

Criminal law protection of economic crime Reality or fiction?

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Abstract

Starting from the definition of economic crime as a totality of illegal acts committed by an individual or a group of individuals to obtain a financial or professional advantage, criminal law protection of this type of crime is becoming more popular both from a theoretical and practical point of view, primarily due to its constituent elements (system of incrimination, subject of economic offense and forms of responsibility, sanctions), and secondary by identifying opportunities for its conception and realization. Therefore, this paper, analyzes situation both in terms of determining the causes of economic crime and responsibility for economic crimes, and in terms of the legal and factual opportunity to realize the criminal law protection in a modern democratic society and market economy, establishment and implementation of appropriate repressive and preventive measures to combat this type of crime.

Key words: economic crime, criminal offence, legal person, criminal sanctions.

Introduction

Economic crime today, covering a range of activities which violate the basic principles of economy, starting from various abuses in economic activities, abuses in the companies against the interests of the company, illegal production, trafficking, money laundering, bribery, abuse of consumer interests, distorting free competition, tax evasion, cybercrime and so on., which inflicted significant damage to individuals, companies, but also the economy and society. Here, we are not talking only about causing direct financial material damages, but also of inflicting enormous intangible losses, such as loss of trust in the business environment as well as individual damages of reputation of certain companies, loss of management time and direct damage of business relations with other legal persons and individuals. Moreover economic crimes in a company threaten a moral of its employees, encouraging imitation and “repeat players”¹. There are several indicators that prove the fact that the risk of existence of economic crimes and damages directly or indirectly caused up are growing daily. Therefore, besides the direct impact

¹ Levi, Michael, „Shaming and the Regulation of Fraud and Business Misconduct,, in: Karstedt, Susanne/ Bussmann, Kai-D. (eds.): Social Dynamic of Crime And Control. 117-132. Oxford.. 2000

on business relations and economic performance of companies, the legal consequences of the exercise of such offenses carry a negative impact on many aspects of the legal person itself.

Court procedure for determine the liability of a legal person for a particular offense had an immediate impact on certain employees (which will appear as representatives by the court, or in the role of witnesses), but further in procedure and pronounce of penal sanctions for legal entity and their execution. The burden of corporate fines falls straight on budget and property of the legal person, but indirectly on salaries, dividends of shareholders, commodity prices (pocket consumers) and so on. The burden of other sanctions indirectly also, falls on the above mentioned entities, so with all characteristics of criminal sanction today, here is very important to define, precisely relevant parameters, so sanction can stay personal, to refer only on offender, not on other innocent people.

All these questions means, some exceptions of basic principles of criminal law, but still on a line of evidently elaborating as opportunity of realization of criminal protection to some crimes with other mechanisms and measures, as last resort and choosing the “lesser evil” in realization of protection of human rights on one side and protection of society of serious crime on the other. It should be easy if we believe that economic crime would be effectively prevented through criminal law and its mechanisms of protection and regular criminal procedure.

But reality, unfortunately describe some opposite moments, few cases actually do end up being reported to the authorities.² The same situation can be found for Macedonia, for example. According to State Statistical Office, statistic with reported, accused and convicted perpetrators of criminal economic offences, is similar.

T-01: Reported adult perpetrators by types of criminal offences										
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total	23 514	23 305	26 409	30 404	30 004	31 284	31 860	34 436	37 164	26069
Crimes against public finances, payment operations and the economy	599	569	596	543	620	472	493	510	310	344
T-01: Reported adult perpetrators by types of criminal offences										
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015

² Ernst & Young , Fraud - The unmanaged Risk. 8th Global Survey. Johannesburg, 2003., <https://www.whistleblowing.com.au/information/documents/EY8thGlobalSurvey2003.pdf>, 1

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Table 1: Reported, accused and convicted adult perpetrators of criminal offences and children in conflict with the law, Republic of Macedonia, State Statistical Office, 2006-2015, <http://www.stat.gov.mk>

As we can see from the table, the most characteristic group of economic offences, Crimes against public finances, payment operations and the economy, do not show some magnificent numbers of offences, so this basic statistic analyze of economic crime in Macedonia, for example, will allude that the situation with economic crime in Macedonia is not worrisome, that the number of committed economic crimes actually decline. That can be connected with adequate implementation of control mechanisms and not having a requirement for introduction of some new measures and methods to prevent and control this type of crime. But aside of this kind of statistical presentation (here we missed some economic crime who are located in other groups in Criminal Code) it's necessary to find some more detailed legal and economic analyze of economic crime in general, the causality with organized crime, economic effects, possibilities of implementation of all occasions to proceed criminal investigation (not only criminal charges), institutional solutions who would help first of all for reporting economic crimes, and then for implementation of adequate criminal sanctions.

The police rarely charges this criminals because believes that here we don't have a crime, but only useful "mismanagement"³. Even less, there are few or not at all, reported cases from other people who are currently on higher position in society, available to adapting to new situations and changes, persons who doesn't look like criminals itself. These are people for whom victims and others who suffered from that crime, even before the beginning of criminal procedure, do not believe that they can be accused for economic crime.

Causes of Economic Crime and Concepts of Prevention

First at all, we can talk about society position of some individuals as a cause for economic crime, which is used and abused for acquire proceeds or property through the perpetration of crime, with abusing the society position, obstruction of official duty, under cover of their luxurious view, material wealth, close relationships with individuals who worked for government and capability for presenting itself as successful businesspeople. Studies have shown that almost two-thirds of offenders were persons who worked for the company, many of them from the ranks of management⁴.

White-collar offenders (as most typical representatives as perpetrators of economic crime) have been characterized by criminological research as risk seekers or as very determined, strongly career-, success and publicity-oriented persons or psychologically extroverted personalities⁵. On the other side, managers must have some characteristic for successful business, be creative and able to work particularly flexibly, with the result that they possess personality traits that are advantageous not only for the legal conduct of their business but also for its illegal variant. Therefore, possibility of preventing the potential perpetrators of this type of crime, from their company, is very limited, because there is no typical criminal characteristic, as indicator, there is no typical economic crime offender, and often the typical economic crime offender is socially unobtrusive. There can be no doubt that the typical economic crime offender is the normal manager, but this does not imply that the majority of managers are economic crime offenders or latent suspects⁶. Is also worth mentioning that if the company is victim or perpetrator of crime itself, it's irrelevant if we are trying to find a reason for committing the crime in one or few individuals. Here it's better to look in system itself and his own failure and omissions.

There we can asked a question, can a legal entity itself affect in preventing the economic crime? One of the measures will be for example, more inside control of business, which made cause increasing the mistrust, loosing the flexibility and transparency and causing of paradox effect of control, as an opposite effect of increasing a control in preventing of crime and provoke perpetrators to crime⁷. So, the key answer in preventing and control the economic crime, will be not only intensive control of business but, influence to some values and norms, increasing of awareness that economic crime is reality today, it is not doing

³ Владо Камбовски, Основни методолошки проблеми на економското казнено право, Годишник на Правниот Факултет Јустинијан Први-Скопје, том 41, 2004/2005, p. 24-26

⁴ Ernst & Young : Fraud □ The unmanaged Risk. 8th Global Survey. Johannesburg, 2003, <https://www.whistleblowing.com.au/information/documents/EY8thGlobalSurvey2003.pdf>, p.11

⁵ Simon, David R./ Hagan, Frank E. , White-Collar Deviance. Boston et al, Prentice Hall, 1998, стр. 145

⁶ http://busmann2.jura.uni-halle.de/econcrime/Busmann2003-Causes_of_EconCrime.pdf, p. 8

⁷ Kai-D. Busmann, Causes of Economic Crime and the Impact of Values:Business Ethics as a Crime Prevention Measure, http://busmann2.jura.uni-halle.de/econcrime/Busmann2003-Causes_of_EconCrime.pdf, 2003, p.8-9

business which is legal and allowed, and its circumstances we all feel as individuals a part of some company.

These approach requires to start from the question, not why some individuals commit the crime but, why others do not commit the crime. In this context are the surveys which confirms that business ethics has influence in appearance and control of corporative and economic crime⁸. On their development in terms of stimulation of some values and norms, including business communication, social interaction, human rights, equal treatment, increasing the level of corporative culture, need to follow development the awareness for of existence of economic crime and appropriate legal control of it⁹.

Therefore, economic crime today, is not only a reality which exist, but a type of crime which is upgraded with new forms and unfortunately present a tendency of growth. That does not mean, economic crime cannot be protect and reduce, but still mean that cannot be completely removed. Despite the fact that economic crime today is normal and reality phenomenon, corporative culture which include effective prevention strategy for reducing the crime and crises management are not that. Almost, every company can constantly be hit by such criminal activities, although, this is no indication of management failure, but it can request a strategy for prevention and control, which can include measures not only to control these type of crime, but specific activities for easier dealing with legal circumstances of executing criminal sanctions against company itself.

New incriminations new sanctions

About criminal policy in general, prevalent opinion today is that short prison sanctions do not achieved effects of their introduction, and that the only useful consequence in combating the crime is retribution for perpetrators of misdemeanors and as some shock therapy for offenders who committed a crime for a first time. Therefore, effect of intimidation of criminal sanction which must discourage perpetrators of criminal offenses for future crime, is replaced by motive, gain and profit from committing the crime and implementation of adequate measures as direct blow to gain and cause for crime. So, if we apply that in a case of economic crime, it'll mean influence on illegal profit from the offence, illegal gain which is the reason for committing criminal act at first¹⁰.

Legal entities mostly are punished by fine, but also with other penalties which are adapted for them, like restriction of corporate rights, publication of judgement, dissolution, suspended sentence, confiscation and so on. Legal persons can be recidivists, can be on probation, rehabilitation, they have court registry. If we

⁸ Steinmann, H., Olbrich, Th./ Klustermann, B. : Unternehmensethik und Unternehmensführung. Überlegungen zur Implementationseffizienz der US-Sentencing Guidelines. bo: Alwart, Heiner (ed.): Verantwortung und Steuerung von Unternehmen in derMarktwirtschaft. München., file:///C:/Users/Natasha%20Todorovska/Downloads/ssoar-1998-alwart-Verantwortung_und_Steuerung_von_Unternehmen.pdf, p. 113-152.

⁹ Palazzo, Bettina (2001): Unternehmensethik als Instrument der Prävention von Wirtschaftskriminalität und Korruption, in: Die Kriminalprävention, 2. p. 52- 60, http://www.palazzo-palazzo.com/dld/Artikel_Korruptionspraevention_BP_kriminalpraevention_2001.pdf

¹⁰ Paternoster, Raymond/ Simpson, Sally, Routine Activity and Rational Choice. bo: Shover, Neal/Wright, John Paul , Crimes of Privilege. Readings in White-Collar Crime, Oxford University Press, New York, 2001, p. 194-210.

ask the question which criminal sentences will be more effective for legal entities, we can find different opinions in theory. Therefore, despite innovation in suggestion for new and various sanctions for legal entities, in general all countries today, are focused first at all on fine and probation. These regulations rarely give the judge other solution except traditional sentences¹¹.

It's obvious that all sanctions that can be imposed in a case of natural person, cannot be imposed in a case of legal person and company, because of it's specific legal nature and possibility to be executed. That conclusion is on a line and favor of allegations that criminal responsibility of legal entities can be treat only by administrative and civil law¹². So, because prison cannot be imposed in a case of legal person, it's impossible, according to common law only fines were available option for legal entities as perpetrators of crime¹³. But in last years, moreover conventional sentences are criticized and there are suggestions for new alternative sentences¹⁴.

From the aspect of establishing criminal liability of legal entities and implementation criminal sentences for them, it's interesting to mention Second protocol of Convention on the protection of the European Communities' financial interests (OJ C 221 from 19.7.1997., 12-22), which regulated the obligations of member states for introducing effective, proportionate and dissuasive criminal penalties to deal with fraud affecting the EU's financial interests. Each EU country must enact legislation to allow heads of businesses or any persons having power to take decisions or exercise control within a business (i.e. legal persons) to be declared criminally liable. The Second Protocol, adopted in 1997, further clarified the Convention regarding the issues of the liability of legal persons, confiscation and money laundering. According to Article 4 of Second Protocol¹⁵ Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; and judicial winding-up order¹⁶.

Between the scientists is arguable if the Second Protocol obligates member states for implementation of criminal liability for legal persons or, this can be regulated by civil or administrative law, and non- criminal sanctions. The Protocol uses the term liability, not criminal liability of legal persons (article 3) and in Article 4 as we can see, sanctions for legal persons, determines as criminal or non-criminal fines. Therefore, some European scientists thought that Protocol does not obligated explicitly to establishing criminal liability for legal persons, and punishment with criminal sanctions¹⁷. But, with allowing sanctions for legal person to be criminal or non-criminal, Protocol obligates each Member State to take necessary measures to ensure that a legal person is punishable by effective, proportionate and dissuasive

¹¹ Tunstall Ian, Review of Sanctions in Corporate Law Submission, http://www.iantunstall.com/whitepapers/submission_%20review_of_sanctions_in_corporate_law.pdf, p 4-6

¹² Beale Sara Sun, A response to the critics of corporate criminal liability, http://www.law.yale.edu/documents/pdf/cbl/Beale_paper.pdf, p. 10

¹³ Jefferson Michael, Corporate Criminal Liability: The Problem of Sanctions, 65 J. Crim. L., 2001, p. 235.

¹⁴ Ferreira Héctor, Corporate Crime – Should corporations be criminally liable?, <http://slei.org/academy/magazine/10I-Trabajo%20para%20Academy%20E%20%20Magazine%202009-hf.pdf>, p. 6

¹⁵ COUNCIL ACT of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests (97/C 221/02)

¹⁶ More, Pradel Jean & Corstens Geert, European criminal law, Kluwer Law International; 1 edition, February 1, 2002, ctp. 516

¹⁷ Pradel Jean & Corstens Geert, European criminal law, Kluwer Law International; 1 edition, February 1, 2002., P. 521

sanctions, which includes not only criminal protection, but also administrative and civil one. But, there some opposite opinions between scientists in EU who elaborated that, according to Second Protocol, member states should took the necessary measures to ensure that legal persons can be held liable, punishable with criminal sanctions¹⁸. We can see that in draft legislation of Second Protocol of European Commission, too¹⁹.

Therefore we can conclude that criminal liability of legal entities today is a part of criminal law, which creates opportunity to influence directly to motive of criminal offense, to impact not only repressive but preventive too, to prevent potential activities who committed legal norms for economy and business and thus perpetrated economic crime.

Conclusion

From this short analyze on specific elements of criminal law protection of economic crime, appears that, economic crime today, despite, incomplete statistical data and court decisions, is reality that involves introduction and implementation of new measures for his protection, which somehow, will deviate from existing forms of combating the conventional crime. This situation, requires different approach in analyze the appearance of this type of crime, not only with legal methods, but economic too, which can help first of all in determining each individual economic offence, and then in allocating specific preventive mechanisms, increase level of corporative culture, business ethic and direct influence on the causes of economic crime in legal persons itself.

Lastly, we must not forgot to allocate a specific system of punishment for natural and legal persons as perpetrators of economic crime which should be different from conventional, but will contribute successful combating of this type of crime.

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¹⁸ Delmas-Marty Mireille, Union européenne et droit pénal, Cah. dr. eur. 1997, in Đurđević Zlata, Kaznena odgovornost i kazneni postupak prema pravnim osobama u Republici Hrvatskoj p. 664

¹⁹ COM (95) 693, OJ C 83/10, 20.3.1996

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