* fraudulent bankruptcy is committed in respect of an economic operator of preferential status for strategic considerations; or *b)* the dimunition of assets, actually or fictitiously, is particularly substantial. (4) Any person who, following the order of liquidation, provides preferential treatment to any creditor in violation of the sequence of satisfaction specified in the Act on Bankruptcy Proceedings and Liquidation Proceedings is guilty of a misdemeanor punishable by imprisonment not exceeding two years. (5) The criminal offenses provided for in Subsections (1)-(3) are punishable if: *a)* bankruptcy proceedings have been opened; *b)* liquidation proceedings, involuntary de-registration or compulsory winding-up proceedings have been ordered; or *c)* liquidation proceedings had not been opened by derogation from the relevant statutory provisions. (6) Fraudulent bankruptcy shall be considered a criminal act if committed by a person who has powers to control the assets, or any part thereof, of the debtor economic operator, or has the opportunity to do so, and also if the contract for any transaction with the assets is considered invalid."

[17] Jávorszki Tamás, Az áfa-visszaigénylés mint az áfacsalásokat lehetővé tevő kriminogén tényező, [The value-added rax refund as a criminal factor making tax evasion possible] Belügyi Szemle, 2002/10. p. 52.

etc.). One of the most common credit card frauds are committed with new technical devices (so called skimmer devices). With these devices they can obtain our credit card numbers and our PIN codes.[18]

2.7. Cybercrime

The globalization of the technology has brought new crime forms – inter alia cybercrime –[19] since most of the data storage and transfer are computer based both in the state and private sectors.

Cybercrime[20] is diverse.[21] The illegal hacking, which violates the data protection regulations and information systems, is extremely dangerous. The illegal acquisition of information with the help of computers and new devices might cause substantial damage for the economic life. Any user could meet the misuse of financial transactions on the internet, so called e-banking[22] offences. For committing these types of crimes advanced information technology knowledge is required.

The spread of e-commerce also increases the danger of becoming an injured party of these offences. The safety of the electronic signatures or the spread of wireless services doesn't seem to be fully convincing. . Unfortunately there are cons as well of the development of technology, especially in regard with the youth ("pedophile industry").[23]

Offences against copyright are often committed with the help of computers and information systems.

---

[18] For more about credit card fraud see further in: Tóth Dávid, *A készpénz-helyettesítő fizetési eszközökkel kapcsolatos bűncselekmények büntetőjogi szabályozása,* [The criminal law regulation of cash-substitute payment instrument related crimes], In: Kecskés Gábor (editor), Doktori Műhelytanulmányok. Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola kiadványa Győr, 2015. pp. 226–237.

[19] Nagy Zoltán, *Az informatikai bűncselekmények*, [Cybercrime] Magyar Tudomány, 2001/8. p. 1., http://www.matud.iif.hu/01aug/nagyz.html

[20] Act C of 2012 on the Criminal Code Breach of Information System or Data " *Section 423* (1) Any person who:

a) gains unauthorized entry to an information system by compromising or defrauding the integrity of the technical means designed to protect the information system, or overrides or infringes his user privileges; *b)* disrupts the use of the information system unlawfully or by way of breaching his user privileges; or *c)* alters or deletes, or renders inaccessible without permission, or by way of breaching his user privileges, data in the information system; is guilty of a misdemeanor punishable by imprisonment not exceeding two years. (2) The penalty shall be imprisonment between one to five years for a felony if the acts defined in Paragraphs *b)-c)* of Subsection (1) involve a substantial number of information systems. (3) The penalty shall be imprisonment between two to eight years if the criminal offense is committed against works of public concern. (4) In the application of this Section 'data' shall mean facts, information or datum stored, controlled, processed and transmitted in information systems in all forms which allows them to be processed in information systems, including those programs designed to execute certain functions by the information systems."

[21] Nagy Zoltán, *A számítástechnikai rendszer és adatok elleni új bűncselekmények*, [Crimes against computer systems and data] Belügyi Szemle, 2002/11-12. p. 30-35.

[22] Heine, Günter, *E-Banking, Die einzelnen Rechtsgeschäfte. Berner Bankrechtstag*, BBT Band 9, Institut für Babnkrecht an der Universität Bern, Hrsg.: Wolfgang Wiegand, Stämpfli Verlag AG, Bern, p. 109-131.

[23] Parti Katalin, *A számítógépes bűnözés és az internet*, [The cybercrime and the internet] Kriminológiai Tanulmányok 40., (szerk.: Irk Ferenc), Országos Kriminológiai Intézet, Budapest, 2003. p. 187.

2.8. Economic corruption crime

Economic corruption crime doesn't mean only the committed offences by the economic actors, but also the committed corrupt crimes[24] by the state (except executive power and government bodies), non-governmental organizations and associations also belong to the concept.[25] It is typical of corruption crimes there are at least two parties against each other in the corruption relation, on the one hand, the one who gives or promises unlawful advantage, on the other hand, which requests or receives unlawful advantage. In the first scenario it accomplishes the active corruption and in the second one the passive corruption.[26]

Accepting a bribe is most often occurred during privatization,[27] procurement procedures, construction industry investments and pocket penalize for example when a head of a firm invite tenders and tell the contractor he is going to win the tender if he gets 10% of the contract price.

2.9. Money laundering

Money laundering is an activity[28], which aim is to make outwardly the illegally acquired money[29] legitimate, and then the "laundered" money can be spent in the legal economy.[30] Money laundering[31] has several well-known techniques[32] such as running a nightclub for covering, issuing invoices with higher price than the specific product's real market price during business transactions. There are some theories which consider that money laundering has become beyond its original meaning and it has come closer to other concepts such as organized crime.[33]

---

[24] Kiss Patrik: *A korrupciós bűncselekmények néhány jogértelmezései nehézsége*, [Some legal interpretaion Problems of the Corruption Crimes] Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica, Tomus XXXII. (2014), pp. 305–309.

[25] Kránitz Mariann, *A korrupció utolsó huszonöt éve Magyarországon (posztumusz tanulmány)*, [The last 25 years of corruption in Hungary] Ügyészek Lapja, 2006/5. p. 35.

[26] Mezei Kitti, *Néhány észrevétel a korrupciós deliktumok hatályos szabályozásával kapcsolatosan*, [Some observations related to the effective regulation of the corruption crimes] Büntetőjogi Szemle 2015/3. szám, p. 95.

[27] Görgényi Ilona, *Az Európai Unió elvárásai a vesztegetés kriminalizálása terén a kerethatározat előtt és után*, [The expectations of the European Union related to bribery's criminalization before and after the framework decision] In: Györgyi Kálmán ünnepi kötet, (Gellér Balázs - editor), Bibliotheca Iuridica, az ELTE Állam.-és Jogtudományi Karának tudományos kiadványai, Libri Amicorum 11., KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004. p. 286.

[28] Gál István László, *A pénzmosás*, [Money laundering] KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004. p. 17.: „Money laundering is a method, which helps to make profits from crimes whiter and whiter through the world's bank systems and businesses."

[29] Kereszty Béla: *A pénzmosás*, [Money laundering] Magyar Jog, 1995/2, p. 65.

[30] Jacsó Judit, *A pénzmosás elleni nemzetközi fellépés eszközei*, [The international means against money laundering] Magyar Jog 2000/9, p. 555.

[31] Adler, F.-Mueller, G.O.W.-Laufer, W. S. Op. cit. p. 509.

[32] Gula József, *Pénzmosás*, [Money laundering] In: Csemáné Váradi Erika - Görgényi Ilona - Gula József - M. Nyitrai Péter - Sántha Ferenc (editors): Magyar Büntetőjog – Különös részi ismeretek, Főiskolai jegyzet (Görgényi Ilona - editor), Bíbor Kiadó, Miskolc 2003. p. 202.

[33] Gál István László, *A pénzmosás szabályozásának régi és új irányai a nemzetközi jogban és az EU-jogban*, [The old and new regulation of money laundering in the international an EU law] Európai Jog 2007/1. szám, p. 13.

3. The means of combating economic crime

Combating economic crime is an extremely complex social-economic-moral and crime pursuing task.[34]

It is able to cause damage to the society twice: firstly, when it withdraws money from the legal economy, secondly, when it reinvests money.

The means against economic crime are the following:

- minimizing entrepreneurial cash flow
- reviewing the economic activity related relevant legal regulations and terminating the loopholes
- setting up special police units and prosecutor agencies for dealing with economic crime
- making the difference of legal and risky economic activities unambiguous[35]
- enhancing the transnational economic cooperation of law enforcement agencies.

According to Oliver Heald[36], economic crime is more visible than ever before and the speed of technological advance, and new ways of doing business, makes the task of fighting economic crime ever more difficult. The traditional response to new types of crime is for governments to address them by making new law. However new laws usually involve creation of additional red-tape burdens for business. If businesses continue to treat compliance as an important issue, and take the initiative to find and prevent problems, this will produce a more effective response to the challenge of economic crime, and will reduce the need for governments to fashion laws which impose expensive obligations on the private sector.

Bibliography

1. Adler, Freda – Mueller, Gerhard O.W.- Laufer, William S., *Kriminológia*, [Criminology] Osiris Kiadó, Budapest, 2000.

2. Bencze József, *A feketegazdaság és az ellen való fellépés lehetőségei*, [The black market and the possibilities to fight against it]

3. Finszter Géza, *A büntetőjog alkalmazásának csapdái*, [The traps of applying criminal law] Magyar Tudomány, 2001/8.

4. Gál István László, *Gazdasági büntetőjog közgazdászoknak*, [Economic criminal law for economists] Akadémiai Kiadó, Budapest, 2007.

5. Gál István László, *A pénzmosás szabályozásának régi és új irányai a nemzetközi jogban és az EU-jogban*, [The old and new regulation of money laundering in the international an EU law] Európai Jog 2007/1. szám

6. Gál István László, *A pénzmosás*, [Money laundering] KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004.

7. Gula József, *Pénzmosás*, [Money laundering] In: Csemáné Váradi Erika – Görgényi Ilona – Gula József – M. Nyitrai Péter – Sántha Ferenc (editors): Magyar Büntetőjog – Különös részi ismeretek, Főiskolai jegyzet (Görgényi Ilona – editor), Bíbor Kiadó, Miskolc 2003. p. 202.

[34] Gál (2004) Op. cit. pp. 23-31.

[35] Bencze József, *A feketegazdaság és az ellen való fellépés lehetőségei*, [The black market and the possibilities to fight against it] Belügyi Szemle, 1995. Különszám, p. 14.

[36] Oliver Heald, *Fighting economic crime in the modern world*, 31st Cambridge International Symposium on Economic Crime. Cambridge, UK, form 1-8th September 2013.
https://www.gov.uk/government/speeches/fighting-economic-crime-in-the-modern-world

8. Görgényi Ilona, *Az Európai Unió elvárásai a vesztegetés kriminalizálása terén a kerethatározat előtt és után*, [The expectations of the European Union related to bribery's criminalization before and after the framework decision] In: Györgyi Kálmán ünnepi kötet, (Gellér Balázs – editor), Bibliotheca Iuridica, az ELTE Állam.-és Jogtudományi Karának tudományos kiadványai, Libri Amicorum 11., KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004.

9. Heald, Oliver Heald, *Fighting economic crime in the modern world*, 31st Cambridge International Symposium on Economic Crime. Cambridge, UK, form 1-8th September 2013.

10. [https://www.gov.uk/government/speeches/fighting-economic-crime-in-the-modern-world]

11. Heine, Günter, *E-Banking, Die einzelnen Rechtsgeschäfte. Berner Bankrechtstag*, BBT Band 9, Institut für Babnkrecht an der Universität Bern, Hrsg.: Wolfgang Wiegand, Stämpfli Verlag AG, Bern.

12. Jacsó Judit, *A pénzmosás elleni nemzetközi fellépés eszközei*, [The international means against money laundering] Magyar Jog 2000/9.

13. Jávorszki Tamás, *Az áfa-visszaigénylés mint az áfacsalásokat lehetővé tevő kriminogén tényező,* [The value-added rax refund as a criminal factor making tax evasion possible] Belügyi Szemle, 2002/10.

14. Kereszty Béla, *A pénzmosás*, [Money laundering] Magyar Jog, 1995/2.

15. Kiss Patrik, *A korrupciós bűncselekmények néhány jogértelmezései nehézsége*, [Some legal interpretaion Problems of the Corruption Crimes] Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica, Tomus XXXII. (2014).

16. Kránitz Mariann, *A korrupció utolsó huszonöt éve Magyarországon (posztumusz tanulmány)*, [The last 25 years of corruption in Hungary] Ügyészek Lapja, 2006/5.

17. Kránitz Mariann, *A "fehérgalléros bűnözés"*, [The white-collar crime] Főiskolai Figyelő, 2/1995.

18. Kránitz Mariann, *A „fehérgalléros bűnözés" Magyarországon az ezredfordulón*, [The white-collar crime in Hungary] In: Kriminológiai és Kriminalisztikai Tanulmányok XXXVI., (Irk Ferenc - editor), Országos Kriminológiai és Kriminalisztikai Intézet, Budapest, 1999.

19. Korinek László, *Bűnözési elméletek*, [Crime theories] Duna Palota és Kiadó, 2006.

20. Mezei Kitti, *Néhány észrevétel a korrupciós deliktumok hatályos szabályozásával kapcsolatosan*, [Some observations related to the effective regulation of the corruption crimes] Büntetőjogi Szemle 2015/3. szám

21. Nagy Zoltán, *A számítástechnikai rendszer és adatok elleni új bűncselekmények*, [Crimes against computer systems and data] Belügyi Szemle, 2002/11-12.

22. Nagy Zoltán, *Az informatikai bűncselekmények*, [Cybercrime] Magyar Tudomány, 2001/8.

23. Parti Katalin, *A számítógépes bűnözés és az internet*, [The cybercrime and the internet] Kriminológiai Tanulmányok 40., In: Irk Ferenc (editor), Országos Kriminológiai Intézet, Budapest, 2003.

24. Pusztai László, *A gazdasági bűnözés*, [Economic crime] In: Kriminológiai ismeretek – bűnözés – bűnözéskontroll, In: Gönczöl Katalin - Korinek László - Lévai Miklós (editors), Corvina, Budapest, 1996.

25. Tóth Dávid, *A készpénz-helyettesítő fizetési eszközökkel kapcsolatos bűncselekmények büntetőjogi szabályozása*, [The criminal law regulation of cash-

substitute payment instrument related crimes], In: Kecskés Gábor (editor), Doktori Műhelytanulmányok. Széchenyi István Egyetem Állam- és Jogtudományi Doktori Iskola kiadványa Győr, 2015.

26. Tóth Mihály, *A fehérgalléros bűnözés; a gazdasági bűnözés*, [The white-collar crime; economic crime] In: Kriminológia – Szakkriminológia, In: Gönczöl Katalin-Kerezsi Klára-Korinek László-Lévay Miklós (editors), Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2006.

27. Tóth Mihály, *Gazdasági bűnözés és bűncselekmények*, [Economic crime and offences] KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2002.

28. Varga László, *Gazdasági rendszer – gazdasági bűnözés*, [Economic system – economic crime] Belügyi Szemle, 2002/10

The Criminal Law Protection of the Stock Market in Hungary

DR. ISTVÁN LÁSZLÓ GÁL
Associate professor
University of Pécs, Faculty of Law, Criminal Law Department

Abstract:

The Criminal Law Protection of the Stock Market in Hungary belongs to the field of economic criminal law. Economic criminal law is the sum total of legal regulations within and outside criminal law that define which of the actions threatening the economic order (that is, the orderly operation of the economy) are considered criminal acts, how the perpetrators of these are to be held responsible, what sanctions can be applied against them and how.

Keywords: *Stock Market, Law Protection, Hungary, economy, economic order.*

In a traditional market the customers bear all the relevant information, which is needed before making the decision of the actual purchase. They can analyze the product or even compare it to an other merchant's offer. The stock exchange, as one of the means of the modern wholesale trade, shows similarities but even more dissimilarities with the regular market. As we know, it has two basic types: one of them is the stock exchange (or market), where securities, especially shares and bonds are traded, and the other is the commodity exchange, where usually raw materials (wheat, corn, coffee, rock oil, etc.) as well as eventually foreign currency are merchandised. The very first stock exchange of the world was founded in Amsterdam during the turn of the 16th and 17th centuries, but nowdays the word, stock exchange' does not necessarily mean an actual physical location, it is rather considered as a certain gathering of the actors of the market, who are connected to each other by formal trading rules and communication networks. These performers appearing in the stock market make investment decisions. A contrary to the regular market, where the customer decides on the ground of costs collated to the expected profits, during concluding a decision of investment the investor concentrates on two matters: the anticipated future yield and the risk. In order to conclude a proper decision they need the most information available. These investors expect that all the relevant information is true, holistic and available for everybody in the same time and same amount and all of these are guaranteed by strict rules. The ideal goal would be to provide the same amount of information for everybody in every moment. Because of these the undertakings of the stock exchange have to publicize certain datas by time to time and it is also declared everywhere among the principles, that insider trading and market influencing is forbidden. The perpetrator of insider trading basely harms other performers of the market by his/her act. If he sells securities wherewith he holds unflattering information, then the customer comes off badly, but if he is expecting the rise of the rates, he pulls out the money of the pocket of those, who would have kept their position. Insider trading can also cause harms on a macro level, because it can result the pull-out of foreign investors and capital from the market.

A typical example could be for insider trading, when a company's finance director see during the compilation of annual results, that the given year will be very propitious and before bringing this information to the public he purchases a greater amount of shares by the support of his relatives. It also occurred that the secretary of the CEO read some documents on her chief's desk during cleaning and later she shared this information with her friend with a financial knowledge, who used this information.

The Criminal Law Protection of the Stock Market in Hungary belongs to the field of economic criminal law. Economic criminal law is the sum total of legal regulations within and outside criminal law that define which of the actions threatening the economic order (that is, the orderly operation of the economy) are considered criminal acts, how the perpetrators of these are to be held responsible, what sanctions can be applied against them and how.

We can make the following conclusions on the basis of the above definition:

- economic criminal law is a sub-area of criminal law; therefore, in a wider sense, it includes the procedural law regulations[1] and the regulations of the execution of sentences which do not show marked differences from the general rules; therefore, we do not cover these;

- in Hungary, economic criminal law is constituted by criminal law (primary) norms and legal norms outside criminal law (secondary). Without exception, the primary norms can be found in one law, Law C of the year 2012 (the Hungarian Criminal Code). In this sense, Hungarian criminal law is a unified, codified criminal law[2]; we do not acknowledge the law-development role of judge-made law[3] or only in a very narrow circle[4]. The secondary (non-criminal law) norms play a role mostly when the primary norms do not contain all the positive and negative conditions of culpability. In this case, the criminal law norm sets out only that frame which the secondary norm fills with concrete contents. This is necessary because the frequent modification of the criminal code is undesirable; criminal law has to show a relative stability. Secondary norms, on the contrary, can be modified dynamically.[5] (This is supported by the fact that the code

---

[1] In many cases economic criminal offenses are a result of organized crime activity and, in those situations, the Public Prosecutor and police may take special evidentiary actions, but for the most special evidentiary actions the judge is responsible to order them. See more: Bošković, A. Pavlović, Z .: *Special evidentiary Actions in the Function of Combating Organized Crime in Serbia*, Journal of Eastern European Criminal Law, No. 1 (2015), p. 40-57.

[2] It is a recurring issue in Hungary whether a part of the criminal law requirements (e.g. criminal bankruptcy, tax fraud or the criminal acts protecting capital market conditions) should be included in specialist laws which also include the appropriate background materials. We consider the unified Hungarian Criminal Code an achievement we do not want to give up primarily for reasons of security in law.

[3] About the Hungarian legal system see: *Judicial Corruption – Quis custodiet costodes?* László Kőhalmi and Dávid Tóth =Journal of Eastern European Criminal Law 2/2014. 57. p., Elek Balázs: The Influence of the Changes of Penal Politics on Judical Practice in Hungary (1993-2014). International Symposium on Sino-European Economic Criminal Law, Oct.28, 2014. Shanghai China, 6-16. p, Organised by Research Center for European Criminal Law of Institute of Law of SASS, Editorial Department of Political Science and Law of Institute of Law, Shanghai Changing District People's Prosecurtorate

[4] In our view, the role of judge-made law is not more than the explanation of the law, or the clarification of certain concepts, but analogy is forbidden: that is, the principle of "*nullum crimen sine lege*" is enforced.

[5] One example: In Hungary, the failure of the reporting obligation related to money laundering is a criminal act. But how wide a circle this obligation is enforced in and exactly what its contents are is defined by a secondary norm, this norm is Law CXXXVI of the year 2007, on the prevention and

containing the primary norms can only be the source of law of the highest level, that is, a law, while the secondary norms can be decrees of different levels.);

Hungary joined the European Union on 1 May 2004 and became its member with full rights. In addition to the starred blue flag, we adopted the complete legal material, European law, as well, which poses serious challenges to the actors of jurisdiction, and has an effect on economic criminal law. This effect, however, for the time being may only be indirect, as the bodies of the European Union at present cannot yet create criminal law norms that could be directly applicable in the member states. Even earlier, we were watching with interest and sympathy the endeavours aimed at the creation of a unified code targeting the protection of the financial interests[6] of the Community, and we think this work – in which we would also like to take part now – is to be continued.

The main European background norm on insider trading is the new 2003/6/EC, which replaced the former 1989/592/EEC directive, but the 2003/124/EC and the 2003/125/EC directives also contain rules related to the topic. The new directives significally widened the sphere of insider information compared to former directives. The insider information is not interpreted only in connection with securities anymore, but this definition also includes information related to financial means and derivative securities, which leads directly to a wider range of impeachment because of insider trading.

410. § Someone who

a) transacts operation referring to a financial mean by using insider information,

b) regarding to the insider information in his/her possession assigns an other to transact operation referring to a financial mean,

c) due to benefit snatching gives insider information away to an unauthorised person, commits a crime, and can be punished by maximum 3 years of imprisonment.

In Hungary this crime was unknown before 1990, but we are not at all late. ‚In the United States there has been legal regulation related to insider trading since 1934, and since 1981 in the United Kingdom. In Germany (where the stock market bears old traditions) the regulation came into force only in 1994. The European Union declared its principles forbidding insider trading in 1989.'[7]

The statement of facts of insider trading got its current form in 2005. It became shorter than the former ones (for example the ‚forbidden security-trading' and the ‚insider security-trading'), but it also widened the range of objects on which this crime can be committed (not only on securities but also on ‚other financial means'), and at last it does not contain the definition of insider information anymore, since that is included in one of the background norms.

The Act on Capital Market of 2001 (Tpt.) stands in the background of this crime. This statute provides a vigorous competence for the National Bank of Hungary, where today a separated department deals with the problems of insider trading (Market

obstruction of money laundering and terrorist financing. If, therefore, we would like to include several service providers in the circle of those with a reporting obligation, we do not necessarily have to reach for the criminal code, it is enough to modify or replace the secondary norm. We could continue the list with a number of secondary norms such as, for instance, the Law on Accountancy, the Bankruptcy Law or the Competition Law.

[6] András Kecskés: *The Legal Theory of Stakeholder Protection* (=JURA 16:(1) pp. 67-76. 2010.)

[7] István Vajda: *Insider Trading* (Economical Journal, 50. year, 2003, p. 235-253.)

Controlling Department). The National Bank of Hungary is authorised to charge the perpetrator of insider trading and market influencing with a penalty, if he/she violates, eludes, omits or performs late one of the provisions written in the Tpt. or in other law derived from it, or one of the National Bank of Hungary's orders or its own by-law.[8]

The penalty in the case of insider trading or market influencing can be between 100.000 and 100.000.000 Forints (400 and 400.000 Euros) or maximum the 400% of the traceable financial benefit. This could have a strong dissuasive force in several cases. The announcement making obligation is also a new element in the regulation in the case of suspicion of insider trading (and this must be fulfilled by the investment service providers), but there is no criminal sanction attached to the omission of this obligation, so it is not a crime, but it also can result a penalty. The service providers are obliged to name an assigned person, just like in the case of money-laundering, but here the announcement has to be sent to the National Bank of Hungary. It decides whether it submits an accusation to the police or settles for a penalty in its own competence.

The object of the crime is the equality of chances, which is essential for stock market transactions and indirectly to fair market attitude. The object on which the crime can be committed is the financial mean.

The offender's behaviour is the sealing of a transaction, the crime can be committed outside the stock market. The phrase "sealing a transaction" does not mean that only the perpetrator himself must seal the transaction, in fact it is not the typical case; usually they use the assistance of some kind of a broker or commission merchant. The investment service provider – if he is unaware of the insider character of the transaction – is exempted from criminal liability on behalf of his mistake. In the first two phrases neither the result (gaining benefit), nor the aim of gaining benefit are elements of the statement of facts, so the crime is carried out even if the perpetrator suffers losses from the transaction. The handing over of insider information to gain benefit practically means the selling of such information.

There are disputes in the scientific literature, whether the benefit can only be a financial type or for example a moral acknowledgment (e.g. promotion) or the possibility of a sexual relationship. We are willing to accept this concept, but adding, that in practice it is not the usual perpetrational behaviour.

The method of perpetration in the first phrase is "with the use of insider information", in the second is "according to the insider information in his possession". To interpret this, we need to specify the definition of insider information, which we can not find in the Penal Code, but in the Act on Capital Market.

Insider information:

1. such important information[9] concerning a financial instrument (not including the goods-based derived transaction)

a. that is not yet publicised

b. that is directly or indirectly connected to the financial instrument or to the issuer of the financial instrument

---

[8] Organisations dealing with investment service providing must conclude a separate by-law on the questions related to insider trading, similarly to money-launder prevention by-laws.

[9] Important information: all information concerning an event or circumstance, that has already occurred or its occurrence is reasonably expectable, and specific enough, to enable to draw a conclusion on the possible influence of an event or circumstance on a given financial instrument's price

c. that in the case of publication would be capable of significantly influence the price of the financial instrument[10]

2. such important information in the case of persons, who are assigned to execute any assignment concerning the financial instrument -excluding the ones listed in a. - that is connected to the current assignment given by the client-

3. such an important information concerning a goods-based derived transaction, which

a. was not yet publicised

b. is directly or indirectly connected to a goods-based derived transaction

c. according to the accepted market practice should be shared with the market actors

d. information is regularly shared with the market actors

The perpetrator can be anyone, so anyone can commit insider trade, who possesses insider information. The circle of so-called insider persons, who posses insider information, can be found in the background norm.

Insider person:

a. leading official and member of the supervising committee of the issuer

b. manager, leading official and member of the supervising committee of the legal person or economical partnership without a legal personality in that the issuer owns directly or indirectly twenty-five or more percent of the shares, or has a right to vote

c. leading official, member of the supervising committee and manager of a legal person or economic partnership without legal personality that directly or indirectly owns ten or more percent in the issuer or has a right to vote

d. manager, leading official and member of the supervising committee of any organisation participating in the distribution or in organising the public buying offer according to the VII. Article; furthermore any employee of these organs or the issuer, who participated in the distribution or in the issue, who got insider information during his work within a year from the distribution

e. a natural person who directly or indirectly owns ten or more percent of the issuer's capital

f. manager, leading official and member of the supervising committee of the issuer's accounting credit institute

g. who received insider information because of his work or duties, during his work or exercising his regular assignments, or in any other way

h. who received insider information through crime

i. a person living in a common household or closely related to a person listed in points a.-h.

j. a person acting on behalf of such a company, where a an insider person listed in points a.-i. owns a significant share

The crime can only be committed intentionally, in the first two phrase with *dolus eventualis*, in the third – according to the aim- only with *douls directus*.

It makes more difficult the judicature , when some important theoretical question, which are important in the practice aren't specifed perfect. Because of this that for example there are just few criminal process in insider transaction.

---

[10] Information capable of influencing the rate: all information that would likely be used by an investor at time of making an investment decision

The first question is the definition of the benefit. There are two absolutely opposite opinions in the definition of benefit. One of the opinions says that the desired benefits can be a service like sexual contact, moreover a moral admission, like an improvement, not just a pecuniary thing.[11]

The justification of the minister proves this opinion. The justification says, that it is not important, that the transmitter or the beneficiary got the benefit, or the benefit is a pecuniary thing or it is a kind of personal benefit. The justification of the minister is a type of the jurisprudential interpretation, so it is not binding in Hungary. It is a kind of help for the judicature, so it has a big effect for the judicature, all the same that is not binding.

It is confirmed by the justification of the minister in which the legislative intention is explained.[12] Even so it is confound the law in practice, because it has an opposite aspect. The judicature aspect is that the benefit can be only a pecuniary thing, because the perpetrator intention intent for a big profit-taking, or to avoid a price loss. They support this aspect of the construction of the crime, because they say if the insider's breach of duty is intent for other benefits, it is effect a kind of corruption crime.

The other important question is the count of the crime, there are also opposite opinions in this topic. One group states that the count of the crime is defined by the numbers of economic organizations that is concerned by the insider information until they join a company as a stake or shareholder. This state means that use more insider information, or do more transaction it is a natural unit. To reckon with the disposable time for the perpetrator we can exclude cumulatively. The opposite opinion states that the count of the crime is determine by the number of the informations, not by the number of the transactions, do continually transactions with the same insider information it effects cumulatively. [13] Naturally, we can not define exactly what is that time that is already, or yet enough for determine cumulatively, and this can be diverse in different crimes.[14] The insider transaction is that kind of crime, in which the resulation of the big profit-taking can inspire the perpetrator very much, to use one insider information in a short time to do many transactions with one determination, for the harm of similar investors. For the judicature it is a problem to determine insider information definition, all the same that the Tpt. determine it exactly. The problem is that the definition is containing two not real exact expressions. One is the assumption of ''not publicized information''. The insider is workaround this in the following way: the insider bring out the important information in a website, which is not frequently visited by the investors, the investors usually doesn't get the informations from this website. In this situation we can not impeach the insider because he/she published the information, this information is accessible for everybody, although he/she knows that not too much investor will get that information.

Ideally the insider's intention can not intent to select the investors who are get the information[15], but it is very hard to prove that what was the intention of the insider.

The definition of price sensitive information is also a problem, it is not sure that in a moment an information what effects in the market. [16] The price sensitivity of the

---

[11] Erdősy-Földvári-Tóth: *Hungarian Criminal Law Special Part*.
[12] József Földvári: *Hungarian Criminal Law General Part.*
[13] Erdősy-Földváry-Tóth: 443.p.
[14] József Földvári: 220.p.
[15] Mihály Tóth: *Economic crimes in the shaping judicature* ELTE Law Continuation Institution.
[16] István Vajda: *Insider Transaction.* Economic Review L. year 2003. March 254. o.

information depends of the activity of the company, and of the function of the company.[17]

There is a bigger problem than the above, the lots of insider information, because from these carefulness, not well prepared, trifling, bad habitudes, the belief into the sufficient financial materials, or because in default of ideas in criminal law the information do not get into the criminal investigation authorities.

The other relative problem is to analyze, and to prove of the intention of the accused.

Was the kitchen cooking employee be aware that he/she get an insider information when he/she questioned the headmaster of the company? There are some simple case when it is easy to decide this, but in most of the cases it is hard task. Because of this, maybe it will be practical to penalize incautious form of the insider transaction., like the Tpt. says in the 201. § (1) section.

The instruments of the National Bank of Hungary in now days are ables to recon effective, and to sanctioning the insider transaction in Hungary, in the last years it was sensible that the cases in insider transaction were multiply. In now days the work of the stock market has traditions. In the form as the insider transaction is in the Btk. is inopportune to impeach, it is necessary to clear the question of the count of the insider transaction, the benefit snatching, and to solve the problem of the difficulty of prove. It is meritorious to make all these, if we are believe seriously that the insider transaction can effect big harms in the economic life in a state.

[17] Laura N. Beny: *Insider Trading Laws and Stock Markets Around The World: An Empirical Constribution To The Theoretical Law and Economics,* John. M. Olin Center of Law and Economics, University of Mitchigan, 2006. 335.o.

All eyes on market: abuse, misuse and insider dealing

Dr. MAGDALENA ROIBU*
Lecturer
West University of Timisoara, Faculty of Law

Abstract:

The meeting point between criminal law and economics gives rise to a number of challenging issues that the following study aims to explore. One of such issues is represented by the offenses related to ***market abuse****.*

Under the EU law definition (Directive 2003/6/CE on insider dealing and market manipulation[1], or market abuse) market abuse may arise in circumstances where financial investors have been unreasonably disadvantaged, directly or indirectly, by others who: (a) have used information which is not publicly available (insider dealing); (b) have distorted the price-setting mechanism of financial instruments; (c) have disseminated false or misleading information. Market abuse can thus be divided into two main aspects: (1) ***insider dealing****, where a person who has information not available to other investors makes use of that information for personal gain; (2)* ***market manipulation****, where a person knowingly gives out false or misleading information in order to influence the price of a share for personal gain.*

The present study aims at analyzing the offences related to capital markets, first from the perspective of the European law, subsequently from the point of view of national legislation (still imprecise), which is quite a mimetic transcript of the former. The analysis will be assorted with examples and comments of the most relevant case-law of the European and national courts. Fortunately, the former have come up with solutions that the Romanian judicial practice lacks or completely ignores.

Keywords: *capital market; market abuse; insider dealing; market manipulation (misuse); the Directive 2003/6/EC on insider dealing and market manipulation (market abuse), abbreviated as MAD; the Romanian Market Abuse Act no. 297/2004, abbreviated as MAA; the Romanian Authority of Financial Supervision (the AFS).*

1. Market abuse in EU law. General references

According to art. 12 of the Preamble to the Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation amounting to market abuse (hereinafter MAD), market abuse consists of two main components, namely *insider dealing* and *market manipulation.*

Both illegal market operations mentioned above prevent the full and proper market transparency, which is a trading prerequisite for all economic actors in integrated financial markets.

* E-mail: *magda_roibu_lawedu@yahoo.com.*

[1] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l24035. It has been amended by Directive 2008/26/EC of the European Parliament and of the Council of 11 March 2008 and by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010.

Insider dealing is committed when a person who has information not available to other investors (i.e. *inside or privileged/confidential information*) makes use of that information for personal gain.

At this point, it is recommendable to define the concept of "inside information", in order to understand the *modus operandi* of the economic offender. Thus, inside information is any information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments (art. 16 of the MAD Preamble). Information which could have a significant effect on the evolution and forming of the prices of a regulated market as such could be considered as information which indirectly relates to one or more issuers of financial instruments or to one or more related derivative financial instruments. Also, in the case of persons charged with the execution of orders concerning financial instruments, "inside information" refers to information conveyed by a client and related to the client's pending orders, which is of a precise nature, which relates directly or indirectly to one or more issuers of financial instruments or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments [art. 1 para. (2) of the MAD].

More clearly, use of inside information can consist, for example, in the acquisition or disposal of financial instruments by a person who knows, or should have known, that the information possessed is inside information. In this respect, the competent national authorities that supervise the market transactions should assess what an average and reasonable person would know or should have known in the circumstances.

It is to be noticed that the mere fact that market-makers, institutions authorized to act as counterparties or persons authorized to execute orders on behalf of third parties with inside information confine themselves to pursuing their legitimate business of buying or selling financial instruments or, to carrying out an order dutifully, should not in itself be deemed to constitute unlawful use of inside information.

The difference between what constitutes *legitimate* or *illegitimate use of inside information* is very sensitive, therefore it is difficult to prove that an offense of market abuse (under the form of insider dealing) was committed.

This is due to the fact that a person (usually a professional, experienced trader) who concludes transactions or issues orders to trade which are constitutive of market manipulation may sustain that his reasons for concluding such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the regulated market concerned. A sanction could still be imposed if the competent authority established that there was another, illegitimate, reason behind these transactions or orders to trade.

EU law provides that having access to inside information relating to another company and using it in the context of a public take-over bid for the purpose of gaining control of that company or proposing a merger with that company should not in itself be deemed to constitute insider dealing (art. 29 of the MAD Preamble). Since the acquisition or disposal of financial instruments necessarily involves a prior decision to acquire or dispose taken by the person who undertakes one or other of these operations, the carrying out of this acquisition or disposal should not be deemed in itself to constitute the use of inside information.

When it comes to *market manipulation*, it may consist of the following illegal activities performed on the market (art. 2 of the MAD):

(a) transactions or orders to trade:

- which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or

- which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level, unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;

(b) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;

(c) dissemination of information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

In respect of journalists when they act in their professional capacity such dissemination of information is to be assessed by taking into account the rules governing their profession, unless those persons derive, directly or indirectly, a personal advantage or profit from the dissemination of the information referred to above.

More precisely, the following examples are derived from the core definition given in points (a), (b) and (c) above:

- conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions,

- the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices,

- taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issuer) while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

2. The European case-law on market abuse

Case of *Soros vs. France*[2]

Although the object of market abuse can be represented by complex financial instruments, an analysis of both European and national case-law leads to the conclusion that securities (shares) are most frequently used to commit market abuse offenses.

In what follows, the article will focus on probably the most renowned case of market abuse that was referred to the European Court of Human Rights, in which the claimant alleged the violation of article 7 of the European Convention on Human Rights, due to the lack of clarity and the unpredictability of the French legislation in defining the so-called *délit d'initié* (insider dealing).

[2] ECHR, *Soros vs. France*, application no. 50.425/2006, a judgment delivered on 06.10.2011, which became final on 08.03.2012. It is available in French at http://hudoc.echr.coe.int/eng?i=001-106659#{%22itemid%22:[%22001-106659%22]}.

As part of its program to shed state-owned companies, the French government sold the Société Générale S.A. France in June 1987 at 407 French francs (then 63 dollars) a share.

After a stock market crash a year later, the shares had fallen to the value of 260 francs[3]. In September 1988, the French financier Georges Pebereau sounded out investors including an adviser to George Soros about joining him in building a stake in Société Générale.

While Soros declined to take part in that operation, that month his Quantum Endowment Fund spent 50 million dollars to buy 160,000 shares of Société Générale as well as shares in three other companies that the French government had sold and whose stocks had tumbled.

Pebereau's takeover effort failed when Société Générale management refused and shares surged. Soros had sold off the stake, after he became convinced that the attempt was driven by the desire of a newly elected French government to place allies on the boards of companies that the previous government had sold.

Soros, best known for making 1 billion dollars in 1992 by betting that the Bank of England would be forced to devalue the pound, turned to the European Court of Human Rights in December 2006, after his appeal was dismissed by the Cour de Cassation, France's highest court, which quashed the fine while upholding the conviction pronounced by French inferior courts.

The claimant underlined the unpredictability of French legal dispositions at the moment when he committed the alleged insider dealing, insisting that he did not have a professional connection with the company in question (the French bank) and did not fall within the category of administrators, auditors, or other persons in the management of banking entities, and that, moreover, the inside information that was used had not been obtained in the course of professional duties. In other words, the inside information did not derive from the target company itself (or its employees, administrators, etc.) but from an "aggressor", a third party who intended to "attack" the company at the stock exchange, without the company even being aware of this.

Consequently, despite the requirements imposed by the French Ordinance no. 67-833 of 28th September 1967, there was no contractual or professional relationship between Soros and the company in question. However, the French courts considered that the insider dealing offense did not imply that the "secondary insiders" (initiés secondaires) may have some contractual connection with the issuer of valuable stocks, and that it was enough for the claimant to come across inside information in the exercise of his duties, in order to be considered a secondary insider.

The Strasbourg, France-based court stated that France didn't violate Soros's rights in punishing him criminally for trading inside information about Société Générale S.A., in spite of the market regulator's[4] conclusion that its rules were unclear. Therefore, there was no violation of article 7 of the European Convention on Human Rights.

The European Court argued that "Soros was a famous institutional investor, well-known to the business community and a participant in major financial projects" also noting that "As a result of his status and experience, he could not have been unaware that his decision to invest" risked violating insider-trading laws, and given "there had been no comparable precedent, he should have been particularly prudent" (paragraph 59 of the judgment).

---

[3] Information available at www.bloomberg.com.

[4] In French it is called Commission des Opérations de Bourse (COB).

Defending his client before the European court, Ron Soffer, Soros's lawyer sustained that "It is inconceivable to expect that the citizen has a better understanding of the law than the authority in charge" of market regulation". He also stated that "The opinion of the regulatory authority is an irrebuttable presumption as to the lack of clarity of the law."[5]

The case is assorted by a famous dissenting opinion of judges Villiger, Yudkivska and Nussberger, who, by opposition to the majority opinion (the non-violation of article 7 was ruled by four votes to three) concluded that "In our opinion, the French regulations in force at that moment (i.e. when Soros committed the so-called *délit d'initié*) were unusefully imprecise and vague: they did not distinguish clearly between legal and illegal activities and did not adequately protect individuals from arbitrary interferences. Therefore, the criminal conviction of the claimant must be regarded as a violation of Article 7 of the Convention".

The case of Soros still raises several questions as to the clear and predictable character of the law, especially of the criminal law.

3. Market abuse in the Romanian legislation

Until quite recently, market abuse used to be a truly exotic topic in the area of business criminal law, due to several reasons. A first reason is that in Romania capital market (commonly known as the stock exchange) can still be qualified as an "emerging market" leaving many issues connected to it in the deep shadows of the law. Another reason is that even to legal experts an area such as capital market is quite untouchable, being considered that it belongs exclusively to economists.

All offences related to capital market, mainly market abuse, fall into the category of *white-collar crimes*, therefore they display the same features, namely the same *modus operandi*, the same type of specialized authors (financial experts, including legal entities), the same *mens rea* (criminal intent), with perhaps one notable exception, namely that, unlike other white-collar crimes, market abuse offenses usually generate huge profit to the offender.

When it comes to the subject-matter (object) of the offence of market abuse, it can be any financial instrument, but the case-law has shown that in practice abusive behaviors make more use of securities[6] (equity securities, e.g. common stocks/shares) and less use of complex financial instruments.

In national law, market abuse is sanctioned by the representative special law, namely *Act no. 297/2004 on capital market*[7] (the market abuse act, hereinafter the MAA), and may entail a dual liability, both criminal and contravention-based (in the Romanian legal system, contraventions are petty violations of the law, usually punishable by a fine).

---

[5] Information available at www.bloomberg.com.

[6] In the fourth trimester of the year 2014, equities were the financial instruments to be mostly subject to transactions on national markets, amounting to 94,27% of the total of financial instruments subject to transactions on the Bucharest Stock Exchange (BVB), a report available at http://wwwasfromania.ro/informatii-publice/media/arhiva/3542-evolutia-pietei-de-capital-din-romania-la-31-12-2014.

[7] The act in question was published in the Official Journal no. 571 of 29.06.2004. Said Act was recently amended, on the 12th of January, 2015.

Perhaps much more than in the case of other offences, which are deeply anchored into the tradition of Romanian criminal law, market abuse has shaped out its content by mimetically transposing the substance of the European directives in the matter.

Thus, according to article 279 letter b) in alliance with article 244-245 of the MAA, market abuse refers to the following criminally sanctioned offences:

(a) insider dealing (buying or selling of securities by a person who has access to privileged, non-public information about securities), consisting in the act of a person who detains privileged information to use that information in order to acquire or dispose, on his/her behalf or on behalf of a third person, directly or indirectly, of financial instruments to which that information relates.

- *other frauds connected to insider dealing*, namely the revealing of privileged information to other persons (except for the case when the revealing was made in the normal scope of the exercise of their employment) or the recommendation made to a person, on the basis of privileged information, to acquire or dispose of financial instruments to which that information relates.

(b) capital market manipulation, which may consist of any of the following:

- *transactions or orders to trade* which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level;

- *transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance*;

- *dissemination of information through the media*, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumors and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

The provisions of the MAA were sharply criticized, especially from the perspective of the lack of predictability of its criminal norms. Thus, a plea of unconstitutionality was raised against the dispositions of several articles, but especially against article 279 para. (1), which was deemed to generate confusion as to both the offense that is provided by the law, and to the sanction that is imposed for its commission. Article 279 was considered to be vague and imprecise when it comes to its use of the expression "inside information", which may refer to two similar modes of committing insider dealing: on the one hand the *use* of inside information (art. 245), on the other hand the *revealing* of inside information (art. 246).

Consequently, such provisions were interpreted to be contrary to art. 1 para. (5) of the Romanian Constitution which consecrates the principle of the binding force of the law.

The Romanian Constitutional Court dismissed these arguments and eventually stated that the MAA is constitutional, because the conduct to be criminally sanctioned is clearly set out in the law, it leads to no confusion or misinterpretation and is thus in conformity with both the constitutional provisions of art. 23 para. (12) of the Romanian Constitution – no punishment without the law – and the counterpart conventional provisions of art. 7 in the European Convention[8].

[8] Romanian Constitutional Court, Decision no. 53/2012 published in the Official Journal no. 234 of 06.04.2012.

3.1. Criminal vs. civil liability for market abuse. The powers of the Romanian Authority of Financial Supervision (AFS)

The coexistence of criminal and contravention-based (civil) liability in case of market abuse is not an invention of national law, but such duality of sanctions actually exists in most of the EU Member-States legislation.

This amounts to the fact that within the same legal act, market abuse can be interpreted either as a civil contravention or as a criminal offence and sanctioned accordingly.

The first text referring to liability incurred for a civil contravention is article 272 para. (2) letter c) of the MAA, stating that 'there shall constitute a civil contravention the breach of the provisions set out in articles 245-248 on market abuse'. The second text concerning liability incurred for a criminal offence is article 279 letter b) of the MAA, which incriminates the two components of market abuse, namely 'the commission of acts provided under articles 245-248 shall constitute an offence'.

The only criterion identified by national legislation in order to distinguish between the situations when a certain act may be considered a civil contravention or a criminal offense has been the *mens rea* with which the act in question was committed.

Therefore, if market abuse is committed with *intent,* judicial authorities will probably establish that *an offence* was committed and the author will incur criminal liability. On the contrary, if market abuse is committed *by recklessness or negligence*, the author is deemed to have committed a *civil contravention*.

This criterion has been contradicted precisely by the Romanian Authority of Financial Supervision (hereinafter the AFS), which was not at all reluctant about inflicting civil (contravention-related) penalties for the intentional commission of market abuse, based on art. 272 of the MAA.

Effectively, the role of the AFS is overwhelming, since it is authorized to report a case of market abuse to the investigation authorities immediately after it discovered its commission. The AFS has taken over and re-organized all the prerogatives of the Romanian Commission of Securities.

The AFS has a power of *de facto* incrimination of market abuse offenses[9]. This means that, at least from the perspective of the factual situation, it has powers of discovering and reporting acts of market abuse in the initial stage of a criminal trial. Such power of *de facto* incrimination is recognized to this authority under art. 17 of the Status of the National Commission of Securities, according to which "in case of breach of the laws governing capital markets, the AFS may order the reporting to criminal investigation authorities when the act committed constitutes an offense, pursuant to specific regulations, or the infliction of civil sanctions". This provision must be completed with art. 1 para. (3) in the MAA, in accordance to which "the AFS is the authority competent to apply the provisions of the present act", and, respectively, with art. 254 para. (1), which states that the only authority competent to assure application of the dispositions of the present section (namely, the market abuse section), is the AFS".

The chronology of events could thus be the following: the AFS detects a dubious conduct on the capital market, considering that it could amount to market abuse. It then starts its own investigation to conclude whether the market abuse act was committed by recklessness or negligence – a case in which the AFS itself can impose a civil sanction

[9] Doris Alina Serban, *Market Abuse Offenses*, PhD thesis defended at the Faculty of Law, Babes-Bolyai University of Cluj-Napoca, p. 483. The PhD thesis is about to be published.

upon the offender – or if the act constitutes an intentional market abuse, when the AFS will refer the case to criminal investigation authorities.

The sensitive issue in this context is the situation where the AFS transfers its own investigation file and collected evidence to the criminal investigation authorities, since its findings could be used in a criminal trial against the accused. In practice, the AFS can extend its own administrative inquiry until it obtains all the relevant information about the alleged offense.

Then it can convey its administrative file to judicial authorities (prosecutor and judicial police), who can use it to initiate criminal proceedings.

The administrative proceedings do not imply respect of all procedural guarantees which are required in the case of criminal proceedings therefore an administrative/civil "accusation" could easily turn into a criminal accusation, without the accused benefitting from minimal procedural safeguards. Thus, the right of the accused to a future fair criminal trial could be substantially affected[10].

The activity and prerogatives of the AFS must be accordingly amended for the future by the Romanian lawmaker, in order to compel the AFS to guarantee all procedural rights that criminal law has provided for the accused.

This is all the more necessary as the AFS enjoys very wide powers in carrying out its own investigative procedure against a person suspected of committing an act of market abuse, such as (art. 255 of the MAA): a) access to any type of documents or the possibility to receive copies of the former; b) request of information from any person, including persons who are successively involved in issuing orders to trade or conclude transactions on the market, as well as their superiors; in such a case, the AFS representative is entitled to interrogate the person in question; c) conduct investigations at the place where the offense is deemed to have occurred; d) request for the transcripts of telephone tapping of the issuing of orders to trade or other information; e) suspend transactions involving financial instruments etc.

When confronted to all these endless prerogatives of investigation recognized in favor of the AFS, the accused person has no counterbalancing guarantees.

The Romanian lawmaker should perhaps adopt the British system solution, by which the authority that supervises the capital market has also criminal investigation powers, expressly provided by the law, which, of course, respect all the rights of the accused. Since a clear division of powers between the Romanian AFS and criminal investigation authorities has not been provided yet, the British idea seems one that is worth considering.

In addition to this tricky problem there should be mentioned another issue that needs to be solved, namely the fact that the Romanian MAA still provides for the possibility of a parallel application of the two types of sanctions, both civil and criminal, which may lead to a violation of the *ne bis in idem* principle.

3.2. National case-law on market abuse

The *Rompetrol* case

In 1998 the Romanian businessman Dinu Patriciu bought from the Romanian state the oil company Rompetrol, in exchange of the huge amount of 85 million dollars. He

[10] For further details as to the breach of procedural guarantees by reports drawn up by administrative authorities, such as the AFS, see Gheorghiță Mateuț, Diana Ionescu: *Inadmissibility of Using as Evidence in a Criminal Trial the Reports and Info Notes Obtained during Proceedings of Administrative Control,* Criminal Law Writings no. 1/2005.

contributed to the transformation of the formerly state-owned company into a prosperous oil services company, ranked in the top positions among the 25 oil companies in the European Union. In 2007, Patriciu sold 75% of the 80% shares he owned in the Rompetrol Holding to a Kazakhstan based, state-owned company, KazMunaiGaz.

On the 22nd March 2005 criminal investigations started against Patriciu and on the 8th of September 2006 he was charged on indictment, alongside with 11 other defendants, for several counts of offenses among which money laundering, embezzlement, capital market manipulation and insider dealing.

The prosecutor charged Patriciu on indictment mainly for *capital market abuse* under the form of *market manipulation* consisting of transactions or orders to trade which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level (art. 244 para. 5 letter a of Act. no. 297/2004 cited above).

Patriciu was also indicted on the count of capital market abuse under the form of *insider dealing*, due to his revealing to a friend, the liberal senator Sorin Roşca Stănescu, privileged information as to his intention to dispose of the shares of the Rompetrol Rafinare (refinery) or RRC (art. 245 para. 1 of Act no. 297/2004), whose value had increased a lot. A former minister of communications, Sorin Pantea was also charged on indictment for conspiracy to market abuse.

According to the prosecutor's indictment, "in the period between 07.04.2004 – 20.04.2004, the defendants D.P., S.P. and S.R.S. have conceived, coordinated and applied common strategies and methods of trading on behalf of the RRC symbol (a.n. a refinery belonging to the Rompetrol holding), taking concerted action in order to establish and maintain the trading price of shares at a level previously determined and to control the evolution of such price as to respond to the financial and commercial interests of the Rompetrol Holding and the persons connected to this company. During this period, with the aid of the broker S.C., by using the bank accounts of natural and legal persons related to this group of interests, there took place coordinated and manipulative operations on the price of RRC shares, consisting of transactions and orders to trade on a large amount of RRC shares that the members of the group disposed of"[11].

One of the conditions that entail applicability of the incriminating norm is that the financial instruments which are the object of the abusive conduct should be allowed to be used in transactions on a regulated market, or there should exist a demand (application) to allow such instruments to be used in transactions.

Allowing a financial instrument to be used in transactions means, in more accessible terms, the listing of that instrument at the stock exchange, i.e. that instrument will go public (in the British slang).

The procedure of allowing a financial instrument to be used in transactions, i.e. to go public, implies several stages that need to be strictly observed, pursuant to the law.

In practice, this staging may create controversial situations – for instance during the period of time elapsed between the filing of an application to go public and the effective moment when the financial instrument goes public (is actually listed at the stock exchange) any person may commit the offense of market manipulation under the

[11] The indictment was drawn up by the DIICOT on the 7th of September 2006 and is available at www.diicot.ro.

form of disseminating misleading information (in order to ensure the success of the initial offer) as to the financial instrument that is about to be listed.

That is why in the Rompetrol case the prosecution considered that the inside information was used prior to the effective moment when the value of shares went public, thus breaching the compulsory stages provided by the law, in other words "the information related to the terms and conditions under which the conclusion of transactions would take place in the accounts controlled by the Rompetrol group, on the very first day the shares are subject to trading, represents use of inside (privileged) information, that could influence the price or other aspects of the transactions with securities of the issuer or the affiliated persons".

On the 28th of August 2012, the Bucharest county court (tribunal) acquitted the businessman for the offense of market abuse, under its both forms, namely market manipulation and insider dealing. When it comes to the first modality of committing the offense, the court essentially stated that "The court considers that the act of the defendant, who, acting as a representative of the Rompetrol group, organized and coordinated the trading of shares issued by the RRC with the aim of securing an abnormal level of the starting price of transactions (on April 7th, 2004) and then ordered and organized the posting into the electronic system of the Bucharest Stock Exchange of some sale and purchase orders, thus giving misleading signals to the other participants to transactions as regards the demand for, supply of and value of shares, does not constitute the offense of market manipulation in a continued form, since it lacks the constituents of the offense".

The county court also acquitted Patriciu for the commission of insider dealing. The reason asserted by the court this time was that the premise situation of the offense was missing, as well as the *actus reus* under the form of insider dealing.

The former senator Sorin Roşca Stănescu was also acquitted by the first instance court, alongside with all the other participants to the alleged offense.

The decision of the Bucharest county court was appealed by the prosecutor.

The Bucharest Court of Appeal, on re-trying the case, sentenced the ex-senator Sorin Roşca Stănescu to the penalty of imprisonment of two years and four months for the offense of market abuse under the form of insider dealing. The former minister of communications, Sorin Pantea was also sentenced to a penalty of imprisonment of two years and eight months for conspiracy to insider dealing. In the case of Dinu Patriciu, the court ruled termination of criminal proceedings, due to the death of the businessman.

The decision of the Bucharest Court of Appeal is now definitive.

However, the case still raises questions as to the ongoing defense arguments, namely that the criminal liability for the market abuse offenses that were allegedly committed is now subject to the statute of limitations in criminal matters.

4. Closing remarks

Dealing with a topic such as capital market offenses is in itself a great challenge.

The challenge derives from a double difficulty, on the one hand the comprehension of the real nature and contents of such offenses requires substantial economic knowledge background, on the other hand, the legal analysis of these criminal acts must be done in a comparative manner, the only approach which allows for the best solutions at the level of national legislation and case-law.

The present study has made an attempt at identifying and discussing a few sensitive issues related to market abuse, under its two forms, insider dealing and market manipulation (misuse). Such issues consist of the lack of predictability of the legal provisions on market abuse, both at the level of the EU law and the domestic legislation, which leads to controversial practice; the duality of criminal and civil liability that may be incurred for very similar acts of market abuse; the breach of the *ne bis in idem* principle; the too wide powers of the national authorities of financial supervision which can carry out their own investigations, while the evidence of such inquiries may be used in a criminal trial, and so on.

The topic still remains open to further legal and economic debate, since capital market offenses continue to raise endless questions to experts, due to the fast evolution of other forms of contemporary white-collar crime.

Money laundering in the legal instruments of the European Union and Council of Europe

VID JAKULIN
Ph.D., Full Professor
Faculty of Law, University of Ljubljana, Slovenia

Abstract:

Money laundering is ranged in the group of international economic crime law as a branch or discipline of international criminal law. Although it is a relatively new notion which has not been yet generally acknowledged as a discipline of international criminal law, it could be nevertheless defined with regard to its subject in narrow and broader sense.

Legal instruments of the European Union and the Council of Europe regulate quite precisely measures for the prevention, detection and prosecution of money laundering. It is important that the mentioned legal acts require from the states, which are bound by these acts, to regulate money laundering in domestic legislation in accordance with definitions of money laundering contained in these acts. That means that the regulation of money laundering in national legislations is very similar, what facilitates the international cooperation, which is for the purpose of prevention and prosecution of money laundering offences particularly important.

Keywords: *money laundering, United Nations, European Union, Council of Europe.*

1. Introduction

Money laundering is ranged in the group of international economic crime law as a branch or discipline of international criminal law. Although it is a relatively new notion which has not been yet generally acknowledged as a discipline of international criminal law, it could be nevertheless defined with regard to its subject in narrow and broader sense. International economic crime law in narrow sense encompasses only those international crimes which can be committed exclusively in the exercise of economic activity with a transnational element or in connection with such an economic activity. On the other hand, international economic crime law in broader terms covers all acts which have a detrimental impact on global economic trends or cause danger to the world economy. Among the acts which belong to this category we can list the following:

transnational organized crime,
money laundering,
corruption,
counterfeiting money,
violations of intellectual property rights,
insider trading,
cyber crime.[1]

[1] Selinšek, L., in the book: Ambrož M. et al.: *Mednarodno kazensko pravo.* Ljubljana, Uradni list Republike Slovenije, 2012, p. 309.

The prevention of money laundering has been a subject of extensive discussions, among others in the United Nations, European Union and Council of Europe which all adopted important legal acts. The United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances from 1988[2] is considered to be the first international legal instrument which defines the substance of the criminal offence of money laundering, although it does not even mention this notion. The Convention defines money laundering in descriptive form when it requires from the signatory states among other to define as criminal offence the acquisition, possession or use of money or property for which a perpetrator knows that it was acquired by narcotic drug trafficking. The Convention also requires from the signatory states to regulate the seizure and confiscation of property resulting from narcotic drug trafficking or the instruments by which this criminal offence has been committed.[3]

The basic legal instrument of the United Nations which stipulates the obligations of the signatory states in their fight against money laundering is the United Nations Convention against Transnational Organised crime from 2000.[4] This Convention pays particular attention to money laundering in Articles 6, 7 and 10. The Convention binds the signatory states to adopt in accordance with the principles of domestic law legislative and other measures as may be necessary to establish as criminal offences the following acts, when committed intentionally:

- the conversion or transfer of property or property benefit, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- the concealment or disguise of the true nature, source, location, disposition, movement or ownership of property or rights with respect to property, knowing that such property is the proceeds of crime;
- the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
- participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences.

The Convention recommends to signatory states to include in predicate offences as large as possible scope of criminal offences and in particular all serious crimes[5], criminal association, corruption and obstruction of justice.[6]

Money laundering is partially included also in the UN Convention against Corruption from 2003[7], which in Article 14 sets out the measures for the prevention of money laundering, often associated with corruption.[8] In the continuation of the paper I shall focus on money laundering in the legal instruments of the European Union and Council of Europe.

---

[2] United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[3] Selinšek L.: *op. cit.,* p. 317

[4] United Nations Convention against Transnational Organised Crime.

[5] As serious crimes are considered those acts that constitute an offence punishable by the sentence of imprisonment for four years or more.

[6] Articles 6, 7 and 10 of the Convention. See also Selinšek L., op. cit, p. 318

[7] United Nations Convention against Corruption.

[8] Selinšek L., *op. cit,* p. 319

2. Money laundering in the legal instruments of the European Union

The European Union has adopted so far three directives concerning the prevention of money laundering. The first one is the Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering.[9] It was followed by the Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending the Council directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering.[10] The third one was the Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the Prevention of the Financial System for the Purpose of Money Laundering and Terrorist Financing[11] which abrogated two previous directives. Now we have a proposal of the Directive of the European Parliament and the Council on the Prevention of the Use of Financial System for the Purpose of Money Laundering and Terrorist Financing[12] which has been already prepared and will substitute the Directive 2005/60/EC, yet it is not possible to foresee when this proposal will be adopted.

The Directive 2005/60/EC that is currently in force consists of a relatively extensive preamble and 47 articles. The preamble contains some statements which deserve our attention. The

European Parliament and the Council state that massive flows of dirty money can damage the stability and reputation of the financial sector and threaten the single market and that terrorism shakes the very foundations of our society. In addition to the criminal law approach, it is possible to produce results also with the preventive measures of the financial system.

Money laundering and terrorist financing are frequently carried out on the international level. Measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects. The measures adopted by the Community in this field should therefore be consistent with other actions undertaken on the international level.

In the recent years a tendency has been noticed to modify the definition of money laundering – originally limited only to illicit trafficking with narcotic drugs – which is to contain a longer list of predicate offences. An extended scope of predicate offences would facilitate the reporting of suspicious transactions and also the international cooperation in this field.

Institutions and persons to which this Directive applies, should in conformity with it identify and verify the identity of beneficial owners. In order to fulfil this requirement, it is left to the institutions and persons whether they make use of public records of beneficial owners, ask their clients for relevant data or obtain the information otherwise, taking into account the fact that the extent of such customer due diligence

---

[9] Council Directive 91/308/EEC of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering OJ L 166, 28. 6. 1991.

[10] Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering OJ L 344, 28. 1. 2001.

[11] Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing OJ L 309, 25. 11. 2005.

[12] Proposal for a Directive of the European Parliament and the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing COM/2013/045 Final – 2013/0025 COD.

measures relates to the risk of money laundering and terrorist financing, which depends on the type of customer, business relationship, product or transaction.

The European Parliament and Council further state that perpetrators of a criminal offence of money laundering and persons who finance terrorism are compelled due to reinforced surveillance in financial sector to seek alternative methods for concealing the origin of proceeds of crime. A the same time, these channels can be also used for the terrorism financing, for this reason the mandatory measures against money laundering and terrorism financing should be applied also to life insurance intermediaries and trust and company service providers.

It has often turned out that large cash payments represent a high risk for money laundering and terrorism financing. Therefore in those Member States that allow cash payments above the established threshold, all natural or legal persons trading in goods by way of business should be covered by this Directive when accepting such cash payments.

Legal advice is still protected by the institute of professional secret, unless the legal counsellor is taking part in money laundering or terrorist financing or the lawyer knows that a client is seeking a legal advice for money laundering or terrorist financing purposes.

Money laundering or terrorist financing are international problems and the effort to combat them should be global. Where Community credit and financial institutions have branches and subsidiaries located in third countries where the legislation in this area is deficient, they should, in order to avoid the application of very different standards within an institution or group of institutions, apply the Community standard or notify the competent authorities of the concerned Member State if this application is impossible.

The importance of combating money laundering and terrorist financing should lead Member States to lay down effective, proportionate and dissuasive penalties in national law for failure to respect the national provisions adopted pursuant to this Directive. Provision should be adopted for penalties in respect of natural and legal persons. Since legal persons are often involved in complex money laundering or terrorist financing operations, sanctions should also be adjusted in line with the activities carried on by legal persons.

The Directive contains 7 chapters and 47 articles.

On the basis of Article 1 of the Directive, the Member States have to ensure that money laundering and terrorist financing are prohibited. According to this Directive, the following conduct, when committed intentionally, shall be regarded as money laundering:

a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

b) the concealment or disguise of the true nature, source, location, disposition, movement of property, rights or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points.

Money laundering shall be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country.

In this Directive »terrorist financing« means the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

Knowledge, intent or purpose required as an element of the activities mentioned in paragraphs 2 and 4 of Article 1 may be inferred from objective factual circumstances.

In Article 2 is set out a scope of natural and legal persons covered by this Directive.

Article 3 provides definitions of the following notions: »credit institution«, »financial institution«, »property«, »criminal activity«, »serious crime«, »beneficial owner«, »trust and company service providers«, »politically exposed person«, »business relationship« and »shall bank«. »Criminal activity« means any kind of criminal involvement in the commission of a serious crime. »Serious crime« means in accordance with this Directive at least:

(a) acts as defined in Articles 1 to 4 of Framework Decision 2002/475/JHA;

(b) any of the offences defined in Article 3(1)(a) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;

(c) the activities of criminal organisations as defined in Article 1 of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;

(d) fraud, at least serious, as defined in Article 1(1) and Article 2 of the Convention on the Protection of the European Communities' Financial Interests;

(e) corruption;

(f) all offences which are punishable by deprivation of liberty or a detention order (safety or educational measure) for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

Chapter II which is divided to four sections, regulates in detail the obligations of the institutions and persons covered by this Directive to establish the identity of clients (customer due diligence). Pursuant to Article 6, Member States have to prohibit their credit and financial institutions from keeping anonymous accounts or anonymous passbooks.

Chapter III is divided to two sections and regulates the reporting obligations of the institutions and persons covered by this Directive to report anything suspicious to the competent authorities. Pursuant to Article 20 of the Directive, Member States have to require that the institutions and persons covered by this Directive pay special attention to any activity which they regard as particularly likely to be related to money laundering or terrorist financing and in particular complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose.

In accordance with Article 21 of the Directive, each Member State has to establish a FIU[13] in order to effectively combat money laundering and terrorist financing. The FIU

[13] The abbreviation FIU means Financial Intelligence Unit – the central national unit, competent for receiving (and if permitted, requesting), analysing and disseminating financial data to competent authorities.

has to be established as a central national unit. It is responsible for receiving (and to the extent permitted to requesting), analysing and disseminating to the competent authorities the information which concern potential money laundering, potential terrorist financing or any other information which are required by national legislation and for their dissemination to the competent authorities. In order to fulfil its tasks, the FIU shall be provided with adequate resources. Member States have to ensure that the FUI has in time an indirect or direct access to the financial, administrative and law enforcement information that it requires to properly fulfil its tasks.[14]

Member states have to adopt appropriate measures to protect from threats or any other hostile acts the employees of institutions or persons covered by this Directive who report their suspicions of money laundering or terrorism financing, be it to their institution or directly to FIU.

Chapter IV regulates record keeping and statistical data. In accordance with Article 23 of the Directive, Member States have to require that their credit and financial institutions establish systems that enable them to respond fully and rapidly to enquiries from the FIU, or from other authorities, in accordance with their national law, as to whether they maintain or have maintained during the previous five years a business relationship with specified natural or legal persons and on the nature of that relationship.

Chapter V, divided to four sections, provides for the enforcement measures. In Section 4 are laid down penalties. Member States have to ensure that natural and legal persons covered by this Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.[15]

In Chapter VI of the Directive are set out technical criteria for assessing whether situations represent a high risk of money laundering or terrorist financing as well as implementing measures. The last chapter, i.e. the Chapter VII provides for final provisions.

3. Money laundering in the legal instruments of the Council of Europe

Money laundering has been treated also by the Council of Europe which has adopted so far two conventions concerning the prevention of money laundering. The first convention was adopted already in 1990. It was the Convention no. 141 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[16] This Convention was substituted in 2005 by the Convention No. 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[17] The Convention currently in force has a preamble and contains 56 articles and is divided to 7 chapters.

Chapter I contains definitions of notions used by the Convention. Among these notions is also a "confiscation" which is defined by the Convention as a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences and results in the final deprivation of property. Here it should be specially pointed out that it is not a question of the confiscation of property as it was

[14] Article 21 of the Directive.

[15] Paragraph 1 of Article 39 of the Directive.

[16] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, European Treaty Series no. 141.

[17] Council of Europe Convention on Laundering, Serch, Seizure and Confiscation of the Proceeds from Crime, and on the Financing of Terrorism, European Treaty Series no. 198.

once known in the Yugoslav criminal law and which meant that it was possible to confiscate to a convict practically all his property without indemnity. Here it is rather a question of the measure which enables to a court to confiscate instrumentalities, proceeds from crime or property the value of which corresponds to such proceeds.

Chapter II defines the financing of terrorism. Pursuant to Article 2 of the Convention, each Party to Convention has to adopt such legislative and other possible measures as may be necessary to enable it to apply the provisions of this Convention applying to the financing of terrorism. Each Party has in particular to ensure that it is able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or the proceeds of this offence, and to provide co-operation to this end to the widest possible extent.

In Chapter III are listed measures to be adopted by Parties on the national level. Among these measures are listed on the first place the measures of confiscation (confiscation). Article 3 of the Convention binds Parties to adopt legislative and other possible measures to confiscate instrumentalities and proceeds or property, the value of which corresponds to such proceeds and laundered property. This provision is very important, because it requires from Parties to adopt such measures as to enable to seize even the legally acquired property in the amount corresponding to a value of unlawfully obtained property benefit. Such a measure can be taken into consideration only in the case when it is not possible to confiscate instrumentalities or proceeds of crime. The second paragraph of Article 3 leaves however a possibility to the Party to establish with a special statement a list of specified offences or a group of criminal offences for which this measures shall be applied, although it is not possible to exclude the use of this measure in totality.

Pursuant to Article 4 of this Convention, each Party has to adopt such legislative and other measures as may be necessary to enable it to rapidly identify, trace, freeze or seize property which is liable to confiscation pursuant to Article 3, in order in particular to facilitate the enforcement of a later confiscation.

Article 5 regulates freezing, seizure and confiscation. Parties have to adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

a) the property into which the proceeds have been transformed or converted;

b) property acquired from legitimate sources, if proceeds have been intermingled**,** in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

Article 7 provides for investigative powers and methods. Each Party has to adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in Articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy. The third paragraph of this Article provides for the use of special investigative methods and techniques facilitating the identification and tracing of proceeds and the gathering of evidence related to them. These methods consist, among others, of

observation, interception of telecommunications, access to computer systems and tasks to produce specific documents.

In Article 8 are laid down the obligations of Parties to adopt such legislative and other measures as may be necessary to ensure to the persons, affected by measures under Articles 3, 4 and 5 and other provisions in this Section, to have effective legal remedies in order to preserve their rights.

Article 9 is very important, because it binds Parties to criminalise in domestic legislation money laundering in the way as it is defined in this Article. Money laundering encompasses according to this Convention the following acts, when committed intentionally:

a) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;

b) the concealment or disguise of the true nature, source, location, disposition, movement, ownership of property or rights to property, knowing that such property is the proceeds of crime;

Taking into consideration their constitutional principles and the basic concepts of their legal systems, Parties have to define as criminal offence also the following acts, when committed intentionally:

c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;

d) participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this Article.

Paragraph 4 of this Article enables to Parties to set out with a special statement a list of specified predicate offences or a group of predicate offences in which a disposal with proceeds of these offences shall be criminalised as money laundering. It is therefore left to Parties to criminalise as money laundering only the disposal of property, originated from a specific predicate offence or to criminalise as money laundering the disposal of any property without being necessary to establish precisely from which predicate offence it is derived. Slovenia has adopted the second option and established as criminal offence the disposal of property, deriving from whatever predicate offence.

Chapter IV provides a regulation of international cooperation. This chapter is the most extensive and it is divided to 7 sections. In this part are laid down the principles of international cooperation, investigative assistance, provisional measures, confiscation, refusal and postponing of cooperation, notification and protection of rights of third persons, procedural and other general rules. Among the provisions in this Chapter, it seems that the most interesting and perhaps also more questionable are the provisions which regulate provisional measures. The first paragraph of Article 21 binds a Party that at the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, takes the necessary provisional measures, such as freezing or seizing, in order to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request. In the second paragraph is set out the obligation of a Party which has received a request for confiscation pursuant to Article 23 (it regulates the obligation of confiscation) to take upon the request the measures, mentioned in paragraph 1 of this Article in respect of any property which is the subject

of the request or which might be such as to satisfy the request. The provision of this Article is very important, because it requires from one Party, upon the request of another Party, even before the termination of criminal proceedings in the requesting state, to freeze or seize on its territory whatever property which represents an object or proceeds of crime or even a property acquired from legitimate sources, which can be seized up to the assessed value of the proceeds.

In Chapter V is regulated the cooperation between FIUs, in Chapter VI the monitoring mechanisms and settlement of disputes and Chapter VII contains final provisions.

4. Conclusion

Legal instruments of the European Union and the Council of Europe which have been presented in this paper regulate quite precisely measures for the prevention, detection and prosecution of money laundering. It is important that the mentioned legal acts require from the states, which are bound by these acts, to regulate money laundering in domestic legislation in accordance with definitions of money laundering contained in these acts. That means that the regulation of money laundering in national legislations is very similar, what facilitates the international cooperation, which is for the purpose of prevention and prosecution of money laundering offences particularly important.

Combating money and property laundering in Lithuania: fundamental issues of economic crime prevention

PROF. DR. RAIMUNDAS JURKA[1]
Mykolas Romeris University, Faculty of Law,
Institute of Criminal Law and Procedure,
Defence Lawyer, Member of Lithuanian Bar

Abstract:

Money and property laundering mechanisms and prevention issues are analyzed in this paper. Author is taking into account general situation on prevention of money and property laundering in Lithuania, institutional ant measures' framework for this prevention.

First of all, paper is focusing on general understanding what should be understood as money laundering per se as procedure and illegal action. This question is raised in common meaning, including worldwide understanding of money laundering phenomenon. Secondly, it is emphasizing what are the measures that must be taken to combat those illegal actions. This question also takes together the institutional framework for prevention and investigation in Lithuania. Thirdly, author is presenting what are the basic keys of money and property laundering in Lithuania and how preconditions of laundering are restricted or eliminated. Final conclusions are made what steps have been made and what steps are going to be implemented.

Keywords: *money, property laundering, prevention of laundering, economic crime, steps of money laundering mechanism.*

1. Principal framework of prevention mechanism

1.1. The overview of situation

Before making an overview of the money, property laundering, as part of economic crime, situation in Lithuania, it should be noted in general, that since the start of new millennium, the Baltic region has enjoyed one the highest growth rates in the world. The key reasons included a housing investment boom fuelled by large capital inflows and cheap credits due to a very loose monetary regime and pro-cyclical fiscal policy. Further, the growth was certainly also driven by economic catching-up and financial deepening effects after obtaining EU membership in 2004. In Europe financial integration has a strong relationship with the current account deficit (hereinafter – CAD), the direction of that relationship depending on a country's income.

The most problematic factors for doing business in Lithuania are: tax rates, tax regulations, inefficient government bureaucracy, corruption, restrictive labor regulations, inadequately educated workforce, access to financing, policy instability, inadequate supply of infrastructure, poor work ethic in national labor force, inflation, government

[1] E-mail: *rjurkos@gmail.com.*

instability, crime and thefts, foreign currency regulations.[2] Its should be noticed, that Lithuania is not a regional financial center. It has adequate legal safeguards against money laundering; however, one could say, that its geographic location bordering Belarus and Russia makes it a target for smuggled goods and tax evasion. The sale of narcotics does not generate a significant portion of money laundering activity in Lithuania. Value added tax (hereinafter – VAT) fraud is one of the biggest sources of illicit income, through underreporting of goods' value. Most financial (economic) crimes, including VAT embezzlement, smuggling, illegal production and sale of alcohol, capital flight, and profit concealment, are tied to tax evasion.

Although the role of organized crime groups from all three Baltic countries should not be underestimated, a central role for Lithuania organized crime seems to have emerged within the region. Lithuanian groups are acting as important traffickers in many criminal markets and regional locations, often beyond the borders of the North-East region. In some cases, Lithuanian organized criminal syndicates within the region including the Polish, Latvian and Estonian groups, may act as 'bridging groups', procuring goods from the global markets for specific sections of the regional market. The Lithuanian organized crime groups act both as independent players and as a main regional link to European Union (hereinafter – EU) and global criminal markets for other regional groups.[3] The crime of money and property laundering is one of economic crimes, which is problematic to cope with. This is the answer, why it should be needed to explain, what is the mechanism of this current crime.

Theoretically and, even, practically, the main methods used to organise money and property laundering could be as follows.[4] For instance, foreign companies transfer their money to the accounts of bogus foreign or Lithuanian companies which are usually established by foreign citizens in the Lithuanian banks where they money is cashed. Money is transferred from one foreign country to another by transit through Lithuania using the accounts of foreign bogus companies opened in credit establishments of Lithuania. Lithuanian companies transfer money to the accounts of Lithuanian bogus companies or non-profit companies (usually various fitness clubs) and the money is immediately cashed after it has been transferred. The proceeds of crime acquired in Lithuania are taken to foreign states or the proceeds of crime acquired in foreign countries are taken to Lithuania. The money is cashed and accounts of foreign bogus companies are opened and managed both by the citizens of Lithuania and foreign countries who are often antisocial or have connections with criminal groups. It is supposed that the major part of assets coming to Lithuania or used in order to conceal the illegal origin of assets and damage is incurred on the budgets of foreign countries, nevertheless, cases have been disclosed in which these were Lithuanian nationals who used accounts of foreign countries committing analogous criminal activity. Lithuanian companies used companies registered in foreign countries and foreign nationals more and more by transferring money for the alleged deals to the accounts of bogus companies or offshore companies in foreign banks. More cases occur in which money is cashed in neighbouring countries and in which the citizens of that particular country are

---

[2] Gutauskas, *A. Economic crisis and organized crime in Lithuania*. *Jurisprudence,* 2011, 18 (1): 303-326.

[3] Hanley-Giersch, J., *The Baltic States and the North Eastern European criminal hub. Acams Today*, 2009, september-november, p. 36.

[4] Gutauskas, A., *Economic crisis and organized crime in Lithuania. Jurisprudence,* 2011, 18 (1): 321-322.

involved. Having the proceeds of crime which were transferred to the accounts of offshore companies of foreign banks been made legal, investments are made in the Lithuanian economy branches in the names of the companies under consideration purchasing companies or their shares.

Quite a number of accounts of foreign bogus companies have been opened in the credit establishments of Lithuania which may be called transit accounts – international payment transfers made into these accounts from abroad, including doing it online, are further transferred to another foreign commercial bank. The scheme of this kind of money movement in which money travel through many countries and get into many accounts may be used in various schemes of tax evasion and in the legalization of the proceeds of crime, in this case it is especially difficult to identify sources of assets and final receivers.

There is no debating that money-laundering is an integral component of illicit trade. It appears there is a multitude of ways to do this and, for the most part, they manage without seeking assistance from professionals outside of the illicit market in which they operate.[5]

Concluding, it is thus necessary, for criminal organizations to, (1) erase the link between the crime and the money, (2) erase the link between the money and its new owner, and finally (3) shelter the profits from possible confiscation.[6] Money laundering has become a critical issue for any significant criminal enterprise. Successful money laundering enables criminals to: remove or distance themselves from the criminal activity generating the profits, thus making it more difficult to prosecute key organisers; distance profits from the criminal activity – to prevent them being confiscated if the criminal is caught; enjoy the benefits of the profits without bringing attention to themselves; and reinvest the profits in future criminal activity or in legitimate business.[7]

Money laundering has a geographical principle which is closely related to the principe of neighbourhood (close in distance, no language boundaries) and a possibility to cross border of EU countries freely. Since the border of Lithuania is one of the external border of the EU, illegal assets are smuggled to the third countries (the Russian Federation, Belarus) not declaring them to the customs services of the Republic of Lithuania. Cash smuggling is one of the most frequent elements in money laundering schemes meant to conceal the illicit source and origin of money as well as it state of origin. Having the internal EU borders become open, the export of the proceeds of crime from the Republic of Lithuania and their export have become extremely simple and after further financial transactions the state of origin of the illicit assets becomes particularly difficult to trace. The geography of the financial transactions of organized criminal groups is also influenced by geographical location of Lithuania, which is especially attractive for drug transit.

As it could be seen above, prevention of money and property laundering crime must be widely miscellaneous and well-timed. The most obvious reasons to establish money

---

[5] Malm, A., Bichler, G., *Using friends for money: the positional importance of money-launderers in organized crime. Trends in Organized Crime*, 2013, 1:380.

[6] Thony, J.-F., *Money laundering and terrorism financing: an overview.* See: https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/thony.pdf

[7] McDonell, R. Money, *Laundering methodologies and international and regional counter-measures.* Paper presented at the conference Gambling, Technology and Society: Regulatory Challenges for the 21st Century, convened by the Australian Institute of Criminology in conjunction with the Australian Institute for Gambling Research and held in Sydney, 7-8 May 1998. See: http://www.aic.gov.au/media_library/conferences/gambling/mcdonnell.pdf

laundering counter-measures are to stop criminals from achieving the benefits of money laundering outlined at the start of this paper. Specifically: to stop them from enjoying the personal benefits of their profits (this may act as a deterrent as well as a punishment); to prevent them from reinvesting their funds in future criminal activities (that is to strip them of their working capital base); and to provide law enforcement with a means to detect criminal activities through the audit trail and to provide an evidentiary link for prosecution purposes between criminal acts and major organisers.[8]

1.2. General consideration of the measures for prevention of money and property laundering within the state

The process of prevention of money laundering is remarkably complex and demanding. It contains many variables that must be taken into consideration in order to achieve the ultimate goal – establishment of effective and efficient anti-money laundering (AML) process.[9]

According to Law on the prevention of money laundering and terrorist financing of the Republic of Lithuania[10], the purpose of this Law is to establish the measures for the prevention of money laundering and/or terrorist financing and designate the institutions responsible for the implementation of the money laundering and/or terrorist financing prevention measures.

In general, Law describes what money laundering shall mean:

1) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

2) the concealment or disguise of the true nature, origin, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

3) the acquisition, possession or use of property, knowing, at the time of receipt/transfer, that such property was derived from criminal activity or from an act of participation in such activity;

4) preparation, attempts to commit and complicity in the commission of any of the activities mentioned in subparagraphs 1-3 of this paragraph.

In general one can say, that in the literature on money laundering, this hurdle for criminals is referred to as the integration of illegal proceeds into the legitimate economy, whereby their criminal origins are concealed upon placement in the financial system. Sometimes this involves complex money laundering constructions, such as financing a purchase via the operations of a foundation that manages an offshore trustee company. Because this form of money laundering requires considerable expertise and resources, criminals will call on the assistance of so-called financial facilitators. These are experts who put criminals in a position to circumvent the anti-moneylaundering

---

[8] *Ibid.*

[9] Trajkovski, G., Nanevski, B., *Customer due diligence – focal point of the anti-money laundering process. Journal of Sustainable Development*, 2015, 1: 40.

[10] Law on the prevention of money laundering and terrorist financing of the Republic of Lithuania was adopted firstly in 1997.

measures. Such experts play a key role in criminal networks due to their unique skills and expertise.[11]

Institutions responsible for the prevention of money laundering in Lithuania are as follows: The Government of the Republic of Lithuania, the Financial Crime Investigation Service under the Ministry of the Interior of the Republic of Lithuania, the State Security Department of the Republic of Lithuania, the Bank of Lithuania, the Customs Department under the Ministry of Finance of the Republic of Lithuania, the Department of Cultural Heritage Protection under the Ministry of Culture of the Republic of Lithuania, the State Gaming Control Commission, the Chamber of Notaries, the Chamber of Auditors, the Lithuanian Chamber of Bailiffs, the Lithuanian Assay Office and the Lithuanian Bar Association.

Every institution, mentioned above, are implementing prevention measures, that should be described more or less in details.

The first measure is Customer's and Beneficial Owner's Due Diligence. According to this measure, financial institutions and other entities must apply due diligence measures in respect of the customer and the beneficial owner: 1) when establishing a business relationship; 2) when carrying out monetary operations or concluding transactions amounting to more than EUR 15000 or the corresponding amount in foreign currency, whether the operation is carried out in a single operation or in several operations which appear to be linked, except in cases when the customer's and beneficial owner's identity has already been established; 3) when exchanging cash, when the amount exchanged exceeds EUR 6000 or the corresponding amount in foreign currency; 4) when performing internal and international remittance transfer services, if the sum of money sent or received exceeds EUR 600 or the corresponding amount in foreign currency; 5) performing and accepting remittance transfers in compliance with the provisions of Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds; 6) when there are doubts about the veracity or authenticity of previously obtained customer or beneficial owner's identification data; 7) in any other case when there are suspicions that the act of money laundering and/or terrorist financing is, was or will be performed.

The second measure is Simplified Customer Due Diligence, which means that simplified customer due diligence shall be applied in respect of: 1) companies whose securities are admitted trading on a regulated market in one or more EU Member States, and other companies from third countries whose securities are traded in regulated markets and which are subject to disclosure requirements consistent with European Union legislation; 2) beneficial owners of pooled held by notaries and other legal professionals from the EU Member States or from third countries, provided that they are subject to requirements to combat money laundering and/or terrorist financing consistent with international standards and are supervised by competent authorities for compliance with those requirements and provided that the information on the identity of the beneficial owner is available, on request, to the financial institutions which have such pooled accounts; 3) life insurance policies where the annual premium is no more than EUR 1000 or the single premium is no more than EUR 2500 or the corresponding amount in foreign currency; 4) insurance policies for pension schemes if there is no surrender clause and the policy cannot be used as collateral; 5) a pension, superannuation or similar scheme that provides retirement benefits to employees, where contributions

[11] Soudijn, M.R.J., *Removing excuses in money laundering. Trends in Organized Crime*, 2012, 1: 147.

are made by way of deduction from wages and the scheme rules do not permit the assignment of a member's interest under the scheme; 6) electronic money, where, if the device cannot be recharged, the maximum amount stored in the device is no more than EUR 250, or the corresponding amount in foreign currency, or where, if the device can be recharged, a limit of EUR 2500, or the corresponding amount in foreign currency, is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1000, or the corresponding amount in foreign currency, or more is redeemed in that same calendar year by the bearer; 7) any customer, if the customer is a financial institution covered by this Law, or a financial institution registered in another EU Member State or in a third country which sets the requirements equivalent to those of this Law, and monitored by competent authorities for compliance with these requirements; and 8) the customer representing a low risk of money laundering and/or terrorist financing.

The third measure is Enhanced Customer Due Diligence, which shall be applied: 1) in the case of performance of transactions or business relationships through the representative or the customer not being physically present for identification purposes; 2) in the case of performance of the cross-border correspondent banking relationships with third country credit institutions; 3) in the case of performance of transactions or business relationships with politically exposed natural persons; 4) where there is a great risk of money laundering and/or terrorist financing.

When the customer opens an account or performs other operations in other than his own name, financial institutions and other entities must verify the customer's identity and that of the person on whose behalf the customer is acting. Financial institutions and other entities may, when identifying the customer or the beneficial owner, make use of the information of the third parties about the customer or the beneficial owner. They may verify the customer's and the beneficial owner's identity without his direct participation making use of the information about the customer or the beneficial owner from financial institutions and other entities or their representations abroad. When requested, third parties must immediately submit to the requesting financial institution or another entity the entire requested information and data which must be in possession. Third parties must immediately submit to the requesting financial institution or another entity copies of the documents relating to identification of the customer or the beneficial owner and other documents relating to the customer or the beneficial owner.

Financial institutions and other entities must report to the Financial Crime Investigation Service about the suspicious or unusual monetary operations and transactions performed by the customer. Such operations and transactions shall be objectively established in the course of performance, by financial institutions and other entities, of ongoing monitoring of the customer's business relationship, including investigation of the transactions concluded during the relationship between the companies.

Concluding, the main institution, that is responsable for prevention of money and property laundering is Financial Crime Investigation Service[12]. According to Law, this Service shall, within its sphere of competence:

[12] In accordance with order of the Minister of the Ministry of Interior of the Republic of Lithuania No. 1V-949 of November 14th of 2013, a new specialized board was established within the Service on December 1st of 2013 – Money Laundering Prevention Board, which was commissioned to implement the prevention measures of money laundering and terrorist financing.

1) collect and record the information indicated in this Law about the monetary operations and transactions of the customer and about the customer carrying out such operations and transactions;

2) accumulate, analyse and publish, according to the procedure established by legal acts, the information relating to the implementation of money laundering and/or terrorist financing prevention measures and the effectiveness of their system of money laundering and/or terrorist financing prevention (also the information on the prevention of the use of the financial system for the purpose of money laundering and/or terrorist financing as specified in paragraph 2 of Article 33 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and/or terrorist financing;

3) communicate to law enforcement and other state institutions according to the procedure established by the Government the information about the monetary operations and transactions carried out by the customer;

4) conduct pre-trial investigation of legalisation of the funds and property derived from criminal activity;

5) co-operate and exchange information with foreign state institutions and international organisations implementing money laundering and/or terrorist financing prevention measures;

6) provide to financial institutions and other entities the information on criteria for identifying possible money laundering and/or terrorist financing and suspicious or unusual monetary operations or transactions;

7) submit proposals about the improvement of the money laundering and/or terrorist financing prevention system to other institutions responsible for money laundering and/or terrorist financing prevention;

8) notify financial institutions and other entities, law enforcement and other state institutions about the results of analysis of and investigation into their reports on suspicious or unusual monetary operations and transactions, on the observed indications of possible money laundering and/or terrorist financing or violations;

9) co-operate, in accordance with the procedure laid down by laws and other legal acts of the Republic of Lithuania under Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010, with European supervisory authorities and provide them with the entire information necessary for the achievement of their tasks.

One of the main measures of the prevention of money laundering and terrorist financing enshrined in the Law on the prevention of money laundering and terrorist financing is reporting to the Service suspicious monetary operations carried out or attempted/planned by customers of financial institutions. Provisions of this Law require that commercial banks and other financial institutions in all cases perform ongoing monitoring of the customer's business relationships, including scrutiny of transactions undertaken throughout the course of such relationship, to ensure that the transactions being conducted are consistent with the financial institutions' or other entities' knowledge of the customer, the business and risk profile, including, where necessary, the source of funds. In implementing the aforementioned actions, commercial banks identify unrepresentative, unusual or suspicious monetary operations of customers and immediately report them to Service as required by the Law.

It should be notices, that most of the anti-money laundering regulations so far concern the banking sector. Although some countries still compete for criminal money and might be less strict in applying the anti-money laundering laws than others, the banking sector has become less attractive for launderers. At the very least, laundering costs might have increased and therefore have a deterrence effect for laundering in the banking sector.[13]

In observance of the regulations approved by the Director of the Service, the Money Laundering Prevention Board also summarises the practice of the application of laws, resolutions of the Government of the Republic of Lithuania, orders of the Minister of the Interior and other legal acts related to the prevention of money laundering and terrorist financing, drafts proposals for their amendments and supplements. Within the limits of its competence, the Board cooperates and exchanges information with foreign financial intelligence units or international organisations and with law enforcement bodies and other institutions of the Republic of Lithuania. It should be noted that the Money Laundering Prevention Board has been granted the powers to investigate the cases of administrative violations of law in the area of prevention of money laundering and terrorist financing.

2. Present situation and lawmaking procedures

It is worth to emphasise, that after evaluation[14] of present situation in Lithuania, concerning money and property laundering issues, the conducted analysis of the financial operations facilitated in disclosing quite a number of Lithuanian entities of which the representatives withdrew large amounts of money from their accounts, like every year. It was established that such entities, as a rule, are either newly set up or have new owners, they employ only one or several employees who often are previously convicted persons, and activities of such entities are doubtful. Cash to accounts of such entities is usually credited by different enterprises of the Republic of Lithuania, and immediately withdrawn from the accounts after the transfer. Almost in all such cases, cash withdrawals, as a rule, were made from automated teller machine (ATMs) operating in Lithuania.

Currently, more than 1300 legal entities have accounts in Lithuania's credit companies; these legal entities are registered in states or zones and do not carry out any activities in them, do not have a real administration object or management and do not pay any taxes. The board pay more attention to the control of activities of such companies.

The accounts of companies recently registered in Lithuania are opened in the banks; no settlements, important operations related to a business activity are carried out in such accounts as well as no payments are transferred to a company's employees ant others. Companies usually do not have employees and companies' heads, who open accounts, are often young persons or foreigners. An account from abroad is credited with great amount of money (an one-time transfer in foreign currency can exceed 1 million litas (in 2014 year)) and such companies immediately try to transfer that sum abroad. In all cases, after such monetary operations Lithuania's credit companies sooner

---

[13] Unger, B., Hertog, J., *Water always finds its way: Identifying new forms of money laundering. Crime, Law & Social Change*, 2012, 57:296.

[14] Money laundering and terrorist financing prevention activities of the Financial crime investigation service in 2014. See: http://www.fntt.lt/uploads/docs/ML_TFP_Activities_Financial_Crime_Investigation_Service_2014. pdf

or later receive SWIFT reports from the banks claiming that those transfers are illegal. Investigations started by the Service proved the most common scheme: by means of swindling criminal groups force foreign companies to transfer great sums to the accounts of companies established in Lithuania; funds obtained from these accounts are legalized through a fictitious companies' network created in various Europe countries.

Use of money transfer systems and typologies of money mules. Reports continue to be received from the money transfer system "Western Union" on persons receiving or transferring money through money transfer systems. The performed analysis showed that such funds usually originate not from the EU Member States; later they are cashed-out by Lithuanian and foreign citizens. It should be emphasized that analyzed cases are often related to so-called typology of money mules when persons committing criminal activities find and hire other persons to perform monetary operations. There are more cases when money transfers are performed or received by Nigeria citizens; therefore, there is a possibility that the before mentioned persons may be related to the fee fraud Nigerian scams.

Value added taxes (VAT) carousel fraud. Criminal acts are usually aimed at avoiding or reducing different taxes. Such illegal activities involve the falsification of the documents of import and acquisition of goods, the use of the offshore companies, the chain of shell companies, making payments for actually undelivered/unsold goods. Criminals illegally replacing the excise codes of goods avoid taxation and benefit from zero excise duty. In cooperation with the STI, the Money Laundering Prevention Board disclosed the cases in which entities that have not been actually engaged in economic activity and have been used only as intermediaries in illegal activities and to enable other VAT payers from the EU to avoid VAT obligations and generate a falsified VAT return in other EU Member States.

As it could be seen from above, money and property laundering, as an element of economic crime, has been developed internationaly, *i.e.* international element is taking place for committing laundering actions.

Having in mind that combating money and property laundering procedure and prevention requires more and more development, responsible Lithuanian institutions are doing their best to improve the legal mechanisms for prevention and combating money and property laundering phenomenon.

For example, on 15 May 2014, the Seimas (Parliament) of the Republic of Lithuania adopted the Law on the prevention of money laundering and terrorist financing of the Republic of Lithuania (hereinafter – Law) of the changes and supplements, which was drew up by the Financial crime investigation service (hereinafter – FCIS) and became valid on September 1 of the same year.

Amending the Law, the recommendations of Moneyval Committee experts and the FATF were implemented:

1. "Suspicious financial transactions" and "terrorist financing" concepts were changed in the way to comply with the Financial Task Action Force (hereinafter – FATF) recommendations; the term "suspicious financial transactions" was waived;

2. "Natural entities participating in politics" and "important public office" concepts were changed in the way to comply with the FATF recommendations. Also, in soon to be changed Law, enhanced identification verification will be applied to the natural entities participating in politics, whose place of residency is in other Member State or in a Third Country. For other natural entities participating in politics, enhanced identification verification may not be applied if there is no legal basis for such actions;

3. The duration of suspension of the suspicious financial transactions is prolonged from 5 to 10 working days;

4. By defining the concept "cash" in the Law, the requirement to declare cash will also include the declaration of other payment measures, such as travel checks etc.;

5. Some provisions of the Law were amended seeking to comply with the Directive of the European Parliament and of the Council requiring that identification of the clients must be determined if financial transactions equal or exceeding 15 000 Euros are performed;

After adopting the Law amendments, the deficiencies identified by the Moneyval experts were eliminated.

Implementing the Law amendments, on 3 December 2014 the Government of the Republic of Lithuania by resolutions No 1351 and No 1352 approved the descriptions and regulations drawn up by the Money laundering prevention board (hereinafter – MLPB) and coordinated with the interested institutions:

1. Register management regulations of monetary operations and suspicious monetary operations performed by a customer;

2. The procedure description of the suspension of suspicious monetary operations and transactions and of the submission of suspicious monetary operations or transactions to the FCIS;

3. The procedure description of the submission of the information to the FCIS on monetary operations and transactions which equals to or exceeds the sum of 15 000 EUR or the same sum in foreign currency.

The before mentioned implemented legislation of the Law carries out the before described and other amendments of the Law reducing the administrative burden to the Law entities. After adopting these amendments, financial institutions and other entities must have the procedure of register filling and administration, but do not have to coordinate it with the FCIS. In addition, the provisions on the conditional features coordination of recognition criteria of suspicious monetary operations or transactions were eliminated. Financial institutions and other entities still have an obligation to inform the FCIS about an appointed responsible person who organises the implementation of the measures of money laundering and terrorist financing prevention and cooperates with the FCIS as determined in the Law.

As far as investigative and prosecutorial authorities are concerned, Lithuania has managed to establish a high degree of specialisation despite the country's limited size and these authorities generally seem to have the necessary legal tools to perform well. However the targeting of criminal assets is still neglected.

Conclusions

1. Laundering of the proceeds of crime seem to be very flexible. Money laundering transforms from the traditional financial (banking) sector to the less regulated derivative market and to other sectors. Electronic payments via the internet or by loadable phone cards are increasing. Money laundering by illegal invoicing of exports and imports and other forms of business based money laundering offer a substitute for offenders.

2. Financial markes offer many shelters for money launderers. The transparency that has been introduced into financial transactions has not been reproduced at the level of appropriate laws. The mobilization of state (public) institutions must be incessantly

pursued, and the collaboration of both the financial sector and more generally the private sector must also be thorough.

3. Measurement and detection of money laundering face new challenges with these new ways of laundering. Money and property laundering prevention includes various measures, such as institutional control, customer's and beneficial owner's due diligence, lawmaking and investigating procedure according to administrative and criminal laws.

References

1. Gutauskas, A., *Economic crisis and organized crime in Lithuania. Jurisprudence,* 2011, 18 (1).

2. Hanley-Giersch, J., *The Baltic States and the North Eastern European criminal hub. Acams Today*, 2009, september-november.

3. Law on the prevention of money laundering and terrorist financing of the Republic of Lithuania was adopted firstly in 1997.

4. Malm, A., Bichler, G., *Using friends for money: the positional importance of money-launderers in organized crime. Trends in Organized Crime*, 2013, 1.

5. McDonell, R. *Money laundering methodologies and international and regional counter-measures.* Paper presented at the conference Gambling, Technology and Society: Regulatory Challenges for the 21st Century, convened by the Australian Institute of Criminology in conjunction with the Australian Institute for Gambling Research and held in Sydney, 7-8 May 1998. See: http://www.aic.gov.au/media_library/conferences /gambling/mcdonnell.pdf

6. Money laundering and terrorist financing prevention activities of the Financial crime investigation service in 2014. See: http://www.fntt.lt/uploads/docs/ML_TFP_ Activities_Financial_Crime_Investigation_Service_2014. pdf

7. Soudijn, M. R. J., *Removing excuses in money laundering. Trends in Organized Crime*, 2012, 1.

8. Thony, J.-F*., Money laundering and terrorism financing: an overview*. See: https://www.imf.org/e xternal/np/leg/sem/2002/cdmfl/eng/thony.pdf

9. Trajkovski, G., Nanevski, B., *Customer due diligence – focal point of the anti-money laundering process. Journal of Sustainable Development*, 2015, 1.

10. Unger, B., Hertog, J., *Water always finds its way: Identifying new forms of money laundering. Crime, Law & Social Change*, 2012, 57.

Place of the crime of money laundering within the criminal law of Serbia

PROFESSOR DR ZORAN PAVLOVIC
University Business Academy, Faculty of Law Novi Sad

DR. ALEKSANDAR BOŠKOVIĆ,
Police Academy, Belgrade

Abstract:

Determining the place of the criminal offense of money laundering within the criminal legislation of Serbia, bearing in mind all the specifics of country's legal system, is not yet completely fulfilled. Specifics of economic transition, political reconstruction and European integration processes that characterize the beginning of XXI century in Serbia brought new kinds of legal incriminations and different visions of traditional values (that determine the roots of criminal code context within its boundaries), where government reaction to the prohibited behavior is not at all simple. Protection of property, businesses, financial stability, official duties (State given employment within the official institutions), are just some of the values protected by the criminal offense of money laundering, either in criminal law code or a separate specific one. By refining the object of protection and its factical place in the law, with the amendment of incrimination it would come up with further possibilities for better results in legal protection.

Key words: *Money laundering (as a felony offense), legal security (of the system and within the system), determining object of protection, place in the criminal law code.*

1. Preliminaries

Determining the place of money laundering as a criminal offense within the Serbian legal system or in the criminal law of Serbia is a topic that is certainly not complete even after we take into consideration that more than 10 years have passed since it has been introduced in Serbian laws, first in a special law, and since the year of 2006 during which it has been officially implemented into the Criminal Code of Serbia.[1]

As a textbook example that shows how difficult it is to determine the place of money laundering offences in a special part of criminal law we can observe a trial before the Special Department for Organized Crime of the Higher Court in Belgrade against Darko Šarić and others (his associates), which is the first in a series of indictments for money laundering where in this particular case first defendant was indicted over 5 years ago. To date, we haven't come to greet a final court verdict on them in the ordinary course of the trial, except for decisions based on the plea bargain agreements between the prosecutor's office (the District Attorney for Organized crime) and some of the defendants.

[1] "Official Gazette of the Republic of Serbia", no. 85/2005, 88 / 2005- corr., 107 / 2005- corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014. The Criminal Code came into force and began with the implementation on 1 January 2006.

The unauthorized drug trafficking of narcotics with the main focus being in trafficking cocaine in large amounts by the organized criminal group (OCG) led by Darko Šarić has reached over 20 million euros of cash in clean profit which has set itself with the question of its ability to be laundered or as we could also view it as facilitating money's entry into the legal cash flows. This amount of money has not been exhausted with the mere purchases of houses, apartments or luxury motor vehicles. There was a task to figure out a way to disguise the origin of large sums of illegally accumulated funds and to pinpoint it into other routes of trade and legal businesses. The task of money laundering was being handled in a way that mainly OCG itself has hired highly educated professionals, with many years of experience in economics and legal professions. Economic experts (among them were two PhD level experts) had a task at hand which essentially was to find a way that would allow the insertion of dirty money (illegally acquired) into the economic system of Serbia and some other countries. Experts in law, hired by the OCG, had the assignment which consisted of using economic transactions to provide the legal framework and thus successfully complete the entry of dirty (illegally acquired) money into the economy.

This was to be done largely by creating a large number of offshore companies and other enterprises that have taken the action of putting part of the money directly into the fiscal system of Serbia, and the second part of the illegal funds are invested in the lease of agricultural land (large portions of it), the assets of companies that were acquired during the process and in the financing of their operations, as well as purchasing companies that were in the privatization process (for low amounts of their actual market value) and financing large purchases on numbers of various other real estate, concealing its (money's/funds) origin in this way. After the purchase and/or lease the OCG members continued their dirty money use as a way to finance the activities of companies that are acquired and so the money is still placed on the market thus projected as legal in terms of those companies usual business ventures. Managers of the two banks have repeatedly abused their authority and have used the money OCG provided for them in order to achieve its conversion and transmission (transaction). *Off-shore* companies are used to make the money transferred from one account to another, in order to get this money in the end, after numerous transactions to be perceived as legal. The legal basis was the conclusion of fictitious contracts for which the money was transmitted without any factual realization of the tasks which are denoted as *causa* contracts. When depositing cash in the bank, despite the existence of compliance to those actual deposits, the management of those banks did not alarm mechanisms which would file complaints and charges to FIU. This is particularly important because the depositions of money sums was carried out by private individuals whose role did not exceed 15,000 euros (the limit under which deposition is not required to provide additional paperwork and insurance of money's origin), and that the money was portrayed as his (depositors)!

These well thought out ways of money laundering would not be possible to be realized by the OCG itself without some thorough help provided by their well sponsored (with the incriminated funds provided to them by the OCG members in return for personal and professional help) helpers which consisted anywhere from consultant bankers, lawyers and other specialists with great knowledge in factical state of economics and law at hand during the time of those illegal ventures. In this way of concealing the illegal funds and projecting them as legal the irreversible damage had been caused to the long-term character of Serbia's economic system, which will feel the

consequences of those felonies for a long time. Multimillion input into the economic system of the Republic of illegally obtained money, for which there is evidence obtained from the crime of illicit drug trafficking, undermine one of the fundamental (basic) pedestals functioning of the economy: the principle of free competition which bases itself on fair competition by those market participants which create the field of fiscal trade in the whole Country and region. The fact is that members of the OCG (where there are still no verdicts against all members of the organization) possessed exceptionally high amounts of cash which they did not have to use in accordance with elements of economic logic. Their primary goal was to dirty money they put into the legal economic flows, not assessing the profitability of investments in which the funds invest, which led to the start that they must have procedures in purchasing companies, privatization and lease of agricultural land is not the same level as other participants in the market. As Nero once burned Rome they have burned principles of fair competition of other undertakings, which are disposed of legally acquired capital and who evaluated the cost-effectiveness of investments that are members of OCG uncritically invested dirty money covering its real origin. In this way the other participants in the market who are on their capital paying taxes and other duties, they had to give up their investment and lending their money, because they are not able to follow the offers that had OCG.

Assets, the economy, the financial system, official duty, legal system are just some of the legally protected terms that are affected by long-term effects of actions related to the crime of money laundering in this case for which a finale consisted of court verdicts is expected soon. The assets acquired through crime in specific cases is suspended in any case. But first things first in explaining the phenomenon in question.

2. Locating the Problem

One of the main problems that arises when setting up an analysis of the criminal offense of money laundering is the choice of the context in which to do this. One possible model is static, which speaks of a certain criminal act isolated from the temporal dimension, with the classic view that one crime remains where we are normally accustomed to find such types of offenses. Another, less common approach is seeing this crime in the context of non-legal, external influences, which ultimately can lead to doubt the traditional division of offenses on their heads and Systematics to which we are used to. This, structural or dynamic model, says that the criminal/penal law should be accompanied by social change, with a dynamic view of the real consequences of these changes in the legal system as a whole. Values as setting up this crime in any of the heads of the Criminal Code can lead to very different approaches in not only his repression but also his prevention. The development and changes in economic relations, with changes of ownership forms in the economy are certainly the reason where to look for grounds to propose changes to the penal legislation and the possible change of the criminal offense of money laundering in the legislative systematics. The offense of money laundering is a criminal offense of specifically complex nature. The different legal systems protect different legal values provided for peremptory norms of international and national criminal law, but regardless of Serbia's acceptance of the solution and generally accepted principles of the European Union has been a convergence of legislation and criminal law regarding this matter at hand.

The very criminalization of money laundering has not yet found an adequate place in the Criminal Code, which continues to cause problems in practice and everyday

implementation of law. Although all of offenses contained in the Criminal Code are seen as unique ones, it seems that the optimal solution would be that the offense of money laundering rests in a special law, with a clear separation which has not been carried out. Starting from the fact that in Article 231 of the Criminal Code the code itself continues to speak separately on assets and cash and order. Supporting the creation of a special law to regulate the prevention of money laundering in the spotlight would be means for cutting off channels that provide transmission of illegally acquired assets, proceeding that attempt in an apparently legal forms. The specificity of the nature and connection with constantly new modes of money laundering are facts that speak in a favor of a special law to be applied in order to better protect monetary (fiscal), financial and economical system. This particular fact can be explained with the almost undivided opinion of the law experts (in Serbia and region with similar legal systems) that despite the constant changes of social, economic and political conditions and opportunities in society, it is not necessary to make the permanent changes in criminal legislation as these are not, or are not sufficiently corrected inaccuracies and justified objections in favor of the crime of money laundering. It all speaks in favor of a different approach with this (and not only this) as a criminal offense.

3. Legal values protected by the criminal offense of money laundering

In Switzerland[2] criminalization of the offense of money laundering protects the judiciary branch of the legal system (Chapter 17 of the Criminal Code). The perpetrator of the offense of money laundering wants to cover up illegal benefit (assets acquired from the traffic in narcotics and other forms of crime that bring profit and could be controlled by a criminal organization) from the judicial organs and courts of law and therefore stop the court form fulfilling its lawful duty to put the perpetrator on trail and repossess[3] the unlawfully acquired assets.

And in the Federal Republic of Germany through the criminalization of money laundering protects the judicial[4] branch of the legal system. The suspect, or suspects in case of OCG, prevents access and control of police and other organs (with manipulating facts about origins of assets and funds that the perpetrator used in his illegal ventures) that are used in usual criminal detection[5] and at the same time we have occurrence of acquiring illegal material benefit by the perpetrators. The Kingdom of Belgium[6] uses criminalization of the offense of money laundering to protect the economy (or more explicitly the monetary system), explicitly defining that the perpetrator of previous criminal acts is at the same time offender of money laundering. It is interesting that in the criminal law of Colombia uses criminal charges and offenses of money laundering to primarily protecting the economy and judicial system, and on the other hand the Republic of Italy and the Kingdom of Spain uses those offenses determined by the criminal law to protect primarily assets.

---

[2] Article 305.bis and 305.ter StGB Switzerland (Strafgesetzbuch).

[3] Claessens, R., *Prevention of Money Laundering,* Association of Banks of Serbia, Belgrade, 2006, p. 84th.

[4] StGB, §261 (Strafgesetzbuch).

[5] http://dejure.org.gesetze/StGB/261.html.

[6] Law on Prevention of Money Laundering of 11.01.1993. year.

In Serbia, the criminal offense of money laundering was amended in Chapter XXII of the Criminal Code – crimes against the economy[7], which ''per se'' does not mean that the only intention is to keep the economy safe. The essence of the offense is to (various forms described in the Criminal Code and the Law on Prevention of Money Laundering and Terrorist Financing[8]) disguise the source of money or assets arising from previous criminal acts of money laundering. Council of Europe Recommendation 12/81 is a general guideline (since it has a leverage on our Serbias internal legal system and thus it further protects itself from felony acts being perpetrated from regional countries), because an economic crime includes the occurrence of mergers and the formation of cartels, avoiding legislation related to taxation and financial transactions, fictitious (phantom) companies etc. According to the recommendation of the Council of Europe[9] and its conceptual framework, economic crime affects a large number of individuals, society and the country as a whole, harming the functioning of the national or international economy[10] and caused a loss of trust and confidence in the economic system, putting the crime as a center of activity as a function of making a profit as such.

Also of great importance is to mention the UN Convention against Transnational Organized Crime[11], which in Article 7 obliges State Parties to establish adequate measures to combat money laundering, but that it will endeavor to develop and promote global, regional, sub regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.

Freedom in the economic relations is based on the hypothesis that certain relationships in the economy must be subordinated to the rule of law, regulated and protected by the legal rules. If we want to preserve stability and security in the country, it is necessary to respect at least the basic legal norms and regulations, some of which are generally the most important ones, which allow smooth functioning of free markets, respect for autonomy, but also the norms necessary implementation and protection of property. All those who do not respect the rules of law in the economy consequently threaten. Thus, the contact point of the economy and criminal justice are talking about an economic crime that has always been a side effect of the development of civilization.

---

[7] In accordance with the recommendations of the Committee of Ministers of CEI No. R (81) 12 of 1981 our legislator in this chapter of the Criminal Code has included crimes of counterfeiting money (Art. 223), forgery of securities (Art. 224), forgery and abuse of credit cards (čl.225), counterfeiting characters to value (Art. 226), making, procuring or providing other means of falsification (art. 227), the issue of waiting and use of credit cards without coverage (Art. 228), tax evasion (Art. 229), smuggling (230) money laundering (231), abuse of monopolistic position (232), unauthorized use of someone else's company (Art. 233), dereliction of business operations (čl.234), causing Bankruptcy (Art. 235), causing false bankruptcy (236), damage Creditor (Art. 237), abuse of authority in economy (Art. 238), violation of business reputation and credit standing (art. 239), revealing business secrets (art. 240), prevention of exercising control (Art. 241), Illicit Manufacturing (Art. 242), trafficking (čl.243) deceiving buyers (art. 244), falsification of marks of labeling, measures and weights (Art. 245).

[8] "Official Gazette of the Republic of Serbia", no. 20/2009, 72/2009, 91/2010 and 139/2014.

[9] Quote from the report of the report on the situation of organized crime in 2005.

[10] According to the Economic Crime Survey 2003, which examined the 89 on the list of 1000 companies, and for two years, 24% were victims of economic crime: 15% of money laundering, 60% of fraud, 20% of cybercrime, 18% corruption. V. http://pwcglobal.com/gx/eng/cfr/gecs//PwC_GECS03_switz_eng.pdf

[11] The Convention was adopted in 2000 in Palermo - the so-called. "Palermo Convention", and the Republic of Serbia had ratified in 2001 (Official Gazette of the FRY - International Treaties ", no. 6/01, p. 20-39).

Using the term for this kind of economic criminal offenses can lead us astray, so that we ignore what are its consequences in all (other) forms of life and work. At the highest level of government are those who illegally divert resources from those who are dedicated and who will have the benefit of tax collected. International terrorists, who use the same techniques as other criminals to collect and transfer money around the world, pose a threat to all communities equally. At the state level, many lose their jobs, of which suffer and their families. If, therefore, money laundering call economic crime, it does not mean that it is less dangerous than other forms of crime. In all countries, it is equally necessary that the state as a whole, judges, prosecutors, police and others, give appropriate weight to economic crime, and to allocate sufficient resources to be responsible were punished.

Economic crime threatens the credibility and security, economic activities and the functioning of financial and legal order in its entirety, causing damage and consequences in different socio-economic levels[12]. And as much as the State legislation has done so far in order to eliminate these consequences, the practice is still enforcing the Prevention of Money Laundering limited by insufficient training of staff directed to prevent the crimes of occurring, experience and funding bodies in the past and criminal proceedings[13]. Money laundering in the context of economic crime, where only the original criminal act related to the acquisition of tangible benefits should be distinguished from those offenses relating to some form of physical misappropriation. For more complex element of money laundering, the harder it is to recognize the illegal action behind the crime committed, and accordingly prepare enough evidence for the successful conduct of criminal proceedings[14]. It should be noted that money laundering is more pronounced in developed countries, especially those where a significant actions of transnational mafia-like organization. Mafia organized illegal production, but also through money laundering through certain banks to participate in legal production and achieved some control over legal production and conduct of business by the banks[15].

Economic crime is a dark side of cultural and technological development of mankind and connectivity in the world. The scope of economic crime is a reflection of the instability of certain states or communities and the affirmation of their legal system. During the implementation of an independent survey on economic crimes for the year 2003 in the UK, it is noted that their national economy in 12 months suffered losses totalling £ 32 billion, of the crimes of fraud, embezzlement and money laundering, and that an additional 8 £ billion spent on combating these phenomena. In the international context of the scale of the problem of money laundering is still evident. The development of professional ethics[16] and customary manner of supervision or control, as well as

---

[12] V. Augsburger-Bucheli, I., *Institute for combating economic crime, measures taken to combat economic crime and organized crime in Switzerland,* Proceedings of the Institute ILCE 2005, cited as an example the crimes of money laundering, violations of insurance law, the rules on competition , stock exchange, false bankruptcy, fiscal fraud, insurance fraud, customs and others.

[13] This also applies to a method for general criminal prevention.

[14] V. Clark, R., *Money laundering and international financial crimes, intriguing crime and skilled laundering techniques from the perspective of lawyers, economic crime and money laundering - serious business,* Book, investigation and prosecution of money laundering and terrorist financing, Belgrade, Documents 2005th , p. 2.

[15] Bošković, M, Bošković, A., *Corruption - money laundering - the financing of terrorism,* Faculty of Security and Protection, Banja Luka, 2011, p. 165th.

[16] V. RSM Robson Rhodes Economic Crime Survey 2004, confirmed by the British Ministry of iternal affairs.

ignorance of the actual impact on the economy of a particular criminal offense within the economic (fiscal) crime has undoubtedly contributed deficient and slow decision-making in individual cases before the courts. The phenomenon that the courts successfully handle minor and classical crimes (those not influencing the society as a whole rather than specific events), but crimes that threaten the economy are present in many countries in the world for example and along these lines we can see that in the Netherlands, Germany or Italy they indeed are. Feel free to be mentioned here that Serbia, without any exceptions in any part of the country, where the courts largest backlog of unsolved cases rest just from Chapter XXII - crimes against the economy[17]. Analysis of these phenomena, a broader view of the failure to solve the problems of criminal justice in this particular matter and the desire for confiscation of illegally acquired property gain have finally resulted in the criminalization conceptually of new criminal offenses – money laundering.

The offense of money laundering in a separate part of the Criminal Code is classified in the group of criminal offenses against the economy, meaning that the legislator considers the economy of the Republic of Serbia for a special object of criminal protection. The Criminal Code does not define the concept of economy or economic system, or define the notion of business entity[18]. Illegal activities, although formally performed in the same manner as permitted, are not included in business operations. In the criminal protection of the economy to the forefront to put the freedom and equality of economic activity, not the protection of economic relations and of themselves (subjects in those relations and the working sector carrying most of the burden). Criminal law provides additional protection ensuring equal economic conditions for all operators, and a free space in which to operate economically and market mechanisms for all members of society should have positive effects[19]. Concepts such as the economy, trade relations and the likes of it all represent a certain kind of generalization in criminal law which points to increased caution in applying the law. Because, for the full application of the principle of legality in criminal law, in addition to legislative planning is obvious that a great contribution to have a science of criminal law and jurisprudence, but also the standards of the entire corpus of law.

If we look at things like this we can conclude that in the Criminal Code in Chapter XXII – crimes against the economy, it is a offense that threats the economy as a whole. It would be a crime counterfeiting money, counterfeiting securities, counterfeiting and abuse of credit cards, etc. Through which dirty money (Art. 231) directly affect the monetary and economic system as a whole. Some of them[20] contain notions about protecting buildings and assets.

However, money laundering as a criminal offense in Serbia appears as one of the most common forms of organized crime,[21] along with drug trafficking, extortion,

---

[17] Here we do not lag behind in the slow resolution of no criminal offenses against official duties.

[18] In Chapter XIV of the Criminal Code, Article 112. Definitions: Count 21, the business entity is an enterprise, other legal entity that performs an economic activity and an entrepreneur (who is newly introduced category compared to the situation before the entry into force of the Criminal Code of 2006). Legal person who in addition to their core activities perform economic activity is considered to be business entity only when it violates this activity.

[19] Taken from Stojanović, Z., *Commentary on the Criminal Code,* Belgrade, 2012, p. 536th.

[20] The offenses referred to in Article 223 to Article 245 of the Criminal Code of the Republic.

[21] About organized crime in Hungary see: Tóth, D., István Gál, L., Kőhalmi, L**:** *Organized Crime in Hungary* Journal of Eastern European Criminal Law, no. 1 (2015), p. 22-27.

kidnapping, human trafficking, corruption. With this in mind, it is important to emphasize that in this case, may order special investigative actions to detect and prove this crime was facilitated. Given the nature of the offense of money laundering there are steps of particular importance to be made, likes of secret surveillances of communications, secret surveillances and recordings of suspects and simulated transactions[22].

The issues raised here are: that the legal validity of the legislator protects the criminal offense of money laundering, as well as whether it is relevant self laundering or money laundering from criminal activity own (and a specificity relating to the time limits of the law)[23]! In comparative law, based on the interpretation of the regulations[24] to target them give different answers from the protection of the economy and monetary system, property, and to justice.

In jurisdictions where criminalization of the offense of money laundering protects the economy, the provisions on liability of the perpetrator of previous criminal offenses for money laundering are more often exposed than in the countries in which the legislator through criminalization of money laundering protects the judiciary branch or private property and assets. Newer FATF recommendations (Recommendation no. 1) and the methodology of the IMF / FATF / WB for assessing compliance with legal and other regulations, as well as their execution, points to revalue and edit the responsibility of the perpetrator of previous criminal acts of money laundering, if such a regulation is in accordance with national law.

Among the various reasons why they are in the fight against crime legislative bodies in the world decided to criminalize money laundering, we will present attitude of the American author Nadelmann-and that's one of the solutions for the identification and prosecution of white-collar crime, because it is generally difficult to prove that they participated in the execution of previous criminal acts, and even harder to take away their illegal benefit[25]. Obviously, the leaders, the purchaser or instigators in the commission of offenses are most closely connected with material gain from these parts. The final beneficiaries of laundered money they wanted the unlawfully appropriated money to be use for themselves, that part of the revenue used alone, and that the remaining part reinvested in crimes that will bring them new benefits, or in the legitimate activities that could accumulate more wealth that they themselves already have. Money often not fully discharged from their hand and often even themselves take steps to go trough the money laundering process themselves. The impact of these perpetrators and leaders of organized criminal syndicates threatens values on which the modern market economy and creates favorable conditions for corruption or unfair competition. One of the additional reasons for the criminalization of money laundering originates from the common notion that the new offense punishing enables professional money launderers who are active perpetrators of past crimes to keep unlawful material

---

[22] Details about the special evidentiary actions in criminal procedural legislation of the Republic of Serbia see: Bošković, A. Pavlovic, Z .: *Special evidentiary Actions in the Function of Combating Organized Crime in Serbia,* Journal of Eastern European Criminal Law, no. 1 (2015), p. 40-57.

[23] About applicability of the RS Law, in conjunction criminal offense of money laundering, as a kind of rarity in criminal law, v. longer with the Pavlović, Z., *Criminal Law characteristics of money laundering in domestic and international law,* PhD, Law School, University Business Academy in Novi Sad, 2008, unpublished.

[24] Example: Germany, Belgium, Spain, Italy, Switzerland, Colombia.

[25] Nadelmann, E. Cops Across Borders: The Internationalization of US Criminal Law Enforcement, University Park, Pennsylvania, 1994, str. 388.

benefit and judicial authorities prevented the withdrawal of such funds. In other words, such a measure was passed two things: first, measures to prevent and detect the level of financial institutions that the state ensured that the main carriers of the legitimate economy (financial institutions, agents and others) do not allow the entry of dirty money into the economy, and second, the seizure illegal material used the money launderers. In this way protects the judiciary, economy and property, and enabled the confiscation of property acquired through crime.

The offense of money laundering is not only a criminal offense that is relevant to punish third parties who are perpetrators of past crimes and at the same time they are helping themselves and their counterparts to keep and use illegal benefits acquired through illegally acquired funds. Before the criminal offense of money laundering, there is criminalization of the offense of concealment. Of course, the crime of money laundering and the criminal offense of concealment are two independent and autonomous offenses, but they do have some similarities.

4. The offense of money laundering and the criminal offense of concealment

The first concepts related to criminal offenses of money laundering were made by simply using certain provisions of the existing criminal law norms. In Germany, Austria and Switzerland we have examples where they have used certain parts of the text that already introduced the offense of hiding – handling of stolen goods, ''die Hehlerei'', as a criminal offense that is relevant in order to protect the property, and the text itself had some new content added to it. In the Scandinavian countries (Finland and Sweden) The offense of money laundering are not incriminated, but the issue of seizing illegally acquired funds and assets were solved using the provisions of the criminal offense of concealment (money receiving offense).

Although at first glance very similar, the offense of concealing the crime of money laundering and the criminal offense of money laundering itself are at a more detailed analysis of individual legal codes practically two different offenses. The offense of money laundering is the general, special and autonomous action. The reason for this is in the legal values to be protected: the crime of concealment is motivated by the circumstance that it is carried out, usually in relation to matters that are acquired by committing a crime against property, usually in the form of movable assets, which can be determined by property (Property) Law, and the crime of money laundering is a particular object of criminal protection of legal regulations in the economy. The legislator uses criminalization of money laundering in order for the legislation to keep its function in protecting the judiciary branch, and legal values on which the modern economy (fair competition, financial system, free market, equality of all forms of ownership). The placement of dirty money into the financial system, for example, represents unfair competition, because such money is not burdened by taxes and contributions. Equality operators in the market is therefore impaired, which consequently affect the stability of the market that will respond to the changed circumstances and cause negative consequences for operators acting under the principle of ''Treu und Glauben in Verkehr'' *(bona fidae).*

For the offense of hiding/concealing illegally acquired funds, this is the same property that is the object of criminal protection as with previous crimes. The sense of determination to conceal as an independent criminal offense in the Criminal Code that

prohibits the extension of unauthorized use of items owned by other persons, companies, business and include persons where a fact is that they know that they are perpetrators of crime or what is to them an desirable asset through sale or exchange masks, push through, buying, receiving pledged or otherwise obtain illegal funds. Concealment is in the group of criminal offenses against property and provides legal certainty in bilateral legal affairs (civil legal relations).

In case of concealment, therefore, it is primarily about the available objects (especially mobile) derived from one or more offenses, it does not thereby follow specifically defined purpose. Disposing therefore arises crime. Suppress protects the legal regulation of civil relationships and damaged.

When money laundering is at the forefront of property which the perpetrator wants to convert or transfer with knowledge that such property is illegally acquired, proceeds along with the crime with intent to conceal or disguise illegal origin of the property, or conceal or misrepresent facts about the property with the knowledge that the property originates from a criminal offense, or acquires, holds or uses property with knowledge at the time of receipt, that such property is proceeds of crime. Concealing the real origin of material used is a special intent of the perpetrator when money laundering. The perpetrator of this crime does not conceal the movable property, but its source.

In doing so, they could conclude that concealment in money laundering means a special form intent – 'dolus directus praemeditatus'' (The most severe form of direct intent). Consequence of – laundered money – is exactly determined, the precise form that the perpetrator intended. Also, the perpetrator of the offense of money laundering based planning, prepared and carried out only a crime. Concealing contaminated sources of money or property is planned.

The crime of concealment is different, in which the concealment of fact, for whom the perpetrator knew or had and could have known that it was the proceeding of the crime itself (or making grounds that make such actions possible), or that, what was for it through sale or exchange, only one of the procedures who, like other acts, is a special form of assistance after committing the crime and who is also the target of the crime. It is about covering up the subject of the offense. It should be noted that this is not about you in terms of participation, but about the help concealer or distributor, without first offering the promise of an offender after the commission of the basic criminal offense and that relates to items that are part of those obtained.

Accessoriness legal nature of the offense of concealment presupposes the existence of another crime that is needed, similar to that of money laundering, objectively prove. The association of the offense of concealing the previous criminal offense comes to the fore when the offender both parts of the same. Concealment, in fact, compared to the previous criminal offense, is impunity subsequent offense, the essence of which is the realization of intent by the offender had in the execution, because, regardless of whether it is a case of real or concurrence of circumstances, in such cases the concurrence circumstances always apparent. The offense of concealment, then, can make the perpetrator of previous criminal acts, in other words, the perpetrator of previous criminal acts can not be held liable for the criminal offense of concealment. In the same way are not introducing criminalization of self laundering justified in the Czech Republic, Hungary[26]

[26] Gál István László , Igor Vuletič: *Main characteristics of Hungarian and Coratian anti-money laundering systems* In: Drinóczi Tímea , Takács Tamara (szerk.) Cross-border and EU legal issues: Hungary-Croatia . 647 p. Pécs; Osijek: PTE Állam- és Jogtudományi Kar, 2011. pp. 185-202.

and Poland in 1996. But these countries have introduced as punishable the act of money laundering in their own criminal law as early as 2001 and 2002, and thus sanctions can be imposed for this punishable act.

5. Instead of conclusion

In the fight against money laundering, there is an obvious intention of Serbia (or it's judiciary branch and its legislation) for the modernization and development of all the leverages in this fight against these crimes. All the above characteristics of this struggle should be seen in light of the newly upcoming threats of money laundering in our country, such as off-shore financial centers, new technique of payments and its implementations in the fiscal system. The rapid expansion of Internet technology, the emergence of newer and newer techniques of payments, as well as the development of new ways of doing business (e.g., Internet banking, internet business with securities and other e-banking services) open up a wide space for concealing the origin of illegally gained profits. National and international experience shows that there is no successful fight against money laundering without the development of pre-defined strategy, team building of professional well trained staff, specialization and professionalization of the compounds of this security sector.

In terms of money laundering[27] we could speak in favor of the current system, and also in favor of regulation in a special criminal law. The current system has been established on the basis of the examination of cases that are in operation and therefore does not cause a lot of difficulties in practice. The use of all legal measures that are related to money laundering, special evidentiary actions and investigative techniques for money laundering, that judicial authorities no longer find strange, but certain positive practice is still developing slowly[28]. Of course, the regulations related to the crime of money laundering is probably not complete and will change more often than is the case with other crimes, because of its specific nature and connection with the new modalities. While Serbia is joining regional and international integration processes, we can expect more such interventions. It still speaks in favor of a special law that would comprehensively and transparently edit money laundering issues in terms of it as a legal offence. Thus interventions through the Criminal Code were perhaps less numerous, and criminal law (financial) regulations would be clearly regulated in a legal document. In doing so they could reopen the question of the legal value of the money laundering actually threatens or protects, although as to argue that that is manned good monetary and financial system, as well as the value in the economy. Sure, if you would support the creation of a special law to regulate the field of fight against money laundering had to take care not to repeat the mistakes of the previous system, and use all these changes for us to bring the new legislation concerning this issue to utmost perfection.

The pressures of the international community have led to a raised level of protection of democracy from the real threats we face today as the growing trend of criminalization of society, which includes also the crime of money laundering and all its

---

[27] Gál István László: *Some thoughts about money laundering* In: Fenyvesi Csaba, Herke Csongor, Mészáros Bence (szerk.) Bizonyítékok: tiszteletkötet Tremmel Flórián Egyetemi Tanár 65. Születésnapjára. 681 p. Pécs: PTE Állam- és Jogtudományi Kar, 2006. pp. 167-173. (Studia iuridica auctoritate Universitatis Pécs publicata, ISSN 0324-5934; 139.)

[28] The first final verdict in Serbia was brought out 10 years ago, but the increasing number of indictments for the crime of money laundering, which entered into force in favor of it.

harmful effects it produces. Therefore it is necessary to make every effort necessary to already adopted international conventions that are beginning to be applied and implemented, and international standards and rules to involve in our judicial practice along with those efforts. The focus of the fight against money laundering and terrorist financing have made the cut for channels that provide transmission crime acquired proceeds in an apparently legal forms. Difficulties that we encounter in this struggle are neither small nor simple. Unnatural circulation of dirty money is unclear and because OCG's way of doing illegal activities in the field by resorting to bank accounts of shell companies in tax havens, making circulation across multiple jurisdictions and legal systems very possible.

The basis of the fight against money laundering is to seize the proceedings of crimes it generates. Thus preventing the penetration of dirty money into the economy. On the other hand, the confiscation of illegal proceedings represent extraordinary budgetary income. Just because the state authorities and other participants in the chain of combating money laundering will have even more to improve the understanding of the measures that are available and act more effectively. The courts will have to start to use the powers they already have in the management of seized assets and act in accordance with the rules of conduct of a prudent businessman in terms of temporarily seized material gain. Costs of States because of poor asset management defendants are still too high. Economic considerations are just struggling with prosecutors and judges, and if you are not started to use in their work, these costs and damages will continue to exist.

The conclusion of the type that could be better if there were more staff in this area, more cooperation, better legislation and more information technology is incomplete because it lacks the most important thing, that good will for a coordinated operation. The human factor which would enable the full implementation of existing regulations would mean a different organizational pattern of work, and took over the leadership role of one of the participants in the proceedings that the state bodies of water ranging from prevention to sanctions criminal offense of money laundering. According to the current state of affairs, it seems that the leading role should belong to the public prosecutor, as the head of the preliminary investigation, but the prosecuting authority, legitimized by the State.

More advanced equipment in the institutions will reach their full effect only if her role and place of which should be realized in one of the state institutions that have specific obligations and relationship with money laundering. More training in the field of financial and economic crime, with a detailed analysis of time intervals in the interaction with short-term operations of law enforcement. The suspect for money laundering offenses have to be followed by the identification of the verdict, and all institutions must have the same definitions and data processing.

As to the question, whether under the current legislation, punish and self laundering, and whether he should be punished for this behavior, if the same person committed the previous criminal offense and the criminal offense of money laundering, or whether there is a subsequent, exculpatory actions, it is our opinion that in the first part of the question is also the answer. In fact, under the current legislation does not provide exculpation of criminal liability that the person who executed the previous criminal offense and then make any of the actions of the offense of money laundering. Our argument, we analyzed the relevant provisions of Article 231 of the Criminal Code, but also through other regulations, which we pointed out the simple application of the

second (other) legislation. And it's adopted international conventions, where we put the reserves on the basis of which it would be clear that we put a limit regarding non-application of the provisions on the punishment for self laundering.

In any case, in order to reach a proper implementation of prevention but also repressive measures by all relevant authorities and the relevant activity of the government in making the legal, economic, financial and other measures, and the existence of expressed political will of the state to counter money laundering, necessary is an analytic approach, through harmonization of the statistical analysis and a common approach to resolving this problem. In this battle doctrine has its place, where to offer analyzes and proposals for the adoption of regulations that will allow the competent authorities to cope effectively within their jurisdiction against these international and national phenomenon. More practices achieved through the adoption of final court decisions that will certainly contribute, as well as permanent education of all the factors involved in this fight, giving contribution in the timely detection of money laundering in all its forms, discovering the same when you acquire the essential elements of the crime of money laundering, security evidence and trial for the same offense based on international law, the constitution and the laws.

References

1. Claessens, R., *Prevention of Money Laundering,* Association of Banks of Serbia, Belgrade, 2006;

2. Augsburger-Bucheli, *I. Institute for combating economic crime, measures taken to combat economic crime and organized crime in Switzerland,* Proceedings of the Institute ILCE 2005;

3. Clark, R.*, Money laundering and international financial crimes, intriguing crime and skilled laundering techniques from the perspective of lawyers, economic crime and money laundering – serious business,* Book, investigation and prosecution of money laundering and terrorist financing, Belgrade, Documents 2005th;

4. Bošković, M, Bošković, A., *Corruption – Money laundering – terrorist financing,* Faculty of Security and Protection, Banja Luka, 2011;

5. Stojanovic, Z, *Commentary of the Criminal Code,* Belgrade, 2012;

6. Bošković, A. Pavlović, Z., *Special evidentiary Actions in the Function of Combating Organized Crime in Serbia,* Journal of Eastern European Criminal Law, No. 1 (2015);

7. Pavlović, Z., *Criminal Law characteristics of money laundering in domestic and international law,* PhD, Faculty of Law, University Business Academy Novi Sad, 2008, unpublished;

8. Nadelmann, E., *Cops Across Borders: The Internationalization of US Criminal Law Enforcement,* University Park, Pennsylvania, 1994.

Money Laundering and Organised Crime

DR. ENDRE NYITRAI*
Faculty of Law, University of Pécs

Abstract

The study shall introduce the organisations participating in the combat against money laundering, the connections between money laundering and organised crime, furthermore, the elements of money laundering. It also introduces the activities of law enforcement authorities and particular measures of protection of key importance. It further states that appropriate legislative backgrounds are not efficient measures, but sufficient experience and professional conduct is required.

Keywords: *money laundering, organised crime, terrorism, international organisations, secret data collection*

1. Introduction

As for structuring and building-up frames, structure of organised crime is similar to the structure of any other enterprise. The most significant difference is that organised crime is an illegal form of structure, hence its activities and movements of labour inevitably run into illegality.

Participants of organised crime are directly or indirectly connected to society on every levels. Being motivated by money, knowingly or not, even intellectuals assist to illegal actions with their expertise, counselling and advisory activities.

In order to be prosperous, groups of crime need some sort of assistance, it is often corrupting respectable law enforcement and police officers. "The bribed person accepts this advantage and usually decides according to the expectations of the active briber. This process is like a business agreement, and unfortunately is almost as usual in the everyday life of Hungary, Europe and China as well".[1]

Appearance of the black market, severity of jurisdiction and, in addition, the past few years of economic crisis are origins of organised crime as well.

Pursuant to recent scientific and technological developments new groups of crime are being shaped, such as actors of the on-line organised crime scene. Due to technological inventions a greater profit can be achieved.

2. Anti-money laundering organisations

Joining the European Union and the Schengen area domestic crime organisations have managed to gain ground, borders have crashed down, foreign crime groups have appeared, same as Hungarian groups have crossed international borders. Nowadays, essentially organised crime groups involve professional forces of labour, and establish diversified connection systems.

* E-mail: *soundlife@freemail.hu.*

[1] István László Gál: *Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption*, Journal of Eastern-European Criminal Law no. 1/2014, Page 23.

It ransomly appears that the illicit profit gained in another country is being smurfed through a 'phantom' company of a neighbouring country. Due to globalisation issues, money laundering has become an international system of activities without boundaries, a circulation, whereas recently domestic groups appear abroad and foreign criminals become active in Hungary.

FATF, Moneyval and Egmont Group are international organisations co-operating in combat against money laundering.

FATF (Financial Action Task Force – intergovernmental body set up to combat money laundering, working alongside OECD) has been established at the meeting of the most developed countries held in 1989. FATF has developed strategies and established grounds of international combat against money laundering and terrorism. Its main prerogative is combat against money laundering and terrorism, monitoring and evaluating anti-money laundering jurisdiction, practice and regulations of member states. Hungary has not joined FATF yet.

Moneyval is an independent monitoring mechanism the Council of Europe representing the members states which are not the members of FATF. As a regional organisation of FATF, Moneyval aims to monitor and evaluate anti-money laundering jurisdiction, practice and regulations of its member states (in accordance with FATF standards and recommendations of Moneyval), and further development and harmonisation of implementations. Hungary is a member the international organisation of Moneyval.[2]

Egmont Group (of Financial Intelligence Units; henceforth FIUs) has been established in 1995. The Hungarian anti-money laundering unit is the member of Egmont Group. Egmont Group co-operates with FATF, organising a correspondence network of FIUs, collecting and processing information suspicious on money laundering or terrorism financing, enacting a quick and reliable system of data processing.

The Group took its name from the Egmont-Arenberg Palace in Brussels, where its first meeting was held.

3. Connections between organised crime and money laundering

As for money laundering, we refer to processes of criminals and their assistance transforming the proceeds of crime into ostensibly legitimate money or assets via financial institutions.

Besides Russian and Ukrainian crime organisations many other criminal groups are present in our country, such as Chinese, Arabic, Turkish and Albanian organisations.

Driving force of organised crime is gaining money, therefore, the essential question is to find measures to legalize the profit aggregated. Members of the crime organisations have managed to pursue policies in order to find ways to fit into legal means of economics.

They establish more and more 'phantom' companies and entities in order to 'clean dirty money'.

Washed clean, illicit money shall stream into financial systems, so banks have essential roles in tracing of proceeds and gathering evidence of transactions and transferring assets. Due to latency, accurate estimation of the amounts washed clean is

[2] http://ngmszakmaiterületek.kormany.hu/a-penzmosas-es-a-terrorizmus-finanszirozasa-elleni-fellepes-nemzetkozi -hattere (*international-background-of-the-fight-against-money-laundering-and-terrorism*).

almost impossible. Money laundering shall never refer to a singular transaction, but to chains of transfers, therefore, the role of banks in tracing illicit transfers of money is indispensable.

Criminalisation of money laundering also protects the customers' trust in legitimate and prudent practice of banks.

Most commonly, process of money laundering shall result in waste of profits of some sorts, nevertheless, incomes of the illicit money provide sufficient compensation.

Acknowledgeably, groups of organised crime seem to conflict and interfere with each-other, however, their co-operative attempts to mislead and smack-up law enforcement bodies pursuant to gain maximum illicit income is rather noticeable.

Crime organisations establish pseudo-enterprises that aim to turn 'dirty money' back into the stream of the economy rather than effectuate legal activities. '... especially the following enterprises are sufficient for money laundering:

- restaurants,
- counselling companies,
- retail shops,
- hotels,
- bars (pubs),
- night clubs, discotechs,
- casinos,
- international financial intermediaries,
- laundry (stain remover) saloons,
- sport enterprises,
- videotechs (DVD/VCR centers) ,
- enterprises maintaining vending machines,
- amusement parks,
- enterprises maintaining parking facilities.'[3]

Key issue is always the significant cash-flow, securing that illicit money is being mixed and shall finally appear as legal, after tax income.[4]

In order to weaken each other, the organisations do co-operate with authorities, provide information and assist to investigations, so hidden interests of co-operating parties must always be taken into consideration by the proceeding law enforcement bodies, hence putting the members of crime organisations under procedure often results in strengthening and benefiting another framework taking over the territories of the organisation investigated.

Typically, unlawful income appears in cash, whereas most of the dirty money is related to trade of drugs.[5]

Since most crime cases may stay in latency, eventual success of the combat against money laundering remains one of the most sufficient measures to confine crime. Criminal organisations can be faced from several angles, yet, extracting financial means

---

[3] István László Gál: *A pénzmosással és a terrorizmus finanszírozásával kapcsolatos jogszabályok magyarázata* (Interpretation of Statutory Regulations on Money Laundering and Financing Terrorism), 2012., Pages 29-30.

[4] István László Gál: *A pénzmosással és a terrorizmus finanszírozásával kapcsolatos jogszabályok magyarázata* (Interpretation of Statutory Regulations on Money Laundering and Financing Terrorism), 2012., Page 30.

[5] István László Gál*: Új Btk. kommentár 8. kötet* (Comentaries on the New Criminal Code Volume 8), 2013., Page 45.

that would leave the organisation numb and ineffective seem to be the most appropriate solutions.

4. Criminal Law background of money laundering

Provisions of money laundering has been incorporated into the provisions on economic crimes, and economic obligations and economic administration thereto of Act IV of 1978 on the Criminal Code of the Hungarian Republic (hereinafter referred to as Btk.) by Section 24 of Act IX of 1994.

Provisions on money laundering are stipulated in an individual chapter (No XL.) in Act C of 2012 on the Criminal Code of the Hungarian Republic.

Protected object of the statutory definition on money laundering are society and community interests of the combat against crime, furthermore, the public interests related to lawful and prudent conduct of financial institutions and other actors of economy.

Statutory definition of this crime is completed upon the execution of any of its elements thereto, whereas successful conduct of money laundering is no further requirement. Except for the perpetrator of the predicate offence, any capable person over the age of 14 can be chargeable for money laundering who did not participate in the predicate offence.[6]

Legalization of dirty money often assists to further crime, nevertheless, the person who, in connection with an asset obtained from criminal activity committed by others, uses the asset for its business activities, performs any financial transaction or receives any financial service in connection with the asset and is negligently unaware of the true origins of the asset, and voluntarily reports to the authorities or initiates such report shall not be liable for prosecution for money laundering, provided that the act has not yet been revealed, or it has been revealed only partially. However, the interest to eliminate money laundering is much greater than the actual prosecution of the person accusable.

Failure of the obligation of notification related to money laundering is a criminal offence, whereas personal objects of the prohibition are expressly specified in Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing thereto.

5. Measures of combat against money laundering

Money laundering is commonly defined to be happening in several steps, whereas each elements and phases are connected to each other. The first step is the actual appearance of illicit cash and shaping the intention to legalize the nature of the assets.

The second step involves placement of cash by some means. Illicit money is usually being introduced into the financial system through intermediaries unknown and/or outside the perspective of the authorities, further eliminating successful law enforcement. Placement is the most problematic stage of money laundering, hence it occurs at the early stage of the business, whereas transactions are not yet confused or tangled. Black money is often mixed with the profits of high revenue enterprises (i.e. cash-intensive businesses as shopping malls, casinos etc.).

---

[6] István László Gál: *Magyar Büntetőjog Különös rész* (Special Provisions of the Hungarian Criminal Law), 2014., Page 524.

The third step is referred to as layering that involves carrying out complex financial transactions to camouflage the illegal source or origins of the money. Most often, this stage has cross-border nature making the detection of origins rather complicated. Having to procure different permits in one or more countries, proceeding authorities are often facing preliminary and time consuming difficulties and hindrances that finally slow down the inspection.

Authorities often have to re-start tracing proceeds and evidence, since actors of money laundering frequently use homeless persons, therefore without registered residence their approach is nearly impossible. Should they be found, they are unable to provide any relevant information, or actually, they do not seem to know what they've signed.

The fourth phase entails acquiring legitimate, after tax wealth generated from the transaction of illicit funds.

Money washed clean in accordance with the above can be safely used and transferred into other businesses of the economy as clean money. Final product of this procedure is legalized money.

After such manoeuvres of turning back financial assets (money) into the stream of economy, it's almost impossible to detect or differentiate between the origins of legitimate and illicit money.

Nowadays, combat against money laundering is closely related to the fight against organised crime and terrorism. Thus globally, the greatest incomes some try to legalize derive from the trade of arms and weapons, drugs and smuggling.

Partially, criminals are able to spend their illicit money earned by illegal actions without money laundering. For criminal offences, whereas perpetrators manage to gain a great amount at once or gain regular access to illicit incomes without having any legal earnings, there is a relatively high risk of being unveiled, so the principal either keeps his money at home without actually being able to spend it, or in cases of extravagances he may draw undesired attention of the tax authorities or the police.[7]

On domestic levels we may find different trends, since crony deals originate in shadow economy. Most of the illicit money derives from tax fraud, fraudulent misuse of funds, receiving, larceny, fraud and malfeasance. Tracking down the revenues of constructions has been a problem for years. The so called 'scaling system' whereas one entrepreneur has processed the job to another constructor has destroyed many families and employees, meaning that by the time the last participant was to be paid sources have ran out, wages have disappeared and the parties accused each-other at the end.

Domestic drug trade raises urging issues, since according to my point of view, from a transit country Hungary has become a target country for drugs that is one of easiest ways to gather illicit money. Nowadays, domestic demand for drugs is quite huge, certainly, they are just as popular as alcohol or cigarettes.

The money after washed clean is the driving force of organised crime, since legitimate sources may further strengthen the organisation. In case of lack of money parties of the circle might as well 'eat each other'.

Besides the efforts taken on detecting, preventing and intersecting offenses, further actions of tracing illicit incomes must be enhanced during the combat against organised crime.

---

[7] István László Gál: *A pénzmosás és a terrorizmus finanszírozása az új magyar büntetőjogban*, Belügyi szemle 2013/6., (Financing Money Laundering and Terrorism in New Hungarian Criminal Law Review on Internal Affairs Pages 2013/6), 2013., Pages 27-28.

Actions of law enforcement bodies must be harmonized even more thoughtfully, and also, further training and continuous education programmes must be held. In most cases even the acknowledgement of money laundering seems to cause a problem. Therefore I must emphasise the importance of organised professional control of the authorities participating in the combat against money laundering and law enforcement bodies (police forces) pursuing the fight against organised crime.

Since some participants of the organised crime scene are already known to authorities, in fortunate cases, as focus or subject of criminal procedures, compartmentalizing and transformation of law enforcement bodies might have a crucial influence on the combat.

According to my observations, groups of organised crime do pay attention to eventual transformations of the organisations of police forces, often taking advantages of the elimination or transformation of a special unit, hence it takes time to re-organise flexible and sufficient operation of a new unit. Most probably, lack of time due to such transformations is beneficial to criminals.

I do hope that the attempts of the recent re-organisations will assist appropriate actions and combat against money laundering. "The organized crime perpetration is much more serious threat to the society than an individual crime. More offenders on one hand means more concentration of power which from an objective view increases the chance of the successful crime perpetration and on the other hand the presence of accomplices and the knowledge of their possible intervention when needed increases the offender's determination."[8]

Role of reconnaisant tasks is essential in this combat, for it may prevent criminal procedures in the form of intelligence services, or it may assist prevailing criminal procedures in the form of secret data collection.

Forces and measures of intelligence units assisting secret information collecting (informants, confidentiality contacts, other persons co-operating in the intelligence activities of police forces, tentative methods, undercover investigations, observations, traps, sample buying, simulated and confidential buying) may assist to investigation of criminal organisations and of money laundering.

Special measures and data used or obtained during undercover investigations assist police forces in the combat against money laundering. In the course of undercover investigations subject to court permit police forces are entitled to

- search private homes secretly, and take records on the data collected using technical means,
- open, check the mail or closed parcel connected to an identifiable person, and take records on the data collected using technical means,
- know contents of communication forwarded via electronic telecommunication, and take records on the data collected using technical means,
- access data forwarded or saved through IT systems, get familiar with, take records on and further use such data.[9]

Reconnaisance service and investigation is a long and exhausting workflow, resulting in initiating criminal procedures and impeachment of the perpetrators.

By now, criminal groups have adopted to the rapidly developing technical measures, so using the statutory means of instruments (secret/intelligence forces) is

[8] Dávid Tóth, István László Gál, László Kőhalmi: Organized Crime in Hungary, Journal of Eastern-European Criminal Law no. 1/2015. Page 23.

[9] 1994. évi XXXIV. törvény a Rendőrségről 69. §. (1) bekezdés (Section 69 (1) of Act XXXIV of 1994 on Police Forces).

indispensable during the inspection of criminal cases consisting of multiple moments or of continuous activities.

6. Final remarks

Combat against money laundering must be an indispensable and crucial element of the fight against organised crime. Clearly, criminals are motivated by money acquired from the offences committed and as well as money legalized thereof, both serve to strengthen these highly centralised organisations. Since money laundering is faltering the fundaments of the efficient economy, appropriate approach against money laundering is simply a social (public) interest. Due to its circulation, the money cleaned during money laundering may effect the safety of the state, infiltrating and corrupting all levels of governmental offices, therefore financial basis of organised crime must be extracted.

Statutory provisions of ant-money laundering are well grounded. Since tracing money laundering is rather difficult, reconnaissance services, secret (undercover) investigations and data collection are the greatest 'assistance' to law enforcement units. In order to pursue legitimate forces, well organised and highly trained law enforcement officers are needed, furthermore, the eventual structural transformations within police forces should enhance combat and investigation of organised crime.

Most importantly, a strong and comprehensive financial intelligence unit of law enforcement officers experienced in this specific field must be set up. Moreover, because of the high latency factors related to these criminal offenses, continuous education of officers and even closer co-operation of law enforcement authorities (exchanging information and experience, conferences, etc.) is required.

Notes

István László Gál: *Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption,* Journal of Eastern-European Criminal Law no. 1/2014. Page 23;

Dávid Tóth, István László Gál, László Kőhalmi: *Organized Crime in Hungary,* Journal of Eastern-European Criminal Law no. 1/2015. Page 23;

István László Gál: *A pénzmosással és a terrorizmus finanszírozásával kapcsolatos jogszabályok magyarázata* (Interpretation of Statutory Regulations on Money Laundering and Financing Terrorism), 2012., Pages 29-30;

István László Gál: *Új Btk. kommentár 8. kötet* (Commentaries on the New Criminal Code Volume 8), 2013., Page 45;

István László Gál: *Magyar Büntetőjog Különös rész* (Special Provisions of the Hungarian Criminal Law), 2014., Page 524;

István László Gál: *A pénzmosás és a terrorizmus finanszírozása az új magyar büntetőjogban, Belügyi szemle 2013/6.,* (Financing Money Laundering and Terrorism in New Hungarian Criminal Law Review on Internal Affairs Pages 6), 2013., Pages 27-28;

1994. évi XXXIV. törvény a Rendőrségről 69. §. (1) bekezdés (Section 69 (1) of Act XXXIV of 1994 on Police Forces);

http://ngmszakmaiterületek.kormany.hu/a-penzmosas-es-a-terrorizmus-finanszirozasa-elleni-fellepes-nemzetkozi-hattere (*international-background-of-the-fight-against-money-laundering-and-terrorism*).

Modifications of the Provisions of the Hungarian Criminal Code Related to Money Laundering and Compliance with International Requirements of Combating Money Laundering

DR. LÁSZLÓ SCHUBAUER
National University of Public Service, Faculty of Law Enforcement

Abstract:

From the mid 1990-ies – during the preparation progress of joining the European Union –, alongside with the establishment of market economy and recovery of the country's international relations Hungary was forced to implement the system of criminal instruments of combating money laundering. In this study I shall introduce developments and progress of the Hungarian jurisdiction related to money laundering from the first incorporation of the offense until present days. I shall hereby compare the provisions of the related international treaties and recommendations of European Union's Directives on money laundering to the settlement and measures of the Hungarian Criminal Code. The study shall introduce characteristics of the Hungarian legislative progress – originating in the laws and principles of our jurisdiction -, and it shall point out the Hungarian measures altering from international expectations, notwithstanding the legislative virtues and deficiencies of the subject. Finally, I shall also specify progress possibilities of the provisions of the Hungarian Civil Code on money laundering in compliance with Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015.

Key words: *criminal law, new Hungarian Criminal Code, economic crimes, obligations under international law, money laundering.*

1. Introduction

As the result of the political and economic changes in its system Hungary has developed market economy at the beginning of the 1990-ies and has initiated its integration to the Euro-Atlantic co-operation (to the NATO and the European Union). Since the 1980-ies, this international community has joined forces in combating organised crime, drug trade and terrorism, whereas it has implemented and obliged its members to adopt the instruments and measures pursuing a policy to fight against transnational criminal actions and money laundering as well. "Organized crime is an increasing threat to the society we live in and wish to preserve."[1]

During the course of transformation, being inexperienced in market economy jurisdiction and having a rather weak economy, Hungary has become the target of international criminal groups. Since significant foreign capital support was required to transfer the country to a market economy, this need for financing had sometimes

[1] Dávid Tóth, István László Gál, László Kőhalmi: Organized Crime in Hungary, Journal of Eastern-European Criminal Law no. 1/2015. Page 23.

appeased criminal organisation from all over the world who aimed to legalize their illicit proceeds.

The international community pursued the policy that Hungary must implement the measures and methods applied in international combat against money laundering. It was obvious, that incorporation of the instruments and requirements of the European Union and other international organisations related to money laundering was condition to the integration.

In this study I aim to introduce the establishment and progresses of the jurisdiction on money laundering from the circumstances of first incorporation until recent days, as well as the reflections of the Hungarian legislations to the international community's requirements.

2. Incorporation of the offense of money laundering in Hungarian Criminal law

The amendment and modification of the old criminal codex incorporated the independent statutory definition of money laundering to the Criminal Code[2] in 1994[3]. Incorporation of money laundering amongst the criminal offenses was necessary due to Hungary's undertakings under international law by joining Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[4]. This Convention was the first – multinational – treaty that specified statutory rules for its member states on penalization of money laundering related to organized crime and on the definitions of the offense.

The 1st Money Laundering Directive[5] of the European Council of 1991 has also effected the definition of the offense of money laundering recommending the member states to extend the objective effects of the Directive in their legislation to incomes originating from criminal activities other than drug trade.

At the implementation of section 303 of the Criminal Code legislators extended the prohibitions of laundering illicit money to the proceeds of smuggling arms and terrorism related offenses in compliance with the provisions of the 1st Money Laundering Directive.

Nevertheless, by definition of the Hungarian Criminal Code money laundering could only be attached to a 'predicate offense' committed by another person (for example a drug trader who legalized his illicit proceeds by money laundering could not be adjudicated for money laundering). As for money laundering, the Criminal Code defined the so called 'predicate offense' as in every felony punishable for more than five years of imprisonment and few other offenses with lower scale punishment rates expressly stipulated in the Act.

Personal effect of perpetrators defined in subsections (1)-(2) of section 303 of the Criminal Code has aimed to comply with the provisions of the 1st Money Laundering Directive and the Vienna Convention, nevertheless, certain alterations still remained:

---

[2] Act IV of 1978 on the Criminal Code has been incorporated during the socialist era, and though it has been modified for more than 90 times after the change of the regime it stayed the criminal codex of Hungary for almost 25 years until June 30, 2013.

[3] Act IX of 1994 has modified the Criminal Code and incorporated the independent statutory definition of money laundering to section 303.

[4] In Act L of 1998 Hungary has announced Vienna Convention and incorporated its provisions

[5] Council Directive of 10 June 1991 on prevention of the of the use of the financial system for the purpose of money laundering (91/308/EEC) *Official Journal of EC issue L166 28.06.1991 p 0077-0083*

- according to the Criminal Code the perpetrator must be aware of the (illicit) origins of the financial assets subject to transfer or trade, nevertheless, the Act did not require the special state of consciousness (motive) projected to reveal the illicit nature of the assets or assistance provided to the perpetrator of the 'predicate offense' to avoid the legal consequences of the felony, which intent is rather hard to be proved in the criminal procedures.

- the Hungarian Act expressly specified the conducts of safeguarding, handling and trading the assets or conducting financial or bank transactions with the asset. As the matter of fact, penalization of these conducts exceeded over the requirement if the international community.

However, the Act has failed to meet the international jurisdictional requirements to penalize the conducts of co-operative, supportive, assistance, advocating and offering criminal actions of money laundering.

Similarly, the Hungarian legal regulation ignores the recommendation on implementing the explanatory principle according to which identification of the knowledge, intent or purpose – referred as elements of the conduct hereto – must be conducted upon proper evaluation of objective, factual consequences.

As for prevention of money laundering, the old Criminal Code penalized failure to report on money laundering, meaning, that the person employed as fiscal officer who failed to fulfil his obligation – specified in separate statutory regulations – to report suspicious transactions had fallen under criminal liability. The criminal act of failure to report on money laundering could be committed both intentionally and by criminal negligence.

1994's amendment of the old Criminal Code established the two pillars of combating money laundering existing until today as part of the Hungarian criminal regulations by penalizing money laundering, furthermore, by criminalizing failure of reporting suspicious transactions attempted to stipulate 'hostile environment' for money laundering.

Despite of four minor modifications in the meantime, significant amendment of the money laundering rules of the old Criminal Code did not take place until December 2001. Nevertheless, we must take note that the amendment executed in 1999 has extended the group of 'predicate offenses', and by these means 'legalization' of the proceeds originating from intentional criminal activities of any third party punishable by imprisonment were considered money laundering. This provision has exceeded the requirements stipulated in the international recommendations on specifications of 'predicate offenses'.

Modifying the old Criminal Code Act LXXXIII of 2001[6] had closed the first phase of the development of regulating money laundering, but more essentially it has aggravated other – non-criminal law – measures of combating money laundering. This statutory regulation has definitely been adapted to the pressure of the international community, since Hungary has been enlisted to 'NEOT' (non-co-operative countries and territories) of Financial Action Task Force (FATF – intergovernmental body set up to combat money laundering) working alongside OECD, however, despite of several notifications, Hungary hesitated to meet certain recommendations of the international organisation (for example termination of anonymity of specific bank deposits).

[6] See Act LXXXIII of 2001 on Aggravation of Rules on Combating Terrorism and Money Laundering and on Further Prohibitions

Being enlisted at 'NEOT' resulted in significant economic and financial disadvantages, so it was crucial for Hungary to comply with the requirements of the international community in reasonably short time. The demand for coherent international co-operation after September 11, 2001 further shortened the time frame for action, and required more aggravated and integrated regulatory systems to confine money laundering as a basis of financing terrorism. In compliance with the international requirements the Act essentially aggravated the legal regulations of both financial and civil law, for example it has removed bearer (anonymous) deposits from the legal system and terminated anonymous public shares as well. Nevertheless, the regulations modifying the Criminal Code have eventually eased the regulations, namely, after the modification supplying false information on the assets related to the 'predicate offense' to the authorities could not apply to all authorities, but only to financial service providers (bank, insurance company etc.) or customs authorities. This provision has actually narrowed the scope of punishable conducts of money laundering.

3. Changing perspectives of the criminal regulatory systems

Unprecedented in the practice of the previous Hungarian jurisdiction the Hungarian Parliament has modified the Criminal Code's provisions on money laundering again, in only three weeks after passing Act the LXXXIII of 2001 on aggravation of the rules of combating money laundering, whereas Act CXXI of 2001 has fundamentally changed the criminal regulations.

The most important change implemented was that the amendment has ordered to penalize money laundering of the assets acquired by a self-committed crime, thus from that point on not only the money laundering connected to an 'predicate offense' committed by a third party was deemed as criminal action.

Above terminating the supplementary nature of the criminal act, after more than ten years of hesitation the amendment has finally incorporated the recommendations of the 1st Money Laundering Directive on penalization of the associate and co-perative conduct of money laundering by penalizing collaboration on money laundering. Criminalization of negligent conduct – money laundering in connection with criminal action committed by others – is further sensation of the modification in accordance with the international recommendations. Nevertheless, the effects of the above intentions were been significantly weakened, whereas the amendment has narrowed the scope of criminal acts that could be taken into consideration as money laundering activities, by these means only the usage of illicit proceeds of business activities and 'legalization' of illicit assets through financial institution were considered money laundering, furthermore, judged as unnecessary on dogmatic grounds the modification terminated the punishment of several acts formerly prohibited (for example acquisition or usage of illicit financial assets). Another problematic provision of the modification has also narrowed the scope of the personal effect of penalizing the failure to comply with the reporting obligation related to suspicious transaction to the employees of financial service providers.

Uniquely interesting aspect of the incorporation of Act CXXI of 2001 that the European Parliament and the Council has implemented Directive 2001/97/EC on amending Council Directive 91/308/EEC on the prevention of the of the use of the financial system for the purpose of money laundering on the same day[7]. Obviously, the

[7] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 on amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the

Hungarian government has been informed about the preparation and objected content of the Directive, nevertheless, they have ignored such recommendations at the implementation of the Criminal Code's modification. The 2nd Money Laundering Directive[8] has significantly extended the variety of the economic actors to whom it has established various obligations (client identification, reporting obligations related to suspicious transactions, other data supplying obligations, etc.). By these means, real estate traders, auditors, bookkeepers and tax advisors, notary publics and other independent legal experts, traders of gemstones, precious metals and pieces of fine art and persons involved in cash-businesses above a certain limit value[9] have become obligors under the new money laundering rules.

Whilst 2nd Money Laundering Directive has widened the scope of combating money laundering by extending the scale of persons subject to reporting obligation related to money laundering – suspicious transactions, whereas the modification to the Hungarian Act provided opposite effects, it's no wonder that international organisations have defined their concerns on the amendments almost immediately. Act XV of 2003 on the next amendment of the Criminal Code has partially repaired the deficiencies by extending the scope of actors obliged to comply with the statutory reporting obligation on suspicions cases.

The joint study of the International Monetary Fund / the World Bank / MONEYVAL on Hungary conducted in 2005 has disapproved that the elements of money laundering stipulated as typical forms of criminal action both in the 1st and 2nd Money Laundering Directives[10] of the EU, further in the Vienna Convention[11] and in the Strasbourg Convention[12] are missing from the independent statutory definition of money laundering (these elements have been removed at the implementation of Act CXXI of 2001).

Act XXVII of 2007 has modified the independent statutory definition of money laundering again, due to the requirements stipulated in the recommendations of the international anti-money laundering organisations implemented upon the survey concluded in 2005 on the one hand, and due to the provisions of the 3rd Money Laundering Directive[13] implemented on October 26, 2005 specifying further recommendations to the amendment of the measures and institutions of combating money laundering on the other hand. Basically, Act XXVII of 2007 has corrected former jurisdictional bungling, and partially it has resulted in compliance with the provisions of the 3rd Money Laundering Directive of the EU.

As stated in the (Ministry's) Commentaries to the Act: *'the amendment implies the perpetrator's conducts formerly removed by Act CXXI of 2001 to entirely cover the criminal*

---

purpose of money laundering – Commission Declaration *Official Journal of EC issue L344 28.12.2001 p 0076-0082.*

[8] See footnote 7.

[9] For cash-transactions over EUR 15,000.

[10] See footnotes 4 and 6.

[11] Act L of 1998 on the Announcement of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances held of 20 December 1988, Vienna.

[12] Act CI of 2000 on the Announcement of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990, Strasbourg.

[13] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the of the use of the financial system for the purpose of money laundering and terrorist financing *Official Journal of EC issue L309/ 15http://eur-lex.europa.*

*action expressly specified in the **Convention**, yet, keeping the integrity of the local legal terminology and securing that there are no inconvenient recurrences or overlaps.'*[14]

Until the implementation of the new Criminal Code[15] there have been only a few insignificant, mainly technical modifications related to the independent statutory definition of money laundering, whereas Act CLXII has specified further aggravated cases and Act LXXX of 2009 has modified measures of punishment.

4. Statutory regulations of money laundering from the new Criminal Code until recent days

Implementation of the new Criminal Code did not bring progressive changes in the instruments and measures of anti-money laundering regulatory system. (The Ministry's) Commentaries refer to the fact that at the incorporation of the independent statutory definition of money laundering legislative action has taken into consideration the provisions specified in article 9 of the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism concluded on May 16, 2005 in Warsaw[16], and furthermore, it is in compliance with the provisions stipulated in article 3 of the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances held on December 20, 1988, furthermore, article 6 of the Palermo Convention[17] held on December 14, 2000[18].

The new Criminal Code has kept the two pillars of anti-money laundering regulatory structure, namely the independent statutory definition of money laundering and the independent statutory definition of failure of compliance with the reporting obligation related to money laundering.

Basically the structure of the independent statutory definition of money laundering has not changed. The legislator has defined four independent versions of money laundering in subsections (1)-(2) and (3) of section 399 and in subsection (4) of section 400 of the Criminal Code. The Act penalizes: a) laundering the illicit income obtained by another person either to the benefit of the perpetrator of the 'predicate offense' or to the benefit of the person not involved in the 'predicate offense'; b) 'cleaning' the illicit income obtained by the perpetrator himself; c) collaboration in the commission of money laundering and d) negligent money laundering. Despite of the fact that the structure the independent statutory definition of money laundering has not changed the terminology became more specific in several aspects. Legislators have compensated the regulative deficiencies of two decades for money laundering conducted in relation to the proceeds of 'predicate offense' committed by another person, whereas they implemented a new element of conduct – as in confuting the criminal procedure held against the perpetrator of the 'predicate offense' – besides the possible intents (motives) of the perpetrator of money laundering to conceal or convert the true origins of the assets.

Important progress specified in the new Criminal Code is that the negligent perpetrator of money laundering who voluntarily reports to the authorities or initiates

---

[14] Ministry's Commentaries to Act XXVII of 2007.

[15] Act C of 2012 on the new Criminal Code replaced Act IV of 1978 on July 1, 2013 after 33 years of being in force

[16] Announced and incorporated by Act LXIII of 2008.

[17] See Act CI of 2006 on the Announcement of the United Nations Convention against Transnational Organised Crime of 14 December 2000, Palermo.

[18] See the Commentaries on sections 398-399 of Act C of 2012.

such report might be exempted from prosecution for money laundering. (According to the provisions of the previous Criminal Code such benefits were available for the person committed the criminal act intentionally.) Narrowing the possibilities of referring to such exemption definitely pointed towards the aggravation of the statutory regulations.

The other pillar of anti-money laundering provisions, namely, the stipulations on failure of compliance with the reporting obligation related to money laundering have remained unchanged in the new Criminal Code[19].

In accordance with the Ministry's Commentaries on the new law legislature has finally taken into consideration the provisions of the three principle anti-money laundering international agreements of the past two decades and enacted in compliance with their requirements, nevertheless, studying the provisions of the law we must establish that we have only come closer to approached objectives, yet, there's still plenty to do. Out of the three international documents especially provisions of articles 6 and 9 of the Warsaw Convention deserve special attention, since these stipulations determine the path of progress for criminal law's anti-money laundering legal and regulatory systems without setting the exact forms and defining contents.

For example, the above-mentioned provisions of the Convention oblige member states to enact and enforce the establishment of the legal framework that allows penalization of money laundering even in case if the conviction for the 'predicate offense' adjudication has not taken place or in case exact stipulation of the 'predicate offense' is not possible. Point b) of section 2 of article 9 expressly specifies that it shall not be relevant, whether the 'predicate offense' falls under the competence and authority of the member state (willing to complete the criminal procedure on money laundering) or not.

I find that the independent statutory definitions related to money laundering stipulated in the Hungarian Criminal Code are able to meet the requirements of the afore-mentioned standards, however, in the form of an explanatory provision it would beneficial to stipulate that lack of adjudication of the 'predicate offense' or lack of competence and authority in the 'predicate offense' shall not object adjudication of money laundering.

Article 10 of the Convention defines detailed requirements regarding the liabilities of legal entities in money laundering (corporate liability).

In accordance with the principles of Hungarian criminal law criminal courts may only adjudicate criminal liabilities of natural persons. Act CIV of 2001 established quasi criminal liability of legal entities – without allowing actual conviction of the legal entity – by entitling the criminal court to take sanctions against the incriminated legal entity in case the criminal act has been conducted to the benefit of the legal entity, or by a person related to the legal entity (for example its member, employee or officer) in its business pattern by using such legal entity[20].

In combating money laundering this aspect of regulatory background shows the most significant difference between the Hungarian jurisdiction and the requirements of the international community. Comparing the provisions of Act CIV of 2001 and section 1 of article 10 of the Warsaw Convention we find that at the present indication of criminal procedure against the legal entity is not possible for money laundering if it's been conducted by the owners (but not officers) of the legal entity to the benefit of the legal

[19] See section 401 of Act C of 2012.

[20] See (1)-(2) of section 2 of Act CIV of 2001 on criminal sanctions against legal entities.

entity, or in case money laundering was conducted by other person (not even under the titulus of assignee) acting independently from and to the benefit of the legal entity. In such cases only the natural person's criminal liability can be adjudicated and even sanctions can not be held against the legal entity.

Regrettably, for nearly two decades, the Hungarian legislation has failed to adopt the explanatory provision (otherwise) included in all anti-money laundering – related international treaties to its statutory regime. According to this explanatory provision '*...'knowledge, intent or purpose required as an element of an offense ... may be inferred from objective, factual consequences'*[21] On the other hand the Hungarian criminal law acknowledges and for several criminal acts applies the definition of 'manifested purpose (motive)', however, this principle is not expressly stipulated in the Criminal Code. Nevertheless, in this case legislation could further approach international recommendations and standards without any significant difficulties.

Defining the regulatory structure of anti-money laundering provisions has not been closed in the Hungarian criminal law yet. First, further specification is required regarding the afore-mentioned subjects, and second, economic, social and political changes urge the international community to adopt new and even more sufficient measures in combating money laundering. As one of the last stands of this progress was implementation Directive (EU) 2015/849[22] by the European Parliament and the Council on May 20, 2015 on the prevention of the of the use of the financial system for the purpose of money laundering or terrorist financing, known by professionals as the 4th directive on Money Laundering.

The Directive simultaneously rationalizes and aggravates the system of instruments and measures of the combat against money laundering. On the one hand, it allows member states to adopt less rigorous provisions, nevertheless, on the other hand it extends the personal effects of anti-money laundering regulations to some high-risk personnel, such as the public actors of politics.

Provisions on the objectives of the Directive specify that the European Union has recognised dangers that chain-like or cross-owner possession structures of legal entities – hiding the actual beneficial owner – represent in money laundering and terrorist financing, and the Directive stipulates the demand for disclosure of the identity of the actual beneficial owner. The Directive modifies and modernizes the anti-money laundering measures and instruments of administrative and financial law that might have an indirect effect on criminal law policies as well. For example, involving trusts or gambling service providers under the personal effects of the Directive shall extend the scale of subjects of the offense failure to comply with reporting obligations related to money laundering.

5. Final remarks

I find that until the effect date of the Directive (June 26, 2017) legislators should not only review the provisions referring to administration law or financial law, but in compliance with the principles of the Directive they should also consider to modify

[21] See point c) of section 2 of article 9 of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005, Warsaw.

[22] *See Official Journal of EC issue L141/73 http://eur-lex.europa.eu/legal-content6HU/TXT/?uri= CELEX:32015L0849.*

(especially) the provisions of Act CIV of 2001 on the criminal sanctions applicable to legal entities together with the modification of the Criminal Code. I agree with the statement: „In recent decades it has been proved that without witness protection we cannot take a stand efficiently against national and international crime during the investigation."[23] The regulations of the (Hungarian) criminal proceeding law should be reviewed with the aim to raise the protection of the witnesses and persons reporting money-laundering.

Even if the recommendations on integration of the legal systems can not be adopted in the national jurisdictions – likely, not into the Hungarian legal regulations – entirely, approaching the integration of legislative measures and instruments is the interest of both the international community and Hungary, at least to the extent that eliminates possible hindrances due to references to public order clause upon differences in legal provisions, objecting transnational co-operation in settling actual money laundering cases.

References

1. Act IV of 1978 on the Criminal Code;

2. (Ministry's) Commentaries of Act IV of 1978;

3. Act IX of 1994 on Amending Criminal Statutory Acts;

4. Act L of 1998 on the Announcement of United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, Vienna;

5. Council Directive 91/308/EEC of 10 June 1991 on prevention of the of the use of the financial system for the purpose of money laundering;

6. Act CI of 2000 on the Announcement of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990, Strasbourg;

7. Act LXXXIII of 2001 on Aggravation of Rules on Combating Terrorism and Money Laundering and on Further Prohibitions;

8. Act CXXI of 2001 on Amending Act IV of 1978 on the Criminal Code;

9. Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 on amending Council Directive 91/308/EEC on the prevention of the of the use of the financial system for the purpose of money laundering – Commission Declaration;

10. Act CIV of 2001 on Measures Applicable to Legal Entities under Criminal Law;

11. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the of the use of the financial system for the purpose of money laundering and terrorist financing;

12. Act CI of 2006 on the Announcement of the United Nations Convention against Transnational Organised Crime of 14 December 2000, Palermo

13. Act XXVII of 2007 on the Amendment of Act IV of 1978 on the Criminal Code and Other Criminal Statutory Acts;

14. Act CLXII of 2007 on the Amendment of Criminal Statutory Acts;

15. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the of the use of the financial system for the purpose of money laundering and terrorist financing;

[23] Endre Nyitrai: *Fight Against Organized Crime in Light of Witness Protection,* Journal of Eastern-European Criminal law no. 1/2015, page 71.

16. Act LXIII of 2008 on the Announcement of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005, Warsaw and on the Amendment of Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing;

17. Act LXXX of 2009 on Amending Act IV of 1978 on the Criminal Code;

18. Act C of 2012 on the Criminal Code;

19. Bill T/6958 with Commentary on the Criminal Code;

20. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) No 648/212 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC;

21. Dávid Tóth, István László Gál, László Kőhalmi: Organized Crime in Hungary, Journal of Eastern-European Criminal Law no. 1/2015. Page 23;

22. Endre Nyitrai: Fight Against Organized Crime in Light of Witness Protection, Journal of Eastern-European Criminal Law no. 1/2015, page 71.

Criminal Law Nature of Criminal Incomes Legalization

YURI PUDOVOCHKIN,
Doctor of Law, Professor,
Head of the Criminal Law Analyses Department ,
Russian State University of Justice Moscow

NIKOLAY PIKUROV
Doctor of Law, Professor,
Senior Research Associate of the Criminal Law Analyses Department,
Russian State University of Justice Moscow

Abstract:

Combat against crimes relating to the legalization of criminal incomes became one of the most important directions of the economic and criminal policy of the state nowadays. The domestic law of almost every state, including Russia, contain the relevant legal provisions. However, the lack of clear theoretical base determining the legal nature of this crime impedes the effective application of law. Specialists tend to associate the said crime with theoretical concepts of involvement in a crime and degrees of crime commission. However, today such approach appears to fail to ensure the correct understanding of the level of social danger of criminal incomes legalization, as well as fails to ensure that the crime qualification issues are adequately addressed. This article proves the necessity for reconsideration of common approach to criminal incomes legalization and, based on analysis of the economic mechanism and economic consequences of criminal incomes legalization, substantiates the point that this crime has a specific legal nature.

Key words: *Legal nature of criminal incomes legalization, concealment, criminal complicity, theoretical constructions and practical needs.*

The time frame within which the legal provisions regarding the criminal liability for criminal incomes legalization are contained in the Russian criminal law is quite short in terms of historical standards relating to science progress stages. Therefore, it is easy to explain that criminal law elaboration of issues which have to be solved in order to ensure effective application of the relevant legal provisions has a short history and faces many difficulties.

From the theoretical perspective, one of the most serious difficulties is to substantiate the legal nature of legalization and to correlate it with the existing constructions of *corpus delicti*, degrees of crime commission and complicity.

It is not much of exaggeration to say that Russian scholarship often follows the momentum of earlier times and achievements, and therefore it has by now failed to get the complete understanding of legalization nature and the grounds of its legal qualification.

Turning to the actual discussion of this crucial issue, it should be noted that it shall necessary “fall into” two directions: substantiating the nature of criminal incomes legalization received by third parties and that of one’s own criminal incomes, as we believe their legal nature differs.

Thus we shall take a typical situation which started the legal history of the legalization in the Russian criminal law: legalization of monetary funds and other property acquired by third parties by criminal means.

In such case the actions of a person (say, a legalizer) is assessed through the criminal law from the perspective of two mutually exclusive criminal law constructions, choice and application of which depends on the point when the legalizer becomes aware of the criminal nature of money or property laundered and the point when he agrees to do so.

Therefore, in a situation when a person who did not participate in the predicate crime, but was aware of the criminal nature of money and property, legalizes it after the predicate crime is committed, the aforementioned actions fall within the framework of crime involvement construction which is well known in the legal theory.

The involvement has always been regarded as the activity different from complicity and, in that sense, as an independent activity. In the middle of the past century V.G. Smirnov wrote that "involvement in a crime is the deliberate activity of persons not participating in the crime, aimed at hiding of criminal traces, instruments and objects of the crime or disposal of its outcomes"[1]. Modern definitions of the involvement have not essentially changed.

Many specialists write that it is possible and purposeful to regard legalization of criminal incomes as a type of involvement. In one of the earlier comments to the Criminal Code of the Russian Federation it was directly stated that legalization elements from the technical perspective are similar to the elements of acquisition or purchase of property knowingly obtained be criminal means[2].

At the same time, equation of the legal nature of legalization and involvement inevitably leads to consequences caused by the aforementioned legal nature.

In particular:

- the logical conclusion would be that this crime is independent and cannot be associated with complicity; therefore, that it requires separate legal provisions defining the relevant *corpus delicti* within the Special part of the Criminal Code;

- analysis of legalization object from the perspective of involvement in a crime leads to the conclusion that the interests of justice[3] or the public safety[4] should be regarded as the one;

- analysis of characteristic features of legalization perpetrator from the perspective of the involvement theory shall lead to conclusion that it is impossible to bring to criminal liability a person who has committed a crime legalization of the property and money acquired by him or herself as a result of crime[5];

---

[1] Smirnov V.G. The notion of the involvement in the Soviet criminal law (Смирнов В.Г. Понятие прикосновенности по советскому уголовному праву. – Л.: Изд-во ЛГУ, 1957. – С. 44.)

[2] Comments to the Criminal Code of the Russian Federation / edited by Yu. I. Skuratov and V.M. Lebedev (Комментарий к Уголовному кодексу Российской Федерации / под ред. Ю.И. Скуратова и В.М. Лебедева. – М.: ИНФРА-М - НОРМА, 1997. – С. 397.)

[3] Klepitskiy I.A. The system of economic crimes (Клепицкий И.А. Система хозяйственных преступлений. – М.: Статут, 2005. – С. 517.)

[4] Razgildiev B.T. Criminal law issues of involvement in a crime (Разгильдиев Б.Т. Уголовно-правовые проблемы прикосновенности к преступлению. – Саратов: изд-во Саратов. ун-та, 1981. – С. 25.)

[5] Serezhkina K.N. Involvement in a crime in the Russian criminal law: provisions and their implementation optimisation: dissertation abstract ... (Сережкина К.Н. Прикосновенность к преступлению в уголовном праве России: оптимизация норм и практики их применения: автореф. … дис. канд. юрид. наук. – Самара, 2009. – С. 7 – 8.).

- taking into account the independent nature of the criminal legalization, issues related to crime degrees, multiplicity of crimes and complicity shall be considered on the general grounds.

In case we regard legalization of criminal incomes as the involvement in a crime we have to specify its place within other actions regarded as the involvement. Acquiescence and concealment that was not promised beforehand and failure to report a crime are regarded today as the involvement in a crime.

We believe it to be evident that legalization is a specific type of concealment not promised beforehand, because, as it is well known, its nature consists in hiding the criminal source of property or money. However, such approach gives rise to the question regarding relation between legalization criminalised by Article 174 of the Criminal Code of the Russian Federation and concealment criminalized by Article 316 of Criminal Code of the Russian Federation (as well as whether the note to Article 316 of the Criminal Code of the Russian Federation that exempts close relatives and spouses from the liability applies to the legalizer).

Some specialists believe that legalization of monetary funds or other property acquired as the result of particularly serious crime should be qualified as a multiplicity under Articles 174 and 316 of the Criminal Code of the Russian Federation[6]. We assume that it is possible only in case the legalization and concealment are treated as different notions and events, which we believe to be wrong. In case the concealment takes place in the form of legalization, these acts partially overlap, which raises the risk of violation of *non bis in idem* principle. We believe that is more justifiable to regard legalisation as a special case of concealment and the correlation between Articles 174 and 316 of the Criminal Code of the Russian Federation shall be regarded as *lex generalis* and *lex specialis*, which means that the special norm (i.e. Article 174 of the Criminal Code of the Russian Federation[7]) prevails (this in particular concerns the application of the note to Article 316 of the Criminal Code of the Russian Federation: it can not be applied to legalizers due to the fact that it is not provided for by the special norm).

Other line of reasoning and conclusions follows from the analysis of a case when the legalizer expresses his consent to perform the relevant actions with monetary funds or property before the crime that leads to acquisition of such objects is committed. Legalization promised beforehand has a considerable inflicting feature, which makes it possible to consider it from the standpoint of complicity. As it was indicated by A.N. Traynin: “In case the actions close to complicity, i.e. concealment and failure to report, were promised to a criminal beforehand and therefore became part of the general plot which led to the criminal result, they lose their distinctive feature and stop being themselves and shall be regarded as the form of complicity, namely the aiding and abetting”[8]. The criminal legislation in force also provides for that a person who promised beforehand to purchase or conceal objects acquired through a crime shall be

---

[6] Mikhaylov V.I. Combating legalisation of income derived from criminal activity: legal regulation, criminal liability, special investigation activities and international cooperation (Михайлов В.И. Противодействие легализации доходов от преступной деятельности: правовое регулирование, уголовная ответственность, оперативно-розыскные мероприятия и международное сотрудничество. – СПб.: Юридический Центр Пресс, 2002. – С. 81.).

[7] Gorelik A.S., Lobanova L.V. Crimes against justice (Горелик А.С., Лобанова Л.В. Преступления против правосудия. – СПБ.: Юридический Центр Пресс, 2005. – С. 214.).

[8] Traynin A.N. Doctrine of complicity (Трайнин А.Н. Учение о соучастии. – М.: Юрид. изд-во НКЮ СССР. – С. 130.).

regarded as an accomplice (Article 33 § 5 of the Criminal Code of the Russian Federation).

In case the beforehand promised legalization is regarded as aiding in crime which should result in acquisition of legalization objects, the following line of argumentation is presupposed:

- social relations which stand as the aim of the "predicate" crime shall be regarded as the legalization object;

- legalization does not require separate criminalisation and can be qualified within the legal framework of complicity, in case it is causally connected to harm inflicted to above-mentioned object as the part of joint activities of the accomplices connected by the united intent;

- legalization being the type of aiding and abetting *ceteris paribus* has a relatively low degree of social danger.

In case the legalization of monetary funds or other property acquired by criminal means is regarded as aiding and abetting, a serious issue arises regarding qualification of the perpetrator's action both as aiding (in predicate crime) and as legalization of criminal incomes. Discussing this issue, P.S. Yani indicates the following: "Due to the fact that there are two objects trespassed, and I believe that the property relations should not be regarded as the additional object protected by the provision stipulating liability for legalization, it should be regarded as multiplicity"[9]. However, in the absence of clarifications of the Plenum of the Supreme Court of the Russian Federation, the criminal law theory provides an alternative solution of the problem. It can be substantiated by the position of the supreme judicial instance stated in the Plenary Resolution No. 11 of the Supreme Court of USSR "On the case-law in the cases concerning intentional concealment and purchase of stolen property, that was not promised beforehand" of 31 July 1962[10] which stated that such multiplicity is not possible due to the fact that the actions regarded as the concealment may either be a complicity or a separate crime.

The stated theoretical approaches to the understanding of legalization disclose, as it was shown, only one construction initially included into the Criminal Code, i.e. legalization of property or monetary funds acquired through criminal means by a third party.

In 2001 the amendments were introduced into the Criminal Code (by the Federal Law of 7 August 2001 No. 121-FZ); according to them, legalization of monetary funds and other property acquired by a person himself as the result of a crime was criminalized as an independent crime.

The results of the doctrinal analysis shown above shall be sufficiently corrected in order to be applied to such *corpus delicti*.

First of all, we shall note that from the standpoint of the today theory, legalization of one's own criminal incomes cannot be considered from the positions of the involvement in a crime or of aiding and abetting. Such legalization is the continuation of the initial criminal activities of a person, and therefore from the theoretical perspective it shall be regarded in the context of crime degree and multiplicity theory.

---

[9] Yani P.S. Illegal entrepreneurship and legalisation of property obtained by criminal means//Legislation. - 2005. - No. 3. - Pages 12–13.

[10] Case-Law to the Criminal Code of the Russian Federation/ Prepared by S.V. Borodin, N.I. Ivanova, under the general editing by the V.M. Lebedev (Судебная практика к Уголовному кодексу Российской Федерации / Сост. С.В. Бородин, Н.И. Иванова; под общ. ред. В.М, Лебедева. – 2 изд., перераб. и доп. – М.: Спарк, 2005. – С. 951.).

In this case the situations shall be assessed separately depending on the moment when a person formed the intent to legalize criminal monetary funds and property.

In case a person initially planned to perform financial operations and other transactions with the "dirty" property, i.e. he/she was pursuing the broad investment aims, than the acquisition of the relevant property shall be regarded as one of the degrees of crime commission, i.e. preparation to the main crime.

In such a case the issues of multiplicity are dealt with based on the degree of social danger of the criminal preparation and the crime itself: the less dangerous crimes-degrees shall be covered by the legalization liability norm, the counts of the similar or exceeding degree of danger shall be qualified as multiple counts.

Other criminal law qualification is used in a situation, when the intention to legalize the criminal property or monetary funds appears after the predicative crime is committed. In this case the financial transactions and other actions shall be regarded as one of the means to dispose of property received by criminal means. When assessing this fact, the criminal law theory and case-law traditionally consider that it is not punishable even if, taken separately, it forms the elements of a crime, because utilisation of consumer properties, as well as any other use of property acquired by criminal means, is already taken into account when forming the sanctions of a crime resulting in such property acquisition. Such an approach is based on the concept of the legal nature of purchase of the stolen property. A.I. Boytsov notes in this regard: "Actual utilization and disposal of stolen property falls outside the elements of the crime of theft and shall not be qualified additionally". And further on: "Perpetrator of theft as the initial crime should not be accused under Article 174 of the Criminal Code even if he/she performs financial transactions and other deals with monetary funds or other stolen property or utilises these funds in his entrepreneur or other economic activities"; the criminal liability for such actions with the property acquired as the result of a crime (Article 174[1] of the Criminal Code of the Russian Federation) may lie contrary to the *non bis in idem* principle[11].

Therefore, the analysis of norms on liability for legalization of criminal incomes from the standpoint of its compliance with the well-established legal constructs shows that they do not comply with many of them, and insofar as they do not conflict with such constructs, they have an extremely limited application prospect.

This conclusion raises one of the crucial issues to the agenda which we believe is not examined by the Russian scholarship to the full extent. The point is whether the common theoretical constructs can be treated as the solid ground for the legal science and whether they could act as the "filters" blocking the provisions which contradict with them from entering the legal framework. Without going further into discussion of this important issue, we shall note that all concepts which seem to be ageless and undeniable usually end up being the relative concepts which are true only within the specific social, criminological, political and legal conditions.

In this regard, the collision of norms on liability for criminal incomes legalisation and the described concepts of concealment, involvement, complicity, degrees and multiplicity of crimes shall be regarded not from the standpoint of their correspondence or non-correspondence to each other, but from the perspective showing how the parties involved in such collision contribute to or obstruct reaching the aims of the criminal policy and ensuring the criminological safety.

---

[11] Boytsov A.N. Crimes against property (Бойцов А.И. Преступления против собственности. – СПб.: Юридический Центр Пресс, 2002. – С. 272 – 273.).

As far as the analysis carried out allows to judge, both the provisions regarding liability for legalization of criminal incomes and the theoretical and legal constructions opposing them at least do not help proper reaching those goals. One of the theoretical reasons for such situation is that the Russian specialists constantly trying to put legalization into the Procrustean bed of involvement and concealment. We believe that futility of such efforts shall be evident today. Establishment of liability for inclusion of property acquired by criminal means into the civil trade turnover requires the national legal systems to reconsider some of the basic approaches to the grounds of criminal liability and to the substantiation of the legal nature of legalization, theoretical legitimation of liability for it. The way to substantiate the compatibility of liability for legalization with the theoretical canons of the criminal law lies in acknowledgement of independent danger of the criminal incomes entering the lawful trade turnover and the recognition of independent legal nature of this crime.

As of today, there is only one concept in the legal science that tries to solve this issue, i.e. the concept of secondary crime.

One of the few definitions for it was proposed by M.M. Lapunin. The author states that the secondary crime is an independent intentional action, provided for by the special part of the Criminal Code, which is not the type of complicity, the social danger and criminal punishability of which depends on the main (predicate) crime committed or being committed beforehand by the same or by third party (depending on the specific crime) in connection to which the secondary crime is committed. The main features characterising the secondary crime according to M.M. Lapunin are as follows: 1) the criminal liability for the secondary crime is provided for by the special part of the Criminal Code; 2) the perpetrator of the secondary crime, depending on the type thereof, shall be the person who committed the primary crime or any other person; 3) the secondary crime always follows the certain primary one; 4) the secondary crime gains social danger and is deemed to be the crime only due to its connection with the previous offence; 5) the *mens rea* of the secondary crime consists in the intentional guilt; 6) the secondary crimes may be committed both as actions and omission[12].

While agreeing with the majority of features named by the author, we should focus on one of them which we believe to be the main one. M.M. Lapunin writes that the secondary action gains social danger and is deemed to be the crime in connection with the previous offence. This basic idea brings the author to conclusions which are quite controversial. On the one hand, he emphasizes the independent nature of the secondary crime (which, *inter alia*, include legalization of criminal monetary funds and other property), and on the other hand, he shows that the essence of the secondary crime is the involvement with the previous crime, finding the main definitions and qualification rules of the secondary crimes in the involvement doctrine.

However, in the light of issues considered, such approach is difficult to agree with. Independence of the illegal incomes legalization is demonstrated by the fact that the standard constructions of involvement and complicity cannot be used to define its legal nature. This fact is acknowledged by M.M. Lapunin himself, when he writes that:

- the object of the secondary crime is not predetermined by the primary crime;

---

[12] Lapunin M.M. Secondary criminal activity and its criminalisation: dissertation abstract (Лапунин М.М. Вторичная преступная деятельность и ее криминализация: автореф. … дис. канд. юрид. наук. – Саратов, 2006. – С. 6 – 8.).

- criminal liability and punishment for the secondary crime are possible notwithstanding whether the predicative crime has been established by a separate judgment or the relevant conclusion is made by court upon the delivery of judgment for the secondary crime;

- liability for the secondary crime is possible even if a perpetrator of the primary crime does not bear responsibility (due to his/her criminal incapacity, being under age, expiration of the statutory limitation, death) or absconds – the mere opportunity to establish the fact of the predicative offence is sufficient.

However, the nature of the secondary crime is such that it follows the crimes, not any other actions or offences. Legalization in its turn may be criminalized, in any case of laundering the illegal (not necessarily criminal) incomes. Following the logics of the secondary crime concept supporters, the legalisation either does not fall into such concept and requires different explanation or can not be regarded as a crime at all.

Apart from that, M.M. Lapunin's notice that the danger of the secondary crime derives from the danger of the primary one brings forth the significant threat of the varied assessment of the social danger of criminal incomes legalization, depending on their source. To accept it shall actually mean to deny the status of legalization as the independent offence and to regard it only as the manifestation of the involvement.

Therefore, it can be acknowledged that the concept of the secondary crime, notwithstanding its distinctiveness and significance, unlikely could provide the explanation of the nature of the criminal incomes legalization.

The domestic criminal law theory does not have the well-grounded list of assertions allowing to substantiate the nature of legalization of criminally acquired property or monetary funds. This results in numerous discussions regarding the elements of this crime and their essence, the place thereof within the Special part of the Criminal Code, just punishment for it etc.

We believe that such situation is caused by the efforts of legal professionals, wishing or not, to "tie" the norms regarding legalization of criminal incomes to the norms regulating liability for actions being the source of such incomes. This path is futile at the very least. We believe that legalization of criminal incomes should get the status of a crime independent from other crimes from the theoretical standpoint. This decision shall be based on recognition of legalization as the independent public safety and order destabilizing factor, which is possible only following the adequate understanding of the whole range of the negative social consequences of this offence, and therefore its social danger.

Taking into account the economics features of the crime at the examination, it should be admitted that the following acts precede legalization of illegal incomes: 1) illegal incomes acquisition; 2) temporary withdrawal of the criminal monetary stock from the financial trade turnover to make searching for it more difficult; 3) accumulation or distribution of monetary funds.

In any case, the material assets are temporary or permanently withdrawn from the economic turnover of the country. Such withdrawal is not planned by the state which is the sole issuer of the national currency determining and correcting the volume of money stock issued and traded within the state and necessary for maintenance of the effective economy and fulfilment of social programmes. Such unplanned decrease of money stock brings forth the whole chain of economic, social and political consequences: lack of money to pay salaries and to effect other social payments leads to decrease of consumer demand which affects the legal manufacturers of goods and providers of services. At the

same time, it justifies the issue of additional money, which in its turn, having no goods to support it, leads to inflation increase, depreciation and fast spending of money savings etc. At a certain moment these consequences overlap.

If we assume that such legalizers introduce "dirty" money into the national trade turnover through their actions, such money infusion may align with the additional money issue and, therefore, aggravate the negative effects. In case the legaliser transfers "dirty" money abroad, the payment balance of the state deteriorates, the exchange rate of the national currency decreases, the investments climate worsens etc.

In any case, legalization presents serious social danger not only as the final stage of the previous crime, but it also has its own negative impact upon the state's economy as a whole.

The nature of the crime in question is determined by the fact that is aimed against the interests of the civilised market-driven economy which prohibits the acquisition and use within the scope of economic activities of income received through violence, fraud, abuse of office and other criminal means. The additional criterion determining the significant harmfulness of such actions is the reproduction of criminal activity, including transnational one, as consequence of the assets acquiring.

The main negative effects of the criminal incomes laundering are as follows: annually, billions of dollars are withdrawn by criminal means from the lawful economy activities, which constitute real threat for the financial well-being of states and affects the stability of the world market; money laundering dilutes international efforts aimed at creation of free and competitive markets and impedes the development of the national economy, disturbs the normal course of market operations, increases the demand for cash, destabilises interests rates and currency exchange rates, creates unfair competition and rises inflation within the states where the criminals carry out their activities; the criminal organisations may gain the significant economical powers allowing them to manipulate the economies of smaller countries by utilising the illegal incomes[13].

The socially dangerous consequences of money laundering therefore go beyond the boundaries of social danger of crimes resulting in money receipt, which makes it possible to regard legalization as an independent crime harming the basic values of the established order of economic relations.

Bibliography:

1. Boytsov A.N., *Crimes against property*. – SPb., 2002.

2. Case-Law to the Criminal Code of the Russian Federation/ Prepared by S.V. Borodin, N.I. Ivanova, under the general editing by the V.M. Lebedev. – M., 2005.

3. *Comments to the Criminal Code of the Russian Federation*, edited by Yu. I. Skuratov and V.M. Lebedev. – M., 1997.

4. FATF recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. – M., 2012.

5. Gorelik A.S., Lobanova L.V., *Crimes against justice*. – SPb., 2005.

6. Klepitskiy I.A., *The system of economic crimes*. – M., 2005.

[13] See: FATF recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (Рекомендации ФАТФ. Международные стандарты по противодействию отмыванию денег, финансированию терроризма и финансированию распространения оружия массового уничтожения / Пер. с англ. – М..: Вече, 2012.).

7. Lapunin M.M., *Secondary criminal activity and its criminalisation: dissertation abstract.* – Saratov, 2006.

8. Mikhaylov V.I., *Combating legalisation of income derived from criminal activity: legal regulation, criminal liability, special investigation activities and international cooperation*.– SPb., 2002.

9. Razgildiev B.T., *Criminal law issues of involvement in a crime*. – Saratov, 1981.

10. Serezhkina K.N., *Involvement in a crime in the Russian criminal law: provisions and their implementation optimisation: dissertation abstract*. – Samara, 2009.

11. Smirnov V.G., *The notion of the involvement in the Soviet criminal law*. – L., 1957.

12. Traynin A.N., *Doctrine of complicity.* – M., 1957.

13. Yani P.S., *Illegal entrepreneurship and legalisation of property obtained by criminal means* // Legislation. – 2005. – No. 3.

The Strategic Choice of Criminal Legislation of Anti-bribery in the Transition Countries – Comparison of Criminal Legislations of Bribery between China and Hungary and Reference for China[1] –

PROF. DR. WEI CHANGDONG
Law institute of Shanghai
Academic of Social Science (SASS) in the People's Republic of China

Abstract:

Both China and Hungary are in the course of economic transition and have the characteristics of commonality and comparability in corruption. Under the framework of the fundamental policy of cracking down the crime of corruption, the criminal legislations of anti-bribery display many differences between China and Hungary, which reflects the different ideas of anti-bribery in criminal law. Unlike the aggressive strategy with expanding the criminal legislation to the front preventive area of anti-corruption adopted by Hungary, the criminal legislation of anti-corruption in China is still guided by the traditional defensive strategy with limited the criminal law in the back end area of anti-corruption, which leads to the environmental and systematic corruption caused by inadequate capacity of criminal legislation. For all this, the positive idea of anti-corruption should be introduced to China and the aggressive strategy of criminal legislation should be established according to the experience of Hungary, which would be a direction for further improving the criminal legislation system of anti-bribery in China.

Key words: *anti-corruption; criminal legislation; comparison of Sino-Hungary; reference.*

China and Hungary both adopt the stress-restraint model in initiating modernization,[2] under which the state plays a dominant role in the process of modernization transition and public officials have the power to decide whether to conduct market-oriented transformation of public resources and the extent thereof as the agent of the state, increasing the risk of abuse of power and giving rise to the rampant corruption in modernization transition of China and Hungary. Facing the corruption "mushroom" in the transition period, Hungary has timely adjusted the

[1] *[Fund Project]* This paper is one of the research achievements on the topic of "Study on the Duty-related Crimes" (Project No. 14SFB20020) which is financial supported by Justice Ministry of the People's Republic of China, and the research achievement on the topic of "Research on China criminal legislation of anti-corruption guided by the Governance Activism" (Project no. 15BFX055) which is financial supported by the national social science fund in China.

[2] According to western scholars, "endogenous modernization" means, in pre-modern traditional societies, modern nature is highly compatible with tradition nature, modernization of these societies is mainly realized by constantly generating factors conducive to modernization from the society itself. "Stress-based modernization" means, modernization is gradually realized by responding to the external stimulus generated after the initiation of modernization in such countries as Britain, the U.S., etc, or rather external stress. [US] edited by Cyril ·E· Black, translated by YANG Yu & CHEN Zuzhou: Comparative Studies on Modernization, Shanghai: Shanghai Translation Publishing House, 1996, Preface, Page 19-20.

philosophy of criminally cracking down on corruption, emphasized the preventive function of criminal laws and regulations and expanded criminal legislation into the "front line" of crime, generating positive effects in control of crimes. In contrast, despite intensified efforts to combat corruption and frequently updated criminal legislation for the crime of corruption, China's criminal system of anti-corruption remains at the stage of traditional ex post governance, and lacks of effective strategies and means responding to environment-based and systematic corruption, putting the criminal law for public officials in a legislative dilemma of "disorientation". *Criminal Law Amendment* (IX) (hereinafter referred to as CLA (IX)) adopted at the 16th session of the 12th National People's Congress Standing Committee on Aug. 9, 2015 represents the most extensive amendment to the legislation of the crime of corruption since China's enactment of criminal code in 1997, which further intensifies the efforts to crack down on bribery and being known as "further tightening the system cage of anti-corruption". [3] However, the newly amended legislation still inherits the traditional idea of ex post control of corruption and focuses on and supplementation of omissions and modification of defects, being far from leap-frog innovation. In the context of new era of anti-corruption, China should learn from Hungary, change the ideas of fighting against the crime of corruption and establish more effective criminal strategies against corruption and institutional measures.

I. Corruption in Modernization of China and Hungary

China and Hungary initiated national modernization transition in 1980s respectively. Different from the pure democratic transformation of South European counties, Hungary's modern state transformation consists of political[4] and economic transformation, involves radical reform of property right system and institutional change of the way of allocation of resources.[5] Hence, Hungary and China are similar and comparable in many aspects in terms of corruption in the period of economic transformation.

(I) Corruption in Modernization of Hungary

In 1989 after "Fall of Communism in Eastern Europe", Hungary officially launched state transformation aimed at "democratization", "market orientation" and "Europeanization" and established the transition model of giving priority to democracy, i.e. abandoning the socialist path first, and embark on market-oriented development path aimed at westernization. The most significant feature was economic transformation orientated at democratization and westernization.[6] Hungary adopted Keynesianism and progressive reform strategy to promote the development of the

[3] YU Hao: *Seven Major Changes in the Draft of Criminal Law Amendment* (IX), China NPC Journal, 2014, no. 21.

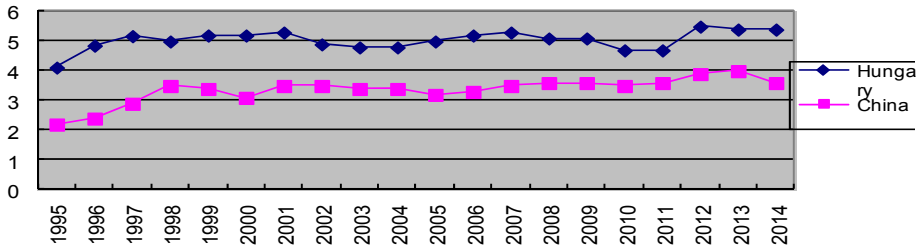
[4] Gál István László: *A gazdasági vesztegetés mint a büntetőjog része és a politikai korrupció egyik kísérőjelensége* In: Csefkó Ferenc , Horváth Csaba (szerk.) *Politika és korrupció:* A törvényesség és törvénytelenség határai. 312 p. Pécs: PTE ÁJK, Pécs-Baranyai Értelmiségi Egyesület, 2010. pp. 306-312. Gál István László: *A korrupciós bűncselekmények* In: Polt Péter (szerk.) Új Btk. kommentár: 5. kötet: Különös rész . Budapest: Nemzeti Közszolgálati és Tankönyv Kiadó Zrt., 2013. pp. 183-210. (English translation)

[5] GAO, Ge: *Relationship between Economic Transition and Political Transition of Eastern European Countries,* Research on Eastern Europe and Central Asia, 2001, no. 4.

[6] YIN Hong: *Analysis of Democratic Leading Transformation: Reflections 20 Years after Drastic Change of Soviet Union and Eastern Europe*, Liaoning University Journal, 2010, no. 3.

market economy through gradual privatization. Over 10 years afterwards, private market economy was established. Private economy only accounted for 18% in GDP in 1989, but increased to 85% in 2000. [7]In the process of privatization, the dominant player of "shadow economy"(underground economy beyond the control and regulation of the State) gained the upper hand relying on its advantage in information, change the direction of the course of privatization by means of bribery, sought personal benefits,[8] resulting in high frequency of corruption occurrence. According to the statistics of United Nations, the number of corruption crime cases nationwide in Hungary was 897 in 1988, 335 in 1990, which was the lowest in history. However, the total number of cases had been on the rise with high volatility. The total number of cases every year from 1991 to 1997 was 344, 782, 464, 796, 509, 967 and 865 respectively.[9] In the regular assessment report on the applicant countries issued by European Commission in 1999, it was pointed that the number of corruption cases in Hungary in 1999 increased by 4% over the previous year, and corruption became one of the two major issues resulting in incompliance of Hungary with EU political criteria.[10] According to the statistics of Corruption Perceptions Index (CPI) of Transparency International (See Figure 1), CPI score in 1995 was the lowest, indicating the public considered the corruption situation was serious then. Facing the rampant corruption, Hungarian government focused on corruption control as the top domestic policy priority, constantly increased input into anti-corruption and made progress to some extent. From 1998 to 2001, CPI score of Hungary was stable and slightly rose, indicating corruption was curbed to some extent. Thereafter, the subject feeling of the public about corruption fluctuated: CPI score declined during 2002-2004 and 2008-2011, indicating the public perceived corruption deteriorated, CPI rose during 2005-2007 and 2011-2014, indicating the public perceived corruption mitigated.

Figure 1



(Source: Transparency International, http://www.transparency.org/)[11]

[7] The delegation of Institute of Economics of Chinese Academy of Social Science to Hungary: Economy and Policy of Hungary under the Crisis, Economic Perspectives, 2011, no. 10.

[8] KONG Tianping: *Ups and Downs of Hungary,* Research Dynamics of Politics and Economics of Transition Countries, 2012, no. 12.

[9] UN, *Joint Project against Corruption in the Republic of Hungary*, 2000, p. 16.

[10] European Commission, *1999 Regular Report from the Commission on Hungary's Progress towards Accession*, p. 76.

[11] As of 2012, Transparency International CPI changes from ten-point system to hundred-mark system. To maintain the integrity of statistics, this paper will convert the scores of 2012-2014 under hundred-mark system into ten-point system by "score/10".

II. Corruption in Modernization Transition of China

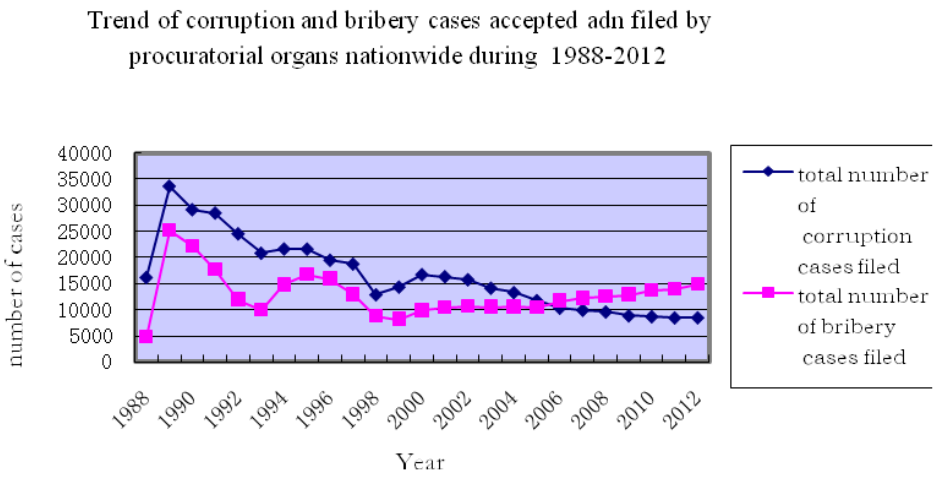
To avoid turbulence of social order, China adopted the progressive approach in economic transition. The State still reserved extensive power of allocating public resources while promoting market economy reform. To obtain the right to use or allocate particular scarce resources, the stakeholders would inevitably desire to corrupt public powers with economic benefits. Institutional power restraint mechanism in modernization was underdeveloped, further increasing the probability of occurrence of corruption. In realization of the overall reform goal, the lack of institutional development led to lag in the State's restriction and control of powers and deviation evaluation capacity development, resulting in rampancy of institutional corruption in China. As HU Angang said, "current corruption was mainly institutional corruption. Corruption mainly stemmed from institutional defect, i.e. institutional defect in the transition period of market economy."[12]

Over the past three decades of reform the opening-up, the characteristics of evolution of corruption in China were manifested as follows: (1) transaction-based corruption replaced possession-based corruption and became the main type of corruption. Seen from Figure 2, the total number of corruption cases filed at the national procuratorial organ has steadily decreased since 1990, but the total number of bribery cases has steadily increased since 1999, and exceeds the number of corruption cases after 2006, becoming the main type of corruption cases. In light of scope of corruption, corrupting gradually expanded from economic field to political field and judicial field, consolidating the root of corruption and stabilizing the order of distribution of illegal gains. Economic subjects sought the status of political subject and became CPPCC member and other quasi-national public officials. Political subjects arranged their interested parties to enter the economic subject and directly participate in economic activities, accelerating the combination of corruption of economic subjects and the corruption of political subjects, giving rise to cross corruption. To realize the safe transfer and possession of corruption interests, "judicial corruption" also became a new link in the corruption interests chain. (2) Group and family-based corruption cases increased obviously. In the industries where market resources were monopolized, individual corruption was dominant in early 1980s, then gradually evolved into group corruption. Corruption organization became communized, manifested as unit corruption crime in the extreme form, especially in traffic, energy, customs and other system featured by power management. Besides, under the framework of administration-based personnel appointment system, unit corruption gradually extended to corruption in the industry system. The units in monopolized industry were correlated in corruption and formed a community of interests. In the case of such group corruption, exposure of one person tended to implicate a group of persons. For instance, in "oil system" interrelated cases, 46 persons in PetroChina system were ousted due to corruption from Mar. 2012 to Dec. 2014, most of which had cooperation relationship or subordination relationship in work. In addition, based on the traditional clanship in China, individual corruption evolved into family- and even clan-based corruption. The whole family of a public official will benefit

[12] HU Angang, KANG Xiaoguang: *Eradicating Corruption by Institutional Innovation, Reform and Theory*, 1994, no. 3.

from his/her public office, and will be implicated in case of downfall of the public official, forming a complete interests chain of corruption. (3)The rank of corrupt officials constantly increased. In Chinese judicial system, the corruption cases involving public officials above the county and section level were referred to as "important case". Seen from Figure 3, the number of persons involved in bribery crime had been on the rise since 1998. Since the 18th national congress of the communist party of China on Nov. 18, 2012, 68 senior officials above provincial and ministerial level were involved in the crime of corruption in two years, 34 senior officials were investigated every year on average, the number of ousted senior officials was more than 10 times of that before the 18th national congress,[13] "Cave-in Corruption", and even state-level "oligarchic corruption" occurred in medium- and high-ranking officials(ZHOU Yongkang case and BO Xilai case). (4)The amount of corruption rose acutely. In Chinese judicial system, the cases of corruption with the amount above RMB50,000Yuan were referred to as "major case". However, in fact, it is normal that the amount of illegal gains of corruption crime reached tens of millions, and even hundreds of millions. It is also true for low-ranking public officials. For example, the former general manger MAO Chaoqun of Beidaihe Water Supply Corporation was just a deputy director level cadre in charge of tap water operation, construction project water consumption, water supply facilities construction etc., but received bribes of cash amounting to RMB120,000,000Yuan, 37kg gold and 68 sets of house property. "Major corruption of minor officials" emerged as the new issue of Chinese-style corruption. [14]

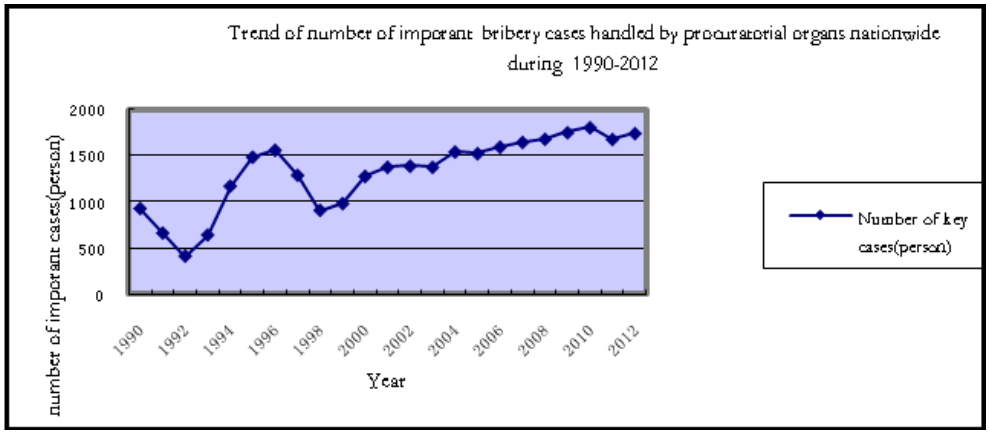
Figure 2:



[13] WU Gaoqing and QIAN Wenjie: *Mass Data of Fight against Major Corrupt Officials: What messages does it convey*, Procuratorate Daily, Jan. 13, 2015.

[14] Zhan Yong: *Solving to Power Crux of Major Corruption of Minor Officials*, People's Daily, Nov. 8, 2014.

Figure 3:



III. Comparison of Corruption of China and Hungary in Modernization

Both China and Hungary implemented highly centralized planning economy system. During 1950-1990, due to highly uniform political, economic and social life, corruption case seldom occurred in Hungary seldom.[15] However, before reform and opening-up of China, few corruption cases occurred in China due to lack of the environment breeding corruption. In the context of "stress-based" modernization, the two countries were common in the following aspects: both adopted the approach of progressive economic transformation, high occurrence of corruption was resulted by underdeveloped system of transition, the main type of corruption was transaction-based corruption, the corruption was concentrated in the cross fields of private sectors and public sectors, such as public procurement and so on.

However, Hungary realized market economy by privatization[16], but China developed market economy by gradually opening-up market resources, resulted in the difference of two countries in structural relationship of corruption: the corruption in China was featured by dominance of politics over economy, i.e. corruption stemmed from active intervention of the State in economy; the corruption in Hungary was featured by dominance of economy over politics due to more radical market-oriented transformation and fierce market competition, i.e. corruption stemmed from pressure imposed by economic subjects on political subjects. In Hungary, 99% of the companies were small and medium-sized enterprises, many companies were sole proprietary enterprise (67%). Most companies relied on the contracts of one client (government or company), which made them dependent and unsafe. Hence, many small and medium-sized enterprises were prone to feel the pressure of income sources, leading to survival-based corruption.[17]

---

[15] Greco, *First Evaluation Round Evaluation Report on Hungary* (Strasbourg, 2003), p. 3.

[16] Gal Istvan Laszlo: Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption (In: Wang Huijin, Wei Changdong (szerk.): Society of Rule of Law, National Governance and Government Audit. Nanjing: Law Press China, 2015. pp. 329-342.)

[17] Transparency International, National Integrity System: Corruption Risks in the Business Sector-Hungary (2008), p. 12.

In addition, the modernization of Hungary was carried out in the historic context of returning to Europe and joining the EU, which enabled Hungary to accelerate anti-corruption system construction at the end of the last century. It established the corruption governance system in compliance with the standards of EU convention against corruption, timely addressed the problem of institutional loophole in the period of transition, as a result of which CPI of Hungary increased to a certain extent, higher than that of China (see Figure 1). In contrast, China's corruption governance mainly depended on political demand of domestic anti-corruption, leading to underdeveloped institution and low CPI. Of course, the two countries had significant differences in terms of political system, economic size, geographic location, area, population and cultural tradition. CPI of "Transparency International" and its ranking could only serve as reference but was not necessarily meaningful. In EU system, Hungary was still a corrupt country, [18] but the relatively high CPI score could reflect that the corruption system of Hungary fit in with international standards to a greater extent, and its corruption was less severe than China, despite fluctuation in corruption situation.

IV. Corruption Control in Modernization of China and Hungary: Comparison Focusing on Criminal Legislation

Advocated by United Nations Convention against Corruption and other international conventions, "prevention first" became the dominant philosophy of international corruption governance. Although criminal punishment ceased to be the main approach to corruption governance, it was still the most important ultimate guarantee mechanism. Criminal governance was an important part of national anti-corruption system construction, and scientific criminal anti-corruption system construction was significant for enhancing the overall effects of anti-corruption. In corruption crime, bribery crime was undoubtedly the most typical and severe crime.[19] Under the influence of "Soviet model", China and Hungary established the bribery governance system featured by severe criminal punishment. But Hungary learned from anti-corruption experience of Europe and rest of the world in national transition, gradually forming the criminal governance strategy of bribery crime and institutional construction with its own characteristics.

Development of Hungarian criminal legislation of bribery crime

1. Criminal legislation of bribery crime before national modernization transition

Hungarian criminal law belongs to the continental law system, with the first criminal code established in 1878. After the World War II, Hungary amended the general

[18] According to the investigation result released by"Transparency International-Hungary" on Dec. 9, 2013, i.e. "World Anti-corruption Day", Hungary remains one of most corrupt one-third countries in EU. LIU Siyue: Hungary Becomes One of the Most Corrupt Countries in EU, UJ SZEMLE, Dec. 17, 2013, http://www.xindb.com/news/xiongyalixinwen/2013/1217/10874.html, last access time: Aug. 25, 2015.

[19] Chapter 27 of Criminal Code of Hungary stipulates the crime of corruption as the crime of transaction-based bribery. The crime of corruption, the crime of misappropriating public funds and other embezzlement-based corruption are stipulated in Chapter 36 "crimes against property". To ensure consistency of the concept of corruption in the context, the crime of corruption mentioned hereinafter only refers to bribery crime in the narrowest sense.

provisions and specific provisions of criminal code in 1951 and 1961 respectively, established the socialist criminal code system with unified feature (the second criminal code), and formed 1978 criminal code (the second criminal code) thereafter. Take 1978 criminal code as an example, Hungarian criminal legislation formed the bribery crime system of dualization of public officials and non-public officials and displayed its own characteristics in standard establishment of crimes, which were similar to capitalist countries. For example, it established the crime of transaction by taking advantage of influence and the crime of judicial bribery, with "incorruptibility" as the legal interest position of bribery crime.

2. Criminal legislation of bribery crime in modernization transition

(1) Innovation period of criminal legislation of bribery crime (mid 1990 – early 2000). After transition of Hungary in 1989, it amended criminal legislation of bribery crime for several times due to changes in political situation and the requirements of joining the EU. Hungary singed two important European anti-corruption conventions in 1998 and 1999, i.e. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter OECD Convention) and Criminal Law Convention on Corruption of European Commission) (hereinafter European Convention against Corruption). According to the requirements of OECD Convention, Hungary adopted Act LXXXVII in 1998 and added the crime of offering bribes to foreign public officials, the crime of receiving bribes from foreign public officials and the crime of taking bribes by taking advantage of international influence. [20] According to the requirements of European Convention against Corruption, Hungary adopted Act CXXI in 2001, added the crime of misprision of bribery of public officials, added the criminal liability of legal entity manager for failure in prevention of bribery and "bilateral" special surrender system, intensified the fight against bribery crime, increased the punishment of bribery crime. For example, the statutory sentence of the crime of receiving bribes was increased from less than 3 years to less than 5 years of imprisonment, the statutory sentence of the crime of offering bribes was increased from less than 2 years to less than 3 years, the nature of crime was changed from minor offense to felony. [21] Hungary formed the basic framework of criminal law legislation for corruption governance during the transition era, which was marked by Act CXXI.

(2) Supplementation and improvement period of criminal legislation of bribery crime (2004-2012). After accession to EU, United Nations Convention against Transnational Organized Crimes came into force in Hungary in 2005 and 2006 respectively, posing further demand on improvement of criminal system of controlling corruption. According to the requirements of international convention against corruption and domestic anti-corruption practice, new criminal code of Hungary amended the criminal legislation of bribery crime again in a systematic way in 2012. However, different from the previous creative amendment, this amendment was supplementary amendment and highlighted the reasonableness of crime and punishment standards. For example, the legislation prescribed the crime of corruption collectively in Chapter 27 "crime of corruption", combined the crime of endangering the honesty of public office and the crime of endangering the honesty of international offices, and integrated crime and constitution of a crime, expanded the scope of subjects of offering bribes, further intensified the fight against the crime of offering crimes, amended and improved the

[20] 1998. évi LXXXVII. Törvény.

[21] 2001. évi CXXI. Törvény.

special surrender system, increased the statutory sentence of some crimes including the crime of misprision of bribery of public officials etc.

Development of Chinese criminal legislation of bribery crime

1. Criminal legislation of bribery crime before national modernization transition

(1) Creation of criminal legislation of bribery crime. After the founding of new China, the Regulations of the People's Republic of China on Punishment of Corruption (hereinafter Regulations), effective as of Apr. 21, 1952, prescribed the crime of corruption for the first time in the form of specific criminal law, and stipulated bribe-taking as a behavioral type of the crime of corruption. [22] Although the Regulations did not directly stipulate bribe-taking as a separate crime, it unprecedently recognized the behavior of bribery as a crime in new China, established the assessment model based on the amount of crime and considering the circumstances of crime and the punishment model with punishment against freedom and applying death sentence to the offender under particularly serious circumstances. On the whole, the Regulations established the basic paradigm and system structure of China's criminal legislation of bribery crime and marked the emergence of China's criminal legislation of bribery crime.

(2) Codification of bribery crime. The criminal code realized codification of bribery crime in 1979, the crime of acceptance of bribes was separated from the crime of corruption as an independent crime. The legislation incorporated "taking advantage of duty" into the constitution elements of crime for the first time, changed the model of identical punishment of the crime of corruption and the crime of acceptance of bribes, set different statutory sentence range for the two crimes. The highest statutory sentence of the crime of corruption was death penalty, the highest statutory sentence of the crime of acceptance of bribes was fixed-term imprisonment of more than 5 years, indicating decreased intensity of criminal punishment.

V. Criminal legislation of bribery crime in modernization transition

(1) Active period of criminal legislation of bribery crime (1982-1997. After the reform and opening-up, due to obvious spread and expansion of bribery crime and deteriorated crime situation, "to accommodating the social transformation and rapid development, China's criminal legislation of bribery crime entered the most active period of adjustment and change".[23] During 1980-1990, the main approach to amendment of criminal legislation of bribery crime was realize criminalization and aggravated penalty by separate criminal law. To cope with new types of corruption, criminal legislation constantly expanded the scope of regulations. Supplementary Provisions on Punishment of the Crime of Corruption and Bribery of the Standing Committee of NPC, effective as of Jan. 21, 1988 added the crime of entity offering bribers and the crime of entity taking bribes and created the "dual subject" bribery crime punishment system. Decision on Punishment of the Crime of Violation of Company Law

[22] Article 2 of Regulations stipulates: "the staff member of any state authorities, enterprises, schools and affiliated institutions thereof whoever embezzles, steals, swindles or extracts national properties, demand properties from others, taking bribes and otherwise seek illicit gains by jobbery, shall be convicted of the crime of corruption."

[23] SUN Guoxiang and WEI Changdong: A Study on International Convention against Corruption and Legislation of Crime of Corruption and Bribery, Beijing: Law Press, 2011, Page 95.

of the Standing Committee of NPC, effective as of Feb. 28, 1995 added the independent crime of taking bribes by personnel of companies and enterprises, extended punishment of bribery crime to non-public field and non-national public officials, further created the "dual status " bribery crime punishment system. Besides, Supplementary Provisions in 1988 stipulated the economic bribery of accepting kickbacks and handling fees, and prescribed the commercial bribery crime. Besides, another feature of legislation of bribery crime in this period was aggravated penalty. The Standing Committee of NPC adopted the Decision on Severe Punishment of the Crime of Undermining Economy on Mar. 8, 1982, increased the maximum statutory penalty for the crime of taking bribes to death penalty, resume the legislation model of meting out equivalent punishment to the crime of corruption and the crime of acceptance of bribes in Regulations 1952. The legislation amendments made in the aforesaid separate criminal law were affirmed by legislation in Criminal Code Amendment 1997. Moreover, Criminal Code 1997 continued to maintain the trend of criminalization, added the behavior type of "mediatory bribery" in the crime of acceptance of bribes,[24] added "economic bribery" in the crime of taking bribes by personnel of companies and enterprises, added the crime of offering bribes to entities and the crime of offering bribes to personnel of companies and enterprises, thus building a systematic criminal punishment system of bribery crime.

(2) International requirements of criminal legislation of bribery crime. In the 21st century, China signed United Nations Convention against Transnational Organized Crimes (effective as of Oct. 2003) and United Nations Convention against Corruption (effective as of Oct. 2005 in China) in Dec. 2000 and Dec. 2003 respectively. According to the requirements of these two international conventions, Chinese criminal legislation of bribery crime maintained the trend of criminalization, further expanded the scope of crime regulation, expanded the scope of subjects of bribery crime of non-public officials and stipulates the crime of corruption and bribery as upstream crime of money laundering through Criminal Law Amendment (VI) (2006), added the crime of accepting bribes by taking advantage of influence through Criminal Law Amendment (VII) (2009), added the crime of offering bribes to foreign public officials and international public organization officers through Criminal Law Amendment (VIII) (2011) and added the crime of offering bribes to particular interested persons through Criminal Law Amendment (IX) (2015).

(III) Comparison of Chinese and Hungarian criminal legislation of bribery crime

Seen from the development of legislation, China and Hungary both emphasized the severe punishment of bribery crime, amended criminal legislation frequently and constantly expanded the regulation scope of legislation. However, there were many differences between the two countries in legislation in terms of charge of a crime, constitution of a crime and criminal punishment, as described below:

Difference in governance structure

Chinese criminal legislation has stressed on fight against the crime of taking bribes, as a result of which the crime of offering bribes and the crime of taking bribes were "asymmetric" in terms of constitution of a crime, the criteria for filing a criminal case,

[24] Article 388, "any public official who takes advantage of favorable conditions of duty or position to seek undue interests for the entrusting person through official conduct of other public officials, and takes or receives property from the entrusting person shall be convicted of the crime of bribery".

special surrender and criminal punishment.[25] For example, the crime of taking bribes was required to have the constitutive element of "seek benefits for others", while the crime of offering bribes was required to have the constitutive element of "seek legitimate benefits". The amount of filing a crime of taking bribes was RMB 5000Yuan, and the amount of filing a crime of offering bribes was RMB10,000Yuan. The maximum statutory penalty for the crime of taking bribes was death penalty while the maximum statutory penalty for the crime of offering bribes was life imprisonment. The briber who voluntarily confesses his/her act before being prosecuted may be given a mitigated punishment or be exempted from punishment. But there were no corresponding stipulations for the crime of taking bribes. Hungary emphasized on the fight against the crime of offering bribes and formed the symmetrical control structure between the crime of offering bribes and the crime of taking bribes. For example, criminal code 2012 amended the crime of offering bribes significantly, placed the crime of offering bribes before the crime of taking bribes in legislation compiling system, which was more aligned with the occurrence mechanism of bribery crime; increased the basic statutory sentence of the crime of offering bribes increased from less than 2 years to less than 3 years, changes the nature of crime from minor offense to felony, which was the same with the crime of taking bribes; deleted the stipulation of mitigated punishment of the crime of offering bribes under the circumstance of extortion; added the crime of offering bribes by taking advantage of influence to correspond to the crime of accepting bribes by taking advantage of influence etc.

Difference in conviction criteria

To avoid that the regulation scope of criminal law was too large to give rise to tension in social order in transition period, China adhered to the criminal policy of "punishment in the minority of cases and education in the majority of cases, also referred to as the policy of focusing on major crimes while relaxing control over minor ones, set higher conviction criteria in legislation of bribery crime through such constructive elements as "the amount of crime", "taking advantage of duty" and "seeking benefits for others", and restricted the regulation scope of criminal law. In contrast, Hungary simplified the constructive elements in legislation of bribery crime, broaden the regulation scope of legislation. As long as the actor "requests or accepts illegal interests related to official duty or interests commitment",[26] it shall constitute the crime of accepting bribes.

Difference in behavior type

According to the behavior theory of the continental law system, to avoid excessive interference of criminal law with the rights of citizens, liberal dangerous acts were generally manifested as action, and as inaction in exceptional case. Bribery crime in Chinese criminal law could be only committed in the form of action. However, as hidden and indirect transactions of bribery crime became increasingly common, "corruption community" emerged based on official appointment system, diminishing the control of legislation over bribery crime. The given action model legislation imposed a very limited control over bribery crime. To enhance the capacity of criminal legislation for corruption control, Hungary created misprision of bribery in Paragraph B of Article 255

[25] QIAN, Xiaoping: Advocating Criminal Policies of Punishing Bribery Crime, China Criminal Science, 2009, No. 12.

[26] Article 249 of Hungary Criminal Code 2012.

of Act CXXI 2001, set reporting the bribery crime clues discovered as the statutory obligation of public officials, and stipulated the inaction crime of breach of statutory obligation. [27] Such provision incorporated the guarantor principle of inaction crime into development of the legislation system, set the particular public officials as guarantor of maintaining honest operation of powers, established the type of inaction crime of bribery crime, thus helping solving the problem of "corruption community".

Difference in subject type

Based on the utilitarian requirements of severe punishment of corruption, Chinese criminal legislation broke through the theoretical limits of traditional natural person crime, directly identified criminal liability of entities and built the crime system of entity-based bribery crime with reference to natural persons. Article 387 of criminal code of China stipulated the crime of entity taking bribes, Article 393 stipulated the crime of entity offering bribes, forming the dual model of natural persons and entities. However, Hungary denied legal person crime based on the traditional criminal theory of continental law system and still adopted the unitary subject model of bribery crime.[28]

Difference in liability type

In light of the traditional ideas of corruption control, Chinese criminal law maintained that the basis of inculpation of bribery crime was the social hazard arising from bribery, thus recognized bribery crime as typical behavioral liability in terms of liability type. However, bribery crime was the result of personal free choice as well as improper prevention of environment. If the organization could effectively supervise the generation, operation and distribution of public power, it could reduce the probability of occurrence of bribery crime. To this end, Hungarian criminal laws added supervision responsibility on the basis of behavioral liability, i.e. stipulated the personal supervision responsibility of manager of the organization. Act CXXI 2001 added Paragraph 3 and 4 following Article 253 and Subparagraph B of Article 258, criminalized the act of negligence of legal person manager in exercising prevention of bribery, *i.e.* the person in charge of the legal person or the internal subject of the legal person having the power of decision–making and control may take responsibility for the act of bribery of the legal person, except the case where it could demonstrate it had performed the obligation of control and supervision. [29] Such provision was incorporated into Criminal Code 2012 as a special type of bribery crime. [30]

---

[27] Criminal Law 2012 stipulates this crime in Article 297, i.e. "Any public official who is supposed to know the behavior of bribery undiscovered, but fails to immediately report to the authority shall be convicted of heavy offence and condemned to imprisonment of less than 3 year".

[28] According to the requirements of OECD Convention and European Convention Against Corruption, Hungary roughly stipulated criminal liability of legal persons in principle in Act CIV 2001("Criminal Law Measures Applicable to Legal Persons"). Pursuant to such Act, in the case that a natural person commits crime for the account of a legal person, the legal person may be imposed a fine, but there is no specific charge of the legal person crime. Hence, such liability is similar to administrative liability to a large extent, and it is questionable whether it can be referred to as criminal liability.

[29] OECD. *Review of Implementation of the Convention and 1997 Recommendation Phase 1 Bis Report* [EB/OL]. [2014-7-10]. http://www.oecd.org, last access time: Aug. 2, 2015.

[30] According to the provisions of Paragraph 4 and 5 of Article 293 Bribery Crime of Hungary New Criminal Code 2012,"where the person in charge of an economic organization, or any person employed by or acting on behalf of the operator and granted the power of operation, control or supervision, fails to duly perform the obligation of control and supervision, as a result of which the person employed by or

Difference in special surrender

Based on the theory of "prisoner's dilemma", special surrender system was an important vehicle for the State to break the "conspiracy of silence" between the bribe giver and bribe taker. Special surrender in Chinese criminal law was unilateral surrender, and lenient punishment was only applicable to the bribers in the event of special surrender. Criminal Code 2012 of Hungary adjusted the design approach of "prisoner's dilemma", established "bilateral" special surrender system. In the case of offering bribes, "any offender who confesses the crime to the authority in person, exposes the crime", "may be given unlimited commutation or be acquitted of charge through special consideration". Meanwhile, in the case of taking bribes, "any offender who confesses to the authority in person, turned in the illegal benefits gained in all forms and exposes the crime", "may be given unlimited commutation or be acquitted of charge under special circumstances".31 By granting leniency to the bribe receiver in the case of special surrender, it may form the competition situation of "whoever surrenders first will be given leniency first" among the subjects of bribery, increase the prosecution efficiency, and effectively contain the motive of offering bribes, thus enhance the preventive control effects of regulation.

Difference in sentencing status

The status in bribe crime in the meaning of Chinese criminal law was only conviction status rather than sentencing status, i.e. public office status was not the statutory factor affecting sentencing. However, the attributes of the power actually abused by public officials in bribery crime determined different degree of social hazard caused by their act. In general, the hazard of abuse of power by senior public officials was more severe than the harm caused by the bribery committed by junior public officials. Senior public officials shall also assume more responsibilities than junior public officials based on their power rank and degree of importance. It was necessary for the State to distinguish the sentencing status according to power-responsibility relationship so as to effectively control corruption. Hungarian criminal legislation actively explored this point. Criminal Code 1978 stipulated statutory aggravating circumstances of bribe-taking by senior public officials. Act CXXI 2001 increased the statutory basic sentence for bribe-taking by ordinary public officials to imprisonment of 1-5 years from imprisonment of less than 3 years, and increased the statutory sentence range for bribe-taking by senior public officials to imprisonment of 2-8 years from imprisonment of 1-5 years, increased the statutory sentence range for bribe-taking and breach of responsibilities by senior public officials to imprisonment of 5-10 years from imprisonment of 2-8 years. Criminal Code 2012 confirmed and inherited the aforesaid

---

acting on behalf of the operator commits the crime as set forth in Paragraph 1-3 for the account of or on behalf of the operator, such person shall assume criminal liability and be punished pursuant to Paragraph 1.""where the person in charge of an economic organization, or any person employed by or acting on behalf of the operator and granted the power of operation, control or supervision negligently commits the crime as set forth in Paragraph 4 , such person shall be convicted of a minor crime and imposed imprisonment of less than 2 years."

31 Hungary Criminal Code 2012 sets forth three groups of symmetrical provisions on bribery crime, including Article 290 (the crime of offering bribes to personnel of an economic organization) and Article 291 (the crime of taking bribes by personnel of an economic organization), Article293(the crime of offering bribes to civil servants) and Article 294 (the crime of taking bribes by civil servants) and Article 295 (the crime of offering bribes in judicial or administrative procedures) and Article 296 (the crime of taking bribes in judicial or administrative procedures), to which"bilateral"special surrender applies.

stipulations, further reflected the criminal punishment position of "punishment with severity".

Difference in imposing heavy penalty

The criminal punishment of bribery crime of China was featured by emphasis on deterrence by heavy penalty. Since high criteria were imposed on the constitution of a crime, the scope of regulation of criminal law was narrow. It was an important choice for criminal legislation to substitute severe punishment for severe regulation and enhance the deterrence of criminal law by increasing the degree of severity of punishment. The criminal punishment setting of bribery crime was characteristic of heavy penalty. Death penalty was the most severe method of punishment, and was not likely to be abolished in a long term. [32] Long-term punishment against freedom was the most common punishment applicable to bribery crime. In contrast, in Hungarian criminal code, the maximum statutory sentence of bribery crime was imprisonment of less than 10 years. It was also classified as heavy penalty, but was light penalty compared with the death penalty and life imprisonment of China.

VI. Implications of Hungarian's experience in criminal legislation of bribery crime for China

(I) Evaluation of Chinese and Hungarian strategies dealing with criminal legislation of bribery crime

Under the fundamental guideline of cracking down on bribery crime, China and Hungary have many differences in criminal legislation of bribery crime, demonstrating the different strategies of the two counties dealing with criminal legislation of bribery crime.

Based on the attribute of modest and restrained principle of criminal law, criminal legislation is naturally "defensive" and follows the principle of ex-post punishment. However, Hungarian criminal legislation of bribery crime adopts "offensive" strategy, realize defense by offense, breaks through the traditional principles and ideas of criminal law, extends to the field of corruption prevention. For instance, it introduces guarantor principle, added the type of inaction of bribery crime, establishes the supervision responsibility of supervisors in the organization, etc. The extension of criminal legislation changes the previous ex post model of evaluation of actual results of corruption. Criminal legislation highlights ex ante and preventive control, fits in with the modern philosophy of prevention-based corruption control, reflects the Hungary's flexibility in adjusting the strategy of corruption control in the course of modernization transition. The ideas reflected by such strategy may be also summarized as "Governance Activism". "Governance Activism" means focusing on "opportunity containment" in derivation of corruption, reasonably extending criminal legislation to the field of ex ante prevention and ex post monitoring, forming the integrated "criminal domain" of source control, process monitoring and ex post punishment, thus giving play to the positive role of criminal laws in cleansing corruption environment. It is worth notice that Hungary remains a highly corrupt country in Europe at present. The questionnaire investigation

[32] Of course, currently China adopts the death penalty policy of "retaining death penalty, but the less the better, the more cautious the better", the death penalty consists of immediate execution and stay of execution, but in effect, immediate execution is applicable to very few cases of corruption crime.

of Transparency International in 2013 indicates that 83% of the Hungarian respondents think corruption is a common issue of Hungary(the average proportion of EU is 76%);[33] another recent statistics ranks Hungary at the third place among the most corrupt countries, next only to Romania and Bulgaria.[34] In this respect, the following points should be fully considered: firstly, corruption control is a comprehensive task and criminal law is only one approach thereof. The absence of progress in corruption control is not necessarily attributable to criminal law, for the loopholes in public procurement law, tax law, budget law and other ex ante legislation could give rise to serious corruption. Secondly, the effects of legislation will not be necessarily unleashed in a short term, and need to be tracked and assessed in a long term. The new criminal code of Hungary takes effect in 2013, and it is not possible to judge the effects of legislation of bribery crime in the short term. Thirdly, Hungarian criminal legislation of bribery crime is aligned with the philosophy of giving top priority to prevention. Similar stipulations are also available in anti-corruption legislation of Britain and the U.S. It is undoubtedly of positive significance as a new attempt of exploring the criminal approach to anti-corruption in modern countries.

In contrast, China's strategy dealing with criminal legislation of bribery crime remains at the traditional "defensive" stage, highlights ex post punishment and focuses on punishment of individual corruption, which is ineffective in prevention of group corruption, incremental corruption and potential corruption. The ideas of corruption control reflected by such strategy of criminal anti-corruption may be summarized as "Governance Passivism". Governance Passivism does not mean the State's negative attitude, inaction and negligence in anti-corruption, but means the conservative attitude of following the beaten track in choosing the strategy of anti-corruption given material changes in the corruption type has undergone and upgraded demand on anti-corruption. Governance passivism emphasizes simplified interpretation of corruption regulation of criminal law as expansion of the regulation scope and increase of the degree of severity of criminal punishment. However, because it does not radically eradicates the root of corruption based on the derivative mechanism of corruption in modern times, it is ineffective in upstream control and environment control of bribery crime, and fails to address the issues of group corruption, clan corruption and ecological corruption facing the countries in modernization transition. Moreover, input of criminal law resources by unduly following the traditional system would even give rise to "saturation of state anti-corruption capacity", result in diminishing marginal benefits of crime control. As shown in Figure 2 above, the amendments to criminal legislation of bribery crime since 1997 have not effectively reduced the quantity of crimes, the quantity of bribery crime has been on the rise after 1998, and the bribery crime has worsened. [35]

(II) Improvement of Chinese criminal legislation of bribery crime: drawing on Hungary's experience

Since the 18th NPC of Communist Party of China, China has seen another round of "anti-corruption storm", highlighted by "Chinese style" anti-corruption manifested by

---

[33] European Commission, *EU Anti-Corruption Report,* (Brussels, 2014), p4.

[34] Attila Weinhardt, Hungary near top on the *corrupt countries* list, http://www.budapest telegraph.com/news/883/hungary_near_top_on_the_%E2%80%9Ccorrupt_countries%E2%80%9D_list , last access time: Aug. 25, 2015.

[35] SUN Guoxiang and WEI Changdong: *A Study on International Convention against Corruption and Legislation of Crime of Corruption and Bribery*, Beijing: Law Press, 2011, Page 224.

"combating the major corrupt officials", "depriving corrupt officials of authority" and "cracking down on major and minor cases together". The severe crackdown without dead zone and limits facilitated the initial formation of the situation of "fear of corruption", 36 and ushered in an important period of historic transformation for China's anti-corruption of China. Many new issues have become the concern of strategic choice. The most important issue is to change the philosophy and strategy of legislation. Criminal Law Amendment (IX) effective as of Aug. 2015 changes the feature of single crime of criminal legislation of corruption crime, focuses on scientific establishment of criminal punishment of bribery. In particular, it stipulates life imprisonment for the death sentence with reprieve for corruption crime, representing a major innovation in China's criminal rule of law of anti-corruption. However, it turns out that Criminal Law Amendment (IX) does not reserve Chinese philosophy of ex post control over the crime of corruption and bribery, criminal law intervention is limited to the back-end domain of crime, and the active prevention function of criminal legislation in front-end domain of crime has not been activated. Hence, in future legislation amendment to criminal law of public office, it is necessary to draw lessons from Hungary's experience, introduce governance activism, establish "offensive" legislation strategy and improve China's criminal legislation system of bribery crime. Accordingly, it is advised to make the following amendments to the current criminal legislation:

Adjustment of behavior type

Criminal legislation should shift from traditional ex post governance to preventive governance, extend the traditional single action type to the inaction type featured by failure in prevention, form the "dual" behavior structure focusing on action, supplemented by inaction, in order to effectively address the problem of "environment corruption". In specific, firstly, adding inaction crime of natural persons. Cleansing the internal environment of civil service system is an important way of effectively preventing occurrence of corruption. Given that Civil Servants Law explicitly stipulated the statutory obligation of civil servants of reporting bribery crime, "misprision of bribery" is added under the crime of bribe-taking, the act of any civil servant who is informed of the facts of bribery crime of any other person in performing duties but fails to report is stipulated as crime under severe circumstances. Secondly, adding inaction crime of entities. The practice of corruption control shows that corporate culture of corruption is the important reason for wanton bribery of companies and their employees. To build honest corporate culture and contain bribery from the source, companies shall assume statutory responsibility for preventing corruption. Given that Company Law, Unfair Competition Law and other front end laws explicitly stipulated statutory responsibility of companies and other market subjects for preventing bribery, the case where any entity is negligent in establishing effective prevention mechanism of bribery as a result of which its employee offers bribes for the benefit of the entity constitutes inaction crime of the entity, and graded criminal punishment criteria are imposed depending on different crimes.

Simplification of constitutive elements of a crime

Bribery crime is featured by power-for-money deal, which violates the incorruptibility of public power the public powers in essence. Hence, the constitutive elements of

---

36 Refer to Zhang Lei: *Going Far at a Consistent Pace*, China Discipline Inspection and Supervision Journal, Mar. 17, 2015.

bribery crime shall revolve around the incorruptibility of public power, so as to maximize the deterrence and prevention effects of criminal law. Currently the elements of "seeking interests for others" and "taking advantage of duty" constituting bribery crime do not precisely reflect the social hazard of incorruptibility of public power. Excessive constitutive elements of a crime result in backward shift of legislation defense front. It does not only give rise to doubts and barriers in litigation proof, but also caused delay in criminal legislation governance, impairing the actual effects of anti-corruption. In this respect, the following suggestions are given: firstly, timely delete the foregoing redundant elements, expand the regulation scope of criminal law for public officials. Where any person requests, consents to acceptance of or actually accepts property benefits, takes action for performance or non-performance of his/her duties, it constitutes the crime of bribe-taking. Secondly, establish graded statutory sentencing circumstance. "Act+ undue performance of responsibility" constitutes the basic constitutive element of bribery crime, "taking advantage of duty" or "seeking benefits for others" constitutes the constitutive element of aggravated crime. Thirdly, delete the element of amount. Although Criminal Law Amendment (IX) deletes the stipulation on specific amount of bribery crime, changes the specific amount-related crime to the model of "circumstance crime +abstract amount crime", it does not change the legal status of abstract amount as constitutive element of a crime, thus does not facilitate the creation of "zero tolerance" corruption environment. For this problem, it is advised to further delete the amount element from the legislation. However, considering the progressive nature of anti-corruption and practical issues of judicial operation, amount should still be clarified as a reference factor of crime circumstance through judicial interpretation.

Building "symmetrical" control structure

In general, bribe-taking derives from offering bribes. To strengthen criminal control over bribe-taking is the necessary choice for modern countries to control corruption. China's legislation for the crime of offering bribes and the crime of taking bribes is "asymmetrical", which is not aligned with the requirements of governance at the source of corruption and should be timely revised. The specific measures are as follows: firstly, correspondingly adjust the constitutive elements of the crime of offering bribes and the crime of taking bribes, delete redundant elements such as seeking benefits for others, seeking undue benefits etc., form concise and rigorous corresponding relationship. Secondly, draw on Hungary's experience, expand the positive role of "prisoner's dilemma" theory in the legislation design of bribery crime, and establish "bilateral" special surrender system; adjust and amend the ground of not constituting the crime of offering bribes, i.e. "where any person is extorted to offer properties to national staff or other personnel engaged in public office without receiving undue benefits, it shall not constitute offering bribes", as the statutory mitigation circumstance of the crime of offering bribes; add special surrender system designed for the crime of taking bribes, with the application conditions slightly more rigorous than those of the crime of offering bribes; set multi-level leniency types for whoever confesses bribery crime in the form of special surrender in view of the specific attributes of the affected power of bribery crime.

Establishing "rigorous and severe" criminal liability system

Introduce the principle of alignment of responsibility and power to the establishment of criminal liability system of bribery crime with reference to Hungary's experience, set different crime and punishment system depending on different rank and nature of public office. In specific, firstly, distinguish the nature of public office, convict judicial bribery as a separate crime, impose heavier statutory sentence to crack down on judicial corruption with severity. Secondly, distinguish the statutory sentencing status of senior public officials and ordinary public officials, stipulate "bribe-taking of senior civil servants" and "offering bribes to senior civil servants" as statutory aggravating circumstance of the crime of taking bribes and the crime of offering bribes respectively.

Strategic planning and directing the fight against economic crime

PROF. DR. OSMAN JAŠAREVIĆ*
Faculty of Law
University of Travnik,
Bosnia and Herzegovina

Abstract:

The article "Strategic planning and directing the fight against economic crime", deals with the question, how to observe on the right time some of the phenomenal forms of economic crime. Saterland marks it as "white collar crime" (White Collar Criminality), the one that makes the wealthy class and that is punishable in terms of criminal law. Despite the fact that the definition of Saterland is still ongoing, Bunić points out that economic crime has changed over time, evolved, and individual acts of economic crime can be committed not only by the higher socioeconomic level, but also by poor people, the unemployed ones and so on. That is to say that the status of the amended situation, knowledge and other elements, shoed that a person who is not a director or owner of a company, can empty the bank account of one citizen, one company, even of one country.

Keywords: *economic crime, strategy, struggle, repression, prevention.*

1. Introduction

Economic crime is not new type of crime, it has been known since the beginning of the twentieth century (1905) as a "crime of traders and entrepreneurs" (la délinquance des Commercants et entrepreneurs), but his theory was developed in 1940 by Edwin Saterland (E. Sutherland), who is considered to be the father of economic crime. Saterland theory was that "white collar crime" (White Collar Criminality), is the one that is made by the wealthy class and that is punishable in terms of criminal law. Despite the fact that the definition of Saterland is still ongoing, Bunić points out that economic crime has been changed over time, it evolved, and individual acts of economic crime can be committed not only by higher socioeconomic level, but also by poor people, the unemployed ones and so on. That is to say that the status of the amended situation, evolved with the new knowledge and other elements, so that we come to the situation that person who is not a director or owner of a company, can empty the bank account of one citizen, one company, even one country. Therefore, it is impossible to specify portrait of economic delinquent – person of certain age, who lives in abundance or modestly and so on.

2. Historical development of economic crime and its characteristics

Basic characteristics of economic crime are: clandestinity, dynamism and a danger to the system and its values. In accordance with these characteristics economic crime

* E-mail: *dr.osmanjasarevic@hotmail.com.*

can be defined or crime as a phenomenological form of criminal offenses defined largely by criminal law, but also in many other laws regulating different areas of economic life (banking, customs, technical standards, security, etc.), whose implementation may have severe consequences for the population and economy of a country or a region, as well as offenses committed by a person who has a special status, outstanding theoretical and professional knowledge (eg. in the field of computer science) or used exceptional means and methods (eg, high tech) and which are motivated by the harm to individuals or the economy of a country, a region or around the world.

While the first "classic" criminology emerged in the early twentieth century, the other, "economic" criminology manifested in late twentieth and early twenty-first century that studies economic criminality. So, the other is dealing with a special type of delinquency called economic crime. Bunić recalls that the criminalistics is discipline that does not belong to one or more of the founders of those whose merits can not deny, such as Hans Gros (Hans Gross) and Edmon Lokar (Edmond Locard), but to whole generations of criminologists who built it like scientific wall on which each adds one or more of the theoretical and scientific bricks. While the first, older criminology, was historically reserved for men, the other domain, economic, gave women an increasingly big place – as a professor, a judge, prosecutor or investigator or inspector.

Although the classic criminology relies on certain methods, such as forensics, ballistics and toxicology, criminology and economic benefits over it, the other relies on-accounting analysis, forensic document, information. However, these two disciplines are used many of the same tools, methods, processes and operations (dactiloscopy, photos, genetic analysis, spectrometry, psychology, tracking, search, hearing, etc.), which makes it virtually impossible to differentiate them. Through historical facts recorded vividly-illustratively describes the relationship between the classical and the economic crime investigation, giving their figurative role of mother and daughter. Classical criminology is a mother of special, economic criminalistics and they are both living in the same family house and serve the same household matters, that is to use the same methods, tools, procedures and operations.

In the chapter "The criminal methods" (Méthodlologie criminalistique), Bunić first gives the history of development of certain groups of offenses, appointed by the members of the criminal and other laws, then describes their characteristics, points out the essence of what constitutes legal protection, modus operandi, and shows criminal measures and actions to detect and prove the offenses of criminal responsibility of the offender, and that the answer to the "nine gold issues in criminology" (what, where, when, how, who, what, when, with whom and why).

3. Prevention in the field of economic crime

It is important to emphasize that the society still can not give up of systemic repression, but it had already shown its limits in the field of economic crime, and that it should be put "at the service of prevention". Prevention should be given a priority over repression, insisting on the formation of personnel involved in the fight against economic crime. Some criminologists, lawyers and other scholars, theorists-practitioners wonder where is the heart of detection and investigation of economic crime. In fact, that is criminal methods, it is the fifth chapter (as it is written on Bunić's web site.

The mentioned section contains data and examples which are important for t study of the causes of economic crime and its manifestation in practice: phenomenology,

etiology, criminal factors of social and individual backgrounds, dark figure and its lighting scientifically, globalization and the economic crisis, a description of the stock exchange crash of Wall Street , mortgage loans, entry securities debts and selling them on the stock exchange as a "value", the lack of regulations that would regulate international relations in the field of trade and exchange of goods and services, particularly finance, on the world stage.

Since the company was the main factor of economic development, the victim, and sometimes the perpetrator or accomplice of certain criminal acts of economic crime, the author proposes concrete measures to protect the company from the inside and the outside, which are very useful to companies in order to avoid involvement of certain individualism, or to control and bypass operations with fictitious companies and mafia-organizations.

In strategic terms, as one of the goals, it is necessary to work constantly on the formation, training and specialization of personnel who will participate in the fight against economic crime. They must know not only the form under which they manifest crimes, but also the means to prevent them. Bunić says "that should be organized not only by this personnel but also by victims of economic crime - companies, associations, collectives, and lastly citizens (legal and natural entities), because there lies" magic power "needed to overcome economic crime. Treated prevention should help victims in the defense of any phenomenological forms of economic crime, "Corruption is everywhere today, from an ordinary counter to the state leadership. A sport not to mention ... "says Bunic.

4. The strategy of fight against economic crime

Strategic planning of fight against economic crime is a form of managerial planning in police structures. The main or general strategy, as opposed to special strategy, seeks to achieve systemic problems in the organization and link the organization with the environment in terms of special strategies and prevention of economic crime.

Its characteristics are: (1) drawing up plans that anticipate possible problems (thus avoiding the sudden decision makers in dealing with the current problems in the system), (2) the planning carried out by management to a higher level of functional rather than specialists for planning (this allows better and more rational or functional management structure), (3) most often the same leaders are functionally involved in the implementation of the resulting criminal policies, and thus become the decision makers both in strategic planning and in directing the fight against economic crime and (4) or less all managers work with a clear understanding of the overall strategic direction of the police organization at different levels, which provides a framework actions of individuals (the prosecutor, the judge for preliminary proceedings, criminal investigators and other law enforcement structures).

Strategic Plan for the fight against economic crime should include: a) the assessment of threat to the system of criminal and phenomenological forms, or of economic crime, b) the organization of the police and other structures that will participate both in general and in special prevention, worked out a system of reporting on a phenomenological the form of economic crime, c) the police and other structures (the prosecution, the court, inspections) in the case of the phenomenological forms of economic crime, d) forensic technical equipment and other means of establishing some form of economic crime, e) joint action or a planned and systematic sylogisation of all structures of the system,

(which means an economic crime as priority task) in the settlement of the economic and criminal problems; f) measures and other business intelligence or counterintelligence protection.

5. Conclusion

Aware that it is a pioneer in the enterprise, Dragan Bunić on the site writes: "Without any pretensions to give readers a recipe for the fight against economic crime and the way you can protect yourself from it, I hope that this book can be considered in the preparation of food whose successful completion means in refining, in order to be well-dressed meal. I will be grateful to all those who we indicate the way, means and modes how we can successfully protect ourselves against economic crime that seriously threatens us in our daily lives whether we are consumers, taxpayers, citizens, whether it comes to companies and the administration".

Modern states have adopted such basic methods of its activities and the prevention and repression so through them trying to effectively suppress phenomenological forms of crime. Today, in Western, capitalist, and the eastern, called socialist countries, including ours (Ex Yugoslavia, Bosnia and Herzegovina and others.), very diverse forms of prevention have been applied. In addition to traditional state bodies agencies were formed together with public authorities who seek the way to prevent the commission of crimes of economic crime, or "to keep the further development of crime".

Used and Consulted literature

1. Aleksić I. Živojin, 1982. *Kriminalistika* (drugo izmjenjeno i dopunjeno izdanje);

2. Bunić Dragan, 2010. *„Criminalistique économique",* autor i izdavač Sentoban, Švajcarska;

3. Jašarević Osman, Kustura Mensur, Travnik 2013. *Kriminologija (etiologija i fenomenologija kriminaliteta);*

4. Nedžad Korajlić, Muharremi, Travnik 2011. Heuristička kriminalistika;

5. ModlY Duško, Korajlić Nedžad, Tešanj, 2002. *Kriminalistički riječnik*;

6. Petrović Andra, Beograd, 1978. *Kriminalistička metodika*.

Subsidy fraud in protection of financial interests of European Union: achievements and challenges

DR. LUCIJA SOKANOVIĆ
Senior assistant lecturer at the Chair for Criminal Law
Faculty of Law,
University of Split, Croatia

Abstract:

The article gives an overview of the development of the criminal protection of the financial interests of European Union. It presents the latest legislative proposal concerning the fight against fraud to the Union's financial interests: Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law. The article indicates legal effects of the differences in the material scope of the competence of Eurojust and European Public Prosecutor's Office in comparison with Directive. Croatian legislative solution is assed as well as evaluation of protection of Union's financial interests through the official data of persons reported, accused and convicted for subsidy fraud.

Key words: *financial interests of European Union, substantive criminal law, Directive, subsidy fraud, material scope of competence of the EPPO.*

1. Introduction

The European Union is a unique economic and political partnership between 28 European countries. The first step towards the Europe of today was taken in 1951, when France, Germany, Italy, Belgium, the Netherlands and Luxembourg concluded the Treaty establishing the European Coal and Steel Community.[1] The following treaties were Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community in 1957.[2] Denmark, Ireland and the United Kingdom acceded to the Communities in 1973, Greece in 1981, Spain and Portugal in 1986. The Treaty of Maastricht on European Union in 1992 created a structure of a EU based upon three pillars.[3] It was amended by the Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001. The Constitution for Europe was adopted in 2004, but never entered into force.[4] Although the inspiration for a new phase in the process of European integration in the Preamble of the Treaty establishing a Constitution for Europe is drawn from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human

[1] Klip, A., *European Criminal Law, An Integrative Approach*, 2012 Interesentia, p. 13.

[2] A separate convention established a single court and a single assembly for the three communities. In 1965, an agreement was reached that all three communities would also have one Commission and one Council. *Ibid.*

[3] Finland, Austria and Sweden acceded in 1995, Cyprus, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004, Bulgaria and Romania in 2007, Croatia in 2013.

[4] OJ 2004, C 310/1.

person, freedom, democracy, equality and the rule of law, the main economic engine of the EU is the single or "internal" market.[5] The Treaty of Lisbon was concluded in 2007 and the European Union is now primarily founded upon two new treaties: the Treaty on European Union and the Treaty on the Functioning of the European Union.[6] The TEU regulates the institutional structure of the Union and the Treaty on the Establishment of the European Communities has been renamed into the TFEU. Article 26 TFEU provides adoption of measures aiming at establishing or ensuring the functioning of the internal market that should comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. The Commission notably committed to delivering an investment plan for Europe in 2015: unlocking public and private investments in the real economy of at least 315 billion euro over next 3 years.[7] This should be supported and complemented by the capital markets union – building a single market for capital.[8]

The protection of the European Union should not be identified with the protection of its financial interests, but, bearing in mind its historical origins, the particular importance for the protection of the EU engages the protection of its financial interests. After an overview of the development of the criminal protection of the financial interests of EU, the current legislative proposals shall be explained and critically analyzed in this article. Special focus will be applied to Croatian legislation on the subject.

2. Protection of the European Union's financial interests in EU

Before the overview of the first steps in the protection of Union's financial interests and discussion about the current legislation proposals, the main figures about EU budget and multiannual financial framework will be pointed out.

The general budget of the Union is the instrument which sets out and authorises the total amount of revenue and expenditure deemed necessary for the European Union and the European Atomic Energy Community for each year. The budget is established and implemented in compliance with the principles of unity, budgetary accuracy, annuality, equilibrium, unit of account, universality, specification, sound financial management and transparency.[9] The expenditure authorised by the present budget totals 145 321 531 152 euro in commitment appropriations and 141 214 040 563 euro in payment appropriations, representing a variation rate of + 1,84 % and of + 1,57 % respectively by comparison with the 2014 budget.[10] Budgetary revenue totals 141 214 040 563 euro. The uniform rate of call for the Vallue Added Tax (VAT) resource is 0,30 % whilst that for the Gross National Income (GNI) resource is 0,7481 %. Traditional own resources (customs duties and sugar levies) account for 11,92 % of the financing of

[5] Preamble of the Treaty establishing a Constitution for Europe. Gaining the first steps in the 50ies, the aim of the Community was to eliminate internal borders and bring about a Common Market.

[6] The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ 2010, C 83/1.

[7] General Report on the Activities of the European Union, 2014, available on http://bookshop.europa.eu/en/general-report-on-the-activities-of-the-european-union-2014-pbNAAD15001/, 23 October 2015.

[8] *Idem.*

[9] Definitive adoption (EU, Euratom) 2015/339 of the European Union's general budget for the financial year 2015, OJ L 69, 13 March 2015.

[10] *Idem.* P. 12.

the budget for 2015. The VAT resource accounts for 12,93 % and the GNI resource for 74,04 %. Other revenue for this financial year is estimated at 1 575 497 557 euro.[11]

The multiannual financial framework (MFF) lays down the maximum annual amounts or ceilings which the EU may spend in different political fields or headings over a period of at least 5 years. The current MFF covers seven years: from 2014 to 2020. This planning policy provides the EU to carry out common policies over a period that is long enough to make them effective. The annual budget is adopted within this framework and usually remains below the MFF expenditure ceilings in order to retain some flexibility to cope with unforeseen needs. For the period 2014-2020, the MFF sets a maximum amount of 960 billion euro for commitment appropriations and 908 billion euro for payment appropriations.[12] The MFF 2014-20 is divided into six categories of expense or headings corresponding to different areas of EU activities: smart and inclusive growth that includes competitiveness for growth and jobs (125.614 million euro) and economic, social and territorial cohesion (325.149 million euro), sustainable growth: natural resources (373.179 million euro), security and citizenship (15.686 million euro), global Europe (58.704 million euro), administration (61.629 million euro) and compensations (27 million euro).[13] A strong emphasis is put on expenditure aimed at bosting growth and creating jobs, in line with the political priorities of the EU: the expenditure ceiling for sub-heading „competitiveness" is increased by more than 37% compared to the previous MFF.[14]

2.1. Lessons from the past

The origins of legal protection of the financial interests of the European Community date back to the sixties of the last century and they were from the beginning two-sided; in the legal systems of the Member States and in the legal order of the European Community.[15] In 1962 a working group of representatives of governments of the Member States was set up with the task of harmonization of criminal law in certain areas with a focus on preventing fraud caused by gaps in legislation of the European Community, in particular fraud at the detriment of the budget of European Community.[16] Studies conducted in nineties (one conducted by the Commission on its own initiative, the other known in public as the Delmas-Marty Report) confirmed the allegations about the activities of transnational and organized crime in this area bypassing the law and misusing not only the legal gaps in EU legislation, but also those caused by differences between national legislations.[17] The protection of the financial interests for the first time entered the primary Community law with the Treaty on

[11] *Idem.*

[12] The functioning of the MFF 2014-2020 will be reviewed by the Commission in 2016 taking full account of the economic situation at the time as well as the latest macroeconomic projections.

[13] Council adopts the multiannual financial framework 2014-2020, Brussels, 2 December 2013, 15259/1/13 REV 1 (OR.en) PRESSE 439, available on http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/139831.pdf, 19 October 2015.

[14] *Idem.*

[15] Đurđević, Z., Criminal protection of the financial interests of European Union, dissertation, Faculty of Law, Zagreb, 2003, p. 377.

[16] *Ibid.*

[17] Đurđević, Z., Convention on the protection of the European Communities' financial interests – drafting, contents and implementation, Croatian Annual of Criminal law and practice, vol. 14, N. 2 (2007), p 927.

European Union in Maastricht in 1992 when the Art. 209a standardized principle of assimilation which was postulated by the European Court of Justice in the case Commission v. Greece. Namely, in the judgment of 21 September 1989, the Court first established the obligation of Member States to protect the financial interests of the Community in the same way and under the same conditions as their own financial interests. In that way, the Member States were obliged to extend their internal criminal law towards the protection of the financial interests of the European Community and thus implement the principle of assimilation and set the legal standard within the sanctions that protect Community finance must be effective, proportionate and dissuasive, and the prosecution has to be just as effective as for crimes against national interests.[18] In December 1994, the Council adopted a decision on drafting a legal instrument for the protection of EU financial interests through national criminal law on the basis of the joint action of the United Kingdom from March 1994 and the Draft Convention prepared by the Commission in June 1994. Convention on the protection of the European Communities' financial interests (*PIF Convention*)[19] as international contract was signed 27 June 1995 by all Member States. Convention represents together with additional protocols *PIF instruments*: Protocol on corruption of national or Community officials,[20] Second Protocol of the Convention on the protection of the European Communities' financial interests,[21] Third additional Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests.[22]

2.2. Current issues

In the TFEU chapter six titled "Combating Fraud" prescribes in the provisions of Art. 325 the duty of the Union and the Member States to counter fraud and any other illegal activities affecting the financial interests of the Union through measures from the same Article that act as a deterrent and afford effective protection in the Member States and in all institutions, bodies, offices and agencies of the Union. In order to counter fraud affecting the financial interests of the Union, Member States should take the same measures taken to counter fraud affecting their own financial interests. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. Therefore, they shall organise, together with the Commission close and regular cooperation between the competent authorities. In order to achieve effective and equivalent protection in the Member States and in all Union's institutions, bodies, offices and agencies, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Court of Auditors, shall adopt the

---

[18] Case 68/88 *Commission of the European Communities v. Hellenic Republic* [1989] ECR I-2965. See Ligeti, K. (ed.), Toward a Prosecutor for the European Union, Volume 1, A Comparative Analysis, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 1004.

[19] OJ C 316, 27 November 1995.

[20] Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests or First Protocol, Anticorruption Protocol, OJ C 313, 23 October 1996.

[21] Second Protocol on *criminal liability of legal persons, confiscation and money – laundering, OJ C 221, 19. July 1997.*

[22] OJ C 151, 20 May 1997.

necessary measures in the fields of the prevention and the fight against fraud affecting the financial interests of the Union. The Commission, in cooperation with the Member States shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation the combating fraud.[23] After entry into force the Lisbon Treaty, the harmonization of substantive criminal law, including criminal offenses against the financial interests of the Union should be based on Art. 83 TFEU.[24]

The Commission has submitted to the European Parliament and Council in 2012 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law.[25] The Proposal includes initiatives for further harmonization of criminal offences and the level of sanctions in the context of substantive criminal law for the protection of the financial interests of the EU. According to the Proposal (Art. 2), the Union's financial interests means all revenues and expenditures covered by, acquired through, or due to: the Union budget and the budgets of institutions, bodies, offices and agencies established under the Treaties or budgets managed and monitored by them.[26] The absence of consensus in relation to the basic concept of the term Union's financial interests suggests the European Parliament legislative resolution of 16 April 2014 on the Proposal.[27] Namely, within the Amendment 12, this term is extended to all the assets and liabilities managed by or on behalf of the Union and its institutions, bodies and agencies; and all its financial operations, including borrowing and lending activities, as well as, in particular, all revenues and expenditures covered by, acquired through, or due to: the Union budget, the budgets of institutions, bodies, offices and agencies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them.

The Proposal divides criminal offences in the fields of prevention of and fight against fraud affecting the Union's financial interests and fraud related criminal offences affecting the Union's financial interests that is in line with the incriminatory elements of

---

[23] The latest is Report from the Commission to the European Parliament and the Council: Protection of the European Union's financial interests – Fight against fraud 2014, Annual Report, Brussels, 31 July 2015 COM(2015) 386 final

[24] Namely, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension.

[25] Proposal for a Directive of the European Parliament and of the Council on the Fight against Fraud to the Union's financial interests by means of criminal law /* COM/2012/0363 final - 2012/0193 (COD) */ available on http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0363 (9.11.2015.) See Kuhl, L., The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law, Eucrim 2/2012, p. 63-66.

[26] The European Court of Justice has confirmed in Judgement of 15 November 2011 in Case C-539/09, *Commission v. Germany* (OJ 2012, C 25, p. 5) existence of a direct link between, on the one hand, the collection of the Value Added Tax revenue in compliance with the applicable Union law, and on the other, the availability to the Union budget of the corresponding Value Added Tax resources, since any lacuna in collection of the first potentially causes a reduction in the second. Value Added Tax fraud therefore has to be considered as affecting the EU's financial interests. See Proposal, p. 8.

[27] European Parliament legislative resolution of 16 April 2014 on the proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM(2012)0363 – C7-0192/2012 – 2012/0193(COD)) (Ordinary legislative procedure: first reading), available on:

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0427+0+DOC+XML+V0//EN (9.11.2015)

the Convention.[28] Fraud affecting the Union's financial interests when committed intentionally is punishable as a criminal offence (a) in respect of expenditure, any act or omission relating to: (1) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the Union budget or budgets managed by the Union, or on its behalf; (2) non-disclosure of information in violation of a specific obligation, with the same effect, or (3) the misapplication of liabilities or expenditure for purposes other than those for which they were granted; (b) in respect of revenue, any act or omission relating to: (1) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf, (2) non-disclosure of information in violation of a specific obligation, with the same effect, or (3) misapplication of a legally obtained benefit, with the same effect.[29] Fraud related criminal offences affecting the Union's financial interests according to Art. 4 of the Proposal are dishonest conduct of tenderers in public procurement, passive and active corruption, misappropriation of funds and money-laundering.[30] Criminalising dishonest conduct of tenderers is definitely common in a number of Member States but within variable level of sanctions, so placing it in the Directive was needed and justifiably. The definition of corruption is largely based on the PIF Convention and the protocols, but now it is no more required that the conduct is "in breach of official duties" to be covered by the provision. The definition of misappropriation includes conduct of public official that does not constitute fraud in a stricter sense and consists in the misappropriation of funds or assets contrary to the purpose foreseen, with the intention to damage the Union's financial interests.

2.3. Current issues in material scope of the Eurojust and European Public Prosecutor's Office

European Union Agency for Cooperation in the field of criminal justice or Eurojust is a body established by Council Decision of 28 February 2002 with a view to reinforcing the fight against serious crime.[31] The Decision was twice amended[32] and on the 17th of July 2013, the Commission presented a proposal for a Regulation on the Eurojust, based on Art. 85 TFEU.[33] The tasks of the Eurojust are support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States, or requiring a prosecution on common basis, on the basis of operations conducted and information supplied by the

[28] That is why some authors as Kuhl suggest that the Proposal contains under its Title II certain provision which may to some extent be qualified as mere *Lisbonisation* of criminal law concepts. Kuhl, L., *op. cit.* (24), p. 65.

[29] Art. 3. The offence remained within the framework of the crime from Convention.

[30] See Amendments 14-19 of the European Parliament legislative resolution.

[31] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6 March 2002.

[32] Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 245, 29 September 2003, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4 June 2009.

33 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) /* COM/2013/0535 final - 2013/0256 (COD) *****/

Member States and by Europol.[34] But the competence of Eurojust covers the forms of crime listed in Annex 1 and related criminal offences excluding the crimes for which the European Public Prosecutor's Office will be competent.[35]

The legal basis to establishment of the European Public Prosecutor's Office is Art 86 TFEU.[36] This Article provides a clear basis to elaborate the regulatory specificities when it comes to the investigation, prosecution and adjudication of crimes affecting the financial interest of the EU, but it remains silent on the precise scope of the competence *ratione materiae* of the EPPO, as it contains a limited reference to a basic mandate to combat crime affecting the financial interest of the EU or, after a unanimous decision in the Council, to an extended mandate to combat serious crimes having a cross-border dimension.[37] In July 2013 European Commission has submitted Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office limiting the material scope of the competence of the EPPO to criminal offences affecting the financial interests of the Union and again, possible extension to serious crimes with cross-border dimension after unanimous decision of the European Council.[38] But, ancillary competence provided by Art. 13 of the Proposal covers offences which are not technically defined under national law as offences affecting the Union's financial interests where their constituent facts are identical and inextricably linked with those of the offences affecting the financial interests of the Union. In such mixed cases, where the offence affecting the Union's financial interests is preponderant, the competence of the EPPO should be exercised after consultation with the competent authorities of the Member State concerned.[39] Preponderance should be established on the basis of criteria as the offences' financial impact for the Union, for national budgets, the number of victims or other circumstances related to the offence' gravity, or the applicable penalties.[40] The reasoning for such extended material scope of the EPPO is in the Recital 22 of the

---

[34] Art. 2, para 1. For the critical review of the Proposal, see Weyembergh, A., An Overall Analysis of the Proposal for a Regulation on Eurojust, eucrim 4/2014, p. 127-131.

[35] Forms of crime from Annex 1 are for example: organised crime, terrorism, drug trafficking, money-laundering, corruption. Related criminal offences are those committed in order to procure the means of perpetrating acts listed in Annex 1, in order to facilitate or carry out acts listed and to ensure the impunity of acts listed in Annex 1. Eurojust and Europol have a general mandate to facilitate exchange of information and coordinate national criminal investigations and prosecutions, but lack the power to carry out acts of investigations or prosecution themselves. OLAF has a mandate to investigate fraud and illegal activities affecting the EU, but its powers are limited to administrative investigations. See Explanatory Memorandum of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, p. 2.

[36] First provisions regarding future EPPO were in *Corpus Juris* in 2000, afterwards in the Green Paper on criminal-law protection of the financial interests of the Community in 2001, unratified Treaty establishing a Constitution for Europe in 2004, the Lisbon Treaty in 2009 and Commission's communication on the protection of the EU's financial interests by criminal law and by administrative investigations in 2011. Recent efforts regarding the work of EPPO represent The European Model Rules for the Procedure of the future European Public Prosecutor's Office (latest version from 26 September 2013) as a result of projects conducted at the University of Luxembourg with the financial support of the EU Commission under the responsibility of Professor Katalin Ligeti. See Sokanović, L., Frauds in Criminal Law, doctoral thesis, Faculty of Law, University of Zagreb, p. 188.

[37] Vervaele, J.A.E., The material scope of competence of the European Public Prosecutor's Office: *Lex uncerta* and *unpraevia*? ERA Forum (2014) 15:85-99, p. 87.

[38] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final 2013/0255 (APP), Brussels, 17 July 2013

[39] *Ibid.* P. 11.

[40] *Idem.*

Proposal supported by the interest of procedural efficiency and the need to avoid a possible breach of the principle *ne bis in idem*. So, the great repercussion of such material competence is different scope of criminal offences affecting the Union's financial interests compared to Directive that suggests legal uncertainty.[41] This legal uncertainty is moreover enlarged by the fact that Directive has to be implemented in the legal systems of the Member States. Namely, Vervaele has heretofore admonished that some of them "will consider that their existing law does already provide for the criminal law protection and does not need any amendments, others will cherry pick, others will go beyond the minimum level of harmonisation required."[42]

3. Croatia

The protection of financial interests of European Union by means of criminal law had in Croatia an unusual path. Namely, firstly the subsidies of EU were protected, and afterwards, within the great changes in criminal legislation in 2011,[43] national subsidies in the same way.[44]

Within the Law on Amendments to the Criminal Code in 2007,[45] the protection of the European Union's financial interests was set up for the first time in the Republic of Croatia. Two new provisions Art. 224b: *Special cases of fraud to the detriment of the European Union's financial interests* and Art. 292a: *Abuse of Authority relating the resources of the European Union* were very soon object of a legislative changes. Within the Law on Amendments to the Criminal Code of 15 December 2008,[46] Art. 292a was deleted, while Art. 224b, as well as the heading above it completely changed into *Fraud affecting the European Communities*. The "new" Criminal Code or CC11 placed the *Subsidy fraud* (Art. 258) in crimes against the economy. Because of frequent criticism that preference is given to the criminal protection of the financial interests of the European Union over national financial interests, and that the Criminal Code is more protective over the budget of the European Union then the national budget,[47] the perpetrator of this crime in the provision of Art. 258 par. 1 and 2 is determined as the one who with the aim to realize for himself or another person state aid present false or incomplete information about the facts on which the decision concerning the state aid depends on, or fails to inform the provider of the state aid about the changes important

---

[41] Ref. 25.

[42] Vervaele, J.A.E., *op. cit.* (37), p. 97. The author further indicates the results of this harmonisation: „First, the existing fragmentation of the design of the PIF-offences in the legal orders of the Member States will not be ended; apart from there being a legislative patchwork, there will also be gaps in implementation. Secondly, the implementation of the directive will not lead to a clear and precise body of law of PIF-offences and penalties and the differences between the Member States will remain substantial."

[43] In the last two decades Croatian criminal law was dominated by the two criminal codes. Criminal Code from 1997 (Official journal or „NN" 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, 143/12) and Criminal Code from 2011 („NN" 125/11, 144/12, 56/15, 61/15). In the further text the abbreviations CC97 and CC11 will be used for these codes.

[44] National subsidies were protected to some extant within other offences, primarily fraud from Art. 224 CC97.

[45] NN 110/07. See Novoselec, P., Der EU-Betrug und das kroatische Strafrecht in Đurđević, Z. (ed.), Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb, 2006, Sveučilišna tiskara, p. 20.

[46] NN 152/08.

[47] Turković, K. *et al*., Komentar Kaznenog zakona, Narodne Novine, Zagreb, 2013, p. 331.

for making a decision on state aid and who uses funds from an approved state aid contrary to their purpose.[48] By the provision of par. 5 the subsidies and assistance granted by the European Union are equal to the state aid. Qualified form of the offence, prescribed by par. 3 is committed if the perpetrator acted with the aim of obtaining or abuse the state aid of large-scale. The provision of par. 4, modelled on the German § 264 par. 5, prescribes the case of voluntary abandonment with facultative exemption from penalties. Within the fast and ambitious legislative reaction on the challenge of a new incrimination and the need to protect the Union's financial interests, Croatia has presented the strong willingness to be an equal partner in EU.[49] But, does an appropriate legislative solution really offer genuine protection of the Union's financial interests? The last published data show that in 2014 only 10 adult persons were reported for subsidy fraud in Croatia, 4 were accused and 3 were convicted for imprisonment of 6-12 months (one suspended).[50] Comparing with the data from 2013, this is a *significant* increase. Namely, in 2013, only 6 adult persons were reported, one accused and none convicted.[51] It would be rather unfair to conclude that the crime has not yet "come to life" in Croatian jurisprudence, better approach would suggest detail research including the number and rates of subsidies granted, administrative investigations, reported perpetrators, reasons for rejected crime reports or termination of the investigation, amounts of money returned after finalisation of the criminal proceedings.

4. Conclusion

Each year the Commission, in cooperation with the Member States, submits to the European Parliament and the Council a report on measures taken to counter fraud and any other illegal activities affecting the EU's financial interests. This obligation is regulated under Art. 325 para. 5 of the TFEU. In 2014, 1649 irregularities were reported by the Member States as fraudulent (both suspected and established fraud), involving

[48] For analyze and critique of the provisions, see Sokanović, L., *op. cit.* (36), p. 150-175. By the Regulation on the Internal organization of the Ministry of Finance in 2012, the Independent Department for combating Irregularities and Fraud is established with responsibility for coordination of legislative, administrative and operational activities between the bodies in the AFCOS system, in order to protect the financial interests of the EU and for direct cooperation with the OLAF. AFCOS is a system through which the coordination of legislative, administrative and operational activities in order to protect the financial interests of the European Union and direct cooperation with the OLAF. AFCOS network was established by the Decision of the Croatian Government and is assembled of representatives of the Ministry of Justice, Ministry of Home Affairs, Ministry of Economy, Ministry of Labour - Directorate for Public Procurement, Ministry of Finance - Tax Administration, Custom Administration, the Department for Budgetary Control, the Central State Office for administration, the State Audit Office, the State Attorney's Office. Elements of the AFCOS system in Croatia are: the system of reporting on irregularities, the AFCOS network (network of bodies dealing with combating fraud, corruption and any other type of irregularities in the system) and Independent Department for combating Irregularities and Fraud.

[49] Other offences concerning the same issue are: Abuse in public-procurement (Art. 254), Embezzlment of taxes or custom (Art. 256), Money laundering (Art. 265), Offering and Accepting a bribe (Art. 294 and 293), Misappropriation (Art. 233) CC11.

[50] Croatian Bureau of Statistics, Statistical Reports1551/2015 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2014", Zagreb, 2015, p. 28, 29, 66, 128, 129.

[51] Croatian Bureau of Statistics, Statistical Reports 1528/2014 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2013", Zagreb, 2014, p. 28, 65, 186.

538 million euro in EU funds.[52] The number of reported fraudulent irregularities has been increased on the revenue side, on the expenditure side, the number decreased slightly in 2014 compared with 2013, while the related amounts have increased. Differences still exist among Member States in detection and reporting, although to a lesser extent than in previous years. Some trends have grown stronger in the past two years: the involvement of administrative bodies in detecting fraudulent irregularities has continued, while the most commonly detected *modus operandi* is the use of falsified documentation. Irregularities not reported as fraudulent have increased, both in terms of amounts and in number, that largely reflects the progressive implementation of the various spending programmes and the fact that the control systems of the European institutions and national audit services have been strengthened.[53]

The continuous and dedicated aspiration towards guarding the financial interests of the European Union and in this way, the European Union itself, is testified by permanent legislative proposals in this area. But the good will and hard work do not guarantee best results at once. Namely, the choice of the European Commission to regulate the material scope of competence of the EPPO by harmonising national substantive criminal law through a directive and differences in definition of criminal offences affecting the Union's financial interests between draft Directive and draft Regulation on EPPO indicate possible legal uncertainty. The Croatian example shows that strong effort has to be invested to upgrade an appropriate legislative solution to best practice. So, once again, a plea for advance in searching consensus, best legislative solutions, cooperation and coordination between all national or EU anti-fraud bodies, finding out the best practices has to be made.

1. Council adopts the multiannual financial framework 2014-2020, Brussels, 2 December 2013, 15259/1/13 REV 1 (OR.en) PRESSE 439, available on http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/139831.pdf;

2. Croatian Bureau of Statistics, Statistical Reports1551/2015 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2014", Zagreb, 2015;

3. Croatian Bureau of Statistics, Statistical Reports 1528/2014 „Adult Perpetrators of Criminal Offences, Reports, Accusations and Convictions, 2013", Zagreb, 2014;

4. Definitive adoption (EU, Euratom) 2015/339 of the European Union's general budget for the financial year 2015, OJ L 69, 13 March 2015;

5. Đurđević, Z: *Criminal protection of the financial interests of European Union*, dissertation, Faculty of Law, Zagreb, 2003;

6. Đurđević, Z: *Convention on the protection of the European Communities' financial interests – drafting, contents and implementation*, Croatian Annual of Criminal law and practice, vol. 14, N. 2 (2007), p. 921-966;

7. General Report on the Activities of the European Union, 2014, available on http://bookshop.europa.eu/en/general-report-on-the-activities-of-the-european-union-2014-pbNAAD15001/;

[52] Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests – Fight against fraud 2014, Annual Report, Brussels, 31 July 2015 COM(2015) 386 final, p. 5.

[53] Citation and above. *Idem.* As stated in the Report, the Commission made 193 decisions to interrupt payments involving 7.7 billion euro in the cohesion policy and rural development areas, it further made 16 new suspension decisions, financial corrections of over 2.2 billion euro and issued recovery orders for 736 million euro.

8. Klip, A: *European Criminal Law*, An Integrative Approach, Interesentia, Cambridge-Antwerp-Portland, 2012;

9. Kuhl, L: *The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law*, Eucrim 2/2012, p. 63-66;

10. Ligeti, K. (ed.): *Toward a Prosecutor for the European Union*, Volume 1, A Comparative Analysis, Hart Publishing, Oxford and Portland, Oregon, 2013;

11. Novoselec, P: *Der EU-Betrug und das kroatische Strafrecht* in Đurđević, Z. (ed.), Current Issues in European Criminal Law and the Protection of EU Financial Interests, Zagreb, 2006, Sveučilišna tiskara;

12. Weyembergh, A: *An Overall Analysis of the Proposal for a Regulation on Eurojust*, Eucrim 4/2014, p. 127-13;

13. Report from the Commission to the European Parliament and the Council: Protection of the European Union's financial interests – Fight against fraud 2014, Annual Report, Brussels, 31 July 2015 COM(2015) 386 final;

14. Sokanović, L: *Frauds in Criminal Law*, doctoral thesis, Faculty of Law, University of Zagreb, 2014, Zagreb;

15. Turković, K. *et al*: *Komentar Kaznenog zakona*, Narodne Novine, Zagreb, 2013;

16. Vervaele, J.A.E: *The material scope of competence of the European Public Prosecutor's Office: Lex uncerta and unpraevia*? ERA Forum (2014) 15:85-99.

Legal person and the tax evasion offences. From theory to practice

DR. LAURA STĂNILĂ*
Senior leturer, Faculty of Law,
West University Timisoara

Abstract:

Tax evasion is a scourge that affects society both in its economic dimension and in its moral, human and legal dimension. In this context, the judicial penal policy of a State, reflected in how the criminal legal norms are promptly applied in concrete situations is a crucial element in fighting this phenomenon. A legal entity is the main actor in the commission of the tax evasion offences, most of such offences being committed in the name, interests or the achievement of the legal purpose of the legal entity. In these conditions we should boost the judiciary to impose criminal liability of legal persons, in cases when all legal requirements are met both in terms of legal content of the offences of tax evasion provided by Law no. 241/2005 and in terms of criminal liability of legal persons provided by art. 135 of the Romanian Penal Code.

Key words: *tax evasion offences, legal person, criminal liability of the legal person, legal scope, mens rea, criminal deed.*

Summary

I. Tax evasion – general aspects
II. The perpetrator of the tax evasion offences
III. The analysis of the conditions provided by art. 135 Romanian Criminal Code (RCC) in relation with the offences provided by Law no. 241/2005 on prevention and combating the tax evasion offences
IV. Critics on the practice of the Romanian Courts
V. Conclusions

I. Tax evasion – general aspects

Tax evasion represents a social phenomenon generated and enhanced by a deficient policy of a state on taxes and financial debts, an area where the state must intervene with extreme causion by means of criminal law. The field of tax evasion is a regulatory area that requires highly sensitive interpretation and the enforcement of criminal rules involves an appeal to the tax and financial provisions, both numerous and complex. In this study we try to draw attention to the way in which the legal provisions are imposed to legal persons, although the subject of our analysis does not concern the causes and forms of tax evasion.

The legal source for tax evasion offenses is Law no. 241/2005[1] on prevention and combating the tax evasion offences, which creates the legislative framework necessary

[1] Published in Public Monitor, Part I, no. 672/27th of July 2015.

to maintain financial discipline, reducing damage caused by embezzlements on taxes owed to the state and taxpayers' compliance behavior in their relations with the State and fiscal authorities.

Law no. 241/2005 provides the tax evasion offences (art. 9 par. 1 letter a-g) and the offences in connection with tax evasion offences (art. 3-8). Both categories can be comitted by an individual (human being), as well as a legal person. Even in the situations where there is a special legal request on the quality of the perpetrator – taxpayer (art. 3 and art. 8), debtor (art. 9 lett. g) – the criminal liability can be imposed to a legal person.

According to provisions of art. 3-8 from the special law, the offenses in connection with tax evasion offences are:

- the intented refusal of a contributor to recover accountig documents that have been previously destroied, within the period established by the officials, also he could have been able to do it (art. 3).

- the unjustified refusal of a person to present to the competent bodies legal documents and assets of the estate, within 15 days from notice, in order to escape the tax obligations (art. 4).

- impeding in any form, of the competent organs to enter, as provided by law, the headquarters, premises or on lands, with the purposes for financial, tax or customs verifications (art. 5).

- possession or putting into circulation without having the right to, of stamps, bands and standard forms with special treatment used in the tax area (art. 7 par. 1).

- printing, possession or putting into circulation, of forgered stamps, bands and standard forms with special treatment used in the tax area (art. 7 par. 2).

- establishing in bad faith by the taxpayer, of taxes or contributions, leading to obtaining, without right, of amounts of money as reimbursement or refund of the general consolidated budget or compensation owed to the general consolidated budget (art. 8 par. 1).

- association to commit the offence provided by art. 8 par. 1 (art. 8 par. 2).

Regarding the offense provided by article. 6 - intentionally retaining and notpaying within 30 days of the due date, of the taxes or withholding – this provision was declared unconstitutional by *decision no. 363/7th May 2015 of Romanian Constitutional Court*[2]

The text was declared unconstitutional since it was unpredictable, not sufficiently precise and clear to be applied. The Court held that neither the art. 6, nor the Law no. 241/2005 or other special laws did not define the term "taxes or withholding". However, the rules adopted to approve the forms used for declaring taxes and contributions inventory the taxes and contributions collected through withholding and the income tax resulted from the transfer of real estate or from other income of individuals are mentioned as a withholding tax at source. The Court therefore held that the material object of the offense is not set by law, but by an administrative act adopted in the purpose of the enforcement of the law, whose regulatory intervention regards a distinct field, namely the model and content of legal forms and acts.

Or, in the case of offenses, including tax and financial offences, the legislature must indicate clearly and unequivocally the material object thereof in the wording of the legal norm, or the legal object should be easily identified by reference to another law which is in connection with the criminalizing text and has an equal force, in order to establish the presence/absence of the offence. Norma criminalization of art. 6 and has exhausted its

[2] Published in Official Monitor, Part I, no. 495/ 6th of July 2015.

legal effects as of August 21, 2015, after crossing the 45 days of the publication, during which the legislature did not intervene to restore consistency text declared unconstitutional by the Basic Law.

According to provisions of art. 9 from the special law, the tax evasion offences, if committed in order to escape the tax obligations are:

a) hiding taxable goods or taxable source;

b) omission, in full or in part, to highlight in the accounting documents or other legal documents, of conducted trade operations or revenues in order to escape the tax obligations;

c) highlighting in accounting documents or other legal documents, of charges that are not based on real transactions or highlighting other fictitious operations in order to escape the tax obligations;

d) altering, destroying or hiding accounting documents, memoirs of electLeiic cash registers or other means of data storage in order to escape the tax obligations;

e) performing of double accounting records, using documents or other means of data storage in order to escape the tax obligations;

f) evading in carrying out financial, tax or customs verifications by fictitious declaring or misreporting on headquarters in order to escape the tax obligations;

g) substitution, degradation or alienation of forfeitable assets by the debtor or third parties in order to escape the tax obligations.

Art. 9 provides distinct offences of tax evasion and not ways to commit an offense. Assuming that two or more acts of those referred to in a-g of the art. 9 of the Law are committed, will hold a plurality of offenses.

Nomatter if discussing about tax evasion offenses or offenses in connection with them, any of those offences can be committed both by individuals and by a legal person. Moreover, even in situations where the legislature speaks of the existence of a qualifying feature of the agent – taxpayer (art. 3 and art. 8), debtor (art. 9 letter g) – the criminal liability may be imposed on legal entities.

Presented below an oversimplification of the facts incriminated by Law no. 241/2005 indicating the legal content, the penal sanction and the perpetrator.

Table I. Offences in connection with tax evasion offences

No.	Legal rule	Legal content	Sanction	Perpetrator
1.	Art. 3	The intented refusal of a contributor to recover accounting documents that have been previously destroied, within the period established by the officials, also he could have been able to do it.	Criminal fee from 5.000 lei to 30.000 lei.	Qualified perpetrator: tax ayer – Naural or legal person
2.	Art. 4	The unjustified refusal of a person to present to the competent bodies legal documents and assets of the estate, within 15 days from notice, in order to escape the tax obligations.	imprisonment 6 months - 3 years or criminal fee.	Any natural or legal person
3.	Art. 5	Impeding in any form, of the competent organs to enter, as provided by law, the headquarters, premises or on	imprisonment 6 months - 3 years or criminal fee.	Any natural or legal person

No.	Legal rule	Legal content	Sanction	Perpetrator
		lands, with the purposes for financial, tax or customs verifications.		
4.	Art. 6	Withholding and intentionally not paying within 30 days of the due date, of the amounts of taxes or withholding.	Unconstitutional *decision no. 363/7th May 2015 RCC*	Any natural or legal person
5.	Art. 7 (1)	Possession or putting into circulation without having the right to, of stamps, bands and standard forms with special treatment used in the tax area.	imprisonment 2 - 7 years.	Any natural or legal person
6.	Art. 7 (2)	Printing, possession or putting into circulation, of forgered stamps, bands and standard forms with special treatment used in the tax area.	imprisonment 3 - 12 years.	Any natural or legal person.
7.	Art. 8 (1)	Establishing in bad faith by the taxpayer, of taxes or contributions, leading to obtaining, without right, of amounts of money as reimbursement or refund of the general consolidated budget or compensation owed to the general consolidated budget.	imprisonment 3 - 10 years.	Qualified perpetrator: taxpayer – natural or legal person.
8.	Art. 8 (2)	Association to commit the offence provided by art. 8(1).	imprisonment 5 - 15 years.	Qualified perpetrator: taxpayer – natural or legal person.

Table II. Tax evasion offences

No.	Legal rule	Legal content	Sanction	Perpetrator
1.	Art. 9 lett. a	hiding taxable goods or taxable source, in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
2	Art. 9 lett. b	omission, in full or in part, to highlight in the accounting documents or other legal documents, of conducted trade operations or revenues in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11	Any natural or legal person

No.	Legal rule	Legal content	Sanction	Perpetrator
			years if a damage more than 500,000 EUR occurred	
3	**Art. 9 lett. c**	Highlighting in accounting documents or other legal documents, of charges that are not based on real transactions or highlighting other fictitious operations in order to escape the tax obligations	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
4	**Art. 9 lett. d**	altering, destroying or hiding accounting documents, memoirs of electLeiic cash registers or other means of data storage in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
5	**Art. 9 lett. e**	performing of double accounting records, using documents or other means of data storage in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
6	**Art. 9 lett. f**	evading in carrying out financial, tax or customs verifications by fictitious declaring or misreporting on headquarters in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	Any natural or legal person
7	Art. 9 lett. g	Substitution, degradation or alienation of forfeitable assets by the debtor or third parties in order to escape the tax obligations.	Imprisonment 2 -8 years Imprisonment 4-10 years if a damage	Debtor – natural or legal person/ third parties

No.	Legal rule	Legal content	Sanction	Perpetrator
			more than 100,000 EUR occurred Imprisonment 5-11 years if a damage more than 500,000 EUR occurred	– natural or legal persons

Regarding the quality of the perpetrator, we note that a legal person can be found guilty for committing them, because the Romanian criminal legal system provides the institution of criminal liability of legal persons. The tax evasion offenses and the offenses related to them are included in a broader category of offenses on account and financial-banking activity[3], so they are committed mainly during the ordinary activities of economic agents, mostly legal entities. Therefore there are huge differences between the scholar's interpretation of the legal provisions in counterpart to the position of the Public Ministry and the Romanian Courts in the activity of imposing the criminal liability to legal persons, that are are almost impossible to explain or argue.

Initially seen by the doctrine as two irreconcilable systems[4], the Continental System and Common Law System have succeeded to significantly get closer, especially in the last two decades, the issue of criminal liability of legal persons being the one of the elements that constituted the glue of this rapprochement. Both in terms of quality and in terms of quantity, the legal person criminal phenomenon covers the most significant area of criminality in the society, constituting, according to an author, the most important topic discussed in criminal law today. [5]

In order to impose criminal liability to a legal person, a verification of the conditions for criminal liability provided by art. 135 RCC is needed:

a) if the offense is committed by a legal entity having legal personality, which has not been specifically excluded by the legislature (State, public authorities and public institutions for acts committed in activities that may not occur in the private domain);

b) if the offense is committed in the name, interest or achievement of the legal purpose of the legal person.

The criminal deed – *actus reus* – is comitted by the legal person through a human agent – administrator or other legal representative, a contractual representative – or an employee of the legal person.

II. The perpetrator of the tax evasion offences

The doctrine[6] has identified five categories of perpetrators of tax evasion offences and offences in relation with them: tax payer, payer, taxable, imposing bearer and other persons.

---

[3] T. Toader, *Infracțiuni prevăzute în legile speciale. Reglementare. Doctrină. Decizii ale Curții Constituționale. Jurisprudență*, 5th edition, Editura Hamangiu, București 2012, p. XIII.

[4] R. Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*, in Buffalo Criminal Law Review, vol. 4, no. 1/1999, p. 283, available online at http://wings.buffalo.edu/law/bclc/bclrarticles/4(1)/hefehndehlpdf.pdf.

[5] B. Schünemann, *Plädoyer zur Einführung einer Unternehmenskuratel*, *apud* R. Hefendehl, *op. cit.*, p. 284.

[6] Ioana Maria Costea, *Particularități privind subiectele evaziunii fiscale*, *in* Analele Științifice ale Universității Al. I. Cuza iași, Tom LIV: 87-100, Științe Juridice 2008, p. 89.

1. *the taxpayer* – Art. 2 letter b of the Law no. 241/2005 – "any natural or legal person or any other entity without legal personality who owes taxes, contributions and other financial duties for the State budget"[7] (art. 17 par. (2) FPC[8], art. 1 pt. 4 of the New FPC[9] applicable from 1 February 2016).[10]

2. *the payer* – a third party that intervene with the debtor and the creditor within the legal relations of tax law; has an obligation to pay or withhold and pay taxes, contributions, fees and other budgetary incomes -can be a legal person

3. *the taxable* – in the matter of VAT; both individuals and legal entities that were registered for VAT, according to legislation.

4. *imposing bearer* – in the field of indirect taxation (VAT, excise duties) – consumer goods and services; is the final consumer; can be a natural or legal person[11].

5. *other persons with the potential to become a perpetrator of tax evasion offences*

- *tax debtor* in the forced execution procedure – (art. 9 letter g) degradation or alienation of forfeitable assets (natural or legal).

- *custodian* – a person who has the obligation to preserve possesions in the forced execution procedure (natural and legal person).

- *persons in specific relations with taxpayer, which are obliged to disclose information or present goods (*art. 4 of Law no. 241/2005) natural or legal persons.

- *third parties* – not subjects of tax law (art. 5, 7 para. 1 and 2, art. 9 letter a), art. 9 letter g, of Law no. 241/2005).

III. Analysis of the conditions provided by art. 135 RCC in relation to offenses under Law no. 241/2005

Analysing the provisions of art. 135 NRC, we conclude:

a) the criminal liability of legal person under the legislation in force is a direct liability.

Criminal liability of legal entities is an independent liability which is imposed by conducting a separate evaluation process of *mens rea*. Legal entities and natural persons are two separate entities.

b) the analysis of criminal liability of legal entities is performed distinctively by the analysis of criminal liability of the individual who committed the actus reus involving a separate analysis of the mens rea of the offense.

c) in order to impose criminal liability of legal entities, the act must be committed by a human agent acting in at least one of the three situations provided by art. 135, namely: in the name, the interest or the achievement of the legal purpose of the legal person.

1. The act is committed on the achievement of the legal purpose of the legal person

The criminal deed is commited by a human agent - a legal representative or a member of the governing bodies of the legal person, or even a contractual representative or *de facto* representative. If the individual is a legal representative, it

---

[7] Art. 2 lett. B, Law no. 241/2005.

[8] O.G. no. 92/2003 on Financial Procedure Code Code, republished in Official Monitor, Part I, no. 513/31st of July 2007.

[9] Law no. 207/2015, published in Official Monitor, Part I, no. 547/ 23rd of July 2015.

[10] To see: Mircea Ștefan Minea, Cosmin Flavius Costaș, Diana Maria Ionescu, *Legea evaziunii fiscale. Comentarii și explicații*, Editura C.H.Beck, București, 2006, p.45.

[11] Ioana Maria Costea, *op. cit.,* p. 94.

does not matter if the act is committed with the disregard of its duties (according to the identification theory) [12]. The criminal liability of the legal person shall not be imposed for acts with only a nonspecific and occasional connection with the legal purpose of the legal entity[13].

Any of the tax evasion offences can be committed in achieving the legal purpose of the legal person, since it seeks to avoid the payment of taxes and other duties to the state budget.

2. The act is comitted in the interest of the legal person

In this situation the legal person will obtain a material (to make profit and avoid a loss) or non-material benefit. The human agent may be a legal, statutory, contractual or *de facto* representative or any other employee. But in this case the identification of *mens rea* is difficult: if the individual is a *legal/statutory representative, according with the identification theory, his/hers will is the legal person's will. If the individual is another employee, we need to verify the decisional structure* of the legal entity (if it knew, foresaw or even could have reasonably foreseen the act or had a tolerant and passive policy towards committing such deeds. If the act was committed in the own interest of the human agent, and there is not a *culpa in eligendo* or *culpa in vigilando* of the decisional structure, it is impossible to impose criminal liability to a legal person. The tax evasion offences are committed in order to escape the tax obligations, so obviously are they are committed in the interest of the legal person.

3. The act is committed in the name of the legal person

In this case the offense can be committed only by the governing bodies and the legal/contractual representatives, acting by virtue and within the powers conferred by the legal person by concluding mandate or management contracts.

The legal person "speaks" and acts through its representatives' voice and body – this is the essence of the identification theory developed both in French and Common law doctrine. [14] In practice the analysis of the subjective element – is automatic; any further analysis of the *mens rea* of the legal person is no loger necessary.

If the offence is committed by the contractual representative (e.g. mandate), a verification of the limits of his actions is required. If he acted in respect with its limits, the consent of the legal representative is presumed. If he acted in disregard with its limits, the verification of the decisional structure policy is required.

Referring to all three cases above, we also show that, in practice, they are sometimes difficult to distinguish, the offense being committed in the name of and in the interest or in order to achieve the legal purpose of the legal person so, except where the act is committed by the very governing body of the legal person, in all other circumstances, the task of determining the subjective element of the legal person can not be achieved without performing a careful and complex analysis of the decision-making structure, its corporate policies, its corporate culture, the guilt of the legal person being determined " by the extent to which the organization and functioning of

---

[12] Viorel Paşca, *Drept penal, Partea generală,* 3rd ed., Editura Universul Juridic, Bucureşti, 2014, p. 183.

[13] Anca Jurma, *Persoana juridică – subiect al răspunderii penale*, Editura C.H. Beck, Bucureşti 2010, p. 137.

[14] Anca Jurma, *op. cit.,* p. 142

the legal entity determined the offense."[15] In Common law system another theory is used in order to determine the *mens rea* of the legal person - the *"willful blindnes" theory*" [16], according to which the criminal liability can be imposed on a legal person if its decisional structure pretends that it knew nothing about the act, in order to succesfully deny it in fLeit of the Court.

IV. Critics on the practice of the Romanian Courts

The analysis of judicial practice in relation to criminal offenses provided by Law no. 241/2005 revealed a worrying aspect: the judicial bodies are reluctant to indict a legal entity, although its acts meet the requirements of art. 135 and of the criminalizing rule provided by the special law.

Looking at official statistics provided by the Public Ministry in the past two years, we see a growing number of cases referring tax evasion offences, which we interpretate as an increased effectiveness of actions taken by the judicial bodies on the one hand, and secondly as an increase of the tax evasion phenomenon at a national scale.

Thus, in 2013, prosecutors have issued 1,539 indictments in cases involving tax evasion offenses which represents a share of 3.3% of all solved cases. They prosecuted 2,042 defendants for tax evasion offences and 120 legal persons.[17]

In 2014, from the total number of indictments, 1,279 cases were disposed on tax evasion offenses which represents a share of 3.5% of all solved cases. 1,803 defendants were indicted for tax evasion offenses and 358 legal persons for economic crimes (the number of legal entities indicted for tax evasion offenses: 164).[18]

Most of the acts were committed by the manager of the company, the sole legal representative or the person authorized by the legal person. In some cases the human agent who committed the act was a *de facto representative*.

Thus, by one of its decisions the Supreme Court has showed that the tax evasion offense referred to in art. 9 para. (1) lett. c) of Law no. 241/2005, consisting of highlighting in accounting documents or other legal documents, of charges that are not based on real transactions or highlighting other fictitious operations in order to escape the tax obligations, may be committed within a company, by the de facto administrator of the legal person, and not only by the statutory administrator, as the law does not provide a special quality of the perpetrator and does not require for the existence of the offense a person who has a certain quality.

In fact, the defendant, O.M. was prosecuted and sentenced for the offense of tax evasion referred to in art. 9 para. (1) c) and para. (2) of Law no. 241/2005, being that, as the sole shareholder and administrator of the company L., based on a single criminal resolution, in February 2008 – March 2009, registered in the accounts of the company unreal, commercial operations, damaging the State budget with the amount of 1,373,352 lei. Romanian High Court of Cassation and Justice held that, unlike the offenses

---

[15] Viorel Paşca, *Modificările codului penal (Legea nr. 278/2006). Comentarii şi explicaţii,* Editura Hamangiu, Bucureşti 2007, pp. 25-26.

[16] Th.A. Hagemann, J. Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction,* in 65 George Washington Law Review, 1996, p. 210; A. Ragozino*, Note, Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach,* in 24 Southwestern University Law Review, 1995, p. 423.

[17] http://www.mpublic.ro/presa/2014/bilant2013.pdf.

[18] http://www.mpublic.ro/presa/2015/raport_activitate_2014.pdf.

mentioned in art. 3 and art. 8 by Law no. 241/2005 where the legislature speaks of the taxpayer - so we have a qualified perpetrator – in case of other offenses, including that provided by art. 9 para. (1) lett. c) and para. (2), the legislature does not show who should be the offender.

Accordingly, the perpetrator of the offense may be any person or entity acting on behalf or interest of the taxpayer, or in order to achieve the legal entity's legal purpose. Therefore, the perpetrator may be the legal or statutory administrator of the company or any other employee – director, accountant, seller – in so far as theirs actions and / or inactions their aim the company to evade to pay due taxes.

The special Law does not require for the existence of the offense an express authorization provided by the person responsible for the organization and maintenance of accounting registers if, in fact, the perpetrator does manage the accounting activities of the company.[19]

In another case, the defendant, C.F., as the administrator of the SC X LTD Răchiţi, as a de facto representative of the company, committed the offense of tax evasion under art. 9 para. 1, lett. c and para. 2 of Law no. 241/2005, on a basis of a special mandate offered by the legal representative of the company. So C.F. ordered repeatedly and under the same criminal intention the registration of fictitious business operations with two companies and several individuals (farmers), concerning the purchase of goods totalling 4,175,592.61 lei, using false invoices. To these facts, only the individual C.F. defendant was convicted, and not the legal person for which he acted in representation.[20]

Another defendant – B.I.M. - was acquitted by the Romanian Supreme Court for the tax evasion under art. 9 para. 1 lett. a and b of Law no. 241/2005 on the *in dubio pro reo* principle, noting that there is a stLeig doubt and showing that it can not be determined with certainty who drafted invoices, receipts and contracts, especially since some of the commercial operations that were not recorded in the accounts of the legal person SC O.P. LTD had occurred before the defendant B.I.M. became the legal representative of the legal person, some of the documents being signed by people who no longer were administrators of this company. In fact, in 2009, the defendant B.I.M., while he was the manager of SC O.P. LTD, has completed two financial leasing contracts for a concrete stand, three equipments used in construction and two loaders, without paying instalments at due dates and systematically refusing to hand over the above-mentioned goods. But not the fact that the individual was acquitted was the controversial issue in this case, but that the legal person involved throughout the financial transaction which included forgeries, false statements and failures to register financial operations has not been brought to justice for committing the same offense. In our opinion it was obvious that the legal requirements provided by art. 135 of the Criminal Code had been met, the acts being committed both in the name and in achieving of the legal purpose of the legal person.[21]

In another case, the court held that the perpetrator U.C. – shareholder and administrator at SC V.R. Ltd, had failed to register three invoices (on the 31st of July 2008 for an amount of 202.109 lei, on the 17th of October 2008 for the sum of 91,791.84 lei and on the 20th of October 2008, all perfecting the trade relations developed with SC B.I. LTD) in the accounts of the company. The acts committed met the constitutive

[19] High Court of Cassation and Justice, criminal section, decision no. 272/28.01.2013, www.scj.ro.
[20] Botoşani Tribunal, criminal sentence no. 1/17.01.2014, www.legeaz.net.
[21] High Court of Cassation and Justice, criminal section, decision no. 145/ 28.01.2015, www.scj.ro.

elements of the offense of tax evasion under art. 9 para. (1) b) of Law no. 241/2005. The defendant was a legal representative – administrator- until October 2008 and a *de facto* representative thereafter, behaving as such in relation to third parties, so that in agreement with the prosecution, the court held that the transfer of shares was fictitious. Again, the legal person has not been convicted.[22]

In a similar case, the court found that the perpetrator V.A.N., who, as administrator of SC CC LTD Bordușani, under the same criminal will, between the 14th of September 2007 – the 31st of December 2007, omitted to register in the accounts of the company 29 invoices and evaded the payment of the tax of 4.079 lei to the state budget and 3.875 lei VAT payment, constitutes the offense of tax evasion under art. 9 para. (1) b) of Law no. 241/2005. The act of the same perpetrator, who, under the same criminal will, from the 1st of January 2009 – to the 31st December 2011, registered in the accounts of SC CC Ltd. of 22 invoices representing phantom expenditure, resulting in circumvention of the state budget in the amount of 44.157 LEI of which 9.780 lei represents the income tax and 34.377 lei representing VAT payable constitutes the tax evasion offense under art. 9 para. (1) c) of Law no. 241/2005. Since the perpetrator acted as sole shareholder and administrator of SC CC LTD, this legal person was held civilly liable only. So the legal person has not been indicted in the case, the court aiming to only repair the damage resulted from the offense.[23]

Another human perpetrator was indicted and convicted for the same act provided by art. 9 para. 1 lett. b of the Law no. 241/2005, because, as administrator of SC D.C. Ltd, has failed to register in the accounts of the company during the period 01.01.2009 - 30.06.2009 the sale of a quantity of goods and so he evaded the payment of an income tax amounting to 1449 lei and a VAT amounting to 9163 lei.[24]

Finally, the first conviction of a legal person in Romania dates from 2009. The legal entity SC A.D.M. LTD was sentenced to a criminal fine for the offense provided by art. 6 of Law no. 241/2005 (incrimination currently declared unconstitutional) showing that, on 24th of April 2008 – to 30th of June 2008, the perpetrator D.M.G., as manager of SC ADM LTD Buzău, issued in favor of some Romanian companies several promissory notes without having enough money in the company's bank account. Thus, the court held that the perpetrator has deceived 14 different companies[25].

Another conviction of a legal person intervened in 2014 for the offense of tax evasion under article. 9 of 1 letter b Law no. 241/2005. Judicial bodies have found that legal entity SC G. C. LTD Brasov which had the legal purpose of "gambling and betting" carried out the operation of 50 slot-machine devices from which three of them were held and operated without a license and authorization. Thus the state budget was damaged with the amount of 31,000 lei, consisting of non-payment of the license fee and charges for operating permits related to the 3 devices. The statutory representative authorized the perpetrator P.C. through a special proxy with full powers to manage SC G. C. LTD, the lack of authorizations and licenses being known both by the statutory representative and the authorized person. The court also held that the offense was

---

[22] High Court of Cassation and Justice, criminal section, decision no. 3105/ 5.12.2014, www.scj.ro.

[23] High Court of Cassation and Justice, criminal section, decision no. 2719/ 30.09. 2014, www.scj.ro.

[24] Ploiesti Appeal Court, criminal, family and minors section, criminal sentence no. 54/ 23.03.2012, www.portal.just.ro.

[25] Buzau Tribunal, criminal sentence no. 123/14.07. 2009, case no. 335/114/2009; criminal decision no. 1079/22.03.2010, caseno.335/114/2009, www.scj.ro.

committed with guilt (knowingly) by the legal entity SC G. C. LTD and by the contractual representative P.C.[26]

V. Conclusions

If *actus reus* of the offense committed by a legal person under article assumes censorship under art. 135 C.C. – the act is committed in achieving of the legal purpose of the legal person, in the interest or on behalf of the legal person – *mens rea* should be set differently according to whether the acts were committed by the management bodies of the legal person – the identification theory – or were committed by others, in which case one should check whether there is a deficiency in organizing the activity of a legal person, a *culpa in eligendo* in regard with the contractual representative or a policy of toleration of acts which determined the commision of the offense.

The number of indictments of legal persons is very slowly increasing according to official statistic data. The prosecutors are very shy in the case of indictment of a legal person. Also the courts have a certain difficulty in motivating the presence of *mens rea* in case of a legal person and that is why they seem to favor the position in the trial as a civilly responsible party of the legal person because it ensures 100% recovery of damages caused by committing tax evasion offences.

We hope that in the future, judicial organs will find more courage in motivating the conditions laid down by art. 135 C.C. and with regard to the *mens rea* in case of offenses committed by legal persons, which will certainly reflect on the number of convictions.

[26] Bacău Tribunal, criminal sentence no. 587/ 22.12.2014, www.legeaz.net.

Computer related economic crimes in Hungary

ASSOCIATE PROFESSOR, DR. PH. D. HABIL. ZOLTÁN NAGY
University of Pécs, Faculty of Law
Department of Criminal Law

PH.D. STUDENT, DR. DÁVID TÓTH
University of Pécs, Faculty of Law
Department of Criminology and Penal Law

Abstract:

The revolution of information technology (e.g. Computer technology) have changed the conditions and possibilities concerning economic crime. For example nowadays criminals with high tech printers can easily produce counterfeit money with good quality.

The aim of this article is to analyse the Hungarian regulation of some computer related economic crimes. In this article the following crimes will be analysed which are closely related to each other:

- *counterfeiting currency*
- *counterfeiting of cash-substitute payment instruments and the aiding in counterfeiting cash-substitute payment instruments*
- *cash-substitute payment instrument fraud.*

Keywords*: economic crimes, computer related crimes, counterfeiting currency, credit card fraud, counterfeiting of credit card.*

I. Introduction – concept of economic crimes and computer related crimes

It is a very difficult task to give an exact definition of economic crime. There is no consensus in the legal literature as well. Under Anne Alvesalo and Steve Tombs[1] economic crime is: "a criminalized act or neglect which is committed in the framework of, or using a corporation or other organisation. The act is done with the aim of attaining unlawful direct or indirect benefit. A criminalized, systematic act that is analogous to entrepreneurship and has the aim point of considerable benefit is also defined as economic crime."

We agree with the definition of Professor Tóth: "In a criminological aspect economic crime is a form a crime which is realised in the economic process (or closely related to it). This form of crime is able to – in the aspect of perpetration behaviour (often with the use of legal forms of business or with the abuse of it) and in the aspect of the result of the crime – breach or endanger the fair and legal order of the economy."[2]

The revolution of information technology (e.g. Computer technology) has changed the conditions and possibilities concerning economic crime. For example nowadays

[1] http://www.britsoccrim.org/volume4/001.pdf (date of download: 10. 09. 2015.)

[2] Tóth Mihály, *Gazdasági bűnözés és bűncselekmények. [Economic crime and offenses]* Kjk-kerszöv kiadó, Budapest. 2002. p. 22.

criminals with high tech printers can easily produce counterfeit money with high quality. The general characteristics of Computer related crimes are the following:

1. anonymity
2. speed
3. high degree of latency
4. the large number of victims
5. international and
6. it is hard to detect the source of the crime.[3]

The aim of this article is to analyse the Hungarian regulation of some computer related economic crimes. In this article the following crimes will be analysed which are closely related to each other:

- counterfeiting currency
- counterfeiting of cash-substitute payment instruments and the aiding in counterfeiting cash-substitute payment instruments
- cash-substitute payment instrument fraud

II. Counterfeiting currency

After almost one hundred amendments of the Act IV of 1978 (The previous Hungarian Criminal Code) it was timeous to create a new and coherent Criminal Code to answer the changes in the society. After a long codification process the lawmakers has finally passed the new Criminal Code in 2012. The Act C of 2012, the fourth written Criminal Code of Hungary came into effect on the first of July 2013.

In the previous Criminal Code counterfeiting was regulated in the Economic Crimes chapter.[4] The new Code regulates counterfeiting currency in a separate Chapter XXXVIII. The title of the chapter is "Criminal offenses relating to counterfeiting currencies and philatelic forgeries." Even though the Economic Crimes chapter does not exist in the Criminal Code, from a criminological aspect counterfeiting currency is still considered as an economic crime.[5]

Regarding counterfeiting, the new regulation does not contain significant changes compared to the previous Code. The extent to which this crime is punishable lies on the rules of the international agreement, established in Geneva, on the 20th of April 1929, which came into effect in Hungary in the Act XI of 1933.

The *legal object* of the crime is the trust in the issued money and securities flow, as well as the legal order of the financial management. The *object of perpetration* is controversial in the legal literature. According to some views the object of perpetration is money, as well as securities and bank notes that are equivalent to money in the

---

[3] Gyaraki Réka, *A számítógépes környezetben elkövetett gazdasági bűncselekmények. [The economic crimes committed in computer environment]* In: Gaál Gyula – Hautzinger Zoltán (editors): Pécsi határőr tudományos közlemények XIII. Pécs, 2012. pp. 235-236.

[4] About the previous regulation see further in: Kőhalmi László, *A pénzhamisítással kapcsolatos bűncselekmények. A pénz büntetőjogi fogalma [Offenses related to counterfeiting currency. The criminal law concept of money]* In: Balogh Ágnes, Büntetőjog II. Különös rész. Dialóg Campus Kiadó, Budapest-Pécs, 2008. pp. 388-394.

[5] About the criminological aspect of counterfeiting currency see further in: Kőhalmi László, *Jogállam és büntetőjog - avagy kételyeim az ezredforduló kriminálјoga körül [Rule of law and criminal law – or my doubts about criminology law int he millenium]* In: Karsai Krisztina (Editor), Keresztmetszet: tanulmányok fiatal büntetőjogászok tollából. Pólay Elemér Alapítvány, Szeged. 2005. pp. 121-137.

criminal law, and therefore considered as money.[6] Under other views not all criminal conduct counterfeiting currency has a subject of perpetration. In the case of the first perpetration conduct, the imitated money is not the object of perpetration but the product of it.[7]

A practical change in the new Criminal Code that it states the definition of money within the statutory provisions of counterfeiting currency (In the previous regulation it was found in another Act), furthermore it clarifies the definition on several points. Under the current regulation not only the bulletin of the institution that is authorized to issue money, but also the legislation, and the legal act of the European Union can specify the legal tender (coins and banknotes) and the obligations to exchange the banknotes withdrawn from circulation.

The new Criminal Code extends the concept of paper money, however, as opposed to the previous Criminal Code, it not lists the securities that satisfy the criteria to be considered as paper money fully comprehensively (in a holistic way), but only ascertain the printed version of securities issued in a continuous flow to be considered as equivalent to banknotes, only if the exchange and transfer of such securities is neither limited nor prohibited by legal measures or contracts of those securities. It is also important to note here at the object of perpetration that foreign currencies and securities are granted protection identical with the domestic ones.[8] This regulation adapts to the Geneva Convention.

There are five *perpetration conducts* of counterfeiting currency:

- imitation,
- counterfeiting (or in other word falsification),
- the intentional acquisition,
- the export, import, or transport through the territory of the country
- the distribution of false or falsified money

These five are extended with the interpretation section: the application or removal of a sign serving as an indication that the currency is valid only in a specific country, and any alteration of currency that has been withdrawn from circulation to create an impression as if it was still in circulation shall be considered imitation of currency.[9] Counterfeiting in the practice is committed typically with highly advanced printers and computers. This crime is a felony and punishable in the basic case by imprisonment between two to eight years.

The crime has two aggravated cases when counterfeiting currency

- involves a particularly considerable or greater amount of money; or
- is committed in criminal association with accomplices.

According to the closing provisions of the Criminal Code particularly considerable amount of money is between 50 million plus one and 5 hundred million Forints so the

---

[6] Molnár Gábor, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Kónya István (Szerk.): Magyar Büntetőjog, Kommentár a gyakorlat számára 3. kiadás. II. Kötet. Hvg-orac Lap és Könyvkiadó Kft, Budapest. 2013. p. 1456.

[7] Gál István László, *Pénz és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Polt Péter (Szerk.): Új Btk. Kommentár. 7. kötet, Különös rész. Nemzeti Közszolgálati és Tankönyvkiadó. Budapest, 2013. p. 197.

[8] Act C of 2012, Section 389 (6).

[9] Karsai Krisztina, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Karsai Krisztina (Szerk.): Kommentár a Büntető Törvénykönyvhöz. Complex Kiadó, Budapest. 2013. p. 818.

aggravated case of counterfeiting currency can be committed above 50 million plus one Forints which is equivalent to about 161235 Euros. Criminal association is formed when two or more persons are engaged in criminal activities in an organized fashion, or they conspire to do so and attempt to commit a criminal act at least once, without, however, creating a criminal organization.[10]

The state of affairs is stricter compared to previous regulations, in aggravated cases the punishment can be imprisonment for up to 15 years at maximum (previous Criminal Code had 10 years at maximum). The preparation of counterfeiting currency is also punishable by imprisonment not exceeding three years. Under the Criminal Code preparation is committed when someone "provides the means necessary for committing a criminal offense or facilitating that, and who invites, volunteers or undertakes to commit a crime, or agrees to commit a crime in league with others shall be punishable for preparation."[11]

The new Criminal Code, as opposed to previous legal traditions, enacts the issue and distribution of counterfeit money not as an independent statutory provision, rather within the act of counterfeiting. The actual difference between the two acts is that, in this case the perpetrator obtains the money legally and „bona fide", and realizes it's wrong, disingenuous and sophisticated nature only after. Legality refers to the legal pretence of acquisition. Therefore, the acquisition is not legitimate if the person obtains the counterfeit money through a criminal act. The legal tradition measures this act as a privileged case with respect to the cause emerged from the expectations, what the international agreement has made feasible and what it has given potential. For the security of the money flow (the circulation) the initiation of increased protection is reasonable. The distribution of forged or counterfeit money of substantial or greater amount cannot be measured as the lack of expectations, since the perpetrator is aware of the increased risk, therefore the new Criminal Code ensures the possibility for the mitigation of the punishment only in specific cases, tied to a threshold limit (when the value of the money is trivial or even less substantial) and with an unlimited mitigation of the punishment.[12]

III. Counterfeiting of cash-substitute payment instruments and the aiding in counterfeiting cash-substitute payment instruments

The predecessors of the cash replacing plastic cards were introduced by oil companies, hotels in the 1920s. The first credit card was introduced by the Bank of America in 1958, while the first European credit card the so called „Karte Blau" appeared at a Rothschild Bank.[13]

---

[10] Act C of 2012, Section 459. (1) 2.

[11] Act C of 2012, Section 11.

[12] Based on the justification of the Act C of 2012.

[13] Harsányi Gyöngyi, *A bankkártyák, és az alapjukat képező szerződéses viszony sajátosságai. [The credit cards, and the characteristics of the contracts based on them]* Gazdaság és Jog, 1996. 10. pp. 10-13.

Dulin Tamás - Kő József, *A hitelkártya-visszaélésekről.* [About the abuses of credit cards] BSZ. 34. 1996. 11. sz. pp. 46 - 50

Huszti Ernő, *Banktan. [Banklore]* Tas Kft, Budapest, 1996. pp. 125-133.

Meir Kohn, *Bank- és pénzügyek, pénzügyi piacok. [Financial institutions and markets]* Osiris Kiadó, Budapest. 1998. pp. 105-113.

In Hungary the first card which was linked to a foreign currency account appeared in 1988. In the same year appeared the first ATM card as well. The use of credit cards started to spread in the early 90's. Today in Hungary there are about 8.5 million credit cards which are supposed to perform financial transaction. There also more than 100 thousand plastic cards which are not produced by banks but from the American Express, oil companies, trading companies etc. The numbers of credit cards are decreasing due to the economic situation in Hungary.[14]

The legislator realized that credit cards are needed to be protected by criminal law measures. There were two crimes introduced in the Hungarian Criminal Code in 1994:

- Counterfeiting of credit card
- Credit card fraud.

Since its introduction the scale of the object of perpetration expanded and thus the name of the crime has changed to counterfeiting of cash-substitute payment instruments, cash-substitute payment instruments fraud.[15] These crimes are regulated within the same chapter as counterfeiting currency.

The *legal object* of the crime is the safety of the flow of the cash-substitute payment instruments as well as the legal order of the financial management.[16] With this statutory provision not just the interests of the bank account owners are protected but the financial institutes as well.[17]

The *object of perpetration* are the cash-substitute payment instruments which may be in material or electronic form. The definition of these can be found in the closing provisions of the Hungarian Criminal Code:

'*cash-substitute payment instrument*' shall mean non-cash means of payment provided for in the act on credit institutions, as well as treasury cards, traveller's checks, credit tokens and bills of exchange made out in accordance with the Personal Income Tax Act, provided they contain protective fixtures, such as coding or signature, against duplication, fraudulent making or forgery, and against unauthorized use.[18]

'*electronic payment instrument*' shall mean, in addition to the non-cash means of payment provided for in the act on credit institutions, treasury cards and electronic credit tokens made out in accordance with the Personal Income Tax Act, provided that they are used through the information system.[19]

These includes credit cards, debit cards meal vouchers, cheques, travellers cheques etc.[20] Under the Criminal Code cash-substitute payment instruments and electronic

---

[14] http://hvg.hu/gazdasag/20140703_Egyre_kevesebb_bankszamla_es_bankkartya_v [date of download 2015. 09. 15,].

[15] Tóth Mihály, *Gazdasági bűnözés és bűncselekmények. [Economic crime and offenses]* KJK-KERSZÖV Jogi és üzleti kiadó, Budapest. 2002. p. 445.

[16] József Gula's opinion is slightly different. See further in: Gula József, *A pénz-és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Horváth Tibor – Lévay Miklós (editors), Magyar Büntetőjog Különös Rész. Wolters Kluwer Kft. Budapest, 2013. p. 592.

[17] Polt Péter, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Blaskó – Hautzinger – Madai – Pallagi – Polt – Schubauer, Büntetőjog, Különös rész II. Rejtjel kiadó, Budapest. 2013. p. 288.

[18] Act C of 2012 Section 394 (2).

[19] Act C of 2012 Section 459. (1) 20.

[20] Nagy Zoltán: *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Tóth Mihály – Nagy Zoltán (editors): Magyar Büntetőjog Különös rész. Osiris Kiadó, Budapest. 2014. p. 500.

payment instruments issued in other States shall receive the same protection as those issued in Hungary.[21]

The statutory provisions consists of three *perpetration conducts*:

- falsification of non-cash payment instruments
- manufacturing counterfeits
- and recording data stored on electronic payment instruments or the related security features, using technical means.

We would like to illustrate the last perpetration conducts with some examples:

- *ATM frauds:* Nowadays more and more people are victimized by ATM frauds. The criminals can plant so-called skimmer devices (electronic card readers, tiny cameras etc.) to ATM slots. After the ATM user puts the credit card into the ATM card reader slot, the skimmer device picks up all the information from the card's magnetic strip. With miniature cameras offenders can obtain our PIN code as well. After the criminals obtained the data, they can create with these clone credit cards and use it as the original one.

- *recording radio frequency signals.* Easy and comfortable payment methods such as paypass has risks. Paypass credit card communicates with the point of sale terminal with radio frequency signals but these can recorded by skimmer devices.[22]

It is very easy to be victimized of this crime thus we would like to present some prevention proposals:

- try to use ATM machines which are inside of a building,
- If you notice some problem contact the bank, or the police and do not accept help from third persons.
- keep your certificate of the ATM transaction.

Lastly it is important to note that the preparation of this crime is also punishable.[23]

The independent crime of *aiding in counterfeiting cash-substitute payment instruments* is very similar to preparation of the previous crime. This crime is established when somebody:

- produces, supplies, receives, obtains, keeps, exports or imports, or
- transports in transit through the country, or
- distributes any material, means, equipment or computer program intended to be used for counterfeiting cash-substitute payment instruments or
- for the recording of data stored on electronic payment instruments or
- the related security features, using technical means.

This crime is a misdemeanour and punishable by imprisonment not exceeding one year.

The most important difference is comparing to the preparation of counterfeiting is that here to effectuate the crime, no intention of use required. The most typical example when someone sells a skimmer device to a criminal. This crime was introduced in the Hungarian Criminal Code in 2003 due to legal harmonization[24] and prevention

---

[21] Act C of 2012 Section 392. (3).

[22] Nagy, *op. cit.* pp. 501-502.

[23] Polt, *op. cit.* p. 287.

[24] The European Union's regulation can be found in 2001/413/JHA: Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment.

See further In: Bujáki László, *Készpénz-helyettesítő fizetési eszközök védelme.[The protection of cash-substitute payment instruments]* In: Kondorosi Ferenc – Ligeti Katalin (editors), Az Európai Büntetőjogi Kézikönyve. Magyar Közlöny Lap- és Könyvkiadó, Budapest. 2008. p. 493.

purposes. The offence has an aggravated case: if somebody commits the crime in criminal association with accomplices or on a commercial scale and it is punished by imprisonment not exceeding two years.[25] The crime is deemed to be committed on a commercial scale if the perpetrator is engaged in criminal activities of the same or similar character to generate profits on a regular basis.[26]

IV. Cash-substitute payment instrument fraud

The *legal subject* and the *object of perpetration* of the crime is the same as mentioned at counterfeiting of cash-substitute payment instruments. However there are differences in the *perpetration conducts*. We can categorize the conducts into three groups.

- unlawful obtainment of cash-substitute payment instruments
- commandeer cash-substitute payment instruments
- and transit type of conducts:

o supplies, obtains, exports or imports, or transports in transit through the territory of Hungary any counterfeit or falsified cash-substitute payment instrument

o or a cash-substitute payment instrument that has been commandeered or obtained in the manner specified in Paragraph a),

o or data stored on electronic payment instruments or the related security features;[27]

This crime in the basic case is a misdemeanour and punishable by imprisonment not exceeding one year.

Types of credit card abuse in the practice:

1. With the use of the stolen credit card:
a. "Cloning"
b. Withdrawal from an ATM
c. Buying in real life (e.g. in department stores.)
d. Buying in cyberspace on the internet.
2. With the use of "cloned" credit cards:
a. Withdrawal from an ATM
b. Buying in real life (e.g. in department stores.)
c. Buying in cyberspace on the internet.
3. The use of credit card data:
a. Buying in cyberspace on the internet.
4. Unlawful monetary gain, while the owner of the credit card tries use it legally.

The form of the crime has changed in the new Criminal Code. Earlier the crime was completed when financial damage was caused by the criminal act. Under the current regulation this is not required, the crime can be established even if the criminal did not cause any financial damage. Moreover if the criminal act caused financial damage not the cash-substitute payment instrument fraud but another crime, information system fraud shall be established by the courts.[28] To sum it up cash-substitute payment instrument fraud has become an *immaterial crime*.

---

[25] Act C of 2012 Section 459. (1) 20.

[26] Act C of 2012 Section 459. (1) 28.

[27] Act C of 2012 Section 393. (1) b.

[28] Molnár Gábor, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Kónya István (editor), Magyar Büntetőjog Kommentár a gyakorlat számára. 3. kiadás. Hvg-orac Lap és Könyvkiadó, Budapest. 2013. p.1493.

The aggravated case of this crime is a felony, and it is established when somebody commits the offence in criminal association with accomplices or on a commercial scale and is punishable by imprisonment at the maximum of three years.[29]

V. Criminal statistics and Conclusions

The following table shows the registered numbers of computer economic related crimes per year.

	2010	**2011**	**2012**	**2013**
counterfeiting currency	2211	1390	1412	920
counterfeiting of cash-substitute payment instruments	282	485	246	65
cash-substitute payment instrument fraud	10172	13057	17595	5804
aiding in counterfeiting cash-substitute payment instruments	11	3	3	3

The registered numbers of computer related economic crimes/year

We can see from the table that counterfeiting currency has a decreasing tendency. Counterfeiting is not primarily a quantity but a quality problem of crime. The real threat of this crime is the damage it can cause to the economy. High numbers of fake money in the circulation can destabilize the economics relations, and the trust in a country's money.

Under the statistics the crime of the cash-substitute payment instrument fraud has the highest numbers but in 2013 a drastic reduction can be seen. The low numbers of counterfeiting of cash-substitute payment instrument can be misleading because in the legal practice the classification can be controversial. Sometimes the courts classify these crimes as

- extortion[30] (When the criminal obtains the PIN Code with violence or threat),
- fraud[31] (when they use clone cards as payment in shops), or
- information system fraud[32] (when someone pays with the stolen credit card number on the internet).

[29] Act C of 2012 Section 393. (2).
[30] Act C of 2012 Section 367.
[31] Act C of 2012 Section 373.
[32] Act C of 2012 Section 375.

On one hand these classification options inhibits us to get the true numbers of this crime. On the other hand, latency, can be another reason for the low numbers in statistics. The damage caused to the victims by these crimes are small comparing to the damage caused to the financial institutes good reputation (or good will) and thus the financial institutes are not interested to cooperate with the authorities. Obviously the clients would be mistrustful if the vulnerability of the banks information system is unfolded. Unfortunately due to these reasons it is doubtful that we will get true numbers in the near future of this crime.[33]

All in all the best way of crime prevention is to pay attention to our everyday financial transaction and thus we can prevent from being victimized. It is expected in the not too distant future, that the chips will be replaced by biometric cards which would increase the financial transaction.

Bibliography

1. Bujáki László, *Készpénz-helyettesítő fizetési eszközök védelme.[The protection of cash-substitute payment instruments]* In: Kondorosi Ferenc – Ligeti Katalin (editors), Az Európai Büntetőjogi Kézikönyve. Magyar Közlöny Lap- és Könyvkiadó, Budapest. 2008;

2. Dulin Tamás – Kő József, *A hitelkártya-visszaélésekről. [About the abuses of credit cards]* BSZ. 34. 1996. 11;

3. Gál István László, *Pénz és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Polt Péter (Szerk.): Új Btk. Kommentár. 7. kötet, Különös rész. Nemzeti Közszolgálati és Tankönyvkiadó. Budapest, 2013;

4. Gula József, *A pénz-és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Horváth Tibor – Lévay Miklós (editors), Magyar Büntetőjog Különös Rész. Wolters Kluwer Kft. Budapest, 2013;

5. Gyaraki Réka, *A számítógépes környezetben elkövetett gazdasági bűncselekmények. [The economic crimes committed in computer environment]* In: Gaál Gyula – Hautzinger Zoltán (editors): Pécsi határőr tudományos közlemények XIII. Pécs, 2012;

6. Harsányi Gyöngyi, *A bankkártyák, és az alapjukat képező szerződéses viszony sajátosságai. [The credit cards, and the characteristics of the contracts based on them]* Gazdaság és Jog, 1996;

7. Huszti Ernő, *Banktan. [Banklore]* Tas Kft, Budapest, 1996;

8. Karsai Krisztina, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények [Criminal offenses relating to counterfeiting currencies and philatelic forgeries*] In: Karsai Krisztina (Szerk.): Kommentár a Büntető Törvénykönyvhöz. Complex Kiadó, Budapest. 2013;

9. Kőhalmi László, *A pénzhamisítással kapcsolatos bűncselekmények. A pénz büntetőjogi fogalma [Offenses related to counterfeiting currency. The criminal law concept of money]* In: Balogh Ágnes, Büntetőjog II. Különös rész. Dialóg Campus Kiadó, Budapest-Pécs, 2008;

10. Kőhalmi László, *Jogállam és büntetőjog – avagy kételyeim az ezredforduló kriminájoga körül [Rule of law and criminal law – or my doubts about criminology law int*

[33] Nagy Zoltán András, *Bűncselekmények számítógépes környezetben*. [Offenses committed in computer enviromnet] Budapest, Ad-Librum, 2014. pp. 153-154.

he millenium] In: Karsai Krisztina (Editor), Keresztmetszet: tanulmányok fiatal büntetőjogászok tollából. Pólay Elemér Alapítvány, Szeged. 2005;

11. Meir Kohn, *Bank- és pénzügyek, pénzügyi piacok. [Financial institutions and markets]* Osiris Kiadó, Budapest. 1998;

12. Molnár Gábor, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Kónya István (Szerk.): Magyar Büntetőjog, Kommentár a gyakorlat számára 3. kiadás. II. Kötet. Hvg-orac Lap és Könyvkiadó Kft, Budapest. 2013;

13. Nagy Zoltán András, *Bűncselekmények számítógépes környezetben*. *[Offenses committed in computer enviromnet]* Budapest, Ad-Librum, 2014;

14. Nagy Zoltán: *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Tóth Mihály – Nagy Zoltán (editors): *Magyar Büntetőjog Különös rész. Osiris Kiadó*, Budapest. 2014;

15. Polt Péter, *Pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Criminal offenses relating to counterfeiting currencies and philatelic forgeries]* In: Blaskó – Hautzinger – Madai – Pallagi – Polt – Schubauer, Büntetőjog, Különös rész II. Rejtjel kiadó, Budapest. 2013;

16. Tóth Mihály, *Gazdasági bűnözés és bűncselekmények. [Economic crime and offenses]* Kjk-kerszöv kiadó, Budapest. 2002.

Follow-the-money! criminal confiscation in economic crime

SENIOR LECTURER FLAVIU CIOPEC, LLD*
Faculty of Law
West University of Timişoara

Abstract:

Economic crime is profit-driven in the sense that it aims at generating a wealth that did not exist before. The best method to neutralize such consistent, continuous and apparently available gain seems to be confiscation. The new sanction which affects the patrimony rather than the person is in accordance with the new penal philosophy: penalties shift from the author (in personam) towards the act or its effects (in rem). The new penal policy intends to approach such penalties more firmly and efficiently. In order to achieve said goal, it needs a theoretical basis able to legitimize the new approach as being a useful social instrument. The new penal doctrine is subject to a critical analysis, capable of revealing the rationale it is based on, as well as the arguments that show that the enthusiasm for this doctrinary construct may be relativized.

Key words*: economic crime, proceeds of crime, confiscation, rationale, money laundering.*

Like any complex reality, economic crime allows several definitions. According to one definition, economic crime is the one committed in an economic environment[1], by using or abusing the means, the context or the economic mechanisms. This is not the meaning that the following study addresses. It seems more interesting to define economic crime by what it is driven to, namely generating profit. It is true that, as a general rule, any offense is associated with a benefit for its author, but what is of interest here is the continuous, systematic and conscious obtainment of an economic advantage by those involved in illegal activities. In other words, this is about introducing business principles into the criminal activity.

There are three types of economic crime[2]. The one is purely predatory and implies a bilateral, involuntary relationship between the offender and victim, in which the former, through duress (force) or fraud, deprives the latter. The other is enterprise crime, where there is a relationship that perfectly renders a legitimate economic setting: there are suppliers of illegal goods and there are buyers (clients) of such goods. The parties enter into this relationship of their own will, voluntarily, being consumers of goods that can be found only on the black market (drugs, prostitution, weapons, etc.). The exchange-based relationship, freely consented to, determines that this type of crime does not have victims in the classical sense. Finally, commercial crime is committed by

* E-mail: *flaviu.ciopec@e-uvt.ro.*

[1] F. Ciopec, *The Concept of Economic Crime in Romanian Criminal Legislation*, in V. Paşca, F. Ciopec, M. Roibu (eds.), *Economic Crime in the Context of Crisis*, Universul Juridic Publishers, Bucharest, 2013, p. 65.

[2] R.T. Naylor, *Towards a General Theory of Profit-Driven Crimes*, British Journal of Criminology, vol. 43, no. 1/2003, p. 84.

legitimate entities which function on a perfectly legal market, but which use illegal methods and techniques (mock auctions, underground labor, cheating the business partners etc.).

Modern criminal law has been focused on a rather constant paradigm, centered on the conditions in which the state might be entitled to refuse a human being his/her fundamental rights (to freedom, to property, and sometimes to life). In the area of profit-driven crime, there has been a gradual shift from traditional theory to a new paradigm. The new concept has challenged the classical paradigm, determining the amendment of several traditional approaches.

This policy of social control is no longer oriented towards the restriction of a person's rights, but rather on the pursuit of illegally obtained goods. Instead of focusing on the investigation and punishment of offenders, its main objective seems to be the undermining and neutralizing of the profits they obtained as a result of the criminal activity. First initiated in the USA, then adopted at international and European level, the pursuit and neutralization of benefits derived from crimes has ceased to be a mere alternative provided by the penal policy, but has become a genuine crusade. The doctrine in favor of using confiscation, under more and more extended forms, as an efficient instrument of the fight against crime has been called „*Follow-the-money!*" The expression is no longer a mere movie line[3], but has become the slogan of the fight against profit-driven crime.

The enthusiasm for such a policy aimed at confiscating the proceeds of crime, as a response of criminal law to a viral problem at social level should not interfere with an unemotional and impartial analysis of the grounds of such policy. The present study attempts to display the arguments that might temper such enthusiasm.

Essentially, there are five reasons[4] for which the „*Follow-the-money!*" policy should be promoted.

1. Profit is the only reason for committing economic crimes. If this reason is ignored, there remains no other incentive that may prompt offenders to insist in committing offenses. Confiscation of proceeds of crime and neutralization of profit should act as strongly dissuasive factors, able to lead to both special prevention (i.e. discourage the offender from persisting in his criminal activities for the future) and general prevention (i.e. demotivate other individuals from adopting a similar conduct). In reality, things are far more complicated.

The statement that profit is the engine of criminal conduct draws the attention on as aspect which it considers as obvious. It is presumed that all offenders, in their rush for profit, are also able to make fortunes in this way. By making fortunes, they become visible and are exposed to confiscation laws if the authorities reach the persuasion that property should be confiscated, judging precisely by the exterior appearances of a property that cannot be justified. However, the great majority of offenders prove to be big spenders. This may be due either to hedonistic reasons, to a will to impress, or to the awareness of the fact that a criminal career is usually short. The choice of the present and the wish to live the moment determines that the profit obtained from the

[3] Robert Redford as journalist Bob Woodward in the movie *All the President's Men* (1976) directed by Alan J. Pakula.

[4] R.T. Naylor, *Wash-out: A critique of follow the money methods in crime control policy*, Crime, Law & Social Change, vol. 32, 1999, pp. 11-15.

commission of crimes become volatile on a rather short notice, which leaves almost no room for confiscation by the state.

Confiscation of goods does not seem to discourage offenders, on the contrary it appears to prompt them to continue their criminal activities since their range of professional skills is quite narrow and they are not able to requalify for an activity which is socially accepted. Continuation of the criminal activity is necessary since it is their only source of income. Additionally, confiscation may even lead to the acquisition of professional skills, translating into the identification of new techniques or the improvement of existing ones in order to protect criminal profits from the actions of authorities, for the future.

In other circumstances, the infliction of confiscation may even lead to unacceptable situations. Criminology explains the relation between the conduct of individuals and the source of their income. Thus, when it comes to labor-related income, most individuals are concerned about the way in which they can spend their money. The same persons, who are cautious about their lawful income, shall adopt a totally different behavior when it comes to illegally obtained income, by gambling or playing numbers game. The latter are spent strictly on private pleasures, even if the lawful income is insufficient to support the family. Therefore, confiscation shall target precisely this income which is visible and easy to pursue, which causes the person in question to be highly unlikely to give up his/her criminal lifestyle. Applying the law in an undifferentiated manner may determine the exact opposite result from what the lawmaker initially expected. From another perspective, if an offender chooses not to spend the money obtained from illegal activities on private pleasures, but to invest it in government bonds which even assure the funds for financing the fight against crime, confiscation becomes much more ambiguous. Finally, if the infliction of confiscation had a truly dissuasive effect, its extension to a large scale, should lead, at least in the case of economic crime, to a decrease in the number of inmates from penitentiaries and in the rate of incarceration. This relationship does not work in real life. Statistically, the USA have lately experienced[5] a significant increase in the rate of incarceration, although they are the country where the policy of confiscation emerged and was continuously applied.

2. Confiscation of proceeds of crime protects the infiltration into and corruption of legitimate economy. Understanding this statement implies an explanation of the aims pursued by the movers and shakers of criminal policy. Thus, if the aim is to punish some criminal acts that were committed in the past, then indeed the goods obtained by using income derived from illicit activities need to be removed from the offender's patrimony, through confiscation. This consequence results from the moral principle according to which the offender should not enjoy or take a benefit from his acts (*crime should not pay*).

If, however, the aim is different, for instance special prevention or control of recidivism, then it should perhaps be better to leave the goods that are derived from criminal activities in the possession of the offender, in order to encourage the shift from illegal activities to those which are allowed by the law. Possessing goods that may assure the development of a lawful activity may be a strong incentive for the farewell to

[5] J. Travis, B. Western, S. Redburn (eds.), *The Growth of Incarceration in the United States. Exploring Causes and Consequences*, Committee on Causes and Consequences of High Rates of Incarceration, The National Academies Press, Washington, D.C., 2014, pp. 1-5.

old habits. Non-confiscation is a sign of amnesty for those who are willing to correct their behavior in accordance with legal norms. Finally, if the aim is to sabotage the underground economy, then the transfer of goods from the underground economy into the legitimate one should also be stimulated. With each transfer or investment into the lawful economy, there takes place a diminution of the underground economy and a maximization of the legal economy. This conversion of goods equals to becoming legitimate, and such process should be encouraged, and not treated as money laundering (recycling of dirty money).

The penetration of legal economy is performed not only by offenders who try to legitimize their business for the reasons mentioned above, but also, as it could be very well argued, by the actors of legal economy. Thus, the entrepreneur who uses duress in order to intimidate and control the employees or his direct competitors, or who offers bribe in order to win a contract or cheats his business partners (suppliers or consumers) can be considered to perform, to an equal extent, an act of corruption of the legitimate economy. All these happen in order to raise one's profit margin, by exploiting the weaknesses of the other actors on the market. Therefore, should such profits also be confiscated or should such techniques of survival be accepted as being part of the rules of a free market?

Why should offenders invest into the legitimate economy?

a. A possible answer might be that they want to save money for the moment when they retire. To that end, they shall resort to professional intermediaries of good reputation (investment brokers) or shall choose legitimate investments into companies with a clear rate of profit. Once the investment is made, it shall be subject to the general rules of the respective financial market, with no risk of interference or control over the former. The offender disguised as investor shall not be able to pretend a position which may allow him to manipulate the market on which he made the investment. That is why it is difficult to affirm whether the investment made is able to corrupt the legitimate economy, although, morally speaking, it is correct to object to the fact that, in this way the offender secures himself an illegally obtained profit.

b. Another hypothesis is the possibility of an offender to assure the transfer of his unlawfully obtained patrimony to his descendants. The success of a legitimate conveyance of patrimony to descendants, upon disappearance of the delinquent holder, implies the transfer of rights and liabilities into the visible economy. Neither in this case can it be stated that the penetration of economy would corrupt the business setting.

c. An entrepreneur may choose to diversify his portfolio as an alternative to the risk-bearing activity in the underground area. Thus, the higher the risk of entering into a fierce competition with other offenders or of the law being strictly applied by the authorities, the more attractive the idea of running a business that is clean, legitimate and free of any interference from the underground world. In any situation, this legitimate business can guarantee a satisfactory financial refuge, deprived of the stress of risk management on the criminal market. It cannot be stated that a business which is conducted by orthodox rules and which has no compromising affiliation may alter the legitimate economy, even if it is managed by individuals of bad reputation.

d. Obviously, there are also less benign reasons for which people invest into the lawful economy.

On the one hand, the legal entity (the company) can be used to recycle dirty money, providing an alibi for the latter. Money laundering is not a way to obtain profit from an illicit activity, but a means of redirecting the existing profit towards lawful destinations: for instance, recycled money is used to make investments into a pension fund. On the other hand, a legal business can be used as a logistic support for the development of underground operations. In this case, the front company represents in fact a component of the illicit system.

Unfortunately, the confiscation policy does not promote different solutions for the distinct hypotheses that may appear in real life. This lack of adaptation is a negative calling card for the coherence of the approach.

3. Confiscation deprives the offenders of financial support and assures their removal out of business. The argument is subject to debate, since confiscation may be inflicted on an individual or a company (the plural is also valid), but does not affect the underground economy itself. As shown before, where there is a demand, there shall be an offer and a supplier who shall undertake to satisfy that demand. Consequently, the disappearance of a supplier, as a result of the confiscation of his illegal property, shall be shortly covered by another supplier able to assume the same risks. The hunting of just one player on the black market does not seem to discourage the market as a whole. It is proven that organized crime has a remarkable capacity to regenerate, as well as vitality and resilience. Therefore, the objective needs to be rather the hunting of the underground market as a whole, the criminal industry and the structures existent on this market, instead of the discouragement of individuals to adhere to such structures.

In order to determine the extent to which the confiscation of proceeds of crime has a measurable influence on the underground economy as a whole, two types of measurements are necessary.

On the one hand, there should be calculated the percentage that the confiscated goods represent among all illegally obtained goods, for each year of the test period. On the other hand, there should be determined the growth rate of illegal income per time unit (year) as compared with the growth of national legal income. This must be done in order to remove from the equation the influence of the general economic conditions and to identify the direct effect which a measure of criminal policy has on the unlawful income.

For the first measurement, the value of the confiscated goods needs to be known. Theoretically, it can be very easily obtained by adding the statistics drawn up by the authorities duly appointed in the field. In reality, the situation is more complicated. The statistical values provided by authorities do not reflect the goods that were effectively confiscated, but rather some assessments of the confiscated goods. The final result may be disappointing as compared to the initial evaluation. This is firstly due to the fact that seized goods are not subject to effective confiscation, because their value considerably decreases as time goes by. Or it is justified by the fact that their value has been overestimated from the beginning due to a flawed assessment or due to reasons of public image. Secondly, due to the fact that the seized goods are burdened with encumbrances whose impact seriously or completely diminishes the intrinsic value of goods. Finally, there can be noticed a different approach to the value of confiscated assets, depending on the authority who reports the statistics. The police and prosecutor's departments report certain statistics, while different ones are reported by tax authorities. The need for a single authority in the field is justified also from this point of view.

The value of confiscated goods must be further correlated with that of all illicit income for the reference period. Here, even the most rigorous assessments are nothing but pale reflections of reality. This is due to the fact that publicizing certain values always depends on a series of conditions imposed on the person who makes the public announcement. The police are interested to report higher values because the budget destined for the suppression of the criminal phenomenon is dependent on the former. Approvers report apocalyptic figures in order to maximize their importance before the judicial authorities for whom they provide the information. Offenders themselves may support this variant, in order to raise their popularity and boost their self-respect. Politicians act as protectors of communities from the social evil thus estimated, while researchers are granted funds depending on the complexity of same phenomenon.

The aspects presented above create a strong impression that we are confronted with a reality that has such variable geometry that the idea of controlling it or at least of rationally approaching it seems to be destined to failure.

4. The pursuit of benefits that are derived from crimes allows the capturing of the heads of criminal organizations, since it is reasonable to presume that the former develop their activity in the proximity of the money they generate. A leader of the mafia keeps himself away from current transactions, precisely in order to avoid a chain of causation being proved between him and the executants, yet he plausibly remains committed to the result of the business which he coordinates. The proceeds of crime are able to lead to the discovery of crime, by the retrospective unfolding of the chain of causation that exists between the two. Thus, by the rules on preventing and combating money laundering, there have been imposed periodical and detailed duties to report financial transactions, able to identify cash flows and to allow their pursuit, and finally, their confiscation. The discovery and identification of crimes, starting from their consequences, are the legal basis for initiating procedures that may eventually allow prosecution of their authors. Thus, the legislation against money laundering supports confiscation, which otherwise could not be achieved or would be considerably impeded.

Although correct as a principle, the argument can be overturned by using the same reasons analyzed above (section 3), since the attempt to undermine the top management of organized crime has not amounted to long-lasting victories, as long as the neutralization of a drug lord by, for instance, putting him in prison, did not hinder the coherence of his illicit business. This is either due to the fact that once a *capo* was caught he was immediately replaced, like a hydra which, although beheaded of one head, immediately generated another to replace the former, or it is due to the fact that isolation in a penitentiary was not a genuine obstacle for the management of the business from the inside.

5. Finally, confiscation guarantees the principle according to which "crime should not pay"[6].

Essentially, this seems to be the strongest argument of the *Follow-the-money!* policy, since it takes its force from a moral principle that allows no objections. However,

[6] Communication from the Commission to the European Parliament and the Council, *Proceeds of Organized Crime. Ensuring that "crime should not pay"*, Bruxelles, 20.11.2008, COM (2008) 0766 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2008/RO/1-2008-766-RO-F1-1.Pdf .

the incidence of the moral principle presently depends, to a large extent, on the intension of the concept of criminality. Currently, fraud and duress have become more refined and insidious, so that it is quite difficult to distinguish them from legitimate methods. The border between legitimate and illegitimate is now much more volatile, which induces a strong sense of equivocity.

Thus, can manipulating marketing techniques or misleading advertising be interpreted as fraud or should they be regarded as acceptable practices? Sales agents are trained to learn that putting pressure on a client to buy, using persuasion techniques, is called help provided to the client in order to take the best decision, while asking the client to buy is a favor done to the client. How far can theses practices go in the name of maximization of profit? Up to what point does the legitimate intention to do business extend itself and where does the fraud start?

Clarifying these issues is crucial, since they are meaningful for the very notion of criminality. Choosing to interpret an act as an offense, when it appears to be nothing else but entrepreneurial excess of diligence, is in fact a structural matter.

The edge of rationality: permitted risk in the criminal law

DR. MELINDA MÁTYÁS
National University of Public Service
Assistant lecturer

Abstract:

Property and risk management are closely related, and due to the tentative circumstances are often unforeseen and unpredictable. Criminal liability incurs after a bad decision resulting in harmful consequences.

What do we mean by rational and irrational risk? This cannot be described by exact, general definition, it is case sensitive and can only be decided upon through proper analysis. This essay deals with the issues of permitted risk exempting culpability, on a theoretical level.

Keywords: *risk management, culpability, criminal liability.*

The social and economic changes of the present require great adaptability and quick response from economic players who are in decision making positions. Property and risk management are closely related, and due to the tentative circumstances are often unforeseen and unpredictable. Criminal liability incurs after a bad decision resulting in harmful consequences. Based on its ultima ratio nature, criminal law could only be applied as a last resort, when an act's extent to which it endangers society requires governmental authority. Risk taking – in case of successful result – is useful and important for the society, since it creates space for development. The overextension of the criminal liability contradicts this by promoting risk- averse, cautious behavior. Society's development and survival cannot be imagined without breaking down the walls of humanity's own comfort zone.[1] What do we mean by rational and irrational risk? This cannot be described by exact, general definition, it is case sensitive and can only be decided upon through proper analysis. The irrational economic and financial behavior always starts way before the conduct of criminal acts. Often it depends on contingency, when the dubious behavior becomes an act of criminal law.[2]

However the courts specified a few landmarks from which the extent could be outlined. Criminal law does not cover the whole scale of irrational risk at all, it merely includes those risks and speculations that threatens the society in a way that it demands the application of ultima ratio.

Risk related decisions have had a growing impact on the technical – economic and civilization development of the society, should they result in failure it could provide a basis for criminal liability. The fear from criminal liability promotes risk-avoidance, even when society's interest would demand brave and bold decisions to be made. The objectives of criminal law is not hindering this progress, but rather protecting the public interest. The study primarily deals with the risk involved in business decision making that due to the unstable economic situation could eventually be risky and often

[1] Erdősy Emil: *A megengedett kockázat a büntetőjogban,* Akadémiai Kiadó, Budapest, 1988, 10. p.
[2] Kallós Erzsébet: *Hűtlen kezelés vagy ésszerű kockázatvállalás?,* Cégvezetés, 2003, 4. no. 30. p.

dangerous. It sheds light on the border between rational and irrational decision making, what is allowed risk, and the point where criminal law intervenes.

1. The definition of risk

Risk is a measurable uncertainty, with which the outcome probability of threats can be measured.[3] Therefore with risk we can specify the outcome probability of a certain disadvantage in some form. The definition of risk can be hardly separated from the personal action, which is the conscious selection from the uncertain outcome possibilities, therefore mere wager. Decision making that involves risk is the source of economic development, therefore taking the risk for a possible loss can result in the better off of the society.[4] The definitions of risk is therefore not a legal definition, it is not specified through legal methods.

When analyzing risk, from a legal and especially from a criminal law point of view, analyzing the human behavior is what makes the difference. Risk taking is an uncertain, but deliberate behavior, with which the risk taker plans to acquire some form of advantage. The danger and profit related to the risk can only be realized in the future, the outcome is uncertain. Rationality measures the size of the risk involved against the profit or advantage that could be accumulated based on which the actions of the risk-taker could be judged. On the action side the intention, while on the subjective side the psychic relation to the outcome of the situation – primarily negligence – should be examined. The purposeful attitude is always present in a decision making, the personal decision in this case is the selection from several possibilities. The probability of risk is considered by the decision maker, hence the known danger involved is a „conditio sine qua non" of the defined risk.[5] In order to analyze risk taking from a legal perspective, the objective existence of the danger must be also defined.

The objective danger is not equal to the risk, because it requires the action taker's behavior that provokes the danger itself.[6] The law will closely examine this behavior, and analyze it from criminal, civil, or labor law point of view. The edge of responsibility can be specified based on the ratio between the assumed risk and the expected return, the social benefit. When specifying this, ensuring the possibility for development and innovation shall not be excluded. Sanctioning failed decisions could hold back any further initiations, moreover the rational risk-taking. Eörsi Gyula described, that even individuals with the right to independently make decisions demand a „liability-free sphere", where they have the possibility to take risk.[7] Legislation should not establish these borders too tightly.

Even economics does not find the „unbounded", irrational risk-taking necessary or socially effective. The economic decision makers must be continuously warned in a similar way for the fact that economic decisions are made in uncertainty. There is no fix, stable environment, the economic and market relations continuously change, there could always be unexpected situations.[8]

---

[3] Knight, F.H., *Risk, uncertainty and Profit,* Sentry Press, New York, 1964.

[4] Knight, F.: *Risk, uncertainty, and profit,* Boston, USA: Hart, Schaffner & Marx; Houghton Mifflin Company.1921. 313 p. In: http://www.econlib.org/LIBRARY/Knight/knRUP.html (2015. 10.02.)

[5] Erdősy Emil: *Megengedett kockázat a büntetőjogban,* Akadémiai Kiadó, Budapest, 1988. 24. no.

[6] Erdősy E. i.m. 28. p.

[7] Eörsi Gyula: *A gazdaságirányítás új rendszerére áttérés jogáról,* Budapest, 1968, 247. p.

[8] Medvegyev Péter: *Néhány megjegyzés a kockázat, bizonytalanság, valószínűség kérdéséhez, Hitelintézeti Szemle,* 2011.X. cl. 4., no. 314. p.

Based on this, the law understands risk as the probability of a harmful outcome, where the probability of the damage is uncertain, only its probable extent could be defined.

By interpreting the definition of risk, „hazard" was also mentioned. Hazard is often mentioned alongside risk, in addition the definitions written in the criminal law do not specify any difference. Hazard is a situation that involves a negative (harmful) outcome, and it lies between the probability of this outcome and its impossibility of occurrence.[9] However, as the way I see the two definitions are not equally the same. The difference could be explained by the levels of uncertainty. While the „hazard-type" uncertainties exist without perpetrators, the „risk-type" uncertainties occur along the choice of action to be taken. In other words, hazard is given, while risk is born in decision making situations.[10] Endangering behaviors however can also be evaluated from a criminal law perspective. From this point of view, the behavior provoking a hazardous situation is similar to the risk-taking behavior. I will explain this analysis further below.

2. Interpreting risk in the criminal law

Analyzing the levels of risk, and setting the borders for rationality are only needed when criminal liability is being questioned. Risk in the sense of criminal law assumes that the criminal act is carried out, and the hazardous behavior threatening the society is realized.

If the outcome of risk-taking is positive, and provides benefit for those involved with it, there will be no need for criminal law analysis.[11] However the lack of any realized damage does not necessarily equal the lack of criminal liability. Even if the consequences of a wrong, irrational decision are evaded, it does not exclude the attempt for criminal action.

The conditions of criminal liability are covered in the Criminal Code. Defining the connection between risk-taking and criminal conduct must be based on these.

The basis of a criminal act is a human behavior, that either takes an active or a passive form. Risk-taking primarily manifests from action, but omission can never be excluded. Delaying a decision can also cause negative consequences, providing the basis for criminal liability. Although in case of criminally measuring risk-taking not the form of behavior is crucial but the effect and direction of action.[12] This is nothing else, but the threat and harm to the social values and interests. The risk taker may not be certain regarding the outcome at the time of making the decision, however still accepts the uncertainty. The risk taker is not fully aware of the circumstances of the decision, but is aware of the probability of a negative outcome. The greater the uncertainty factor, less rational the decision is, and it is more likely that the risk-taking was irrational and unreasonable. It is proved, that the applied probability measures in process analyses are empirical rather than just given methods. In other words the individual concludes a decision following an empirical process.[13] Based on this, we can examine how and based on what the individual measured the level of rationality. How the objective and

[9] Földvári József: *Egység és a halmazat határesetei a büntetőjogban*, Budapest, 1962. 11. p.

[10] Bonss, W.: *Bizonytalanság, kockázat és veszély. Replika*, 1998. IX. cl. 31.–32. no., 49. p.

[11] Erdősy Emil (1988) i.m. 32. p.

[12] Erdősy Emil. (1988) i.m. 66. p.

[13] Bélyácz Iván: *Kockázat, bizonytalanság, valószínűség. Hitelintézeti Szemle,* 2011, X. cl., 4. no, 300. p.

subjective reasons influenced the individual and what was the objective probability for the positive outcome of its action.

However this question will be more important in examining guilt.

Behavior, as the conditio sine qua non of the criminal act, is realized in the decision related to the risk taking. Endangering behaviors can be defined based on the situation itself. The danger can be abstract or remote, and concrete or in other words close danger.[14] Regarding risk taking, the more remote the involved risk is, the more rational it is, since a positive outcome is expected. It differs from endangering behavior due to being tendentious, since risk-taking deliberately causes a dangerous situation, the action is aimed at realizing a positive outcome. The decision can be rational even if the danger is closer, when the profit; the risk premium is so big, that the decision maker takes the bigger risk as well. By examining the sense of purpose, we arrive to the other element of the criminal act, the criminality.

The other connection point with criminal act is therefore criminality. Criminality is the psychic relation between the perpetrator and its action, for which he or she can be blamed for that action.[15] This is the actual psychic relation between the perpetrator's consciousness and its action threatening the society, that is carried out deliberately or in the form of negligence.[16]

When defining risk-taking the sense of purpose is also defined, therefore the action has to be carried out intentionally – whether as dolus directus or dolus eventualis. The aim of the risk-taker is to realize a positive outcome in the future, which he or she expects with probability. The extent of probability can be a measure for the target of the intention. According to: Section 7 of the Criminal Code, from a criminal perspective deliberate intention is: „Whoever wishes for the outcome of its action, or accepts the consequences deliberately carries out the criminal act". Based on this, intentionality has two forms, the dolus directus and the dolus eventualis. Either way the criminal act is carried out, the intention has to be related to the consequences as well. Risk-taking comes to criminal law when it threatens the social interests that must be protected. If the person is striving for a negative outcome, then an intentional criminal offense is realized, however it cannot be related to the definition of risk-taking, because, in that case the action is aimed at a benefit – social, or financial benefit - and an outcome that realizes it. Therefore direct intention is not acceptable in examining the risk-taking behaviors. In this case however purposefulness cannot be rated either, the purpose or target could only be the success that criminally cannot be examined. In case of the risk-taker only the dolus eventualis, or negligence could be examined. The risk-taker is aware of the probability of failure and knows it could occur. He or she measures this probability either well or badly, but either accepts it or hopes for the failure not to be realized. In addition to risk-taking, the individual does not have all the information and is not in total control.[17] In case of economic decisions, the basis for decision making is the awareness of information, as well as its credibility, hence in examining criminality the circumspection and thoroughness can be crucial. Criminal law will only sanction when the lack of thoroughness is expected behind the decision making, or when the person is responsible for the mistake.

---

[14] Horváth Tibor: *Az élet, testi épség egészség büntetőjogi védelme*, Budapest, 1965, 34. p.

[15] Földvári József: *Magyar büntetőjog Általános rész,* Osiris Kiadó, Budapest, 2006, 112. p.

[16] Blaskó Béla: *Magyar büntetőjog Általános rész,* Rejtjel Kiadó, Budapest, 2013. 181. p.

[17] Erdősy E. (1988) i.m. 70. p.

In connection to risk-taking I must also mention the protection of society, thus the endangering nature of the act itself. According to Paragraph 2 of Section 4 of the Criminal Code: „That act or negligence threatens the society, which threatens or is against the rights of individuals as well as the social, economic and federal order of Hungary".[18] The need for risk-taking can be reasoned with socially useful objectives. If the relation between the taken risk and the expected benefit justifies the decision, criminal law will not interfere. However we cannot ignore the outcome probability of the risk premium. If the probability is low, or if the negative outcome suggests bigger disadvantage, then the decision can be declared to threaten the society.

By defining the connection points between risk-taking and criminal conduct we arrive to an important question. When can be the action of the risk-taker accepted and legal, when does the criminal law not interfere?

3. Permitted risk, as an exclusion for culpability

Risk-taking permitted (justified) if the perpetrator is expected to reach the socially beneficial goal within optimal circumstances. If the probability for achieving this is realistic, the risk can turn the situation to unwanted, to be socially harmful. In these cases the danger can be judged based on the reasonable and acceptable balance between the risk taken and the expected social benefit, so that the action could still be justified.[19] The outcome probability of the social benefit shall always be judged based on the information available at the point of decision making. Often the social and economic changes cannot be foreseen and measured on the spot. In order to judge an action, the objective foreseeability shall be examined. The subjective characteristics of the individual are related to the culpability.

The risk-taking attitude[20] cannot be an excuse for a wrong decision, even if the great expected return had justified it, if the individual's risk-taking exceeded the objectively acceptable level.

Permitted risk is a reason for excluding culpability, that is, the action is not punished due to the lack of a conceptual element of the criminal act. Legal literature extends the definition with the criteria of social necessity, scale and safety besides the objective foreseeable result. Researching and experimenting usually involves risk, and uncertainty occasionally causes damage (harm). Research and development, and therefore the progress of society would be greatly hindered, if the consequential damage would involve not only financial and ethical losses, but criminal consequences as well.[21]

Therefore in case of risk-taking the goal should be aimed at the better-off of the society.

The sense of purpose is therefore aimed at realizing this positive value. And if the decision is the only tool to achieve this, then the necessity cannot be questioned. The advantage however cannot be an advantage measurable only by the individual. The realized benefit must be of positive value to part of society, in order for it to be accepted and justified by the law.[22]

---

[18] Act of C 2012 Criminal Code.

[19] Blaskó B. (2013) i.m. 255. p.

[20] Vasvári Tamás: Kockázat, kockázatészlelés, kockázatkezelés 2015. In: http://www.researchgate.net/publication/278411082 (2015. 10.10.).

[21] Blaskó B. (2013) i.m. 255. p.

[22] Békés Imre: A gondatlanság a büntetőjogban. Budapest 1974. 311. p.

The Criminal Code does not include the permitted risk as exclusion for culpability that can be assumed from the definite elements of the criminal act.

Theoretically, risk was first related to luxuria within the criminal law. For a long time permitted risk-taking was covered in the sections of culpability (negligence).[23] The basis for this was that a person acting with conscious negligence acts for the sake of the possible outcome, while naively takes the risk for causing this result.[24] According to the creators behind this idea, we cannot say that there is no threat to the society when a negative outcome is eventually realized. Therefore excluding responsibility can only be done if the lack of culpability is justified.[25] Talking about the lack of culpability could be justified; if we analyze the circumstances of the decision making, and we check the individual's goal, as well as all the information that was available at that time.

Other theories basically rule out the illicitly of the action when it comes to risk-taking. The lack of illicitly can be measured in the lack of threat to the society, therefore in achieving the target goal. The society is handed a greater benefit, than the loss it would suffer if the outcome is negative. Therefore the justified risk „already eliminates the criminal nature of the action on an objective basis (by striving for a socially beneficial goal) and criminality cannot be a question".[26] It must be decided objectively, whether the risk-taking is justified, based on the circumstances at the point of conduct. When measuring the amount and probability of the achievable benefit and the expected loss we must take into account, that the level of justified risk is not the same in the different areas in life. Risk taken in economics the balance between values created must overcome that of the value risked losing in order for the decision to be seen rational.[27]

4. Risk-taking in business life

A major field for uncertain decisions is the economics. In criminal law these actions include economic and financial offenses, related to property management.[28]

The obligation of property management is being principally regulated by other law fields (first of all the civil law, but other norms and regulations as well).[29] The violations of the obligations derived from the property management must be correlated to these norms[30]. The delicts related to property management activity, as well as crimes in accordance with economics, first of all the delicts against property, but also other crimes (f.e. bureaucratic delicts) could be part of this.[31]

Risk taking occurs mostly among decisions referring to property enlargement, because the purpose of risking is usually a kind of property benefit. Economic decisions

---

[23] Blaskó B. (2013) i.m. 256. p.

[24] Békés Imre, Földvári József, Gáspár Gyula, Tokaji Géza: Magyar büntetőjog. Általános rész BM Könyvkiadó Budapest, 1980. 186. p.

[25] Földvári József: *Magyar büntetőjog általános rész,* Osiris Kiadó, Budapest, 2002, 168. p.

[26] Nagy Ferenc: *A magyar büntetőjog általános része,* HVG-ORAC Lap- és könyvkiadó Kft. Budapest, 2008. 156. p

[27] Erdősy E. i.m. 76. p.

[28] Wiener A. Imre: *Gazdasági bűncselekmények, Közgazdasági és Jogi Könyvkiadó*, Budapest, 1986. 105. p.

[29] Tóth Mihály: *A Few Remarks about Criminal Corruption* in Hungary Journal of Eastern European Criminal Law No.1/2014 77. p.

[30] Gál István László: *Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption*, Journal of Eastern European Criminal Law no. 1/2014 27.p.

[31] Tóth Mihály: *Gazdasági bűnözés és bűncselekmények,* KJK-Kerszöv, 2000 8. p.

arose always beneath insecure environment. This is a constant factor on such a market, where competitors are present as well, and other factors could also affect the outcome of decisions. Behind the decisions there can usually be found a person or a syndicate, but the result of them (either positive or negative) will end up at the organization. In case of failure the criminal liability of the decision maker could or must only be stated, if the purpose intends to be reached and the threated interest are not commensurate with each other. The proportionality raises another question, namely what time or what period it must be examined, short term or long term? The virtually disproportioned risk taking or loss taking – if later turns into rational, and brings the expected success – is named as prohibited behaviour, or fits into the obligation of property management. The permitted risk as a reason for excluding culpability must be examined in the economic sector uniquely as well. If the benefit occurs later and the decision could transitionally be held as irrational, because it causes loss, the decision will not be illegal at the end, because it focussed on long term benefit.[32] Property disadvantage or even its appearance within a defined period is not enough to the objective unlawfulness to be stated. Important fields of examination are as well the mandate of property management or other data and targets which substantiates the decision.

Risk-taking will not be culpable, if it falls under permitted risk. Nowadays there has been growing the importance of economic risk, its role in the modern ages is much more significant, as of among former societies. According to the economic science this points out very well the difference between two categories, danger and risk. In traditional societies the mankind had been incurred by a lot of danger factors,[33] while modernization and technical development gave the possibility of diminishing the number of danger factors in one hand and arose countless new risk factors in the other hand. The acceleration of production, the regulated market, the presence of stock-exchange, and globalization contains several risk factors which could threaten the successful decision making. Therefore insecurity is considered as constant factor of market decisions. Liability behind decisions has changed either, because the circle of possible risks has broadened too, property management tasks have changed, and profit maximalization requires much higher risk from the decision makers. The task of market actors is „beneath protecting the greatest possible benefits to reduce risks with the most efficient distribution of the available resources, means to maximize social benefit".[34] Both the subject of the risk and the targeted benefit can be expressed with property value. The wrong property handling could threaten either financial or other property value and usually the risk level could be measured. In case of failure risk causes property disadvantage. Property disadvantage means according to the Criminal Code damage to one's property and lost income.[35] The property manager's obligation is namely not only to protect the value of the property, but also its enlargement. The rationality of those risks must be measured to this universal obligation either. The decisions within the general property management depending on the exact committal behaviour could be ground for statement of different delicts (f.e. peculation, fraudulence, misappropriation, defalcation, etc.). A possible reason for excluding culpability must be examined based on this.

---

[32] Békés Imre, *Gondatlanság a büntetőjogban. Közgazdasági és Jogi Könyvkiadó*, Budapest, 1974, 312. p.

[33] Bernstein, P.L.: *Szembeszállni az istenekkel. A kockázatvállalás különös története. Panem könyvkiadó.* Budapest, 1998. 109. p.

[34] Zoltayné Paprika Zita: *Döntéselmélet,* Alinea Kiadó 2002, 458. P.

[35] Act of C 2012 Section 459 point 17.

The person entitled for property handling is obliged to examine several circumstances before making decision. During economical decisions the most important purpose is reaching the invested property as much profit as possible. This – by necessity – wear risk, therefore the decision maker must consider the importance of insecurity factors and their foreseeable consequences.[36] From the point of liability examination only those factors are considered importance, which the person could foresee objectively and possibly took into account during decision making. Other unforeseen dangers cannot be considered as risk-taking. The possible list of probable risks could be different either. The decision could be objectively wrong, – where risk-taking is irrational – but the mistake is not chargeable. It could be also wrong and chargeable and there are such cases where the loss is foreseeable but the risk is necessary and rational.[37]

5. The permitted economic risk in the criminal liability

The behavior corresponding to the characteristics of permitted risk counts an exclusion for culpability in criminal liability, hence cannot be seen as a criminal act. The current Criminal Code does not specify this legal measure. It can be applied when the perpetrator plans to achieve the socially beneficial goal in optimal circumstances.[38] If the balance between the risk taken and the expected social benefit is still acceptable, then the risk taken is justified according to the criminal law. The legal literature agrees on the fact, that the existence of permitted risk is accepted, but it is defined in different ways which liability criterias it excludes. Some opinions exclude that it threatens the society (not illicit), others exclude the culpability of the risk-taker.

According to opinions pro the non-illicit nature of it, the individual acts for the sake of society's development when he or she takes the risk, the targeted result is the public interest and the benefits of society.

Often sacrifices must be made in life to make progress, and law has to allow those acts that serve as ways of reaching these goals.[39] The socially beneficial level of the act defines whether it is within the permitted risk or exceeds it. According to some views the criteria for criminal liability regarding the risk-taker is based on background normative.[40] There is no misconduct as long as it happens for the society's better-off. Negative outcome that results despite the individual's prudent behavior cannot be illicit if carried out for the sake of a greater good.[41] This applies as long as the result cannot be objectively foreseen.

The lack of social threat „already eliminates (based on the socially beneficial target goal) the action's criminality on an objective basis, criminality cannot be reasoned".[42] All

---

[36] Wiener A. Imre: *Gazdasági bűncselekmények, Közgazdasági és Jogi Könyvkiadó,* Budapest, 1986. 105. p.

[37] Wiener A. Imre (1986) i.m.

[38] Blaskó Béla i.m. 255. p.

[39] Erdősy Emil i.m. 136.p.

[40] Viski László: *Közlekedési büntetőjog, Közgazdasági és –jogi Könyvkiadó,* Budapest 1974. 356. p.; Viski László: *Veszélyeztetés, mint materiális bűncselekmény,* Állam- és Jogtudomány 1968. no. 1.; Wiener Imre: *A gazdasági vezetők büntetőjogi felelőssége, Közgazdasági és Jogi Könyvkiadó,* Budapest 1974. 266. p.

[41] Békés Imre i.m. 301.p.

[42] Nagy Ferenc: *A magyar büntetőjog általános része,* HVG-ORAC Lap- és könyvkiadó Kft. Budapest, 2008. 156. p.

views agree, that the threshold for permitted risk should be found in the legal norm, and misconduct should be measured against a concrete rule.

These opinions focus on the analysis of the actions, with the objective characteristics of the risk, they don't deal with the individual.

Views that exclude criminality examine the behavior and the criminality of the risk-taker. The basis of the theory is that we can hardly talk about non threat to the society when some form of negative outcome can eventually occur.[43] They examine the information that influenced the decision-maker in taking the risk, and how much the resulted loss was objectively foreseeable. In this way, excluding liability can only occur if there is no criminality at all. Based on the purposefulness, misconduct can be excluded regarding the risk-taker behavior. Decisions however cannot be generalized because of different situations in life. The probability of the negative outcome in economic decisions cannot be rationalized in advance. If the risk-taker acts responsibly, thoroughly and considerately then even despite the negative outcome its action does not become illicit and no criminality should be identified.

From the aforementioned theories, in my opinion the lack of threat to the society answers the theoretical question the best, since nowadays the legal measures behind business decisions cover the boundaries of individual actions sufficiently.

When analyzing wrong decisions, law enforcement can determine based on background rules and legal measures whether the action is within the permitted level of risk or exceeds it. [44] Regarding economic players we primarily apply the rules of the Civil Code, complying with these laws does not result in criminal liability. Decisions made within the market conditions are often wrong and result in losses. Judging failure – if it aligns with the criminal la – is based on legal measures in the fields of economy, where criminal law does not interfere.

Summary

This essay deals with the issues of permitted risk exempting culpability, on a theoretical level. Game and the uncertainty behind the decisions and calculations are an essential part of business life. Shareholders of profit-oriented companies expect high level of income every year. The goal of property management is also to increase the wealth which can often be achieved only through risky decisions. Managing the risk is one of the most important tasks of businessmen. The purpose of criminal law is to protect the society, to set a limit to those human behaviors that violate or threaten the social coexistence. However, it doesn't wish to hinder the growth, the progress, and according to the ultima ratio principle it only intervenes when necessary.

Regulation of permitted risk allows making such decisions which aim at results of social benefit, but harmful consequences cannot be excluded either. This essay is examining the criminal evaluation of risk and risk taking and the reasons excluding liability.

[43] Földvári József: *Magyar büntetőjog általános rész,* Osiris Kiadó, Budapest, 2002., 168. p.

[44] Belovics Ervin: *A Büntető Törvénykönyvben nem szabályozott büntetendőséget kizáró okok- II.* ,In: Ügyészek Lapja, 2007. no. 4. 9. p.

Criminal offense of embezzlement in the Criminal Code of the Republic of Serbia. Specifics of detection and proving

PHD STUDENT DARIAN RAKITOVAN*
Faculty of Law
West University Timişoara, Romania

ALEKSANDRA DABIĆ, M.A.**
Teaching assistant at Faculty of European Legal and Political Studies
Educons University, Republic of Serbia

Abstract:

"Economic crime" is a very broad term that includes a whole range of offenses and as such is one of the most complex and most perfidious crime phenomena. Among the offenses covered by this term is the criminal act of embezzlement.

In the disclosure, and proving in particular of criminal offenses from the group of so-called "economic crime", due to their complexity and diversity of the forms of manifestation, the authorities face serious difficulties which significantly complicates their suppression.

The subject of this paper is to point out these problems, especially in relation to the detection and proving of one of the "economic crimes" – the crime of embezzlement.

In this sense, this paper first analyzed the offense of embezzlement according to the Criminal Code of the Republic of Serbia, and then, in a relatively concise manner, there are presentation of specific methods of detection of the crime and finding the perpetrators and gathering and providing evidences.

Keywords: *criminal act of embezzlement, detection and proving, the Criminal Code of the Republic of Serbia, economic crime.*

1. Introduction

In the doctrine the concept of "economic crime" is one of the most complex crime phenomena, which is why it is the object of study in various scientific fields of criminal matters, such as criminology, criminal justice, criminal law, etc., both at national and international level.

This type of crime includes "all delinquent behavior (action or omission) that are made in the economic relations of the legal and natural persons, who as subjects of these relationships have adequate powers to property in which these relationships are based, and the tort behaviors are directly harmful to the property and violate or threaten

* E-mail: drakitovan@yahoo.com.
** E-mail: aleksandradabic89@yahoo.com.

economic relations."[1] From the definitions we could easily conclude that economic crime is a very broad term that encompasses a whole range of offenses.

Among the most serious crimes that are covered by this term are criminal offenses against official duty. The crime of embezzlement is one of these acts and it is represented for a long time in almost all national criminal jurisdictions.

Contemporary economic flows, and ways of doing business and developed markets of goods and services created fertile ground for the development of so-called economic crime. In this respect, the Republic of Serbia is no exception. Because of the relatively large scale, variability of forms, special structure, specialization and professionalization of perpetrators and specificity of evidence, the authorities in detecting and in particular proving of these crimes face various difficulties, which significantly hinders the suppression of this extremely harmful social phenomenon.

The subject of this paper is just to point out the problems in detecting and proving one of the offenses covered by the group "economic crimes" – the crime of embezzling.

2. Criminal Offense of Embezzlement in the Criminal Code of the Republic Of Serbia

In Serbia, the crime of embezzlement is incriminated by Article 364 of the Criminal Code[2] and as in most other national criminal laws, is classified in the group of criminal offenses against official duty. In addition to this crime, Chapter XXXIII of the Criminal Code includes the following offenses against official duty: the crime of abuse of official position (Art. 359 of the Criminal Code), criminal offense of violation of law by a judge, public prosecutor and his deputy (Art. 360 CC -a), the crime of dereliction of duty (Art. 361 CC), the crime of unlawful Collection and Payment (Art. 362 of the Criminal Code), criminal offense of improper use of budgetary resources (Art. 362a of the Criminal Code), criminal act of deception on duty (Art. 363 of the Criminal Code), criminal offense of service (Art. 365 of the Criminal Code), the criminal offense trading in influence (Art. 366 of the Criminal Code), the criminal offense of receiving bribe (Art. 367 CC) , the crime of bribery (Art. 368 of the Criminal Code) and criminal offense disclosure of official secrets (Art. 369 of the Criminal Code).

According to the legal formulation, the crime of embezzlement *makes a person who, with intent to acquire unlawful material benefit to himself or to another, appropriates money, securities or other movable entrusted to him in service or work in a state authority, company, institution or other entity or action*.

Basic form of this offense is punishable with imprisonment from six months to five years.[3]

The Criminal Code provides two graver forms of the criminal offense. For the first more severe form, which exists *when the value of acquired material gain exceeding four hundred thousand dinars*, is prescribed a prison sentence of one to eight years.[4] When there is offense from the paragraph 1, and *illegal material gain is over one million and*

---

[1] Božidar Banović, *Privredni kriminal i korupcija,* Institut za kriminološka i sociološka istraživanja, Beograd, 2001, p. 5.

[2] Criminal Code, *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

[3] Art. 364 paragraph. 1 of the Criminal Code.

[4] Art. 364 paragraph. 2 of the Criminal Code.

five hundred thousand dinars, that makes other more severe form for which soemeone can get prison sentence of two to twelve years.[5]

The subject of a crime of embezzlement, therefore, are money, securities or other movable entrusted to the service or to work in a state authority, company, institution or other entity or action. This particular object of protection makes the hallmark by which embezzlement is different from other crimes that also has a misappropriation of others' things as act of executing. Therefore, for the existence of this criminal act it is important to determine whether the appropriated thing can be considered as a matter of "entrusted in the service or at work." We think that the concept of delegated thing in the service or at work should be interpreted broadly. Entrusted is every thing that is in tightening of perpetrators, primarily on the business or labor, but also the things that are entrusted to the perpetrator in the line of duty or work, which suggests that the concept of delegated things in the service or even at work should be spread interpreted. Proceeding from this understanding, under the term entrusted matters which can be subject of appropriation, it is understood assets arising in the performance of duty or the performance of work, or. production process, or during the manipulation of the assets of the state body or a business entity, as well as all those assets that are received from third parties, or in connection with the exercise of their duties or work in a state body, office, or other organization, and similar. In other words, entrusted things are those things that the perpetrator has in a tightening in the service or work and that he is competent to keep or receive and which he can dispose for the needs of the service or work. To be particularly underlined the fact that it is necessary that these things have the value of the assets, due to the fact that the crime of embezzlement is done with the intention of obtaining unlawful gain.

The action of this crime consists in the unlawful appropriation of the above mentioned items.

The appropriation is to establish proprietary relations towards things that the perpetrator has in his possession by a legal relationship, but not in the property. So, when the entrusted matters offender behaves as if they were his property, or manifests the will to treat them as if they are his, and disposes with them, and then it is considered that he *appropriated* those things. Disposition of things can be manifested in different ways. The perpetrator can use, sell, give to another or otherwise dispose as desired, use them for its own purposes, substituting for money or other goods, donate, pledge and similar.

However, to be able to talk about the crime of embezzlement, the perpetrator appropriates things with the intention to get to himself or another unlawful material benefit. So, in addition to direct intent that is the only possible form of *culpability* in this crime, the subjective level must be intention to acquire unlawful material benefit for himself or to another.

In the crime of embezzlement perpetrator takes the action of execution in order to achieve a particular goal or result – with the intention of obtaining unlawful gain for himself or another, which means that the perpetator at the time of the action of execution is aware that he appropriates money, securities or other personal property, he is aware that these things are entrusted to him in connection with the exercise of official duties or duties at work and that he wants to take this action in order to achieve planned goals or results.

---

[5] Art. 364 paragraph. 3 of the Criminal Code.

We mentioned already that the current Criminal Code of the Republic of Serbia provides for two more severe forms of the crime. Those two more severe forms are different from basic by amount of unlawful gain. In relation to the amount of material gain in both more severe forms of the crime perpetrator may act deliberately *or* by negligence. The offender may, but does not have to be aware that he appropriates things that exceeds the amount of four hundred and fifty thousand dinars, ie. million five hundred thousand dinars, as it was aware, or ought to have and could have been aware that such appropriation providing high material gain. So he will, if it is found that he made illegal benefit that is greater than the amount defined by law, be responsible for a more severe form of this criminal act, regardless of whether he had or not a precise idea of the amount obtained.

As for the *perpetrator*, it is evident that the notion of the subject in this crime is determined wider than in most other criminal offenses against official duty from Chapter XXXIII of the Criminal Code. The perpetrator of this crime can be not only official, but it can be any other person at work in a state authority, company, institution or other entity to whom the money, securities or other movable are entrusted to service or at work. This person does not have to be employed, it may perform work in these entities by another relation. So, for the perpetrator of this crime is essential to actually perform tasks where are entrusted objects of embezzlement, regardless of his status, occupation or position.

The place of commiting of this crime is workplace of the perpetrator.

The criminal act is *over* with the appropriation of things that can be subject of embezzlement. "These things are appropriated not only in cases where the perpetrator of the crime behave as if they were his property (consumes them, donated, sold, etc.), but when his activity created the ability to treat these cases like that."[6] Retrieval of appropriated money, securities or things do not exclude the existence of this crime. It can only affect sentencing (through mitigation – keeping the perpetrator after committing the crime[7]).

3. Detection of embezzlement

The big problem with crime detection in the field of economic crime represents their perpetrators are unexposed and covert actions that viewed from the outside apparently seem completely legal. The perpetrators of these crimes tend to appear as a legal for their criminal activities. Therefore, they constitute false documentation, so-called double documentation and false accounting records, falsify the whole documents or particular data within existing business, they make fictitious contracts, establish a "phantom companies", etc. all with aim to give the illusion of legal activity for their criminal activities. The most common movement of goods, in whole or in part, is not accompanied by appropriate documentation and thus puts into circulation a greater amount of goods, or goods not corresponding to the contents of the accompanying documentation, or they misrepresented data concerning the production, transport, legal work etc. Therefore, the basis of any serious analysis is the control of documentation on the fulfillment of conditions for business, the legality of operations and the concrete work and comparing the documents with the real state of things.

---

[6] Nikola Srzentić and others, *Komentar Krivičnih zakona SR Srbije, SAP Kosova i SAP Vojvodine*, Savremena administracija, Beograd, 1981, p. 747.

[7] Art. 54 paragraph. 1 of the Criminal Code.

For any offense to be discovered, it is necessary to know the methods of committing the crime.

Committing crime of embezzlement can be divided into several stages, namely:

- Act of appropriation;
- Act of concealment;
- Action of taking out the appropriated objects from the facility in which the offender is employed;
- Transportation and sale of appropriated objects (with natural forms of property); and
- The effect of the crime on the perpetator.[8]

Appropriation has already been discussed in the first part of this work, which is why at this point we will only repeat that the misappropriation is essential legal characteristic of this crime and that it must be determined in each case.

"The most interesting" phase in commission of crime of embezzlement is certainly concealing phase. Therefore, and due to the fact that the remaining stages – taking out, the transport and sale of objects, as well as the effect of the crime to the offender, more or less are typical for other crimes, so in the continuation of this work we will focus at this stage of execution.

"Concealment is performed after the completion of appropriation, and sometimes before and when the offender expected deficit as a result of its activities"[9] There are few perpetrators who do not think, plan and combine how to conceal a commited crime before the decision and approach to its execution. This fact is of special, one could say, crucial for developing methods of detection of crimes of embezzlement. When identifying various forms of concealing, the perpetrators, depending on the level of education, expertise, skill and resourcefulness, in some cases show perfidy and remarkable inventiveness, to the utmost ruthlessness, but sometimes they show banal amateurism.

Below are some of the most common ways of concealing embezzled things, because we think that is one of the best ways to detect these crimes is just studying, monitoring and timely notification of authorities with all aspects of concealment, as well as permanent and systematic exchange of experiences between doctrine and the prosecuting authorities and between the prosecuting authorities themselves.

Amateur ways of concealing criminal acts of embezzlement are manifested in very different ways. At first glance they seem very naive, even banal. However, in practice, that form is followed by very large appropriation of another's property. As an example of the so-called amateur way of concealing we can highlight treatment of supervisor in retail stores during the regular list of goods and cash, when the books show different data on the types and quantities of goods or the actual situation.

Falsification or destruction of documentation is a basic procedure that is commonly applied by perpetrators not only to the offenses of embezzlement, but also in other criminal acts that have appropriation of other property as a common characteristic. It essentially represents the safest way to conceal the commission of a crime. With falsified accounting documents perpetrators are seek to close the circle of their delinquent conduct and facilitate illegal flow of goods and services. Most commonly creation and issue of false documents relating to the receipt and delivery of goods or money. The

[8] *See:* Božidar Banović, *Kriminalistička metodika*, Beograd, 2005, p. 344.

[9] *Ibidem*.

essence of forgery is to show that the perpetrator released more or is receiving fewer goods or money. Forgery can be made in various ways: by making a completely new document with false contents, modify existing documents in various ways, by planting already used documents to their backdating, etc. Moreover, in practice it is often the case that the embezzlement, concealing and destroying documents, arson, faking the theft and robberies etc.

Concealing by making fictitious lists of debtors. This method is used to conceal committed misappropriation and is commonly used in retail shops in small towns. The book or a list of fictitious debtors need to justify shortage if it exists at the time of the census.

Artificial increase in inventories of goods. Certain types of goods are by nature hygroscopic, so this characteristic is misused for the illegal appropriation of another's property. This type of concealment commonly used by managers and distributors who are in charge of that kind of goods in their work.

System of fictitious travel bills for a long time in the past was a convenient way of concealing a crime of embezzlement, but also some other crimes. The essence of issuing fictitious travel bills consisted in the fact that the appropriated money through fictitious travel account "justify" and thus conceal its misappropriation. In the current business conditions, due to changes in the ownership structure of capital, this way of concealing crimes is significantly less present, although it is a fact that is still being used.

The preparation of fictitious payroll. This method consists in the fact that the payroll or accounting entries lists contain fictitious names of individuals who are not employed and their signatures are forged. "Their earnings" are then appropriated. In a similar manner to treat is the payment of additional work when very often additional work is invented in order to disguise committed appropriation of money.[10]

These are just a few of the most common used methods of concealing embezzled things. Knowledge of these and other similar methods perpetrators are using during the commission of embezzlement, contributes greatly to the efficiency and effectiveness of the work of investigative bodies.

We could have initial findings that the case the crime of embezzlement is committed in different ways.

First of all, to such findings can be reached on the basis of criminal complaint submitted by certain entities. The criminal complaint is a written document or verbal statement advising the competent state authority that a criminal offense has been made. As the applicants for criminal charges may appear different subjects: injured persons and other citizens, the state authorities, territorial autonomy, local governments, public enterprises, institutions, law enforcement agencies etc.

Also, law enforcement agencies can get the indicia of criminal offense committed and its perpetrator by direct operational control.

On the other hand, citizens can spot the clues and find information that is related to the implementation of illegally appropriated objects or other effects of the offense, or they can provide useful evidence located outside the city in which the misappropriation occurred. Initial findings about crimes of economic criminal and possible perpetrators can be found from public appearances and speeches, also.

---

[10] *See:* Miodrag Đošić, *Kriminalistička obrada krivičnog dela pronevere*, Savezni sekretarijat za unutrašnje poslove, Beograd, 1972, p. 32-39.

Particular aspects of detecting these crimes are the results of the methods of analogies and circumstantial methods and the work of police authorities to shed light on other crimes, since under the guise of execution of other crimes embezzlement is ofter hidden

3.1. Detecting embezzlement in a criminal investigation of other crimes

One of the most important sources of information on criminal offenses of embezzlement is operational work on resolving specific cases. Very often it happens that the perpetrators with a view to mislead the organs of control and prosecution steps to conceal embezzlement faking other crimes such as theft, arson, robberies, etc. Police, acting on such reports, by checking the identified discrepancies and contradictions, often reveal that in reality there are deliberate simulated acts, which automatically opens the way to the discovery of the crime committed by the offender he wanted to disguise – and in many cases it is crime of embezzlement.

The feigned crimes, otherwise, because of their specificity, require the use of special methods to identify them and clarify. The person, who feigned a crime or event, no matter in what capacity, as a rule gives a false statement in respect of an act or event and presents some false information. Operating worker, therefore, must evaluate what are the key facts that point to the faked crime during the conversation. Also, he has to act tactically in the further course of conversation, so the person that reports feigned criminal offense doesnt its special interest for the specific facts and circumstances. In such tactical approach, operative starting from the basic rule that is based on past criminal practice – not a single person who feigns a criminal offense can not anticipate all the details and information that could be included in questions posed by an operative.[11]

3.2. Application of analogies in the detection of embezzlement

A special mode internal affairs organs in detecting of embezzlement consists in using the method of analogy or so-called *MOS (modus operandi system)* on economic crime. This method consists in the analysis of cases that have already undergone a criminal investigation, through determination of basic criminogenic factors that are acting in these cases, the traces and clues. The classic understanding of the *MOS* is based on the doctrine of percervance which means the persistence and commitment of the perpetrator during the commission of the same offense – is always done in the same way. According to modern concepts, *MOS* is a complex system that includes not only the execution of the same action that is repeated within the same type of work, but also the whole complex of circumstances, many of which become constant, even when the offender changes the type of crime committed. This new understanding of *MOS* is based on the changed interpretation of perservance which includes the adherence to the manner of execution or individual elements in the manner of execution by the perpetrators during the conduct, commission or concealment of crimes from the same or from different groups of offenses.

In order to the use of this method in practice to be successful, it is necessary to be accompanied by special software, with a broad base of data and a large number of options which can establish certain connections and comparisons, which has long existed in the world (eg. *Viklas system, GIS technology* etc.).

---

[11] *See*: Mićo Bošković, *Kriminalistika – Metodika II*, Policijska akademija, Beograd, 2000, p. 209.

3.3. The use of circumstantial methods in detecting embezzlement

Existing forms of economic crime almost always have deliberate and organized activities whose traces and consequences are carefully removed and camouflaged. There are very few situations where perpetrators find themselves in the act. Therefore, in its work on the discovery of these crimes and prosecution of their perpetrators, the police must use circumstantial method.

In this method analytical evaluation and verification of all external changes and events are performed until the possibility that there is criminal offense, or to establish closer or further conection to a certain person with some criminal work.

Out of all many indications, whose importance can be properly weigh only in each case individually, special attention should be paid to those that are manifested in the psychological effects of work on the offender and his using of the material benefits of the crime. Indications concerning the material and psychological effects of a criminal offense on offenders, as initial data on completed embezzlement, are easy to notice and their perception does not need any special methods or means, because it works primarily on the basis of direct observation of officials. Some research, however, shows that these initial data are not used enough in practice of internal affairs organs, but rather, through them, often lightly passes, which can certainly be considered wrong orientation.

"Circumstantial methods should be used in conjunction with the records by way of execution, because in this way, using past experience, may shed more light on some unusual circumstances and actions of offenders."[12]

3.4. Clues

The changes in the outside world that arise from the crime are traces of a criminal offense. Traces of a criminal act can be found at the scene of the crime, perpetrator, victim or elsewhere, while their probative value, *i.e.* the connection between them and the crime and certain persons as possible perpetrators, differ from case to case.

In the crime of embezzlement as the track is most common deficiency or excess in the business. This economic categories are specifics of embezzlement.

3.4.1. Lack in business as a mark of committed embezzlement

As noted above, in order to clarify any criminal offense, and therefore crime of embezzlement, we must look the traces that crime left.

Considering that the embezzlement consists in the unlawful appropriation of property entrusted to the perpetrators in the service or at work, one of the most common indications that the offense was committed is found in the lack of business units of the enterprise. It is usually determined by regular or extraordinary inventory (list) or revision of business. In all these cases it is necessary to determine the causes of the resulting deficit, since a shortage can occur for many reasons, not just because of misappropriation of entrusted property. Lack may occur because of outdated or inaccurate and incomplete records in the business books, unprofessional and negligent work of persons who have it established, the apparent reduction (shrinkage) of natural forms of property, breakage, force majeure, appropriation or unauthorized parking by others, negligence at work transfer, storage and handling of entrusted property, etc.

---

[12] Slavko Pihler, *Aktuelni problemi suzbijanja korupcije,* Institut za kriminološka i sociološka istraživanja, Beograd, 1993, str., p. 138.

Only when we eliminate all of these options in terms of causes of the resulting deficit we can conclude that the lack is result of misappropriation of entrusted property, embezzlement.

To clarify all these circumstances, we must carry out complete many operations in the workplace, perform basic control of documents and business records and, where necessary, do an accounting expertise (rarely technical or technological expertise).

3.4.2. The surplus in bussines as possible track of embezzlement

The creation and subsequent appropriation of surplus production is one of the most perfidious forms of the crime of embezzlement.

However, the determination of the surplus only can not be directly linked to the appropriation of property. If the excess is determined – it has not been appropriated yet. Since there are unrecorded surplus (which has no basis in business documents), we can only suspect that such excess is ready to be misused. In that case, the excess is taken only as an indication of a possible appropriation and only with other subsequent indications and clues that manifest themselves on the line for its export, implementation and use of that enjoying, benefits can be turned into evidence of the embezzlement.

4. Finding, colecting and securing evidences of committed crime of embezzlement

Phase of detection and obtaining of initial findings of embezzlement and the next phase of finding, collecting and providing evidence of such criminal offense can not be strictly divided into two distinct phases, because they essentially form one inseparable whole. In addition, as a rule, through the process of discovering a criminal offense we provide a basic, primarily material evidence.

For officers of the internal affairs organs the most important task is to clarify early mode of appropriation and way of concealing unlawfully appropriated property. During clarification of embezzlement, we should specifically define what kind of manner of execution it is, whether there are appropriated money or securities, or other movables, where is the working place where the offense was committed, property, or the status of a suspect on such a workplace, to determine whether the assets are entrusted to him, and how, to establish a way of concealing things appropriated and the amount of acquired illegal material gain, also as where and how it was spent.

For all of these questions is needed very patient and hard work, with intensive use and combination of the operating assets of criminal techniques, tactics and methodology.

4.1. Operational and investigative activities in detecting and proving embezzlement

At detection and particularly in proving of this criminal offense there are various operational and investigative activities. Due to limited space in this paper we will briefly mention some of them.

In line of operational and tactical actions and measures we include: collecting of necessary information, verification, inspection of the business documents and records, monitoring and surveillance of suspects, ambushes, operational control and operational links; and from investigative actions are most commonly used: search of persons and an apartment, confiscation of objects and expertise.

4.1.1. Monitoring the business documents and records

Insight into accounting and other documentation for the purpose of finding, collecting and securing material evidence is the most important tool in the work of the police in combating crime of embezzlement. In this way they can most reliable and safest collect and provide material evidence of the existence of this crime for the simple reason that in the system of economic business entities in our country, we adopted the principle that on each such transaction on the property in terms of handling, use or disposal, we must, under precisely defined legal conditions and in the prescribed form, prepare written documentation. Therefore, every business change in respect of assets (purchase, sale, delivery of goods, inventory, payment in cash, payment by current account or by check and so on.), must have their mark in the relevant accounting records.

During an inspection of accounting and other business documents can be often necessary to *temporarily seize them.* This will be the case when there is grounded suspicion that the documentation can be destroyed, hiden or modified, in particular when it comes to counterfeit or fictitious documents. The original documentation, in some cases may be certified copy or regular copies, and can be seized.

4.1.2. Tracking

Tracking the suspects, as one of the operational-tactical measures can also be used in certain cases during the criminal investigation of a criminal offense of embezzlement. Such cases in practice are not as common, but they are possible, and sometimes desirable.

Operational-tactical action of monitoring seeks to collect notifications notably on the manner of appropriation, concealment and unlawful spending of appropriated property. This measure is justified if it is in combination with other operational-tactical measures and if it can find and provide material evidence.

4.1.3. Search of an apartment and other facilities

Necessary legal requirement to search facilities and persons means that the competent authority has estimated that: it is likely that a search to find the defendant or to find evidence of a crime or objects might be relevant to the criminal proceedings. A search is carried out solely on the basis of written permission by court, and only in exceptional cases without a warrant, under the conditions provided for by law and on the basis of legal authority.[13]

Object of the search may be a person (personal search), or apartments and other facilities.

In order to secure material evidence, especially for the purpose of finding goods or money that can be the subject of a crime of embezzlement, as well as for finding forged or fictitious documents being used for the concealment of the criminal offense, is often need to search the person against the criminal investigation is in the course, to search an apartments or other facilities, and in some cases personal search is required. Such actions have a certain specificity in relation to the search, on the occasion of other crimes. The main specificity consists in the fact that the use of search in embezzlement is to find forged and fictitious documents which served during the commission or

[13] Art. 152 of the Code of Criminal Procedure.

concealment of the criminal offense. During the search, special attention should be payed to find the invoices of executed purchase and sale, waybills, delivery and receipt, work orders and other similar documents. We should also pay attention to the correspondence, particularly those from business environment to locate letters, various notes, tagging, notebooks etc. The above documents may help in establishing the essential conditions for the manner of appropriation and expenditure of money or other movable goods originating from embezzlement, as well as in determining the mutual relations between the perpetrators, if it there are more perpetrators of the crime.[14]

4.1.4. The expertise

Very important evidence in proceedings against economic crime is certainly expertise.

Expertise is a procedural action undertaken by proceeding body, in addition to compliance with the conditions prescribed by the Criminal Procedure Code[15], in order to determine or assess some of the facts in the procedure which require expertise that Court does not possess. In order to perform these evidence actions special professionals are engaged – experts, and they, in accordance with the rules of their profession, conscientiously and impartially give their expert findings and opinion regarding the subject of the expertise they are in charge. On the economic and accounting expertise or the expertise of business books, which are by far the most common type of expertise for the crime of embezzlement, shall apply the general provisions of the Code that are applicable to all kinds of expertise.

5. Conclusion

Although for some of its characteristics is similar to evasion, and in that sense, it could be in the group of the crimes against property, the crime of embezzlement in Serbian criminal material law, in our opinion, is completely correctly classified in the group of criminal offenses against official duty. The justification for this view is in the fact that the crime of embezzlement can not be performed by any person, because this criminal act can be commited only in relation to the performance of official duties or work, and only in respect of movable property which is entrusted to the offender in connection with the exercise of these duties.

However, whether it is treated as a criminal offense against official duty, or as a crime against property or even a criminal offense against the economy, embezzlement, certainly falls into criminal offenses in the area of economic crime. It is maybe not the most dangerous, nor the most common act in this category, but that does not mean it should be overlooked in the work of competent authorities and doctrine.

To be particularly underlined that the crimes of economic criminality as a rule are very difficult to detect, even in those countries where there are effective legal mechanisms and where the authorities have adequate material resources and specialized knowledge and skills in the field of detection of such crimes and prosecution

---

[14] *See:* Miodrag Đošić, *Kriminalistička obrada krivičnog dela pronevere*, Savezni sekretarijat za unutrašnje poslove, Beograd, 1972, p. 85.

[15] Criminal Procedure Code, *Official Gazette of the Republic of Serbia,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

of their perpetrators. Given the fact that such crimes were carried out in almost all economic sectors, and also in the domain of social activities, their manifestations and modes of execution are very diverse. In practice, there are often the cases when there is no direct evidence that could determine act of perpetration. Still, almost always there are certain indications on the basis of which it can be concluded that the acts are committed by certain persons. However, the indications to prove the crime are long road that requires extremely hard work of regulatory authorities.

The use of *MOS* and circumstantial methods, tracking leads, deficits and surpluses in the business, monitoring the business documents and records, as well as tracking of people and search of a dwelling or other premises, are just some of the necessary operational and investigative methods that law enforcement agencies must use in detecting and proving of all criminal acts of economic crime, and therefore the crime of embezzlement.

Nowadays, it is noticeable that the exponents of economic crime increasingly specialize and improve more and they are more closely associated with each other in the execution and covering of their criminal activities. Such "professional executives" may be opposed by qualified and professional work of the authorities of detection and prosecution. Many factors suggest that economic crime can not be fully controlled, especially with only preventive measures. Therefore, effective prosecution and adequate repressive punishment of its perpetrators play the most important role in the struggle in which the ultimate goal is to prevent these harmful social phenomenon and reduce it to a minimum.

The Republic of Serbia is currently in the process of introducing the new *Law on organization and jurisdiction of state authorities in fighting organized crime and corruption*, which envisages the establishment of special police services, as well as special professional departments of Higher Courts and Higher Public Prosecutors for combaing corruption, which is under the jurisdiction of treatment in the case for the majority of crimes against official duties (including the crime of embezzlement) and other crimes against the economy. We strongly support this initiative, because the results in the not too distant past have shown that the existing legal mechanisms for the detection and identification of crimes in this area are inadequate. In addition, control and suppresion of economic crime in Serbia has been weak recently and perpetators were punished selectively. State authorities, especially the police and the judiciary did not adapt in time to a new social and economic conditions which directly created free space for expansion of economic crime. Also, the lack of technical equipment, and the lack of anti-corruption mechanisms and programs greatly influenced the inefficiency of authorities in this fight. We hope that the adoption and above all, consistent application of this new law, will substantially eliminated these problems.

References:

1. Banović Božidar, *Kriminalistička metodika*, Beograd, 2005;

2. Banović Božidar, *Privredni kriminal i korupcija,* Institut za kriminološka i sociološka istraživanja, Beograd, 2001;

3. Bošković Mićo, *Kriminalistika – Metodika II*, Policijska akademija, Beograd, 2000;

5. Đošić Miodrag, *Kriminalistička obrada krivičnog dela pronevere*, Savezni sekretarijat za unutrašnje poslove, Beograd, 1972;

6. Pihler Slavko, *Aktuelni problemi suzbijanja korupcije,* Institut za kriminološka i sociološka istraživanja, Beograd, 1993;

7. Srzentić Nikola and others, *Komentar Krivičnih zakona SR Srbije, SAP Kosova i SAP Vojvodine*, Savremena administracija, Beograd, 1981;

8. Criminal Code, *Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014;

9. Criminal Procedure Code, *Official Gazette of the Republic of Serbia,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

ICT, Data Retention, and Criminal Investigations of Economic Crimes

DR. PHD SILVIA SIGNORATO [*]
Research Fellow in Criminal Procedure, School of Law,
University of Padua (Italy)
Lecturer in Criminal Procedure,
Institut für Italienisches Recht, University of Innsbruck (Austria)

Abstract:

The Information and Communication Technology nowadays plays a core role in the execution of crimes of economic criminality. This seems to be due to two factors, that can be defined as the structural factor and the instrumental factor. Moreover, every time we use the new technologies we leave behind us some sorts of "traces", i.e. the traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. Such data can be extremely useful in the context of criminal investigations. The regulation on the obligation of the States to require the retention of such data by service providers for investigative purposes, for the discovery and repression of crimes is called "data retention". Data retention has some general features that are valid at global level. Within the European Union the respective regulation set out by the Directive 2006/24/EC has been declared invalid by the Court of Justice of the European Union. Therefore it seems necessary to adopt a new European regulation on data retention, regarding to which the article traces in its conclusions the possible reference points.

Keywords: *criminal investigations, cyber investigations, economic crimes, data retention, Directive 2006/24/EC, judgment of the Court of Justice of the European Union of the 8th of April 2014 Digital Rights Ireland and Others, right to respect for private and family life, right to protection of personal data, right to freedom of expression and information.*

1. The use of the Information and Communication Tecnology by economic criminality

Economic criminality takes advantage – and will increasingly take advantage – of the Information and Communication Technology – "ICT" in short – in order to pursue its criminal purposes. This seems to be due to two factors, which can be defined as the "structural factor" and the "instrumental factor".

a) The first factor, *i.e.* the **structural factor**, is represented by the fact that the *Information and Communication Technology* nowadays plays a core role in the execution of economic activities.

We may consider, for example, the importance of informatics in the processes of industrial production, the management of banking data, the industrial accountability

[*] E-mail: *silvia.signorato@unipd.it.*

and the payment of taxes by industries to the State. Furthermore, the very same economic and financial transactions nowadays take place in a virtual way. In this regard it is necessary to recall not only systems of electronic payments such as payments by credit cards, *online* bank transfers or *paypal*, but also transactions carried out with real virtual currencies – the so-called *crypto-currency* – such as *Bitcoin* and *Litecoin.*

From the fact that the *Information and Communication Technology* nowadays takes on structurally a fundamental role in the execution of economic activities we can infer that also the criminal activities concerning economic activities[1] make use more frequently of the *Information and Communication Technology*.

b) The second factor of the use of informatics and the net for the purposes of economic criminality, *i.e.* the **instrumental factor**, is explained by the fact that the use of the new technologies facilitates the execution of crimes and renders their prosecution more difficult.

In particular the use of the net facilitates the anonymity in the execution of crimes. Moreover the acquisition of digital evidence is complex and it is necessary that investigators follow what are known as "best practices"[2], since an irregular acquisition of evidence can alter the evidence itself. Finally, the virtual nature and the non-territorial nature of the net can lead to relevant problems in determining the State that is effectively entitled to carry out the investigations.

It is therefore possible to say that the use of informatics for criminal purposes can result in an instrument that impedes investigative activities to the point of becoming a counter-investigative strategy.

2. The importance of *data retention* in the context of criminal investigations against economic criminality

The repression of economic criminality crimes is surely more difficult when these crimes are executed with the use of new technologies and, in particular, such new techniques as steganography[3] and cryptography[4], or computer programs that allow anonymization.

Nevertheless the repression of such crimes remains still possible, also thanks to the acquisition of certain types of data. In this regard it is necessary to recall that every time we use a *computer system* (such as, a computer, a notebook, a tablet, a last generation mobile phone, etc.) we leave behind a series of "traces". They represent the location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user and to traffic data. Moreover, as regards this latter

[1] For an analysis of economic crimes relating to the use of new technologies see U. SIEBER, *La delinquence informatique,* E. Story-Scientia, 1990, p. 7 et seq.

[2] E. Casey, *Digital evidence and Computer Crime: Forensic Science, Computers and the Internet,* Academic Press, 2011, p. 17r et seq.; S. SIGNORATO, *Electronic investigations in Italian criminal proceedings*, in *Analele universității de vest din Timisoara*, seria drept, 2014, n. 1, p. 10 et seq.

[3] D. Buso - D. Pistolesi, *Le perquisizioni e i sequestri informatici*, in F. Ruggieri – L. Picotti (eds.), *Nuove tendenze della giustizia penale di fronte alla criminalità informatica. Aspetti sostanziali e processuali*, Giappichelli, 2011, p. 185; G. Costabile – M. Mattiucci – G. Mazzaraco, *Crittografia, steganografia e tecniche di analisi forense*, in S. Aterno, F. Cajani, G. Costabile, M. Mattiucci, G. Mazzaraco (eds.), *Computer forensics e indagini digitali, Manuale tecnico-giuridico e casi pratici*, vol. III, Experta, 2011, p. 633 et seq.

[4] G. Ziccardi, *Crittografia e diritto*, Giappichelli, 2003 and, as regards the purely technical aspects of cryptography, see D. R. STINSON, *Cryptography, Theory and Practice*, 3rd edition, CRC Press, 2005.

data, under article 1, letter d), of the *Convention on Cybercrime* «"traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service»[5].

Such data can play a fundamental role for investigative purposes. For this reason many States require that those who provide publicly available electronic communications services or public communications networks to retain this data for the purposes of the investigation, the detection and the prosecution of crimes. This occurs irrespective of the fact that the crime relating to whose investigations such data can be useful may already have been committed. The data storage activity takes place indeed regardless of the fact that a crime has been committed and of the existence of a *notitia criminis*, i.e. of a crime report.

This preventive storage activity telematics data is defined as ***data retention***[6].

Relating to the subject at hand it seems appropriate to point out the following aspects, that relate in general to the retention of data, regardless of the fact that such data are being retained by providers of publicly available electronic communications services or of public communications networks subject or not subject to the law of the European Union.

a) The persons whose data is being retained. Everybody's data is being retained, even if it relates to persons who are not suspects and who will never become suspects. Not even their age matters. Therefore it represents a collection of data carried out *erga omnes*, i.e. towards everyone.

b) The persons who store the data. The data is being stored by service providers and by telephone line managers. It is necessary to stress that such persons are normally not public entities, but private individuals. They follow market reasons, not justice ones. This can lead to some problematic aspects, also on the level of security of the storage of data itself.

c) The global nature. If a communication takes place in a certain State, it is not granted that the respective traffic and location data on persons and to the related data necessary to identify the subscriber or registered is retained by providers of services that have their seat in the same State. On the contrary such electronics *data* is stored always more frequently in a different State from the one where the communication took place. This entails that in the investigative context it is often necessary to acquire *traffic*

---

[5] See art. 1, d), of the Convention on Cybercrime of the Council of Europe, signed on the 23rd of November 2001. «Traffic data» do not concern the content of communications. It is however necessary to point out that while, as regards traditional telephone communications, it is possible to distinguish between data relating to and data not relating to the content of a communication, such a distinction becomes blurred in the context of those forms of communication that use new technologies. See L. BACHMAIER WINTER, *Criminal investigation and right of privacy: the case-law of the European Court of Human Rights and its limits*, in Lex ET Scientia, Juridical Series, vol. II, 2009, p. 12.

[6] «Data retention is distinct from data preservation (also known as 'quick freeze') under which operators served with a court order are obliged to retain data relating only to specific individuals suspected of criminal activity as from the date of the preservation order. Data preservation is one of the investigative tools envisaged and used by participating states» under the art. 16 Convention on Cybercrime of Council of Europe. See *Report from the Commission to the Council and the European Parliament, Evaluation report on the Data Retention Directive (Directive 2006/24/EC),* Brussels, 18.4.2011, COM(2011) 225 final, p. 5.

data retained in another State[7]. That is however possible by recurring to a letter rogatory or other tools eventually foreseen for cross-border gathering of evidence[8]. In this regard it is furthermore necessary to point out how the use of such tools usually leads to an extension of the time necessary to obtain evidence.

d) The length of data retention. Traffic data is retained for the time foreseen by the State on whose territory the *service provider* or the telephone line manager storing this data has its seat.

Moreover every State has its own different regulation on *data retention*. In this regard it seems possible to identify three groups of States.

A first group seems even unwilling to adopt a regulation on *data retention* or foresee really very short periods of time to retain data.

On the contrary a second group of States foresees that data be retained for extremely long periods of time, to the point that such data are not just investigative instruments but seem almost functional to a sort of mass control over the citizens.

On an intermediate level there is finally a third group of States that foresees a period of retention of data wavering between 6 months and 24 months[9].

The fact that every State foresees such different periods of retention of data can however constitute a problematic aspect for criminal investigations.

e) The violation of fundamental rights. *Electronic data* is no neutral data. It is data that, if combined with other data, can allow to go back up to several features of a person, including personal relationships, professional relationships, social relationships, religious beliefs or political views. It is therefore a very personal data and it determines an interference in one's *privacy*.

In this regard it is however necessary to point out that not all States consider *privacy* in the same way.

On the one hand there are States – such as the Member States of the European Union – that consider privacy as a fundamental right in its double nature of *right to be let alone* and *right to have control over access to personal information*. Moreover, the European Convention on Human Rights foresees in article 8 the right to respect for private and family life. Furthermore also the Charter of Fundamental Rights of the European Union recognizes in article 7 the right to respect for private and family life and in article 8 the right to protection of personal data.

On the other hand there are States where the right to privacy has however only recently been established, since for a long time such right has been considered as breaching the ethical tradition[10].

---

[7] On the transnational dimension of electronic investigations see M. SIMONATO, *YP Special Report, Defence rights and teh use of information technology in Criminal procedure,* in *Revue international de droit Pénal,* 2014, p. 279 et seq.

[8] On cross-border gathering of evidence see M. DANIELE, *Ricerca e formazione della prova,* in R. E. KOSTORIS (ed.), *Manuale di procedura penale europea,* 2 edition amended and extended, Giuffrè, 2015, p. 355 et seq.

[9] As indicated in the *Report from the Commission to the Council and the European Parliament, Evaluation report on the Data Retention Directive (Directive 2006/24/EC)*, Brussels, 18.4.2011, *COM(2011) 225 final*, Table 3, p. 14, by the time of the report among the Member States of the European Union that foresee the same period of retention of the various kinds of data, Poland foresees a two-year-retention period of retention; Latvia established a 1-and-a-half-year period of retention; Bulgaria, Denmark, Estonia, Greece, Spain, France, Netherlands, Portugal, Finland, United Kingdom set out a period of retention of one year; finally, Cyprus, Luxembourg, Lithuania foresee a period of retention of six months.

3. The invalidity of the Directive 2006/24/EC on data retention

In European Union data retention[11] has been last regulated by the Directive 2006/24/CE[12]. Since its adoption it has been a highly controversial directive from the point of view of its conformity to fundamental rights and, in particular, the right to *privacy*[13].

Nevertheless, on the basis of the Directive 2006/24/CE many European States have foreseen or amended their national regulation on data retention. However precisely those national regulations implementing this directive have raised some constitutional issues. This lead to the Constitutional Courts of Romania[14], the Czech Republic[15] and Germany[16] declaring non-constitutional their national dispositions implementing the directive on data retention[17].

Even though the judgments of these three Constitutional Courts present some differences, it can be pointed out that the non-constitutionality aspects were related especially to the lack of proportionality of the regulation on data retention, the absence of a precise list of subjects authorised to request such data and the general referral to "serious crime" without any further clarification.

After the judgments of the Constitutional Courts of Romania, the Czech Republic and Germany declaring as non-constitutional the respective national implementing regulations, the Court of Justice of the European Union (ECJ) received a request for preliminary ruling from the High Court of Ireland and one from the Austrian Constitutional Court concerning the validity of the Directive 2006/24/CE[18].

---

[10] This is what happened in the People's Republic of China. In this regard see S. WU, *La tutela penale della privacy nell'epoca di Internet. Esperienze italiane e cinesi a confronto*, Edizioni Scientifiche italiane, 2012, p. XXI.

[11] See E. D. Busser, *European initiatives concerning the use of it in Criminal procedure and data protection,* in *Revue international de droit Pénal*, 2014, p. 213 et seq.

[12] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[13] In the system of European legal sources, directives foresee an obligation of result. It is then up to the every single Member State to determine how to achieve such a result.

For an overall view of the plurality of legal sources in the context of European criminal procedure, see R.E. KOSTORIS, *La dimensione reticolare delle fonti*, in R.E. KOSTORIS (ed.), *Manuale di procedura penale europea*, 2nd ed. amended and extended, Giuffrè, 2015, p. 68 et seq.

[14] See Constitutional Court, judgment n. 1258 of the 8th of October 2009.

[15] See Constitutional Court, judgment of the 22nd of March 2011.

[16] See Constitutional Court, judgment of the 2nd of March 2010. See R. Flor, *Le recenti sentenze del Bundesverfassungsgericht e della Curtea Constituțională sul data retention*, in L. Violante - T. Galiani - A. Merli (eds.), *Oggetto e limiti del potere coercitivo dello Stato nelle democrazie costituzionali*, in *Annali della facoltà giuridica*, Camerino, 2013, p. 308 et seq.

[17] See also Supreme Administrative Court of Bulgaria, decision n. 13627 of the 11th of December 2008; Supreme Court of Cyprus, actions nn. 65/2009, 78/2009, 82/2009 and 15/2010-22/2010, of the 1st of February 2011; constitutional action brought on the 2nd of June 2008 in Hungary by the Hungarian Civil Liberties Union.

[18] Also the Slovenian Constitutional Court has been requested to rule on the constitutionality of its national regulation (Articles 162 to 169 of the Electronic Communications Act - Official Gazette RS No. 109/12 -) implementing the Directive 2006/24/EC. Moreover, the Slovenian Constitutional Court ruled by order on the 26th of September 2013 that the proceedings to review the constitutionality of Articles 162 to 169 of the Electronic Communications Act should be stayed until the Court of Justice of the European Union adopts a decision in Cases C-293/12 and C-594/12. For the order see http://www.us-rs.si/media/u-i-65-13.-.order.pdf

Following these requests for a preliminary ruling, on the 8th of April 2014 the Grand Chamber of the Court of Justice of the European Union[19] considered firstly the relevance of Articles 7 (Respect for private and family life), 8 (Protection of personal data) and 11 (Freedom of expression and information) of the Charter of fundamental rights of the European Union with regard to the question of the validity of the Directive. It has then proclaimed the existence of an interference with the rights laid down in articles 7 and 8 of the Charter and has examined whether such an interference was justified and proportionate.

Having regard to such an analysis the Court of Justice concluded by ruling that the Directive 2006/24/CE was invalid, since it did not comply with the principle of proportionality examined in the light of articles 7, 8 and 52 (Scope of guaranteed rights), par. 1, of the Charter of fundamental rights of the European Union.

With regard to such invalidity the judgment considered that there was no reason to examine also the validity of the directive in the light article 11 of the Charter[20].

4. Towards new European horizons of data retention

The judgment of the Grand Chamber of the Court of Justice of the European Union pronounced on the 8th of April 2014 has represented a fundamental judgment not only at a European level, but also at a global level, since it has become a significant reference point in data retention matters.

Following this judgment two kinds of issues arose at a European level. Firstly, one finds the issue of understanding the fate of the national regulations implementing the directive declared invalid. Secondly, one finds the issue relating the increasing need for the European Union to adopt a new regulation on data retention. The attention will be focused on the latter need.

In order to determine the reference points of the new regulation it is necessary to start by examining the rights that have a prominent role. In this regard it is necessary to point out that every regulation on data retention can lead to at least a double restriction of rights.

Firstly, we witness a strong interference with the **right to privacy**[21]. As specified by the Court of Justice of the European Union, the mere fact that service providers retain data constitutes in itself an interference[22] with such a right. As regards data retention, the subsequent access of national authorities to the data constitutes therefore a further interference with the right to privacy[23].

Secondly, data retention can cause also a restriction of the **right to freedom of expression**. Since their data is being retained, private individuals can in fact use the means of communication in a more limited way or anyway in a different way than the one they would have opted for had the regulation on data retention not existed[24].

---

[19] See Court of Justice of the European Union (Grand Chamber) of the 8th of April 2014, *Digital Rights Ireland and Others*, Joined Cases C-293/12, C-594/12.

[20] See Court of Justice, 8th April 2014, C-293/12 and C- 594/12, *cit.,* paragraph 70.

[21] «To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way». See, to that effect, Court of Justice, 20 May 2003, *Österreichischer Rundfunk and Others,* Cases C-465/00, C-138/01 and C-139/01, paragraph 75.

[22] See Court of Justice, 8th April 2014, C-293/12 and C- 594/12, *cit.,* paragraph 34.

[23] See Court of Justice, 8th April 2014, C-293/12 and C- 594/12, *cit.,* paragraph 35.

[24] See Court of Justice, 8th April 2014, C-293/12 and C- 594/12, *cit.,* paragraph 28.

Both the right to privacy and the freedom of expression are protected by the Charter of Fundamental Rights of the European Union as well as the European Convention on Human Rights.

These are rights that can be legitimately limited only in accordance with a legal disposition. Furthermore, as regards the right to privacy, such a restriction is legitimate only if it is necessary in a democratic society, in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others[25]. While, as regards the freedom of expression, such a restriction is legitimate if it is necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary[26].

Moreover, these rights can be limited only so long as they respect the principle of proportionality. Therefore, every European regulation on data retention will have to comply firstly with the principles of proportionality and necessity.

5. Conclusions

In my opinion, at a European level it would be necessary to adopt two separate and different regulations, on the one hand, for data retention and, on the other one, for the subsequent activity of data acquisition by the national authorities.

In particular, as regards the **activity of data retention**, it would seem appropriate that the new European regulation would:

a) precisely define the subjects that have to retain data;

b) allow that the activity of data retention be carried out towards everyone, since it is not possible to determine a priori the subjects that may commit a crime;

c) point out the goals according to which the retention is carried out;

d) radically exclude the possibility of retaining the contents of communications;

e) define the period of data retention, which has to be neither too short nor too long, and establish the same period for the telephone traffic data as well as for the telematics data, since it seems unreasonable to set out different periods of time for these two kinds of data;

f) foresee that the data retention be carried out in those States of the European Union or in third countries that ensure a protection of the rights equal to or superior to the one foreseen within the European Union;

g) require the respect of the rules of security in the retention of data;

h)determine adequate guarantees to prevent abuses in the retention of data, including the illegal use of data[27], also as regards the automatic processing of data;

---

[25] See art. 8.2 of the European Convention on Human Rights.

[26] See art. 10.2 of the European Convention on Human Rights.

[27] See, to that effect, Eur. Court H.R., *Liberty and Others v. the United Kingdom*, 1 July 2008, no. 58243/00, paragraph 62 and 63.

i) proclaim once more the necessity of the existence of an independent authority surveying the correct retention of data;

j) effectively contribute to the harmonisation of the dispositions of the Member States on data retention by those who provide publicly available electronic communications services or public communications networks.

II. On the other hand, various provisions should be adopted in relation to the subsequent **activity of acquisition of data by the national authorities**.

In this regard it would be appropriate that the respective regulation would:

a) precisely define the subjects entitled to acquire such data, limiting the number of persons authorised to have access to the data to what is strictly necessary;

b) require the judicial control over the request to acquire the data;

c) precisely determine the crimes that authorise the acquisition of data;

d) set out that the data acquired by violating the substantial and procedural requirements cannot be used in the context of a criminal proceeding.

If there do not seem to exist any doubts relating to the necessity to adopt a new European regulation on data retention, the issue however remains, as already mentioned, that data is often retained by service providers not located in a Member State of the European Union. Therefore, it would be necessary also to harmonise the regulations on data retention of the states that are not members of the European Union. This is surely a long path and one that is still partly to be walked through, but it could receive a significant impulse from the very same predisposition of a new European regulation on data retention, if it will be recognised that its regulation plays the role of relevant reference point on the matter.

Recognizing of forensic accounting and forensic audit in the South-Eastern European countries

DR. SNEZANA MOJSOSKA
Associate Professor, University St. Kliment Ohridski – Bitola,
Faculty of Security – Skopje

DR. NIKOLA DUJOVSKI
Assistant Professor, University St. Kliment Ohridski – Bitola,
Faculty of Security – Skopje

Abstract:

Some of the recent events of crime such as Enron, WorldCom, Parmalat, and Xerox, drew some new questions related to the trustworthiness of the financial reports and financial results of the companies. Financial frauds committed in smaller companies, as it was shown in the research conducted by the Association of Certified Researchers of Crime, are of a different type, such as false payments, false invoices, forgery of cheques, etc. According to the Report to the Nations on Occupational Fraud and Abuse from 2014, the participants' estimation of typical organization loses is 5% of the revenues each year to fraud. If applied to the 2013 estimated Gross World Product, this is translated to a potential projected global fraud loss of nearly $3.7 trillion. The median loss caused by the frauds in study was $145,000. Additionally, 22% of the cases involved losses of at least $1 million. The purpose of this paper is to recognize this new direction through its defining, its recognizing in Europe and the USA, as well as to comparatively present its recognizing in the countries of south-eastern Europe. The Republic of Macedonia still does not recognize the branch of forensic accounting and forensic audit even though it has become a need. The need of recognizing these two sciences or sub branches of accounting and audit, as well as the establishment of an international body which will unite and train the experts, will come as a conclusion to this paper.

Keywords: *accounting, auditing, forensic accounting, forensic audit, fraud.*

1. Introduction

The increase of the number of unauthorized activities, commercial frauds, corruptedness, false financial reports, etc. was caused by the decline of the business culture in the recent decades, as well as the constant changes in the legal and financial understanding of the economic situation and the successfulness of the company. A one-sided and false presentation of the results of the financial reports can emerge out of different reasons such as a mistake of the human factor out of negligence, or maybe an unintended mistake. The mistake can be made by an individual coming from some institution or maybe a group, or a third party. The intentional mistake can be defined as a fraud. Accounting and audit cannot discuss on detecting the intentional mistakes, and this led to the need of a new course in the accounting and audit, the so-called forensic accounting and forensic audit. On the part of accountants and according to the

accounting standards which the revisors abide, frouds can be defined as a criminal deed in the finances or deeds causing other harm. According to forensic accountants and auditors, frauds can be classified into three groups: corruption, rigging of financial reports, and expropriation of property. Sometimes frauds are commenced for tax evasion by reduction of the tax base through the fictitious increase of the expenses and obligations, as well as reduction of the incomes and the assets.

The purpose of this paper is to present the recognizing of forensic accounting and forensic audit in the world and the region, and especially in our country. The paper consists of four parts. In the first part, after the introduction, we will make an effort to define forensic accounting and forensic audit. In the second part we will give notion of the awareness of forensic accounting and forensic audit in Europe and the USA and we will present the existence of professionals and institutions which are engaged in forensic audit and accounting in the region. Here, we will also elaborate the state in Macedonia. At the end, we will come to the conclusion in which the need of clear definition of the forensic accounting and audit is evident, as well as the need of establishing an international institution which will define the rules, the codex and all the other necessary knowledge and training which must be possessed by the forensic accountant and the forensic auditor.

2. Defining forensic accounting and forensic audit

Individuals, investors, managers as well as Governments obtain information and decision-making strictly from the financial reports, i.e. information which derives from the accounting industry. There have always been frauds in accounting followed by bankruptcy failure of the company, and in recent times by other serious consequences. In the past, managers used accounting for manipulation with the information. One of the most significant steps in regaining the trust in the financial reports of all engaged parties is the use of information from accounting and audit based on standardized solutions.

The forensic scientist is the creator of independent and objective knowledge and information related to the economic truth. Forensics is usually a special type of independent and impartial investigation and estimation of correct and ethically acceptable, above all lawful behavior in the enterprises. Forensic economy stems from the Latin word "forensic" and implies to judicial, trial, and expert evidence. Traditionally, forensic economics has referred to the application of economics into detection and quantification of harm from behavior that has become the subject of litigation and has been practiced by experts who are paid by the court or one of the parties.[1][2]

A forensic investigation cannot be conducted without some knowledge of the accounting principles. For the first time, fraud and accounting as a relation were mentioned in 1909 by Robert Montgomery, one of the founding fathers of the American accounting profession. He stated that "the detection of fraud is a most important portion of the auditor's duties, and there will be no disputing the contention that the auditor who is able to detect fraud is – other things being equal – a better man than the auditor who cannot."[3]

---

[1] This is the focus of the National Association of Forensic Economics (www.nafe.org), which publishes the *Journal of Forensic Economics*.

[2] Eric Zitzewitz, Forensic Economics, Forthcoming, *Journal of Economic Literature,* February 2011, p. 1.

[3] O. Ronald Gray, Stephanie D. Moussalli, *Forensic accounting and auditing united again: A historical perspective Journal of Business Issues.*

Forensic accounting is a special type of accounting investigation and estimation which aims for prevention from or detecting and proving of a fraud or other criminal trial procedures and with its competent and professional ethics and undoubted certainty to give real opinions for real or potential danger of individuals as well as of existence of legally prohibited actions in their work. The accounting forensic scientist as a person who performs accounting activities and special technical activities professionally estimates whether the economic categories are treated truly (legally) and fair (morally), and how they are presented to the business community, as well as for other purposes among which is the possibility to fight against economic criminal activities of the legal persons and individuals.

Forensic accounting as a notion was first mentioned in 1824 in Glasgow, Scotland, and its application in the practice has been especially present in the recent years.[4] According to other sources, it is not new. Its roots were traced as far back as the early 1800's to Glasgow, Scotland that, notwithstanding forensic accounting as a profession remained relatively unknown until the plethora of high-profile corporate scandals and stricter reporting and internal control regulations which brought to light its importance to the business world.[5] The name Forensic Accounting was not even coined until 1946 implying that this specialty career path was not especially common. Even the first forensic accounting book did not come out until 1982 ("Introduction to Forensic," 2011). The popularity and the need of the services that forensic accountants provide, has steadily and rapidly grown in the past few decades.[6]

The professional forensic accountant feels the gap between accountants, auditors, inspectors, and all the other representatives of judicial bodies who lack special knowledge and skills for prevention from, detection, and proving of criminal and other illegal activities in the establishment and the functioning of the enterprises. The forensic accountant has to have a sustained knowledge of the basic methods and techniques of economy. These are more or less known manners, methods, and techniques developed by economic and other allied scientific disciplines. In their work, they have to possess broad business knowledge and organization experience, and they have to be competent and moral, by which their professional opinion on frauds and other illegal activities will be sufficiently substantial.

Forensic accountants pay great attention to the examples as well as the reasons and the consequences. "Causa effect analysis" studies the notion of the phenomenon and the detection of fraud and other illegal activities (if there are any) and its influence on accounting and financial advising. This principle in the investigation of this kind is an estimation of the facts, i.e. the current events, processes and states, and not an estimation of the formal (pro-forma) accounting and / or non-accounting reports.

Forensic accounting is a special accounting activity conducted by an accounting forensic scientist capable of detection and estimation of the lost economic profit, the loss and the obligations which cause penal and other prohibited activities.

---

[4] Ramaswamy, Vinita, New Frontiers: Training Forensic Accountants within the Accounting Program, *Journal of College Teaching & Learning*, V. 4, No. 9, p. 31 – 38, Sep 2007.

[5] Nigerian Academic Forum, *A Multidisciplinary Journal,* National Association of the Academics (2009), p. 39.

[6] Grand Valley State University ScholarWorks@GVSU Honors Projects Undergraduate Research and Creative Practice 2014, History of Forensic Accounting Kristen Dreyer Grand Valley State University, p. 5.

Many authors define forensic accounting in different ways. According to the American Institute of authorised public accountants (AICPA), forensic accounting is an "application of accounting principles, theories and disciplines of facts and assumptions about the issues in the judicial cases and it embraces every branch of accounting knowledge". On the other part, it represents "a general term used to describe any financial investigation which can result in a court case"[7]. According to the Association of certified fraud examiners (ACFE), forensic accounting implies to "utilisation of accounting skills in potential or real civil or criminal disputes, including generally accepted accounting or audit principles, with the aim to approve the lost profit, income, assets or damage, to estimate the efficacy of the intern control, to detect frauds or realisation of other activities which require implication of accounting expertises in the legal system". According to the AICPA, forensic accounting encompasses collecting, obtaining, gathering, and interpreting of evidence[8]. Although CPAs are not typically trained in forensic accounting, forensic accounting services involve the "investigative skills possessed by CPAs to collect, analyze, and evaluate evidential matter".[9] Hopwood, Leiner and Young (2008) characterize forensic accounting as "the application of investigative and analytical skills".[10] Rasmussen and Leauanae equate forensic accounting with investigative accounting.[11]

Auditors have a lack of knowledge to lead a criminal procedure and legal norm, whereas in the institutions combating crime there is a lack of knowledge related to business, accounting, and management, and they do not usually posses any prior knowledge. The primary task of the financial auditor is to protect the interests of the owners of assets and to provide with a base of trustworthy information to all beneficiaries of the financial reports. As a result of serious failures in the financial advising, emerged the need of re-auditing. The conducted re-auditing of the financial reports gained new contents in the spreading of the auditing services in accordance with the demands posed by the beneficiaries.

The increased number of cases of corporative scandals in the world caused by criminal activities in the financial working led to the fact that the main world auditing companies have started providing services of the type of the so-called forensic audit, an area in which there is still a significant lack of regulations and standards. Unlike the forensic accounting, forensic audit is a skill by which the forensic auditors, by their analytical and investigational skills, aim in detection of frauds or manipulation of the financial reports which were conducted by a variation from the accounting standards, the tax regulation as well as all the other laws on the economic work.

The forensic auditor should provide support in the investigation and prevention from frauds – bankruptcy, in the investigation, preparation and review of the proofs, in the preparation of expert reports, decisions, arbitrage, mediation, as well as solving of

---

[7] Bologna, G. Jack, Lindquist, J. Robert, Fraud Auditing and Forensic Accounting, Second edition, John Wiley&Sons, New Yersey, 1995, p. 47

[8] AICPA. 2010. *FVS Practice Aid 10-1: Serving as an Expert Witness or Consultant*. New York: American Institute of Certified Public Accountants

[9] Seda, M., and B. K. Peterson Kramer 2008, Emergence of Forensic Accounting Programs in Higher Education, *Management Accounting Quarterly* 9(3): pp. 15 - 25

[10] Hopwood, W. S., J. J. Leiner, and G. R. Young, 2008, *Forensic Accounting*, New York: McGraw-Hill/Irwin

[11] Rasmussen, D. G., and J. L. Leauanae, 2004, Expert Witness Qualifications and Selection. *Journal of Financial Crime* 12(2): pp. 165 - 71

problems. Forensic auditors are creators of information related to the economic truth. They should possess experience and competence, according to the equation:

Forensic audit = accounting + audit + economy + statistics + informatics + knowing of the legal regulation + investigation skills

Forensic auditors should have the following knowledge and skills necessary for this work:

- expert of accounting and revision (to possess knowledge about the International Accounting Standards, the International Standard on Financial Advising and the International Revision Standards)
- to be aware even of the smallest details;
- to analyze data thoroughly;
- to think creatively;
- to know businesses;
- to possess computer skills and have excellent communicational skills;
- to possess the so-called "sixth sense", in order to perform the reconstruction in details from the part of the accounting transactions;
- to possess photographic memory which helps in the effort to visualize and reconstruct the events of the past;

Forensic audit has different definitions according to different authors. According to Tommie W. Singleton it represents "a specialised approach and methodology for detecting of fraud or an audit by which proofs on fraud are gathered, i.e. an entire investigation of frauds which includes revision of the accounting records in direction of proving or denying a suspicion of existence of fraud".[12] According to Rezaee, forensic audit is: "(1) consulting services for support of legal procedures, (2) testifying in court, (3) investigation of fraud".[13] Forensic audit "implies a contract with the auditing company and an auditor who completed a special training and experience in the prevention and detection of criminal activities".[14]

Taking into consideration the big number of definitions, forensic audit can be defined as a special sector of a department for auditing of the revised financial reports by application of the financial standards and the auditing skills and detailed auditing procedures, with the unique aim of detecting of the criminal activities and presenting them in a way acceptable to the court procedure.[15] The difference between the regular audit and the forensic audit is that the regular audit aims to prevent, to detect the action, whereas forensics aims to investigate, solve, and at the end to bring to the court the perpetrator.[16]

---

[12] Tommie W. Singleton, Aaron J. Singleton *Fraud Auditing and Forensic Accounting*, 2006, p. 43

[13] Rezaee, Zabihollah. 2002. *Financial Statement Fraud: Prevention and Detection*. New York: Wiley 2007, p. 224

[14] Buckhoff, Thomas. 2008. *Forensic Audit vs. Financial Statement Audits*. Current Accounts, September/October.
http://www.gscpa.org/Content/Files/Pdfs/Current%20Accounts/SeptOct08CA.pdf.

[15] Petković, Aleksandar., 2010. *Forensic Audit – Criminal Actions in the Financial Reports,* Bečej: Proleter, 2010, p. 188

[16] Budimir N., Forensic Accounting*, A Yearbook of the business economy*, year V, book 1, No. 8, 2013, p.: 1-16, UDK: 657.632:343.983, DOI: 10.7251/APE0813001B

Many analysts do not see the difference between forensic audit and forensic accounting. Forensic accounting and audit detect the whole chain of frauds and give the answer to the questions of: who – what – where – why – when – how. Forensic accountants and auditors work on the following activities:

- investigate and analyze proofs of conducted fraud;
- develop computerized applications which will be used in the analysis and presenting of the financial proofs;
- present the results of the investigation in terms of reports and complete the paperwork;
- assist in the court procedures, including testimony in courts as expert-witnesses, and prepare visual aids which will be used as proofs in the trial.[17]

Forensic accounting and auditing are only just re-discovering each other's competencies, and both need to improve their handling of financial statement fraud. A recent handbook on corporate fraud by Joseph Wells, the founder of the Association of Certified Fraud Examiners [18] for instance, devotes only 80 of its 430 pages to fraudulent financial statements (Wells, 2004). A forensic accounting textbook "for non-experts" devotes its entire attention to asset misappropriation, except for one passing reference to financial statement fraud (Silversone & Sheetz, 2004). Certainly, as Wells pointed out in a 2005 interview, accounting students need more "anti-fraud training in college". Research in fraud detection techniques is needed, too. We do not even know, for example, if the commonly-used "red flag" approach to fraud detection actually works.[19] But, at least it is now commonly acknowledged that the work of the auditor and that of the forensic accountant are quite similar.[20][21]As an experienced arson investigator Jeffrey Salins said in1998: "You should understand from the beginning that there is very little difference in the actual work the CPA performs in an arson case and the kind of work performed by CPAs on a regular basis. It is financial analysis…" As a result, the professional literature now routinely mingles its advice to auditors and forensic accountants.[22]

3. A modern discipline in South-Eastern Europe

The first forms of forensic accounting in the world were met in Spain in the 19th century, a work of Pedro Antonio Alarcon[23] who explained his story on pumpkins and tomatoes. Namely, forensic accounting for the first time was applied in the court case

[17] Development of the Forensic Accounting and Audit in Bosnia and Herzegovina as a factor of detecting of criminal actions and financial frauds, Professor Božo Vukoja, *3 International Symposium, FOJNICA 24 - 25.04.2015*, Preparation of Bosnian economy for entrance in EU

[18] Zwirn, Ed. (2005). "Joseph T. Wells: Sound Scepticism" *Internal Auditor* 62, No. 1 (February): p. 73 - 77

[19] Albrecht, Conan C., W. Steve Albrecht, & J. Gregory Dunn. (2001). "Can Auditors Detect Fraud: A Review of the Research Evidence" *Journal of Forensic Accounting* 2: p. 1 - 12

[20] Pagano, Walter J., & Thomas A. Buckhoff, eds. (2005) *Expert Witnessing in Forensic Accounting*, Philadelphia: Edwards

[21] Brazina, Paul R. (2006). "On the Trail: How Financial Audits Mark the Path for Forensic Teams." *Pennsylvania CPA Journal* 77, No. 1 (Spring): pp. 22 - 25

[22] O. Ronald Gray, University of West Florida, Stephanie D. Moussalli, University of West Florida *Journal of Business Issues*, Forensic accounting and auditing united again: A historical perspective, p. 15

[23] D. Larry Crumbley, Lester E. Heitger, G. Stevenson Smith, Forensic and. Investigative Accounting, 3rd edition (CCH 2007), p. 287

against Steftona Meyer from 1817, for causing bankruptcy. It is believed that the term "forensic accounting" was first used by Morris Peloubet E. (1946) in his work on forensic accounting. Yet, in 1982 the first book on forensic accounting was published, written by Francis B. Dykeman. In the USA there are many organisations who support the use of forensic accounting and establish strict standards related to this question. Some of these organisations are: the Association of Certified Specialists for Fraud, the American College of Court Investigators, the American Institute of Certified Public Accountants, etc. Forensic accounting and audit in the USA were spread in the early 1980. Afterwards they began to form associations of forensic accounting and audit. The Association of Certified Inspectors on Fraud was establishes in 1988. The American College of Forensic Investigation was established in 1992. In comparison, the USA, the UK and Canada have a number of professional forensic accounting bodies offering specialised certifications to those seeking to develop, update or demonstrate their skills and knowledge.[24]

In the region of southeastern Europe this is also a new and contemporary discipline. As to the studying of the forensic accounting or audit in the region, we can say that it is in a very low level. Regarding the countries in our region, in the Republic of Srpska, in 2012 was introduced a new professional title of Certified Forensic Accountants, while in the Republic of Croatia this title was introduced in 2009. Unfortunately, so far, in the Republic of Serbia, in 2011 was introduced only a course of forensic accounting in financial investigations for prosecutors, organized by the Organization for Economic Co-operation and Development (OEEC) in Serbia and the Ministry of Justice of the United States. This course was aimed to improve the work of the Prosecutor's Office, through the analysis of financial data, as well as gathering information on money laundering, corruption or other criminal acts of economic crime. Taking into account the experience of the neighbouring countries, as well as the current economic situation in the region, we believe that Serbia should take the incentive and introduce the aforementioned titles, in order to strengthen the mechanism against financial frauds.[25] In Croatia, at the University of Split, there is a department of forensic science in which students, among other things, can chose the Department of Financial and Accounting Forensics in which they have a subject called "Forensic Accounting I" and "Forensic Accounting II". In Serbia there is the Association of Accountants and Auditors of Serbia, which performs professional education and publishes a variety of publications in this field. Serbian forensic accounting is insufficiently known as a concept and is still linked exclusively to Audit. There is a larger number of professional bodies dealing with education in these areas. Exception in Serbia is the Association of accountants and auditors, who are professionally trained and make researches in forensic accounting and audit.[26] Forensic accounting in Slovenia is a new branch in the accounting and a new area. The accountants who will specialize in this field will have to acquire a great knowledge, innovation, interdisciplinary, and a high level of professionalism. They also have to constantly improve their interdisciplinary knowledge

[24] Van Akkeren, Jeanette, Buckby, Sherrena, & MacKenzie, Kim (2013) Metamorphosis of the traditional accountant: an insight into forensic accounting services in Australia. Pacific Accounting Review, 25(2), pp. 188 - 216, p. 4

[25] Nada Arežina1, Goranka Knežević, Nataša Simeunović, Sofija Vukićević, Forensic accountant: Innate trait or acquired skill?, Financial advising in the function of the corporative functioning, Financial reporting Function of the corporate governance, DOI: 10.15308/finiz-2014-131 - 134, p. 2

[26] Magazine on theory and practice of the management 2012/65

– business economy, law, accounting and audit, as well as criminal law and criminalistics. The aim of forensic accounting is:

- prevention from and detection of financial frauds and other business-financial frauds;
- investigating of the certainty of the different business subjects related to such behaviour;

Forensic accountants are independent professionals who perform evaluation and express their independent opinion of a possible threat or a real existence of a criminal or other illegal behaviour in the working of different individuals. The Association of Accountants, Treasurers and Auditors of Slovenia in 2011 established a department for forensic accountants, and in 2012 the first generation of forensic accountants started their education.

In Bosnia and Herzegovina there are not some significant researches in the part of forensic accounting and audit. The entire impression is that the profession of accountants in Bosnia and Herzegovina is conservative. The practice of accountants is not familiar with the title of forensic accountant and forensic auditor. It is necessary to work on modification of the conceptual framework and think and advance into a new direction of accounting and audit.

The forensic accounting in Romania is governed by the Civil Procedural Code, the Criminal Procedural Code and other special laws and represents evidence in court. The forensic accounting in Romania is a technical expertise conducted by experts or specialists, in the disposal of the prosecution, the courts or other bodies having jurisdiction, in order to explain the facts and circumstances of the case. The forensic accounting records are useful in solving cases and can be drawn up strictly by chartered accountant. Judicial audit represents accounting examinations ordered ex officio or at the request of the parties and is used in stages of civil or commercial trial, attached or not to a criminal process. The forensic accounting examinations are administered by the judicial body as individual samples and their conclusions cannot be automatically assumed by the authority that ordered or accepted them. In this sense, the judicial body may admit or reject the forensic accounting conclusions based on the scientific level, its quality and its correlation with the other evidence in cases subject to investigation and trial. The forensic accounting records are automatically placed or accepted at the request of the parties involved in the judicial process for all stages of its progress in order to establish the truth and correctness of the litigation material in cases under investigation or trial phases.

The main features of the forensic accounting in Romania are:

- it becomes evidence in any legal and judiciary lawsuit only when it stands necessary to elucidate the causes under investigation or trial;
- it is the activity by which the judicial bodies receive economic-financial information in order to establish good and necessary truth in order to resolve legal cases on facts researched and investigated or prosecuted;
- it is restricted to research of economic and financial problems indicated by the judiciary;
- it has jurisdiction to review technical and operational documents and records and accounting necessary to clarify the objectives set by the judiciary;
- forensic accounting aims to confirm or to inform about the damages, irregularities, deficiencies or / and gaps;

- occurs as evidence given by the prosecution and the judgment in order to convince the reality and the conditions on the damage, defect, irregularity and so on;
- it is an occasional activity that occurs only when ordered by the judiciary.

The forensic accounting in Romania can be considered to have a scientific nature, due to the following statements:

- it is a research for facts and circumstances of economic and financial nature;
- its purpose of action includes economic activity for an economic issues and objectives set out by the judiciary;
- it examines statements and facts based on the information provided by economic record and its material support;
- it interprets data records and provides views on the issues investigated, based on the laws and normative acts regulating the activity in question;
- it draws conclusions based on the findings that they serve as evidence for the judicial body which ordered the forensic accounting in Romania.

The task of carrying out forensic accounting expertise is binding unless the objection or the existence of circumstances generates incompatibility.[27]

Regarding that Macedonia is also a part of the overall globalisation of the world, in our country frauds will also appear as well as in all the other countries. Some types of frauds which we could not even imagine taking place in our country, have already been detected or are to be detected. Also, whereas in our country, in the previous periods the enterprises mainly had the tendency of underestimation of the financial results, mostly because of the undefined ownership and the high taxes, in the recent times the estimation of the working results is more and more present because of the financial pressure coming from the loan institutions, the will of increasing the bonuses of the managers or the dividend of the investors.

All this emphasizes the need of generation of staff in the area of forensic audit and their continuous education. Of course, at the beginning, because of the small market and with it the small space for conduction of frauds in quantity and in value, we consider that there will not be a proper environment for independent functioning of this type of audit. But, forensic audit can be performed through the existing auditing companies as special departments. Further, when the enterprises perceive the benefits of forensic audit, special companies for forensic audit can also be formed.[28]

4. Conclusion

Forensic accounting and auditing are newer disciplines in the framework of accounting and auditing which is directed towards detecting of frauds. In accounting, there have always been frauds followed by financial bankruptcy of the company, and in recent times, even with more serious consequences. Many analytics do not see the difference between forensic audit and forensic accounting.

There are different definitions on forensic accounting and forensic audit. As a conclusion we can give the definition which says that: forensic accounting is an accounting above the regular accounting, and the forensic audit is an audit of the regular audit. They exist to discover the intentional mistakes, to discover the fraud, to conduct investigation, all in service of the prosecutors, the court, the lawyers companies, and

[27] http://www.romanian-accountants.com/forensic-accounting-in-romania (accessed on 25.08.2015).
[28] http://www.revizija.com.mk/new-page.aspx.

other engaged parties. The most important is to regain the trust in the financial reports on the base of standardized solutions. In the developed countries there are already institutions where forensic investigators for forensic investigations are trained and educated.

But, in the southeastern European region there are also countries that do not recognize this profession, and in others it is in its beginning. What is needed is education and establishing of an international institution which will set the standards, the rules, and the solutions of this profession. Even though the decline in education is very expensive, yet, benefits will be extremely significant for all the subjects engaged in the financial investigation.

References

1. Albrecht, Conan C., W. Steve Albrecht, & J. Gregory Dunn. "*Can Auditors Detect Fraud: A Review of the Research Evidence*." London: Journal of Forensic Accounting, 2001, p. 2: 1 – 12;

2. Brazina, Paul R. (2006). "*On the Trail: How Financial Audits Mark the Path for Forensic Teams*" Pennsylvania: CPA Journal 77, no. 1, 2006, (Spring): 22-25;

3. Buckhoff, Thomas., *Forensic Audit vs. Financial Statement Audits*. 2008, CurrentAccountsSeptember/October,//www.gscpa.org/Content/Files/Pdfs/Current%20Accounts/SeptOct08CA.pdf.

4. Budimir N., *Forensic Accounting, A Yearbook of the business economy*, year V, book 1, No. 8, 2013, p.: 1-16, UDK: 657.632:343.983, DOI: 10.7251/APE0813001B;

5. Magazine on theory and practice of management 2012/65;

6. D. Larry Crumbley, Lester E. Heitger, G. Stevenson Smith, *Forensic and Investigative Accounting,* 3rd edition (CCH 2007), p. 287;

7. Hopwood, W. S., J. J. Leiner, and G. R. Young. 2008. Forensic Accounting. New York: McGraw-Hill/Irwin;

8. Arežina Nada, Knežević Goranka, Simeunović Nataša, Vukićević Sofija. *Forensic accountant: innate trait or acquired skill?, Financial advising in the function of the corporative functioning, Financial reporting Function of the corporate governance*, DOI: 10.15308/finiz-2014-131 - 134, p. 2;

9. O. Ronald Gray, University of West Florida, Stephanie D. Moussalli, University of West Florida Journal of Business Issues, *Forensic accounting and auditing united again: a historical perspective*, Miami, Florida, 2014, p. 15;

10. Pagano, Walter J., & Thomas A. Buckhoff, eds. *Expert Witnessing in Forensic Accounting*, Philadelphia: Edwards, 2005;

11. Petković, Aleksandar. *Forensic Audit – Criminal Actions in the Financial Reports,* Bečej: Proleter, 2010, p. 188;

12. Rasmussen, D. G., and J. L. Leauanae. *Expert Witness Qualifications and Selection.* Oslo: Oslo Journal of Financial Crime, 2013, 12(2): 165-71;

13. Rezaee, Zabihollah. *Financial Statement Fraud: Prevention and Detection.* New York: Wiley. 2007, p. 224;

14. Tommie W. Singleton, Aaron J. Singleton: *Fraud Auditing and Forensic Accounting*, 2006, p. 43;

15. Van Akkeren, Jeanette, Buckby, Sherrena, & MacKenzie, Kim: *A metamorphosis of the traditional accountant: an insight into forensic accounting services in Australia.* Pacific Accounting Review, 25(2), 2014, pp. 188-216, p. 4;

16. Vukoja Božo. *Development of the Forensic Accounting and Audit in Bosnia and Herzegovina as a factor of detecting of criminal actions and financial frauds, 3 International Symposium, FOJNICA 24 - 25.04.2015, Preparation of Bosnian economy for entrance in EU.* Sarajevo, 2015;

17. Zwirn, Ed."Joseph T. Wells: Sound Skepticism." Internal Auditor 62, no. 1 February, 2005, p. 73–77;

18. http://www.revizija.com.mk/new-page.aspx, accessed on 15. August 2015

http://www.romanian-accountants.com/forensic-accounting-in-romania, accessed 25.

FOR CONTRIBUTORS

Any correspondence with the journal editors shall be sent with the mention for the JOURNAL of Eastern European Criminal Law at the following mail addresses:

viorel.pasca@e-uvt.ro

gal.istvan@ajk.pte.hu

For the time being, the journal cannot pay copyright compensation, any collaboration article shall therefore be voluntarily submitted.

Non-patrimonial copyright is protected, so any reproduction, representation, adaptation, translation and/or modification, partial or total, or transfer to a site of the articles, without consent of the authors, is prohibited.

The articles to be published shall be written in the following forma

Title (capital letters, bold type, centred, 14)

Author(s)' name (e.g. Sandra Marked[1], Werner Taylor[2], Roland G. Rowling[3]) (italics, bold type, centred, 12)

Scientific degree, position (in order of the marking number), centred

Abstract and key words: Times New Roman font type, size 12.

The text shall be typed on A4 size (white copy paper), margins: left 3 cm, others 2.5 cm, Times New Roman font type, size 12.

Please do not insert page numbers.

No line(s) feed between paragraphs, the text shall be continuous.

Headings (chapter titles) shall be in capitals, with a blank line preceding and following them.

Within chapters, subheadings shall be italicized with a blank line preceding and following them.

References shall be listed at the end of the paper, in alphabetical order.

The recommended form of the list of references at the end of the paper: 1. Lippman, M: *Contemporary Criminal Law*, London: Sage Publications, 2007, p...

The paper shall be written exclusively in English, and shall be accompanied by an abstract in English (10-15 lines).

Next issue of the Journal of Eastern Criminal Law appears in June 2016

Collaborators may sends articles to June 1, 2016

For further information, please access the following e-mail address: jeecl@e-uvt.ro.

THE BOARD OF EDITORS

JOURNAL OF EASTERN CRIMINAL LAW

PURCHASE ORDER

No. Both contry abroad
120lei € 40 T.T.C.
Name: ....
First Name: ....
Company: ....
Address: ....
Postcode: ..... City: ....
Country: ....
Phone: Fax ....
E-mail: ....
Number (s): ..... Number of copies (s): ....
I pay the amount of ....

○ by a check payable to the Asociatia Centrul European de Studii si Cercetari Juridice CIF 24629157 Timisoara, Bd. Eroilor de la Tisa nr. 9/A, cam. 46, jud

○ by bank transfer to the Asociatia Centrul European de Studii si Cercetari Juridice CIF 24629157 Timisoara, Bd. Eroilor de la Tisa nr. 9/A, cam. 46, jud. Timis
RON: RO32BTRL03601205J74582XX
EUR: RO07BTRL03604205J74582XX
USD: RO56BTRL03602205J74582XX
SWIFT: BTRL22TMA
Banca Transilvania Timisoara