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PRAVOSUDNA AKDADEMIJA
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VI MEĐUNARODNI NAUČNI SKUP
VI International scientific thematic conference

INSTITUCIJE I PREVENCIJA FINANSIJSKOG KRIMINALITETA

INSTITUTIONS AND PREVENTION OF FINANCIAL CRIME

Tematski zbornik radova međunarodnog značaja -
Thematic Conference Proceedings of International Significance-

Urednici/Editors:

Jelena Kostić
Aleksandar Stevanović
Marina Matić Bošković

Beograd, 2021.
Belgrade, 2021

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PREDGOVOR

Prilikom otkrivanja i dokazivanja finansijskog kriminaliteta neophodna je blagovremena i adekvatna saradnja različitih državnih institucija i privrednih organizacija. Prikupljanje dokaza protiv njihovih izvršilaca zahteva korišćenje različitih dokaznih tehnika i metoda. Zbog toga je osim policije, javnog tužilaštva i sudova u cilju njihovog otkrivanja neophodno da deluju i banke, društva za osiguranje, Poreska uprava, Uprava carina, Agencija za sprečavanje korupcije, vrhovna revizorska institucija, Komisija za hartije od vrednosti itd. Radi dobijanja odgovora na pitanja koja postoje u praksi, a tiču se međusobne saradnje navedenih institucija i pravosudnih organa, odlučili smo da tema ovogodišnjeg zbornika bude „Institucije i prevencija finansijskog kriminaliteta".

Poslednjih godina, izvršioci krivičnih dela koja se mogu svrstati u finansijski kriminalitet koriste nove tehnike i metode kako bi prikrili izvršenje ne samo tih krivičnih dela, već i imovinsku korist stečenu njihovim izvršenjem, a koju je moguće čuvati i u kriptovalutama. To nameće mnogo pitanja na koje teorija i praksa tek treba da daju adekvatan odgovor.

Međunarodni karakter ovogodišnje konferencije i zbornika, kao i rezultati istraživanja koji su sadržani u objavljenim radovima, trebalo bi da doprinesu razmeni iskustava i znanja iz oblasti suzbijanja finansijskog kriminaliteta. Ovogodišnja konferencija okupila je naučnike i praktičare iz Rusije, Savezne Republike Nemačke, Mađarske, Rumunije, Italije, Brazila, Portugala, Bosne i Hercegovine i Srbije, a koji se u svojim radovima bave kako fenomenološkim, tako i etiološkim aspektom finansijskog kriminaliteta. Nadamo se da će sugestije sadržane u radovima učesnika konferencije dati odgovor ili bar smernice za rešavanje nekih spornih pitanja koja postoje u praksi ili predstavljati osnov za dalja naučna istraživanja u oblasti prevencije finansijskog kriminaliteta.

Beograd, 3. decembar 2021.

Dr Jelena Kostić
Aleksandar Stevanović, MA
Dr Marina Matić Bošković

FOREWORD

Detection and evidence gathering in cases of financial crime requires timely and adequate cooperation of different state authorities and private/commercial entities. In addition, collection of evidence against perpetrators of financial crime demands application of diverse evidence technics and methods. Due to complexity of financial crime detection involves police, public prosecutors and courts, but also banks, insurance companies, tax administration, custom, agency for prevention of corruption, supreme audit institution, securities commission, etc. To get answer on questions that are raised in the practice and relates to the cooperation of all relevant institutions and judicial bodies, we decided to dedicate this year's collection to topic "Institutions and prevention of financial crime".

In recent years, perpetrators of criminal acts that can be classified as financial crime have used new technics and methods to cover up not only the commission of these crimes, but also the proceeds of crime, which can be stored in crypto currencies. This trend raises many issues to which theory and practice have yet to provide adequate answer.

The international character of this year's conference and collection of papers, as well as the results of the research contained in the published articles, should contribute to the exchange of experiences and knowledge in the field of combating financial crime. This year's conference brought together scientists and practitioners from Russia, the Federal Republic of Germany, Hungary, Romania, Italy, Brazil, Portugal, Bosnia and Herzegovina and Serbia, who deal with both the phenomenological and etiological aspects of financial crime. We hope that the suggestions contained in the papers of the conference participants will provide an answer or at least guidelines for resolving some controversial issues that exist in practice or be the basis for further scientific research in the field of financial crime prevention.

Belgrade, 3 December 2021.

Dr Jelena Kostić
Aleksandar Stevanović, MA
Dr Marina Matić Bošković

INTERNATIONAL COOPERATION IN THE FIGHT AGAINST FINANCIAL CRIMES IN THE CONTEXT OF THE PROCESS OF EUROPEANISATION*

Dmitriy V. Galushko**

The article is devoted to the analysis of the process of lawmaking and generalization of EU experience of legal regulation in order to determine the content and characteristics of the public-law mechanism for combating financial crimes in the light of Europeanisation. The author pointed the tendency for Europeanisation of organizational and legal forms of interaction between states in the field of justice and home affairs in general, and of fight against financial crimes in particular, which is expressed in the establishment and activities of special law enforcement structures, which are gradually vested with powers previously characteristic of domestic law enforcement agencies, such as, for example, initiation of criminal cases, conducting investigations, participation in the work of joint investigative teams, carrying out operational-search activities. The Europeanisation trend testifies to the formation an EU system of "supranational" enforcement agencies, to which a number of functions of state power are transferred. Particular attention is paid to the analysis of the EU legal framework, adopted within the framework of the process of European integration.

KEYWORDS: Europeanisation; European Union; fight against financial crimes; legal approximation; justice and home affairs.

INTRODUCTION

The concept of "Europeanisation" is very relevant for today's agenda. In the Merriam-Webster Dictionary, the word of "Europeanise" is defined as "to

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** Ph.D, Associate Professor, Financial University under the Government of the Russian Federation (Financial University), Moscow, Russia, e-mail: *galushkodv@gmail.com.*

cause to acquire or conform to European characteristics"[1]. However, this process is such a cumbersome, complex, dynamic and interdisciplinary phenomenon that it is difficult to reveal its content. Europeanisation is a "fashionable concept of the process of change", a "contradictory concept" that, on the one hand, has captured the minds of the modern academic community, and on the other — studied only at the level of individual articles and sections in monographs (Olsen, 2002: 921). Currently, research on the method of Europeanisation and its legal consequences is particularly relevant.

All this is fully characteristic of the forensic and operational investigative activities in the fight against financial crimes within the European Union. Moreover, at the present stage of development, states has come to understand the need to deepen cooperation in the field of forensic and operational-investigative activities within the framework of integration and intergovernmental entities in order to effectively counter global challenges, which is confirmed by the creation of a number of thematically substantively designated institutions, declared the readiness of states to interact in the format of an agreed resolution of the entire complex of interstate problems, an important component of which is economic and financial crime. The development of proactive and strategic approaches to the prevention of financial crimes, their joint disclosure and investigation, as well as the development of common approaches to ensuring human rights during operational activities, in the selection, storage and interstate exchange of forensic and other information, in particular, biological data of an individual. Integration and intergovernmental entities such as the European Union are called upon to solve controversial problems arising between states, to promote constructive dialogue and strengthen cooperation in the field of fight against financial crimes.

1. NOTION OF EUROPEANISATION

The genesis and development of the concept of «Europeanisation» can be traced in the literature on integration in Europe, where in the 90s of the last century there was an acute question of whether the integration process affects the legal and institutional transformation of participating states. And it is in the context of finding an answer to this question that the concept of Europeanisation was proposed. The boundaries of the conceptual context of the use of this concept are outlined by such terms as European integration, supranationality, multilevel administration, institutionalism, the European Union.

[1] Merriam-Webster Dictionary. Available at: https://www.merriam-webster.com/dictionary/Europeanize [Accessed 1 September 2021].

In the European academic literature, the term "Europeanisation" is used in several senses. In particular, some scholars justify the position of a broad understanding of Europeanisation, the methodological basis of which is the comparative method of scientific knowledge, which K. Dyson defined as "a process that develops over time, which includes complex interactions of variable elements, leading to differentiated, interdependent and even contradictory effects" (Dyson, 1999).

Under Europeanisation as a historical phenomenon is understood the "export" of European authority and social norms: institutional organization and practice, social and cultural traditions, values, behavior. Thus, the term "Europeanisation" is used by scientists to describe the export of different norms and patterns of behavior. This approach is common in the scientific literature, where Europeanisation is perceived either as one of the options for modernization "from above", or as a process of conscious perception of European norms and rules of conduct (Featherstone, 2003: 5).

Recently, the term "Europeanisation" has become one of the most commonly used in academic discourse on international relations, as researchers sought to understand the transformations associated with European integration, its impact on EU member states and neighboring countries (Featherstone, 2003: 6). According to the notion formed in the EU and member states, Europeanisation symbolizes the spread of pan-European politics, law, culture and other values in the world, so that they are perceived by other peoples, states and communities. In view of this, the use of the term "Europeanisation" to study new features of European integration is associated with the so-called «systemic effect» of the EU, i.e. the reverse effect of the supranational system of government created in Europe on the national legal, political and institutional structures of the states that founded it and joined it. It should be noted, that terminologically this concept is defined as "approximation", "strengthening the relationship", i.e. the process of compaction, intensification or strengthening of the characteristics of a relationship (Derjabina, 2012: 30).

2. CONTEMPORARY FEATURES OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS WITHIN EU

Within the framework of the European Union, cooperation between states in the field of activities in the fight against financial crimes is exceptional and extraordinary when considered in two main aspects. First, availability of opportunities for flexible management of this area, where national interests of states are combined and various instruments for regulating cooperation in the field of forensic and operational investigative activities within the EU. Secondly,

cooperation in the field of forensic and operational-search activities is assigned a single territorial dimension, in connection with which the process of overcoming the division between national jurisdictions is underway and the principle of a worldwide response to common threats is proclaimed. Cooperation of states within the framework of the European Union in the field of forensic and operational-search activities has a unique characteristic, which is that the EU creates in its structure institutions that are competent for forensic and operational-search activities, which are endowed with limited "supranational" powers.

At the present stage in the European Union, there is a tendency for the isolation of an independent organizational and legal form of interaction between states in the field of justice and home affairs, which is expressed in the establishment and activities of special law enforcement structures, which are gradually vested with powers previously characteristic of domestic law enforcement agencies, such as, for example, initiation of criminal cases, conducting investigations, participation in the work of joint investigative teams, carrying out operational-search activities. In the mode of objective statement of facts, all this testifies to the formation in the EU of a system of "supranational" international law enforcement agencies, to which a number of functions of state power are transferred.

Study of the existing doctrinal approaches to the issue of Europeanisation in the sphere reflects approximation of national legislations of states in the field of forensic and operational investigative activities within the framework of integration associations allows us to identify the following stages and forms of its implementation: 1) streamlining the relationship between the law enforcement agencies of European states; 2) the adaptation of the legal systems of states to each other; 3) the development and implementation of general acts.

It can be stated that it is quite difficult to achieve a full approximation of criminal and criminal procedural laws of European states in order to effectively combat crime without a common legislative body and uniformity in law enforcement practice (Klip, 2000: 75). In the field of justice and home affairs, the main instrument of the legal policy of the EU member states is the approximation of national laws and law enforcement practices — their Europeanisation. The specified term is a generalized concept in relation to harmonization, coordination and unification.

In the mode of objective statement of facts, three forms of legal approximation in the field of forensic and operational investigative activities should be distinguished (Nijboer, 2000).

The first form is the unification of legal norms, which implies that countries with different national legislation to adopt exactly the same laws, united by a common judicial control mechanism. EU regulations are a prime example of such documents. The norms are combined into a coherent system and are directly applicable to all EU member states. Meanwhile, in the criminal and criminal procedure legislation

of European countries, a full-fledged first form of legal rapprochement does not yet exist due to the fact that any country has its own style of law enforcement and its own priorities. Thus, criminal and criminal procedural norms of some European countries are factors that complicate or nullify attempts to organize international cooperation (Nijboer, 2000: 9). As it is pointed out that "this position follows from the key provision of cooperation on the application of countries' own criminal procedure in the execution of international orders" (Volzhenkina, 1999). Therefore, some foreign experts in the field of international law negatively regard the sovereignty of states as one of the «atavisms» and the main obstacles to the creation of a centralized "world order" represented in the form of "supranational power" (Lucas, 1999).

Thus, A. Eser considers the often encountered and at present "insular" approach in domestic law and in the national judicial language among lawyers defending the interests of the so-called "national spirit of the country" as an autistic approach. Times are changing, and "traditions" are becoming a weaker and weaker argument against further convergence of national criminal procedure systems (Eser, 1998: 100). The current trend is that states restrict their freedom of action in order to successfully solve common problems in the fight against crime, especially financial crimes.

It should be noted that the creation of common European penitentiary law as a kind of closed part of the criminal legislation is still a difficult task. The efforts made by the European Union to approximate the norms of penitentiary law in the national legislation of the EU member states, of course, led to a certain degree of progress towards the European system of criminal law. The current practice of the EU Court of Justice applying criminal sanctions against lawbreakers in a number of areas previously related to the first pillar, such as environmental protection or consumer violations[2], does not answer the question of how far the Court in Luxembourg has gone in the transfer of powers in the field of criminal and criminal procedure law to the European Union and how far the Court and the European Union will go in the future, as "EU action in the field of financial and organised crime has been uneven. On the one hand, there has been a plethora of anti-money laundering (AML)/countering financing of terrorism (CFT) legislation, with new EU standards justified as necessary to align with international developments, in particular the FATF recommendations. Yet notwithstanding these laws, concerns remain regarding both the effectiveness of EU rules to tackle money laundering and their impact on fundamental rights and national criminal law systems. On the

[2] Judgment of the Court (Grand Chamber) of 23 October 2007. Commission of the European Communities v Council of the European Union. Action for annulment - Articles 31(1)(e) EU, 34 EU and 47 EU - Framework Decision 2005/667/JHA - Enforcement of the law against ship-source pollution - Criminal penalties - Community competence - Legal basis - Article 80(2) EC. Case C-440/05. *European Court Reports* 2007, I-09097.

other hand, EU standards in the fields of the criminalisation of organised criminal activity and corruption (in particular corruption in the private sector) are limited and dated" (Foffani, Mitsilegas, Caeiro, 2020: 248).

Each EU member state has its own consequences from the process of approximation of national legislations, which are different from each other, since each country has its own traditions in legislation, in its interpretation and theoretical development of criminal and criminal procedural law. In this context, it is very important that the norms of criminal and criminal procedural law of the EU member states would be as consistent as possible.

The second form is harmonization, which consists of actions aimed at approximation, some compliance or convergence of legal norms. With the entry into force of the Amsterdam Treaty on 1 May 1999, the EU was able to develop and adopt directives, "framework decisions" and other acts that could be considered as the beginning of the process of harmonization in the field of justice and home affairs. There are also agreements that do not require the adoption of special legal rules. These agreements unite the parties to achieve a common result.

The third form of legal convergence is a certain coordination, which consists in the fact that some legal instruments are aimed at the harmonization process, while others are not. A distinction should be made between intentional harmonization actions and accidental actions that are a "by-product" of certain legislative developments or law enforcement bodies' cooperation (Nijboer, 2000).

Europeanisation of national legislations and law enforcement practices in the field of justice and home affairs is organized through the application of certain methods of legal approximation (Galushko, 2020).

"Full approximation" is characterized by the establishment of common legal terms (for example, the publication of norms (set of norms), standards, or detailing of other indicators, completed in their content), which essentially means the incorporation of integration provisions into domestic law. In the EU member states, when using this method, it is noted that it contradicts the principle of proportionality in the case if integration goals can be achieved by applying "softer" methods that provide for less deep regulation.

In the case of "framework approximation", legal acts contain only fundamental criteria, which are applied on an equal basis with national rules. These criteria represent an agreed level of legal convergence, which provides for freedom of action for national authorities, which most adequately reflects the political aspirations of European states at the stage of cooperation in the field of forensic and operational search activities.

"Reference approximation" is the establishment of basic criteria in acts, i.e. requirements that are recognized by the world community as mandatory from the standpoint of protecting human rights and freedoms, the preservation of natural

resources, etc. As for the basic criteria themselves, they must be concretized on the basis of technical norms and rules developed by different standardization agencies. "Categorical approximation" is defined as the harmonization of rules for a specific set of regulated subjects, for example, rules for obtaining a residence permit. "Dispositive approximation" proceeds from the availability of freedom of choice for the national authorities within the limits allowed by a legal act. "Alternative approximation" provides for the freedom to choose subjects of national law from several mandatory options established by a legal act. "Optional approximation" provides for the consolidation in an act of the possibility of recognition or non-recognition of the norms of integration law as binding on the part of subjects of national law (Shelenkova, 2005).

Cooperation of the European Union in the field of forensic and operational-search activities has its own specifics, a number of features, as well as features that are not typical for other integration entities. Within the Russian legal science, the following forms of cooperation between the EU member states in the field of forensic and operational investigative activities are distinguished:

- through direct interaction of law enforcement agencies of European states within the EU;
- through interaction of the EU member states through specially created institutions of the Union, its specialized bodies and structural divisions of institutions, whose competence includes issues of cooperation in the field of justice and home affairs in the area of forensic and operational investigative activities (Volovodz, 2009: 110).

From a conceptual legal perspective, it seems to substantively designate two more forms of cooperation, which are currently relevant in the implementation of cooperation in the field of justice and home affairs through forensic and operational investigative activities. Specifically, this is done as follows. First, through direct interaction between the law enforcement agencies of the EU member states and representatives of public or private companies through specially created organizations and associations. Second, through the interaction of specially created EU institutions, specialized EU bodies and structural units of its institutions, whose competence includes issues of cooperation in the field of justice and home affairs through forensic and operational investigative activities, and public or private companies that are not directly involved in the law enforcement activities of states.

3. LEGAL ASPECTS OF EU COOPERATION IN THE FIELD OF COMBATING FINANCIAL CRIMES

The EU attaches particular importance to combating economic and financial crimes. When conducting cross-border investigations, it is not enough just to arrest and convict the accused; in particular some mechanisms are needed to ensure the confiscation of illegally obtained incomes. Thus, EU countries have repeatedly addressed the problem of developing legal instruments to improve cooperation in the field of international search, arrest, seizure and confiscation of the proceeds of crime in a number of legal acts, increasing Europeanisation of legal regulation in the field.

In 2001, the EU Council Framework Decision 2001/500/JHA of 26 June 2001, concerning money laundering issues, prescribed procedures for the identification, tracing, freezing, seizure and confiscation of illicit enrichment and criminal proceeds in order to impose restrictions on member states with regard to reservations provided for by certain Articles of the 1990 Council of Europe Convention[3].

In 2003, the EU Council adopted a framework decision — European orders freezing property and evidence[4], which was subsequently supplemented by a framework decision of the EU Council on the application of the principle of mutual recognition of orders for confiscation funds and property obtained by criminal means, as well as material evidence in criminal cases[5]. In the mode of objective statement of facts, the actions of these orders were limited to the seizure of property and the seizure of evidence, and their transfer was still carried out in accordance with the classical procedures for the provision of legal assistance. This "two-stage procedure" did not contribute to the effectiveness of cooperation in criminal cases.

In 2007, in accordance with the decision of the EU Council for Cooperation between Asset Recovery Offices of EU member states in the field of tracing and identification of proceeds of crime or other property obtained by criminal means, adopted at the initiative of EU member states, the National Asset Recovery Offices have been established to facilitate cooperation between member states and the exchange of information in the field of activity[6].

Subsequently, the Criminal Assets Seizure Center was established in Europol, which is responsible for assisting EU member states at the stage of detecting illegal

[3] Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, *Official Journal,* 2001, L 182/1.

[4] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *Official Journal, 2003,* L 196/45.

[5] Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *Official Journal, 2006,* L 328/59.

[6] Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, *Official Journal.* L 332, 18.12.2007, pp. 103–105.

proceeds in order to uncover all criminal connections outside the borders of a particular state. In March 2012, the European Parliament and the EU Council presented new amendments to the 2003 Directive on the improvement of legal norms regarding cases of delay in the process of confiscation of money and property obtained by criminal means, by means of the possibility of its execution before a court judgment in connection with the evasion of the accused from the court[7].

In 2006, the European Commission proposed the development of a European Evidence Warrant (EEW). EEW is an act issued by the competent authority of any EU member state with the aim of obtaining objects, documents or other data on the territory of another EU country in order to use them in the framework of criminal proceedings. EEW has been based on the principle of recognition of judgments, according to which a legal act issued by a competent authority in one EU member state is legally binding throughout the Union. The EU Council Framework Decision on the EEW, which entered into force on 19 January 2009, included mechanisms of previously adopted EU documents on obtaining of the property and documents (2003/577/JHA of 22 July 2003) and mutual recognition of orders of confiscation (2006/783/JHA of 6 October 2006)[8].

The EEW advantages are that it is subject to direct recognition in the executing member state without the need for confirmation at the national level; is accepted in a standard unified form; a deadline for execution may be specified (60 days); minimum guarantees are provided in the executing and requesting state; the list for refusal to execute EEW has been significantly reduced.

On the other hand, EEW could only be applied to already existing evidence, and therefore extended only to a limited range of legal assistance by states in criminal matters in the context of the detection, fixation, collection and storage of evidence. EEW did not apply to the following types of evidence: interrogation of persons involved in the case; conducting an examination, as well as obtaining various kinds of analyzes from living persons, including comparative samples for DNA analysis; receiving information in real time; control over bank accounts; analysis of existing objects, documents and information; obtaining information contained in open sources.

Due to the very limited scope of EEW, the competent authorities of the EU member states were allowed to use either a new tool, or traditional legal aid procedures that extended to other types of evidence not covered by EEW. Practice

[7] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decision 2002/584/JHA, 2005/214/JHA, the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absent of the person concerned at the trial, *Official Journal,* 2009, L 81, p. 24-36.

[8] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceeding in criminal matters, *Official Journal,* 2008, L 350/72.

has convincingly shown that the existing restrictions on the collection of evidence in cooperation between states in the field of forensic and operational search activities were so fragmented and complex that they did not contribute to the effective disclosure and investigation of crimes. Thus, the mechanisms developed in the EU to ensure the receipt of evidence in criminal cases were criticized by practitioners, as they were very limited.

The provisions of the framework decision, which apply only to certain types of evidence, as well as reflections on the likely development of a new EEW or a separate comprehensive document covering all types of evidence, forced legislators not to focus on its implementation, and practitioners to give preference to traditional procedures of provision of mutual legal assistance.

In 2010, eight EU member states (Belgium, Bulgaria, Estonia, Spain, Luxembourg, Austria, Slovenia and Sweden) began implementing the directive introducing the European Investigation Order (EIO) in criminal matters. In December 2011, the Justice and Home Affairs Council (JHA) agreed on a common approach to the application of an inquiry order[9]. Finally, in 2014, the EU enacted the European Investigation Order in criminal matters[10].

EIO is a special mechanism for carrying out one or more investigative steps in the investigation of crimes in the requested state in order to obtain evidence. The warrant applies as far as possible to all types of evidence, including those in the possession of the requested state, and replaces all previously existing documents in this area, such as the European Order of Evidence. The adoption of this document was a serious step towards the mutual recognition of court decisions in criminal cases in the EU countries.

It is worth noting that certain activities are permitted by special rules that are not covered by EIO, and their delimitation is reasonable in practice. These include, for example, the creation of joint investigation teams and the collection of evidence as part of their work, as well as special forms of investigation, such as interception of telecommunications (interception with immediate transmission or interception by satellite)[11]. Existing legal remedies should continue to be applied to these forms of cross-border crime investigation. EIO also does not apply to cross-border surveillance, which is governed by Art. 40 of the Convention implementing the Schengen agreements of 1990.

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[9] Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of … regarding the European Investigation Order in criminal matters, *Official Journal,* C 165, 24.6.2010, p. 22-39.

[10] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *Official Journal,* L 130, 1.5.2014, p. 1-36.

[11] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union - Council Declaration on Article 10(9) - Declaration by the United Kingdom on Article 20, *Official Journal,* C 197, 12.7.2000, p. 3–23.

Thus, separate legal instruments have been integrated into a single legal act, which should improve cooperation in the field of forensic and operational investigative activities.

The fight against fraud and corruption is based on Article 325 TFEU, which empowers the Council and the European Parliament to take the necessary measures to combat fraud affecting the EU's financial interests. Pursuant to Part 3, Chapter V, Chapters 4 and 5 of the TFEU, concerning cooperation between the police and the judiciary in criminal matters, Eurojust and Europol have the right to support EU countries in the fight against fraud and corruption. The European Anti-Fraud Office (OLAF) is responsible for combating fraud affecting the EU budget, as well as corruption and misconduct in the EU institutions.

In 2013, the Commission submitted a proposal to establish a European Public Prosecutor's Office in accordance with Article 86 TFEU to investigate and prosecute crimes affecting the EU budget. Earlier, in 2012, the Commission proposed a Directive to combat fraud against the financial interests of the Union through criminal law 2012/0193 (COD)[12], which was then adopted in 2017 as Directive (EU) 2017/1371 of the European Parliament and Council of 5 July 2017 on combating fraud in the financial interests of the Union through criminal law[13]. The aim of the Directive is to create a stronger and more coherent system with minimum common rules for combating crime, which affects the EU budget, in order to better protect the EU's financial interests and taxpayers' money across the Union. The document deals with fraud and other criminal offenses, such as corruption, misappropriation or money laundering, affecting the EU's financial interests, i.e. the EU budget, budgets of EU institutions, bodies, offices and agencies approved under treaties, or budgets directly or indirectly managed and controlled by them; "serious offenses" against the system of general value added tax (VAT), such as «carousels» with VAT (offenses are considered serious if they are related to the territory of two or more EU member states and involve a total loss of at least 10,000,000 euro). It also lays down general rules on sanctions and limitation periods for criminal offenses covered by the Directive. The Directive defines crimes recognized at EU level (fraud, money laundering as defined in Directive (EU) 2015/849; intentional passive and active corruption; misappropriation committed intentionally). It contains provisions on the criminalization of these crimes in the legislation of EU member states.

The directive provides for minimum "effective, adequate and deterrent" criminal sanctions. They include a maximum penalty of imprisonment of at least 4 years: if the financial loss to the EU budget exceeds the threshold of 100,000 euros; in

[12] 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).

[13] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *Official Journal*, L 198, 28.7.2017, p. 29–41.

any case, serious crimes against the single VAT system; other serious circumstances determined by national law. The Directive also covers: the freezing and confiscation of funds and proceeds of crime affecting the EU budget; establishing jurisdiction for such crimes; minimum statutes of limitations that allow for investigations and prosecutions, as well as the application of penalties imposed after conviction for the commission of these crimes. It also regulates cooperation between member states and EU institutions, bodies, offices and agencies, including obligations of the EU, Eurojust, the European Public Prosecutor's Office, OLAF and the Commission to cooperate in combating the criminal offenses defined by this Directive. OLAF and, as appropriate, Eurojust provide technical and operational assistance to facilitate the coordination of investigations in EU member states.

If the European Court of Auditors (ECA) and the auditors responsible for auditing the budgets of EU institutions, bodies, offices and agencies or other budgets managed and audited by the institutions find irregularities which may constitute a criminal offense under this Directive, they shall inform the Union, the Prosecutor's Office, OLAF and other competent authorities. EU member states must ensure that national audit bodies do the same. Criminal offenses, as defined in the Directive, fall within the competence of the European Public Prosecutor's Office, an independent EU body empowered to investigate and prosecute these offenses and to refer them to the competent national courts.

In 2001, the EU adopted Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment, which defines fraudulent behavior that EU countries must treat as criminal offenses. On 13 September 2017, the Commission proposed a new Directive (COM/2017/0489) aimed at updating the existing legal framework, removing obstacles to operational cooperation and strengthening measures to prevent and assist victims in order to take action by law enforcement agencies to combat fraud and counterfeiting of non-cash means of payment are more effective[14]. In 2019, Directive (EU) 2019/713 of the European Parliament and the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA was adopted, obliging member states to implement effective and efficient criminal law measures, necessary to protect non-monetary means of payment from fraud and counterfeiting (Article 13)[15].

[14] Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, COM/2017/0489 final - 2017/0226 (COD).

[15] Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, PE/89/2018/REV/3, *Official Journal,* L 123, 10.5.2019, p. 18–29.

CONCLUSION

Thus, within the framework of the European Union, cooperation between states in the field of activities in the fight against financial crimes is exceptional and extraordinary when considered in two main aspects. Firstly, availability of opportunities for flexible management of this area, where national interests of states are combined and various instruments for regulating cooperation in the field of forensic and operational investigative activities. Secondly, cooperation in the field of forensic and operational search activities is assigned a single territorial dimension, in connection with which the process of overcoming the division between national jurisdictions is underway and the principle of a worldwide response to common threats is proclaimed. Cooperation of states within the framework of the European Union in the field of forensic and operational-investigative activities has a unique characteristic, which is that the EU creates agencies within its structure, which are responsible for forensic and operational-investigative activities with «supranational» powers for Europeanisation of the national dimension of the member states.

At the present stage in the European Union, there is the tendency for the Europeanisation of organizational and legal forms of interaction between states in the field of justice and home affairs, which is expressed in the establishment and activities of special law enforcement structures, which are gradually vested with powers previously characteristic of domestic law enforcement agencies, such as, for example, initiation of criminal cases, conducting investigations, participation in the work of joint investigative teams, carrying out operational-search activities. The Europeanisation trend testifies to the formation an EU system of "supranational" enforcement agencies, to which a number of functions of state power are transferred.

The European Union is constantly improving the forms of criminal cooperation and in its development has gone from general legal regulation of law enforcement cooperation to the establishment of institutional structures (Europol, Eurojust, OLAF, etc.) and coordination of common priorities and operational actions to respond to new challenges and threats to organized crime, in particular in the financial sphere, to a policy cycle that provides a methodology for an intelligence-led approach to home security based on joint assessments of emerging threats, which allows for a strategy to counter the latter through appropriate tools.

It should be noted that the effectiveness of Europeanisation of the fight against financial crimes depends on the proper legal regulation of issues of inter-state cooperation, which includes the criminalization of illegal acts; determination of forms and methods of cooperation in counteracting these actions; determining the competence of bodies, specialized institutions in the field of combating financial crimes, etc. It should be noted that EU legislation tends to constantly improve the

legal norms in this area. The fight against fraud and corruption is an integral part of the protection of the Union's financial interests as they affect the Community budget. In order to combat these crimes, a number of organizational and legal measures have been introduced, in particular, mechanisms have been established to coordinate and facilitate the cooperation of national law enforcement agencies in this area, increasing the level of Europeanisation of the process.

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MEĐUNARODNA SARADNJA U BORBI PROTIV FINANSIJSKOG KRIMINALITETA U KONTEKSTU PROCESA EVROPEIZACIJE

U ovom radu autor analizira proces donošenja pravne regulative i iskustva EU u cilju utvrđivanja adekvatnog mehanizma u borbi protiv finansijskog kriminaliteta u procesu evropeizacije. Autor je ukazao na tendenciju evropeizacije pravosudne i policijske saradnje država, a što *je posebno značajno u oblasti suzbijanja finasijskog kriminaliteta, a koja se ogleda i u osnivanju posebnih tela na nacionalnom nivou sa novim ovlašćenjima u oblasti pokretanja krivičnih postupaka, sprovođenja istraga, učešća u radu zajedničkih istražnih timova, vršenja operativno-istražnih radnji. O trendu evropeizacije svedoči i formiranje novih tela i institucija Evropske unije nadležnih za sprovođenje navedenih aktivnosti. Stoga je posebna pažnja u radu posvećena analizi pravnog okvira Evropske unije.*

KLJUČNE REČI: evropeizacija; Evropska unija; borba protiv finansijskog kriminaliteta; pravna aproksimacija; pravosuđe i unutrašnji poslovi.

KRIPTOVALUTE: IZAZOV U PREVENCIJI FINANSIJSKOG KRIMINALITETA*

Arben Murtezić**

Generalno, promjene koje sa sobom nosi ono što se često naziva digitalnom revolucijom predstavljaju veliki izazov za zakonodavce, regulatorne institucije kao i sve kojima je zadatak sprovođenje zakona. Pomenuti proces sa sobom nosi niz novina i neslućenih prednosti ali, nažalost, i nove pojavne oblike kriminaliteta kao i nova sredstva za izvršenje ranije poznatih krivičnih djela. Posljednjih godina odnosno nešto duže od decenije, pažnju opšte i stručne javnosti zaokuplja pojava kriptovaluta. Ovo prvenstveno zbog toga što se radi o pojavi po mnogo čemu drugačijoj od onoga što je uobičajeno u finansijskom poslovanju, te velikih vrijednosti koje se vežu za kriptovalute. Pored toga, uočeno je da se kriptovalute masovno koriste kao sredstvo plaćanja kod različitih nedozvoljenih trgovina i ilegalnih usluga.

Zbog gore navedenog, u ovom radu će biti izloženo osnovno o porijeklu i karakteristikama kriptovaluta te predstavljeni različiti oblici zloupotrebe u kriminalne svrhe sa naglaskom na pranje novca. Nakon toga će biti evoluirani problemi i dosadašnji napori vezani za regulaciju ove oblasti. Na ovaj način će se pokušati dati doprinos razvijanju diskusije o mogućim pravcima djelovanja državnih institucija, prije svega u cilju prevencije narušavanja finansijskog sistema te sprječavanja pomenutih zloupotreba.

KLJUČNE REČI: kriptovalute; kompjuterski kriminal; regulacija; pranje novca

UVOD

U samoj srži kriptovaluta jeste mogućnost sigurnog obavljanja digitalnih transankcija uz manje ili više obezbjeđenu anonimnost, preko državnih i drugih

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** Doktor pravnih nauka, direktor Centra za edukaciju sudija i tužilaca Federacije Bosna i Hercegovina, Sarajevo, Bosna i Hercegovina, e-mail: *arben.murtezic@cest.gov.ba.*

granica u gotovo stvarnom vremenu. Pored toga, standardne prekogranične finansijske transankcije uglavnom podrazumijevaju uključenost multinacionalnih banaka koje, ukoliko se pridržavaju propisa i dobrih poslovnih praksi, kroz prijavljivanje transakcija za koje se sumnja da su povezane s ilegalnim aktivnostima, a posebno sa pranjem novca predstavljaju važnog saveznika državnih i međunarodnih institucija. Međutim, kod kriptovaluta transankcije se poduzimaju između decentraliziranih mreža korisnika raširenih širom svijeta bez posredstva banke kao centralne institucije čiji je rad strogo normiran i, u principu, adekvatno kontrolisan. Pored toga, kao i kod ostalih legalnih i ilegalnih aktivnosti koje se odvijaju isključivo u sajber prostoru javlja se problem nadležnosti, a onima koji operišu u tom svijetu otvara mogućnost biranja jurisdikcija koje im najviše odgovaraju.

Već iz ovih nekoliko osnovnih crtica se naziru izazovi koji se nameću pred tradicionalne kontrolore i regulatore finansijskih tokova.

Iako veliki dio opšte pa ni stručne javnosti ne percipira kriptovalute kao novac u tradicionalnom smislu sa sigurnošću se može reći da se u kontekstu borbe protiv svih vidova finansijskog kriminaliteta, a naročito protiv pranja novca ne mogu zanemariti. Naime, dileme oko teorijske, pa i pravne kvalifikacije kriptovaluta ne smiju skrenuti pažnju sa suštinskog cilja borbe protiv pranja novca a to je sprječavanje uključivanja prihoda od nezakonitih aktivnosti u legitimni finansijski sistem.

U prvom dijelu rada će biti izložena tehnologija nastanka kriptovaluta i osnovne karakteristike i to naročito one koje privlače kriminalce različitih profila. U nastavku su evoluirani pojavni oblici zloupotrebe kriptovaluta u kriminalne svrhe, sa naglaskom na pranje novca. Nakon toga su prezentovani problemi pravnog definisanja i različiti pristupi regulisanja u ovoj oblasti. Zaključna razmatranja daju određene prijedloge o pravcima institucionalnog djelovanja.

Treba napomenuti da se u ovom radu kao i u velikom broju drugih sa ovom tematikom termini bitkoin i kriptovaluta ravnopravno koriste praktično kao sininimi. Ovo ne samo zbog toga što je bitkoin prva i najpoznatija valuta već i što je još uvijek ubjedljivo najčešće korištena kako kod legalnih tako i ilegalnih transakcija. Određene druge razlike će biti dodatno objašnjene u tekstu.

1. KRIPTOVALUTE

Bitkoin je najpopularniji, ujedno i najkontraverzniji rezultat "Blockchain" tehnologije. Ova tehnologija je u osnovi javna baza podataka ili javni registar svih transakcija ili digitalnih radnji koji su poduzete između učesnika. Svaka transakcija u ovakvoj javnoj knjizi potvrđuje se konsenzusom učesnika u sistemu. Jednom uneseni podaci se više ne mogu izbrisati, te uvijek ostaje provjerljiv zapis

o svakoj transakciji koja je ikada napravljena. Dakle, sama Blockchain tehnologija nije kontroverzna i godinama radi besprijekorno i uspješno se primjenjuje i na finansijske i na nefinansijske svjetske aplikacije. Pobornici za ovaj izum tvrde da je u svijetu informativnih tehnologija najznačajniji nakon samog interneta, a uopšteno da se može porediti sa pronalaskom parne mašine ili motora sa unutrašnjim sagorijevenjem (Crosby *et al.* 2016).

Prije obrazlaganja pomenutih kontraverzi u vezi sa bitkoinom, interesantno je kratko razmotriti koje su to prednosti koje ovu tehnologiju čine tako značajnom. Naime, trenutni digitalni promet temelji se na oslanjanju na neku treću stranu. Recimo kada pošaljemo e-mail ili viber, oslanjamo se na provajdera da će ga isporučiti samo licu na koje je naslovljeno. Isto tako, kada banci damo nalog za uplatu ili isplatu, očekujemo da će biti ispunjen onako kako glasi. Dakle činjenica je da putem digitalnih naloga svakodnevno stvari manjeg ili većeg značaja za koje očekujemo određeni stepen privatnosti povjeravamo posrednicima (Lee *et al.* 2015). Tu je prednost blockchaina koji korisit *peer-to-peer* mrežu i isključuje posrednike. Ovaj termin *peer-to-peer* se s razlogom rijetko prevodi, ali recimo da se radi o odnosu između istih sa istim ili odnosu između vršnjaka. Dakle svi računari koji su dio *peer-to-peer* mreže direktno su povezani jedni s drugima, isti su nema važnijeg ili starijeg, odnosno nema centralnog ili menadžrskog računara. Na ovaj način, svi kompjuteri na ovoj mreži istovremeno i server i klijent.

Kao začetak bitkoina smatra se članak, "bijeli papir", iz 2008. godine, čiji se autor ili grupa autora nalazi iza pseudonima Satoshi Nakamoto, a postao je potpuno funkcionalan u januaru 2009. Sam ovaj nastanak, odnosno nepoznavanje stvarnog autora je amblematičan za valutu kod koje je anonimnost korištenja jedna od naistaknutijih karakteristika.

Prvo važno je objasniti u kojoj mjeri je trgovina ili samo posjedovanje bitkoina u stvari anonimno. Anonimnost nije potpuna i vrlo je specifična. Naime, podaci o samim transakcijama i posjedovanju računa su lakše vidljivi i dostupni nego kod standardnog bankarskog poslovanja. Dakle bitkoin je dizajniran tako da se može pratiti. Tako da istražitelji koji razumiju sistem kroz korištenje adekvatnih algoritama mogu ustanoviti da je jedna adresa povezana s određenim ponašanjem, uključujući i ilegalne, i na taj način i druge adrese koje s njom obavljaju transakcije mogu biti označene kao potencijalno kriminalne (Bistarelli, Parroccini & Santini, 2018).

Međutim daleko veći izazov jeste povezati pseudonim sa stvarnom osobom jer nije povezan s imenom ili bilo kojim drugim podacima koje korisnik ne mora dati ukoliko ne želi, a sve zbog pomenute decentralizovane prirode bitkoina. Zbog svega navedenog se uobičajeno kaže da bitkoin nudi "pseudoanonimnost" (Lee *et al.* 2015). Ono što svaki korisnik mora posjedovati je virtuelni "novčanik" koji sadrži javne i privatne ključeve, odnosno šifre koje su nezavisne od mreže, čuvaju se posebno i koriste se kao digitalni potpis za potvrđivanje transakcija. Dakle, ovaj

javni ključ je račun na koji se bitkoin može slati. Može se reći da je to kao IBAN koji se javno može podijeliti, dok je privatna šifra nešto kao PIN koji koristimo u redovnom elektronskom bankarstvu i koristi se samo interno.

Za određene korisnike transparentnost i samog blockchaina nije poželjna, te se nude alternative valute poput ZCash and Monero, koji koriste ugrađenu tehnologiju dizajniranu da prikriju informacije o pošiljateljima i/ili primateljima. Privatnost ili zašto ne reći, tajnost je jedan od osnovnih motiva za korištenje ovih valuta koje se osim alternativnim još nazivaju i privatnim. Međutim, zbog niza razloga, kao što su složeniji način upotrebe, veće provizije prilikom konverzije, te manjak povjerenja u te sisteme, bitkoin je i dalje ubjedljivo najčešće korištena kriptovaluta čak i na Dark Net -u, gdje je većina transakcija nezakonita te je anonimnost imperativ (Kethineni, Cao & Dodge, 2018).

Na kraju, konvertovanje bitkoina u fiat valutu je daleko jednostavnije nego što se neupućenima čini i poredi se sa običnim mijenjanjem novca u mjenjačnici u svojoj ili u zemlji u koju putujete. Naravno, kursna lista nije određena od strane vlade ili centralne banke, već je vrijednost određena jednostavnim zakonom ponude i potražnje. Postoje dva načina za konvertovanje, a to su transakcije putem treće strane, odnosno brokera, i direktne peer-to-peer razmjene sa drugim licem. Prvi način se opisuje kao jednostavan i siguran, ali ne i najbrži način, jer obično treba nekih 4-5 dana da se transankcija realizuje u potpunosti. Pored toga, tu su troškovi provizije te, kod registrovanih brokera, i podložnost zakonima o pranju novca. Za bržu transankciju se koriste peer-to-peer platforme za pomenutu direktnu prodaju. Ovaj način prodaje zaista omogućava brže transakcije uz manje naknade, ali se i ovdje anonimnost uvijek posebno ističe kao prednost.

Ono što je sasvim izvjesno je da što više bude rastao stepen prihvaćenosti i mogućnosti upotrebe se budu širile, širiti će se i mogućnost pretvaranja kripto u fiat valute.

2. BITKOIN KAO VALUTA PODZEMLJA

Danas se kriptovalute, prvenstveno bitkoin, uobičajeno koriste u različitim vidovima kompjuterskog kriminala. Jedna od jednostavnijih ali i možda najčešće korištenih klasifikacija kompjuterskog kriminala je podjela na dvije velike grupe. U prvoj su djela koja spadaju u kompjuterski kriminal u užem smislu, kao što su hakiranje i instaliranje softvera koji služi za ometanje rada i ucjenjivanje žrtve. Kažemo u užem smislu jer su ovo djela koja ne bi ni postojala bez kompjutera i interneta i kompjuteri su i sredstvo i predmet izvršenja. Druga velika grupa su "klasična" krivična djela koja su postojala i prije razvoja informacionih tehnologija,

gdje moderne informativne-komunikacione tehnologije pomažu da se djelo izvrši. Primjera radi, to su trgovina drogom, oružjem ili ljudima na internetskim forumima (Murtezić & Dizdarević, 2020). Neki od već dugo poznatih oblika kriminalnog ponašanja, kao što je dječija pornografija su danas gotovo nezamislivi bez IKT-a, a oblici i obim krivičnih djela prevare su kroz upotrebu interneta dobili potpuno druge dimenzije.

Bez obzira o kojoj vrsti kompjuterskog kriminala govorimo bitkoin se javlja kao sredstvo plaćanja i motivacija. Kao razlozi za popularnost među komjuterskim kriminalcima se najčešće spominju jednostavnost upotrebe, relativna anonimnost i upotreba koja nije limitirana granicama ili zakonodavstvom (Brill & Keene, 2014). U nekim posebno opasnim pojavnim oblicima važnost bitkoina je posebno izražena. Na primjer, žrtve ransomvarea *("ransomware"),* trenutno najopasnijeg vida kompjuterskog kriminala u užem smislu, prisiljene su zamijeniti otkupninu iz fiat valute u bitkoin i prenijeti taj iznos na određenu adresu koju su dostavili kriminalci. Prema nekim procjenama, više od 35 % korporacija u Velikoj Britaniji kupilo je bitkoine kako bi bili spremni platiti otkupnine, odnosno otključavanje napadnutih datoteka koje sadrže ključne podatke, poput intelektualnog vlasništva (Kshetri & Voas, 2017). Gore je pomenuto, da se na podzemnim tržištima u velikom broju slučajeva kod nedozvoljene trgovine drogom, oružjem i ostalim, bitkoin koristi kao sredstvo plaćanja. Nije iznenađujuće da preovladava i u slučajevima u kojima se kompjuterski kriminal nudi kao servis odnosno usluga. Naime, rastući je fenomen da oni koji posjeduju tehnička znanja prodaju svoje usluge kao što su upadi i napadi na kompjuterske mreže (Huang, Siegel & Madnick, 2017).

Međutim, ono što je zajedničko za sve pomenute ali i sve druge vidove kriminala koji za cilj imaju sticanje imovinske koristi je potreba za pranjem tako stečenog novca. Bitkoin zbog većine gore opisanih karakteristika, koje nema potrebe ponavljati, predstavlja ogroman izazov za globalne napore u borbi protiv pranja novca (Campbell-Verduyn, 2018).

I pored toga opisana relativna transparentnost ove tehnologije ne čini mogućnosti pranja novca tako jednostavnim kako se čini i tradicionalni princip praćenja tokova novca je na određeni način primjenjiv i ovdje. Međutim, pojava onoga što se naziva "miksanje" daje problemu pranja novca posebnu težinu i blizu je toga da pseudoanonimnost pretvori u gotovo punu anonimnost (Houben & Snyers, 2018). Naime, kroz ovaj postupak se određeni iznos bitkoina reže na stotine manjih transakcija i miješa (miksa) sa različitim transakcijama iz drugih izvora, tako da se ulazni iznos uplaćuje, na određenu izlaznu adresu a pravi izvor ostaje prikriven. Miješanje bitkoina koji su legalno stečeni nije zločin, ali ono što je simptomatično jeste da osim od ove operacije nema stvarne koristi koja bi legitimnog korisnika motivisala da za nju plati naknadu. Ova usluga se manje ili više otvoreno reklamira kao usluga pranja novca (Van Wegberg, Oerlemans & Van

Deventer, 2018). Proporcije ovog problema se naziru kroz primjer jednog od većih ovakvih servisa pod nazivom *Bestmixer*, koji su EUROPOL i vlasti Nizozemske zatvorili 2019. godine i koji je za nešto manje od godinu dana rada i postojanja imao promet od oko 200 miliona US dolara (EUROPOL, 2019).

Dalje, nije novina da se za prenošenje i preuzimanje novca do kojeg se došlo ilegalnim putem koriste pojedinci koji služe kao kuriri ili tkz. "mule" slično kao i kod trgovine drogom. Međutim, primjećeno je da se u ove svrhe u posljednje vrijeme koriste bitkoini, a pojedinci i grupe koji su često nesvjesni da krše zakon, regrutuju kroz različite oglase koji nude značajnu zaradu za rad od kuće. Oni se upućuju kako da unovčavaju bitkoine te novac nose odnosno uplaćuju na određene adrese (Brown, 2016). Moguće je da je jedna od prednosti korištenja kriptovaluta u ovom sistemu i to što oni koji prihvataju ove poslove, lakše povjeruju da se radi o legalnom poslu, u poređenju sa jednostavnim prebacivanjem keša sa jednog mjesta na drugo.

3. PRAVNE KVALIFIKACIJE I REGULACIJA: NEKE OD DILEMA

U vezi pravne kvalifikacije i definisanja kriptovaluta ne postoji konsenzus, što je posljedica kompleksnog karaktera. Jedno od stanovišta jeste da se uopšte ne radi o novcu već o tehnologiji (Campbell-Verduyn, 2018).

Prilično prihvaćena teorija je da je bitkoin hibrid robnog i fiat novca, odnosno valute. Međutim, slijedeći najjednostavniju definiciju robnog novca, prema kojoj je to novac čija vrijednost dolazi od robe od koje je sačinjen, bitkoin nema takvu ali ni ''unutrašnju" vrijednost sličnu fiatnom novcu (Baur, Hong & Lee, 2018).

Dalje, ako se bitkoin uglavnom koristi kao valuta za plaćanje roba i usluga, znači da konkuriše fiat valuti poput američkog dolara i može uticati na njegovu vrijednost i na kraju monetarnu politiku i potrebno ga je regulisati kao takvog (Selgin, 2015). Zaista, istorijski gledano, postoji mnogo primjera ekonomija sa dvije ili više valuta. Postojale su različite robne valute kao mediji razmjene, a u srednjem vijeku zlatni, srebrni i bakreni novac često su cirkulirali istovremeno po unaprijed definiranim kursevima. U novije vrijeme primjećuju se brojni primjeri ekonomija s dvojnom valutom u ekonomijama u razvoju i zemljama u razvoju, uključujući Liberiju, Kubu i mnoge latinoameričke države. Švicarska je primjer napredne industrijske zemlje u kojoj je devizni euro prihvaćen u većini dijelova pored državnog pa i globalno prihvaćenog švicarskog franka (Baur, Hong & Lee, 2018). S druge strane, ako se uglavnom koristiti kao ulaganje, kvalifikuje se poput državnih obveznica, dionica i roba onda i regulaciji treba pristupiti na takav način. U literaturi, naročito posljednjih godina, se često može naći i poređenje sa zlatom.

Ovo se, između ostalog, obrazlaže uporedivom decentralizovanošću, te činjenicom da se i zlato i kriptovalute mogu korisititi i kao sredstvo za kupovinu, jedinica za vrijednost kao i investicija (Dyhrberg, 2018; Kyriazis 2020).

Kriptovalute su se pojavile u jednom regulatornom vakuumu, a zbog svih gore pomenutih problema sa definisanjem i kvalifikovanjem nastavljaju predstavljati izazov za zakonodavce i regulatore širom svijeta. U današnje vrijeme ne postoji jedinstven pristup regulaciji kriptovaluta, i teško je naći poređenje sa nekom drugom tako važnom oblasti u kojoj postoje takva razmimoilaženja, pa čak i između zemalja koje su po mnogim osobinama slične. Naime, neke zemlje ih direktno izričito priznaju, druge ih zabranjuju, neke ih legalno priznaju i pružaju zaštitu korisnicima, dok neke, što je još uvijek čest slučaj, prema njima ostaju neutralne. Tako je recimo, konstatovano da je moguće da kripotovalute imaju veliku mogućnost širenja u zemljama u razvoju zbog slabo razvijenog bankarskog sektora i pomoći da se izbjegnu problemi hiperinflacije, visokih provizija i falsifikata (Darlington, 2015, 2). Konkretno, smatra se da bi bitkoin mogao u budućnosti igrati važnu ulogu u razvoju Subsaharske Afrike (Hileman, 2015). Međutim, i zemlje na uporedivom nivou razvoja biraju drugačija rješenja, pa su tako kriptovalute legalizovane i uređene u Meksiku ali zabranjene u Pakistanu. Dalje, postoje istraživanja iz kojih proizilazi da su zemlje s visokim stepenom i dužom tradicijom demokratije sklonije legalizovanju i uređenju kripotovaluta, između ostalog i zbog toga što imaju razvijenija i sofisticiranija zakonodavna i regulatorna tijela. Trenutne velike razlike među razvijenim zemljama, koji uglavnom variraju između regulacije i neutralnosti se pravdaju time da se odgovori još uvijek traže (Horban, 2020).

ZAKLJUČAK

Bitkoin i ostale kriptovalute su neka vrsta uljeza na regulisanim i često strogo normiranim nacionalnim i međunarodnim finansijskim tržištima. Obzirom na složenost i važnost problema, te stalno nove trendove koji se pojavljuju, teško je očekivati da bilo koji nacionalni zakon ili međunarodni dokument riješi postojeće a naročito ne potencijalne probleme. Pored toga, posezanje za zabranom ili toliko strogom kontrolom kojom bi se pokušala nadoknaditi decentralizovanost koja je u suštini ovog koncepta bi predstavljalo odraz nemirenja sa neminovnom opštom digitalizacijom svijeta.

S druge strane, neutralnost kojoj, čini se, više iz razloga nespremnosti, pa i svojevrsne zbunjenosti za sada pribjegava veliki dio svijeta nije rješenje obzirom na konstantni rast ovog tržišta i niza pitanja koja se otvaraju. Loš imidž koji kriptovalute uživaju zbog česte povezanosti sa raznim gore navedenim vidovima kriminala, ne smije zatamniti činjenicu da većina poslovnih ljudi i građana koji investiraju

u njih i koji profesionalno nude različite usluge u ovoj oblasti ne želi kršiti zakon. Upravo njihovo specifično znanje i iskustvo treba iskoristiti kroz različite oblike javno-privatnog partnerstva radi jačanja kapaciteta relevantnih institucija. Iako se čini da smo prilično daleko čak i od okvirnog globalnog konsenzusa, sigurno je da trendove treba pratiti, kako u smislu zakonskih rješenja, tako i institucionalnog, praktičnog pristupa.

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CRYPTOCURRENCIES: A CHALLENGE IN FINANCIAL CRIME PREVENTION

In general, changes brought by digital revolution represent a major challenge for legislators, regulatory institutions as well as all other stakeholders involved in law enforcement. Mentioned process carry with itself a lot of novelties and unimagined advantages, but there are also, unfortunately, new forms of criminality as well as new tools for execution of formerly known criminal acts. In recent years, precisely bit longer than a decade, the attention of general and professional community has been occupied by the appearance of cryptocurrencies. We mentioned this primary because it is a phenomenon much more different than everything what is common in financial business, as well as because of huge values of involved. Besides that, it is notices that cryptocurrencies often used for payment in different illicit trades and for illegal services.

Because of all above mentioned, in this paper the basics about the origin and properties of cryptocurrencies will be introduced, as well as different forms of misuse for criminal purposes with an accent on the money laundering. After that, problems and previous efforts connected to regulation of this area will be evaluated. Therefore, this research aims to contribute to development of the discussion about possible ways of acting of public institutions, in order to avoid potential jeopardies for the financial system and prevent mentioned misuses.

KEYWORDS: cryptocurrencies; computer crime; regulation; money laundering.

RESPONSIBILITY IN THE PROTECTION OF PERSONAL DATA AND PREVENTION OF ABUSE AND CRIME

Ana Vuković*

The paper discusses institutional and individual responsibility in the use of personal data. In the first part of the paper we will define the institutional and individual responsibility, social relation, social action and the context in which the exchange and protection of personal data takes place. Then is explained the social role of institutions and individuals who have direct access to personal data, the procedure for using personal data within the Law on Personal Data Protection. The protection of personal data is an example of the interrelationship between individual and collective responsibility in a society. The author concludes that the forms of using personal data and suppressing financial and other forms of data misuse depend on legally established mechanisms and control, but also on individual and collective responsibility, i.e. social context, general culture and social relations.

KEYWORDS: institution; individual; social relations; social control; responsibility.

1. PERSONAL DATA: BETWEEN INDIVIDUAL AND INSTITUTIONAL RESPONSIBILITY

The individual of the modern world is in a whirlwind of hyperproduction of information, which has contributed to the devaluation of personal data within the ideology of information management and supervision. Social development implies different social forms, phenomena and relations in the interaction of various social subsystems.[1] It has been noticed that in different degrees of social development, it is possible that prevails the dominance of a social subsystem – political, economic, cultural. In that sense, social practices arise as a product of individual or collective actions, but they always occur within the social context

* Ph.D, Research Associate, Institute of Social Sciences, Belgrade, Serbia, e-mail: *annvukovic@yahoo.com.*

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that makes those actions meaningful for the individuals who perform them and for members of group. Continuity and reproduction of social practices enables the existence of social systems. In that sense, social positions are structurally constituted through specific sets of meanings, domination and legitimation that are connected with the typification's and representations of social actors (Giddens, 1984: 83).

Today, the weakness of the individual is manifested through the "most subtle form of conformism" in the form of "passive acceptance of surveillance technologies" which are the price for technical progress, in which identity is lost and drowned in consumer society. Most people do not attach importance to the problem of supervision, but internalize it as a "default value that enables smooth functioning" (Subotić, 2011: 265).

The classic of sociological thought, Durkheim, gave the provision of social fact as "ways of acting, thinking and feeling that have a striking property that exists outside the individual consciousness. (...) i.e. as a type of facts that have very special characteristics: they consist in ways of acting, thinking and feeling that are external to the individual and that have the power of coercion on the basis of which they are imposed on him". And the collective feeling is, according to Durkheim, "the result of living together, the product of actions and reactions that arise between individual consciousnesses and, if it is reflected in each of them, it is due to a special force due to its collective origin" (Dirkem, 1963: 22-27). In explaining the rules concerning the distinction between normal and pathological, Durkheim points out that crime is a fact whose pathological character seems indisputable, and believes that "crime is not observed only in most societies of this or that kind, but in all societies of all types, there is no societies where crime does not exist. It changes shape, not everywhere the same actions to which this property is attributed; but there have always been people everywhere who behave in such a way as to incur criminal repression". Crime is "an integral part of any healthy society (...) normal because it is quite impossible for a society to be free of it and (...) it consists in an action that insults certain collective feelings, which have a special power and clarity". As an example, "theft and simple negligence insult the same altruistic feeling, respect for other people's property" (Dirkem, 1963: 69-72).

In the information society, without much criticism, the content of collective consciousness has changed, and instead of the former form "a set of beliefs and feelings common to the average member of the same society" (Dirkem, 1972) becomes omnipresent information without critical spirit and need to belong to the community. Collective consciousness as a general spirit (and not a simple sum of individual consciousnesses) is reduced to the occasional or permanent presence of the individual and the collective only through the presence given in the form of online data. Such a new form of social relation has replaced the old form of social coercion – in the Durkheim's sense, where the basic property of social facts, as

elements of collective consciousness, is to impose themselves and force us to obey certain ways of thinking, acting and feeling. The purpose of social coercion is to prevent the violation of general moral, customary and legal regulations and the implementation of social and criminal sanctions (Dirkem, 1963).

Social action also includes abstinence from action and can be oriented towards the past, present or future, expected behavior of others –individuals and known, or an indefinite multitude and unknown. Religious behavior e.g. its not, when it remains contemplation or solitary prayer. Contact between people has a social character only if our own behavior is meaningfully oriented towards the behavior of other. Social action can be determined: goal-rational: when one acts in accordance with the expectation of the behavior of objects of the outside world and other people, and using those expectations as "means" to achieve one's own goals to which one strives rationally; value-rational: when one consciously believes in - ethical, religious or any other - absolute value of a certain behavior, because it is such, and regardless of success; affective - especially emotional: when acting in accordance with current affects and mental state and traditionally: when acting in accordance with established habits (Veber, 1976, 1:15-17).

Another important feature of the social character of action is social power, which is defined as the ability of one person or number of people to realize their will in joint action despite the resistance of the partners in the interaction. Power is the degree to which an individual or group can impose their will in a social relationship no matter what that possibility rests on, and influence is defined as the general means by which the process of persuasion takes place. Weber definition is: "Power represents the prospect of carrying out one's own will in the context of a social relationship, despite resistance, regardless of what those prospects are based on" (Veber, 1976, 1:37).

In the modern sense in the analysis of individual responsibility of employees, the authors believe that "it is necessary to emphasize that employees are a special group with certain psychological needs to belong, to become legitimate members of a social group guided by values, to give meaning to its existence" (Tyler & Degoey, 1995; Huo, Smith, Tyler & Lind, 1996). Individual responsibility is a part of an individual's personality and shapes their different experiences. The institutional environment is important for the formation of responsible behavior of the individual, because the reciprocity of the relationship between individual and institutional responsibility is seen in the fact that the responsible attitude of the institution affects the responsible behavior of the individual.

According to Durkheim, the set of united individuals who, by uniting with each other, form a system, forms the substrate of society and the basis over which social life rises (Dirkem, 2007: 74). We are not governed by current ideas, but by "residues left by our previous life, all adopted habits, prejudices, aspirations that

move us without us even being aware of it - in a word, that is all that makes up our moral will" (Ibid., 2007: 59)

Social fact, in Durkheim's sense of the word, has changed form, because now the presence in the virtual world exerts social coercion towards others to join, otherwise they will be "excommunicated" because they do not adapt to the new social context. This is especially present among the younger generations. The new form of social relationship completely changes the attitude towards privacy, and, in accordance with that, the attitude towards personal data, both of the individual and the people whose personal data is accidentally or intentionally obtained. In this new network of communication, anyone who does not want to be "caught" in it is considered unworthy of any other way of communication (e.g. face to face), so other channels of communication are closed and the need for close (immediate) contact disappears as an inherent feature of human society.

2. LAW ON PERSONAL DATA PROTECTION: INDIVIDUAL AND COLLECTIVE CONSCIOUNESS IN PRACTICE

The protection of personal data is an example of the interrelationship between individual and institutional responsibility in society. The social role of individuals and institutions that have direct access to personal data, as well as the procedure for using these sensitive data is regulated by the Law on Personal Data Protection. However, law enforcement depends on an established system of behavioral patterns that prevail in the social relationship and shape the social context in which data is exchanged.

The ambivalence of situations in which personal data are used can be seen in the fact that they, on the one hand, "open opportunities for the progress of society", but, on the other hand, "open the door to various dangers". These dangers (risks) can lead to a threat to a group of individual rights: right to privacy, right to liberty, right to family life, right to inviolability of correspondence and other rights. International organizations, states, citizens point to the need to protect personal data in the modern world. Due to the specificity of personal data, measures for their protection are introduced, such as: technical, organizational and legal protection measures, which are most effective if used by interaction and application within the elements of personal data processing (Andonović, Prlja 2020: 37- 38).

The introduction of legal protection of personal data implies "the process of adoption and application of general and special legal norms, at the international, state and internal level, which includes the implementation of technical and organizational rules and the establishment of legal mechanisms and means to protect

privacy, as well as other rights and freedom of citizens in relation to personal data" (Andonović, Prlja, 2020: 41-42). The authors also make a distinction between the material concept of legal protection of personal data, which includes the application of rules for the protection of the individual rights in relation to personal data, but also personal data (as an intangible good of man).

Means and measures that are necessary to achieve the security of citizens' data and their rights include: activities to limit the time disposal of certain types of data; (non) providing information to non-state entities, state bodies and organizations, and informing citizens about what data is collected about them and for what purpose form a functional concept of legal protection of personal data (Ibid.).

In 2018, the National Assembly of Serbia adopted a new Law on Personal Data Protection, following the example of the EU General Regulation, new institutes were introduced: data protection persons, special rights of citizens regarding personal data, code of conduct, obligations of persons who handle and process data, "however, during and after the adoption there were a number of ambiguities regarding the scope of application of this regulation, which is the main challenge of the legal and proper application" (Andonović, Prlja, 2020: 60-61). The use of personal data is also regulated within the responsibility of specialized individuals for the use of personal data within the competence of the Commissioner for Information of Public Importance and Personal Data Protection. The Law on Personal Data Protection began to be applied in 2019.[2] Within this Law, one of the obligations of the Commissioner is to provide training for persons who handle and process data, i.e. persons designated for the protection of personal data. Obligations of data handlers are divided into general obligations that include the application of all principles of data processing: the principle of legality; the principle of expediency; the principle of responsibility; the principle of proportionality; data accuracy principle; the principle of data security and the principle of limited data retention. Special obligations are considered to be: contractual relationship with the processor (article 45); records on processing operations (article 47); recording the processing operations of the competent authorities (article 48); notification of data protection breach (c. 52); data protection impact assessment (article 54-55), Data Protection Officer (article 56-58), Code of Conduct (article 59); special obligations regarding the transfer of personal data to other states and international organizations.[3]

As an example of the relationship individual - work organization - social context in the use of personal data stands out a police officer or other authorized person who directly implements the method (computer search of personal and other

[2] Law on Personal Data Protection, *Official Gazette of the Republic of Serbia*, no. 87/18.

[3] More about that is available on: *Commissioner for information of public importance and personal data protection*, https://www.poverenik.rs

data). In that case, the individual (official) should fulfill ethical and legal principles, such as: "1) application of measures against a specific person for whom there is a basis for suspicion that he has committed a crime in the field of organized crime or other legally prescribed act; 2) proportionality - application of a covert measure by permitted techniques only for the purpose of clarifying the specific criminal offense specified in the court order (justifies encroachment on the right to privacy of citizens); 3) necessity, means that the expected results could not be achieved by some other 'milder' measure; 4) time limit of the measure; 5) initiating the suspension of the measure when its further duration is irrelevant from the aspect of further collection of evidence, 6) initiating the extension of the measure when it is extremely necessary, respecting proportionality; 7) the court order for the application of the measure and the application itself should be supervised; 8) the duty to maintain the confidentiality of data obtained through search and processing (the collected data are otherwise marked 'official secret – strictly confidential') "(Jović, 2013: 126-126).

Given that financial crime is closely linked to high-tech illegal activities that often take place via the Internet, in practice, the virtuality of the Internet contains a large amount of personal, business data, documents, phone numbers and bank accounts that are a valuable source of cyber (financial) crime. This form of crime includes the following typology of illegal activities: misuse of payment cards; money laundering; counterfeiting money; document forgery and fraud through social engineering. Given the topic of this text, one of the common types of vulnerabilities at the macro level (individual) in the context of payment card abuse is: false reporting; account collection, lost or stolen payment card, forged payment card, non-presentation of payment card and ATM fraud. One of the common ways of misusing personal data and endangering privacy is forgery of documents, in the case of: unauthorized production of the original document; forgery of the original document; false document; fraudulently procured original document; misuse of the original document. And then, fraud through social engineering, which according to the Interpol division includes: making a phone call; sending e-mails; managerial fraud; intrusions into e-mail accounts; internet prizes and lottery winnings; forensic recovery; Quid pro quo; baiting; tailgating; theft through diversion (Uljanov, 2018: 224-231).

We can conclude that all these forms of misuse of personal data are characterized by the fact that they take place without establishing a direct social relationship between individuals (face to face), in "communication" with technological inventions, and represent par excellence a consequence of informationally controlled society in which an individual is considered a member of a "new society" only if he is present in it on the basis of the availability of his personal data in various digital databases. In that way, the loss of direct social contact during social action enabled a faster and wider range of misuse of personal data, disappearance of social responsibility and manipulation of social control.

3. SOCIAL CONTROL AND DIGITALIZATION AS DEHUMANIZATION

Education is an important factor in social development, but instead of being a socially significant national and cultural category, it is more often the subject of a purchase-sale relationship. Instead of knowledge (and education) being an authentic reflection of the historical and structural substance of a country, characterless knowledge is introduced. (Vuković, 2020: 150-151). Such social changes make it impossible to develop a mature, stable, and responsible individual who will rarely be subject to manipulation and social control.

According to a theoretical research in which the phenomenon of informationally controlled society was thoroughly analyzed, it was noticed that the position of an individual is very endangered in modern society. "The extreme impact of the supervision paradigm within the ICS is reflected in the cases of those citizens who are not only accustomed to supervision as a normality, but also accept the ethos of supervision in relation to other people. It is the most subtle kind of conformism (...) - conformism of personal acceptance of supervision as a way of one's own life and action" (Subotić, 2011: 264). The ethos of surveillance takes a threefold form: directing surveillance technologies towards oneself - discovering one's intimacy towards others, self-initiated surveillance of people from one's immediate environment and intrusion into the intimacy of other. When oversight becomes an inherent part of the worldview and way of life, all other forms of conformism under the influence of the predominant consumer sphere introduce unconditional adherence to surveillance systems. Although there may be a dose of hesitation when giving personal data, under pressure in most cases "the reality of endangered privacy is accepted, which additionally depends on generational affiliation, given that, in principle, younger generations have less developed a sense of privacy. A strong conformist mechanism within the ICS that forces a compromise with privacy is the existence of certain cases in which there is only one possibility to participate in society at all, where the use of services is in principle free, but a negative response actually leads to exclusion" (Subotić, 2011: 264).

Various instruments of social control have been observed, such as: hyperproduction of information, construction of identity, education, hate speech, secularization, ideology of healthy living. The application of these instruments enables the manipulation of individuals and social groups in modern society and their easier management. Hyperproduction of information enables information management, education reform serves for cultural management, hate speech for the political, identity construction for the economic, etc. (Đukić, 2014: 110-149). The table shows an overview of the transformation of the social control system into three types of society: premodern, modern and postmodern.

Table 1: Overview on the transformation of the social control system

Social control	Premodern society	Modern society	Postmodern society
Control practice	Repressive	Nihilistic	Manipulative
Control area	Politics	Economy	Culture
Means of control	Institution	Scientific, ideological axiological and religious systems	Information
Type of control	Mechanical	Constructive	Simulation
Object of control	Action	Motivation	Perception
Subject of control	Collective and individual action	Collective and individual needs, interest and values	Collective and individual systems of meaning and sense

Source: Đukić, N. (2014: 35)

Dialogue is one of the main characteristics of direct communication (human character of social interaction), in which social actors show knowledge, ideas, attitudes, because dialogue implies emotional interference and respect for the personality of participants and their diversity (Vuković, 2017: 218). But, postmodern society is more often characterized by manipulation through simulation and perception of information about collective and individual systems of meaning and significance. And the area within which control takes place is the cultural subsystem. Simulation and manipulation of the control system in a broader sense, instead of providing social order, open opportunities for misuse of personal data and endangering the individual through the use of information as a means of control, and changing the collective awareness of the role of old patterns and meaning systems. This prevents social action in the Weberian sense as an individual act to which we attach a certain meaning and intention, which is reciprocal in its semantic content because it is directed towards others. In these circumstances, the individual finds himself in a subordinate role in relation to the new authority – general supervision and control, which prevents the development of a stable personality, critical thinking and organized social action.

CONCLUSION

The ways of using personal data and suppressing financial crime and other forms of data misuse depend on legally established mechanisms and control, but also on individual and collective responsibility, i.e. on the social context, general

culture and social relations. The parallel reality of (mis)use of personal data began with the need for data to become digitized and stored in electronic databases, in which they are most often used without direct contact with each other. Although the digitization of data enabled their rapid transfer, availability, personal data as information lost its personal mark and took on a feature and significance like any other data, thus enabling a careless attitude towards the individual. Social relations today reflect the action of the system, and not the depth and content of the perception of the personal in social action and interaction. As a result, a large number of individuals still leave their own and other people's personal data unprotected, often without knowledge of the consequences of such a pattern of behavior and potential forms of abuse.

The paradox of the efficiency of social responsibility paradigm is reflected in the fact that institutional responsibility is formally determined by defining rules on the manner of personal data processing and penalties for potential abuses (institutional responsibility for (mis)use is strictly defined), while individuals are not educated about possible (mis)use of personal data. In the case of personal data, there is a cause-and-effect relationship between individual and institutional responsibility in data protection, which only in joint social action can ensure the functioning of the social responsibility paradigm. The phenomenon of anonymity is slowly going down in history, because it is suppressed by the phenomenon of the ubiquity of the individual on the Internet, which is a consequence of consumeristic culture, mass media influence, lack of critical thinking, and sense of meaningless personal life if it is not manifested in virtual "reality".

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ODGOVORNOST U ZAŠTITI PODATAKA O LIČNOSTI I PREVENCIJA ZLOUPOTREBE I KRIMINALITETA

U radu se razmatraju institucionalna i pojedinačna odgovornost u korišćenju podataka o ličnosti. Prvi deo rada obuhvatiće određivanje institucionalne i pojedinačne odgovornosti, društvenog odnosa i delanja, kao i konteksta u kome se odvija razmena i zaštita podataka o ličnosti. Zatim se objašnjava društvena uloga institucija i pojedinaca koji imaju direktan pristup podacima o ličnosti, procedura korišćenja podataka o ličnosti u okviru Zakona o zaštiti podataka o ličnosti. Zaštita podataka o ličnosti je primer uzajamne sprege između pojedinačne i kolektivne odgovornosti u jednom društvu. Autor zaključuje da oblici korišćenja podataka o ličnosti i suzbijanje finansijske i drugih formi zloupotrebe podataka zavise od zakonski utvrđenih mehanizama i kontrole, ali i od individualne i kolektivne odgovornosti, tj. od društvenog konteksta, opšte kulture i društvenih odnosa.

KLJUČNE REČI: institucija; pojedinac; društveni odnosi; socijalna kontrola; odgovornost.

THE APPLICATION OF FINANCIAL FORENSICS IN COMBATING FINANCIAL CYBERCRIMES

Nikola Paunović*

The contemporary information-based society as well as the rapid development of information and communication technologies have created an impact on the increase of financial cybercrimes. Encouraged by the availability of various opportunities for conducting financial transactions in cyber space the perpetrators of this type of crimes, in the latest time, have begun to pay increasingly their particular attention to cyberattacks targeting computer data and systems with the purpose to obtain illegal material gain. Among the wide range of possibilities for the perpetrators to commit financial cybercrimes today, the following three forms are on the rise: 1) phishing; 2) smishing; and 3) vishing. Taking into account this fact, in the first part of the paper, phenomenological forms of the chosen financial cybercrime are analyzed, with the purpose of recognizing typical trends of committing these crimes. Moreover, bearing in mind that in the context of detecting financial cybercrimes, the field of financial forensics has particular importance in combating this type of crime, the second part of the paper discusses the role of the financial forensic specialist, as a personal embodiment of the institutional framework of the financial forensics service, in the analysis of cash flows and financial transactions, with reference to the position of this entity in criminal proceedings. Related to this issue, the attention is also paid to the analysis of the conditions for the admissibility of digital evidence in criminal proceedings. In the concluding remarks, it is pointed out the importance of implementing a proactive approach in combating financial cybercrimes through the application of knowledge and achievements from the field of financial forensics and the use of digital evidence in criminal proceedings as well.

KEYWORDS: financial crimes; cybercrime; financial forensics; computer systems; digital evidence.

* Third Secretary at the Ministry of Foreign Affairs of the Republic of Serbia and Ph.D, Student at the Faculty of Law, University of Belgrade, e-mail: *dzoni925@gmail.com*.

INTRODUCTION

The application of information technologies and the use of the Internet on a daily basis have brought numerous benefits to the business sector but also to individuals. However, at the same time, cyber infrastructure has become a place where high-tech crimes are increasingly being committed with the purpose to obtain illegal material gain or to damage or destroy user's computer data. In cyberspace, there are various possibilities for criminals to commit high-tech financial crimes (Kostić, 2021: 6). Their common characteristics are embodied in a similar pattern of execution consisting of sending links pretending it originates from the official website of some company and actually comes from hackers accounts using false websites who are intending to obtain someone's personal data such as username or password. By misleading the users, hackers using specially created false Uniform Resource Locator (URL) links lure victims to click on them which re-directing them to malicious internet sites. While creating their belief that these websites are official, hackers infect all data files and capture their personal data (Cybersecgroup, 2021). The following common characteristic of high-tech crimes is reflected in their financial nature.

Therefore, bearing in mind all abovementioned the term of financial cybercrime might be defined as the illicit act of obtaining material gain by using different social engineering techniques in order to lure victims into providing confidential personal data, mostly via the commission of identity fraud cases, including email, SMS or voice fraud schemes. For example, it can be manifested through fake e-mails supposedly sent by user's providers of chosen services asking to pay their subscription monthly invoices, or through fake profiles on popular social media sites asking for money transactions (Arkvik, 2020).

These examples have also demonstrated that the wide availability of information technologies around the world has brought new trends in business and private communication. In the business and private environment, people to people communication are increasingly relying on the use of information technology, which in addition to benefits also brings numerous risks (Paunović, 2018: 265-266). Financial cybercrimes as one of those risks that are becoming today the dominant form of high-tech crime in cyberspace mostly due to: 1) the existence of numerous opportunities for acquiring illegal material benefits; 2) the possibility of making an enormous profit in the form of illegal material gain in a short term; 3) aggravated opportunities for detecting financial cybercrime and collecting digital evidence. Bearing in mind that on this occasion it is impossible to cover all existing cases of financial cybercrimes, in the following lines it will be analyzed the following most common phenomenological forms of financial cybercrimes in the latest period: 1) phishing; 2) smishing; and 3) vishing.

1. THE MOST COMMON PHENOMENOLOGICAL FORMS OF FINANCIAL CYBERCRIME

1.1. Phishing

Phishing is usually classified as a type of social engineering scam which through different techniques aims to incite users to share confidential information about themselves, by extracting their confidential personal data to facilitate identity theft, such as account information, passwords, and challenge-response questions. Illicitly acquired data cyber perpetrators use to impersonate the individual or legal entities whose data have been obtained. A phishing attack has several common features and can be identified by: 1) sending supposed valid email messages; 2) luring users to give information by acknowledging the message or clicking a malicious link; 3) asking for users to provide sensitive data about their accounts, passwords, or identity; 4) activating malware programme by clicking a malicious link. In the context of phishing, the common modus operandi for installing malicious content on the user's system represents the method so-called „drive-by downloads". This method bears its name since a victim solely should make a connection to the web page to start the process of downloading, meaning that such downloads possess the capacity for self-installation, with no signs for warning. In the context of this method, it should be mentioned that there are two common models of the malware programme, *keylogger technique* which implies that every key pressed by a user on his or her system is logged into an exclusive file called a keystroke log, on the one hand, and *Trojan horses software technique* which means that this programme assists in transferring a keylog to some beneficiary address looking for sensitive data such as accounts, passwords, and other data, on the other hand (Thomas, 2020).

Phishing is usually accompanied by an unauthorized computer intrusion targeting individuals or legal entities. In support of this is the case in which the perpetrator gained access to the employees' email accounts extracting personal data of many victims, including their names, birth dates, financial and bank information, social security numbers, driver's license numbers and insurance information (Panda Security, 2021). The cases of phishing can often lead to enormous loss of profits of the targeted legal entity. It was the case with one company that became the victim of an attack by a hacker who, posing as the executive director, sent an email to an entry-level accounting employee who later transferred funds to an account for a fake project resulting in the company enormous loss (Crane, 2021). Apart from the fact that hackers often impersonate executive directors, they also posing themselves as lawyers. This was the case of one computer networking company that became a victim of hackers phishing attack who impersonated themselves as the company's

lawyer, inviting high-level company's officer to make various transfers of funds to close a secret acquisition, causing in that way the company enormous loss (Check Point, Software Technologies Ltd, 2021).

In addition to the traditional requests for funds transfer, as evidenced by the following examples, hackers also undertake phishing attacks using more sophisticated methods. For example, hackers often send an email to selected victims posing as an employee of a legal entity with the notification that their account has been compromised and shall be deactivated if the victims do not verify their credit card information. Besides sending notifications about compromised accounts, hackers often send an email informing that the victim's credit card has been compromised and that he or she needs to confirm his or her data. Also, a common case used by hackers is the creation of a fake website to which the victim is directed by a link sent in an email. The e-mail text usually uses wording informing the victim that a confidential policy update has been made, asking the victim to confirm access to the account (Terranova Security, 2021). One of the largest phishing cases up to now so-called operation Phish Phry testifies about using the fake website as a tool for this attack. In this case, a large number of bank and credit card clients received official-looking emails directing them towards fake financial websites with the request to fill out their account numbers and passwords, facilitating thus hacker's easy access to their private data (Brad, 2018).

1.2. Smishing

Smishing is the type of phishing with the main difference that instead of sending malicious emails hackers send SMS to obtain sensitive data from the user's system by luring the recipients to click on a fraudulent link which is part of text messages. In the context of smishing, hackers obtain usually personal data by using: 1) malware software and 2) malicious fake websites. For example, the malicious malware may imitate an original app asking users for typing in confidential personal data. Besides malicious malware, hackers also use fraudulent websites to seek personal data from victims by sending the link of the fake website asking them to click on it which leads them to a supposed official website (Kaspersky, 2021).

There are several typical forms of smishing attacks. One of the most common forms involves sending a message informing that the bank account or credit card is blocked and that it is necessary for the victim to confirm his or her data by clicking on the link sent in the message. In addition to these attacks, a common case of smishing attacks involves sending a message informing the recipient that he or she is the random winner of a prize wherefore he or she is invited to click on the link

sent in the message and to fill out the form concerning his or her personal data in order for the prize to be paid. This type of smishing attack can also be performed by sending a message in which the recipient is invited to participate in a survey or quiz as well as to enter his or her personal data, after which if he or she answers all the questions correctly, that person becomes the winner of the prize. Finally, the common pattern of this type of phishing means that hackers send messages informing recipients that there has been unusual activity on their accounts due to which it is necessary to click on the link sent in the message in order to secure their personal data (Sussman, 2020).

1.3. Vishing

Vishing is another type of phishing with the principal difference that in this case hackers utilize voice-based telephony techniques. This type of phishing means that hackers mislead the victims by the use of a fake caller ID that looks like comes from a known number or local area code. Moreover, hackers may also use callback numbers or automated recordings to lure the victims into fraudulent operations. The vishing perpetrators initiate usually contact with chosen victims posing as someone trustworthy who usually need help or money in a short period of time. The main purpose of vishing attacks is almost identical to other forms of phishing consisting in unauthorized access to user's systems in order to reveal confidential personal information (Sjouwerman, 2021). The types of vishing might be classified in several groups depending on whether perpetrators impersonate: 1) marketing representatives; 2) law enforcement officials; 3) hi-tech experts or 4) bank or other financial employees. In the role of marketing representatives, perpetrators may pose as officials from a charity or similar organizations that need victim's help asking for a small account of donation. In the fact, there is no charity and the paid money will be transferred to the account of the perpetrators. They may also act as law enforcement officials, such as tax authorities informing the selected victims about some invoices that should be paid urgently due to some emergency case. Moreover, being aware of everyday use of information and communication technology perpetrators misleads their victims by representing themselves as hi-tech experts who discovered some technical problem on the victim's devices which should be fixed in a short time, requesting for this purpose transferring of some amount of money to their accounts. Actually, the presented problem does not exist and serves only to mislead the victims in order to obtain illegal material gain. Finally, the common example of vishing fraud schemes includes acting of perpetrators as a bank or other financial employees notifying the victims about some non-existent

reason due to which they need to provide their personal data (Threat Mark, 2020). An example of this type of vishing is the case of a retired employee who received a call on his mobile from an individual impersonating as a bank officer from his bank, informing that his debit card would be blocked if some basic information about him was not updated instantly. After making general checking of the victim's personal data such as his name and address, the perpetrator asked the victim to reveal his debit card PIN notifying that the call was under security protocol. Convinced that it was an authentic call from his banker, the victim disclosed the PIN after which he received a text message from his bank stating that a certain amount of money was debited from his account (The Hindy, 2014).

2. THE LINK BETWEEN DIGITAL DATA EVIDENCE COLLECTION AND FINANCIAL FORENSICS

Financial forensics is a special field that combines skills from finances, accounting, auditing, banking, stock exchange and other similar financial fields for the purpose of conducting a criminal investigation. Precisely, the knowledge of financial forensics specialists finds its purpose in criminal proceedings where these experts assist prosecutors in the monitoring of cash flows and the analysis of financial transactions. Therefore, the principal goal of the application of financial forensics in criminal investigation is the prevention, detection and proving of financial crime (Hayes, 2021).

In the context of cybercrime financial forensics investigations there are numerous individuals who can be involved in securing digital evidence of cybercrime including a law enforcement agent, digital forensics expert, military police officer, private investigator, an information technology specialist, or another person who is tasked with responding to cybercrime cases (UNODC, 2019). In financial forensics investigations these individuals take a role during two successive stages: 1) identification of the given type of financial cybercrime; and 2) digital data evidence collection;

The first stage consisting in identifying the given type of committed financial cybercrime involves providing response to the following issues: 1) what the infraction was, 2) what caused it, 3) how the infraction was committed; 4) where the affected computer's system is located and 5) when as well as in what time intervals the cybercrime was committed. Providing a response to these questions is essential in order to define an adequate approach to forensics analysis on a specific case. Moreover, effective and accurate response to these questions requires the presence of competent consultants and support teams at the crime scene who will assist the

law enforcement authorities in resolving forensic doubts that may arise and provide them with the latest information concerning trends and techniques in combatting financial cybercrimes. The identification of the exact type of cybercrime in a timely manner is of the great importance for the early detection, scoping, probing, and classifying of the malicious operator or process applied in the given case that caused the infraction. The following stage is related to digital data evidence collection which implies that all information relevant to the evidentiary procedure should be evaluated and classified. This process implies two substages: a) evidence retrieval and b) digital validation confirmations. Data recovery analysis and evaluations should be of high confidence in credibility in order to be acceptable and valid proof of evidence in court proceedings. This is of crucial importance since the credibility of cyber data results can be questioned. For this reason, it is necessary to make it probable that the digital data obtained has not been manipulated, altered or damaged or the evidence material collected will be considered not acceptable and credible in the given case. During the investigation process, it is recommendable to collect all evidence, including also from related systems connected with the system which is the primary object of the investigation with the aim to make visible the cause activities involved in the infraction in the concrete case. In order to collect digital forensic findings it is required to discover digital fingerprints and to make access to the server as well as to session transactions conducted in the affected computer's system (Cybersecgroup, 2021).

In other words, conducting the search of digital data evidence requires proving data relating to the connection between the perpetrator and the victim as well as the proving of the specific reasons for authorization of such search. This approach was also taken by the European Court of Human Rights (hereinafter: the Court) in the case *Robathin v. Austria*. In this case, the applicant complained about a search of his computer devices and seizure of all his electronic data on suspicion of having committed fraud of his clients. Bringing in the nexus applicant's complaint with Article 8 of the Convention on Human Rights and Fundamental Freedoms (hereinafter: the Convention) which refers to the right to respect for private and family life, the Court held that there had been a *violation of Article 8* of the Convention.[1] According to the Court's point of view, despite the fact that the applicant had exercised various procedural guarantees, the review chamber to which he had made a complaint, had provided solely general remarks and reasons concerning the fulfillment of the conditions for authorizing the search of all the electronic data from the applicant's computers. Instead of this general approach, the Court noticed that the complete search of applicant's electronic data implied that specific and particular reasons should have been demonstrated to be allowed

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

this search. In the absence of such reasons, the Court found that the seizure and examination of all the data had gone beyond what was necessary to achieve the legitimate aim.[2]

On the other side in the case, Sérvulo & Associados - Sociedade de Advogados, RL v. Portugal the Court held that there had been *no violation of Article 8* of the Convention. In this case, the applicant complained about a search of computer devices and the seizure of computer files and email messages, on suspicion of having committed several financial crimes. Contrary to the previous case, in this matter the Court found that the safeguards afforded to the applicant against abuse, arbitrariness and breaches of legal professional secrecy had been adequate and sufficient, meaning that the search and seizure operations had not amounted to a disproportionate interference with the legitimate aim pursued. This decision was made on the basis that the investigating judge had ordered the deletion of the computer files and emails that had been seized, which he considered to be private, to be covered by professional secrecy or to have no direct bearing on the case.[3]

These achievements of the Court are in the line with the Council of Europe Convention on Cybercrime (hereinafter: the Budapest Convention), the most comprehensive act dealing with digital data evidence collection.[4] According to Article 15 of the Budapest Convention the collection of evidence in electronic form shall in concordance with the principle of proportionality. It means that authorising of the search of digital data should include, as appropriate in view of the nature of the procedure or power concerned, inter alia, judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such procedure. The main purpose of these guarantees is reflected in the duty of law enforcement authorities to make a balance between public interests and the impact of such procedures upon the rights, responsibilities and legitimate interests of third parties.

Besides the principle of proportionality in order to be considered eligible before the court, collected digital data should fulfill the requirement of authenticity. In this sense, in Article 16 the Budapest Convention prescribes that digital data which has been stored by means of a computer system should be protected against any loss or modification. In addition, according to the Budapest Convention the integrity of the specified stored computer data in the person's possession or control should be preserved and maintained for a period of time as long as necessary, up to a maximum of ninety days, to enable the competent authorities to seek its

[2] Robathin v. Austria (application no. 30457/06) Judgment of 03 July 2012 www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf.

[3] Sérvulo & Associados - Sociedade de Advogados, RL v. Portugal Judgment of 03 September of 2015 www.echr.coe.int/Documents/FS_New_technologies_ENG.pdf.

[4] Council of Europe, Convention on Cybercrime, European Treaty Series - No. 185, Budapest, 23.XI.2001.

disclosure (Carrera, Stefan & Mitsilegas, 2020: 37). In respect of digital data that is to be preserved under Article 17 national states shall ensure that: a) expeditious preservation of such data is available regardless of whether one or more service providers were involved in the transmission of suspected communication; and b) expeditious disclosure of a sufficient amount of such data is enabled to the Party's competent authority, or a person designated by that authority, to identify the service providers and the path through which the communication was transmitted.

The scope of the search of digital data covers under Article 18 collecting of the: a) specified computer data in person's possession or control, which is stored in a computer system or a computer-data storage medium; and b) subscriber information relating to services in provider's possession or control. For the purpose of this article, the term subscriber information means any information contained in the form of computer data or any other form that is held by a service provider and by which can be established: a) the type of communication service used, the technical provisions taken thereto and the period of service; b) the subscriber's identity, postal or geographic address, telephone and another access number, billing and payment information, available on the basis of the service agreement or arrangement; and c) any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

In the context of the search and seizure of stored computer data under Article 19 national law enforcement authorities are powered to: a) seize or similarly secure a computer system or part of it or a computer-data storage medium; b) make and retain a copy of those computer data; c) maintain the integrity of the relevant stored computer data; d) render inaccessible or remove those computer data in the accessed computer system.

Apart from the reactive approach regarding digital data evidence collection the Budapest Convention provides also the proactive approach reflected in real-time collection of digital data in Article 20 and 21 empowering competent authorities to compel a service provider, within its existing technical capabilities to: a) collect or record digital data; and b) cooperate and assist the competent authorities in the collection or recording of digital data in real-time. The proactive approach covered by these articles means the application of special investigation techniques, and above all, interception of digital data in cases where as may be necessary, in relation to a range of serious offences determined by domestic law.

Lastly, it should be underlined that in order to fulfill the assigned role, financial forensics should be composed of financial forensics specialists, civil servants who possess expert knowledge in the field of finances and similar financial related branches (Kostić & Matić-Bošković, 2019: 268). These specialists act with the purpose to help the Public Prosecutor in the monitoring of cash flows and analysis of financial transactions for the purpose of the criminal investigation. In

order to be eligible to carry out their tasks, financial forensics specialists should be subject to the specialised training in the field of criminal law. From the given capacity of financial forensics specialists stems several issues to which responses need to be provided. The first one is related to the nature of the assisting role of financial forensics specialists, the second one concerns possibilities for the examination of financial forensics specialists, the third one deals with the right of defence to examine the documents contained findings and opinions of financial forensics specialists, while the fourth one points out to the required conditions for conducting specialised training in the field of criminal law.

First of all, in the context of the nature of the assisting role of financial forensics specialists, it should be mentioned that they should provide their final findings and opinions to the public prosecutor in a written form. In addition, since during the course of criminal proceedings it may occur a need for additional clarifications of these findings and opinions, which due to special knowledge may only be provided by financial forensic specialists, they should be considered eligible for examination in the capacity of experts. Moreover, in this context, it should be allowed to defense side the right to deliver of these findings and opinions of financial forensics specialists and reviewing such case files documents in order to challenge it, if necessary. Finally, when it comes to specialised training in the field of criminal law it seems that it is not enough just to attend training in criminal law to be declared as financial forensics specialist, but to complete it successfully as well, demonstrating high level of acquired knowledge on the final exam (Paunović, 2019: 290).

CONCLUSION

The analysis conducted in this paper confirmed that in contemporary society cases of financial cybercrime have become part of our daily lives which makes it difficult process of identifying and proving this type of crime. Every phenomenological form of financial cybercrime acquires new subforms very quickly as soon as previous patterns of execution are registered by law enforcement authorities. This is exactly the case with phishing, which, after its scheme of the commission was revealed, acquired new forms in the form of smishing and vishing. New forms of financial cybercrime enable criminals to be one step ahead of law enforcement authorities who need time to uncover new enforcement schemes.

For that reason, the key issue is how to act preventively in the fight against financial cybercrime, which is becoming the uppermost type of crime in cyberspace nowadays. Firstly, in terms of prevention, it is necessary to conduct awareness-raising

campaigns on the importance of the issue of financial cybercrime. This is important to implement in practice since the abovementioned financial cybercrimes are often accompanied by misleading victims, where perpetrators by taking advantage of the lack of experience, recklessness or dependence of their victims play on their trust in order to gain financial gain for themselves or another individual. In that sense, it is necessary to make visible to individuals and companies not only the existing patterns of financial cybercrime cases, but also the ones that have just appeared so that they would be aware of all threats of this type of crime in a timely manner.

Furthermore, in a situation when traditional evidence techniques do not play an important role and when the application of special knowledge and skills in the field of financial business management becomes a priority in the fight against financial cybercrime, the tasks of financial forensics experts are even more important. The financial forensics specialists as the entities who should be able to apply knowledge in the field of accounting, finance, banking and related branches, as well as in the field of criminal law assisting the public prosecutor in prosecuting the crimes of the financial cybercrime and in gathering digital financial evidence. The role of these specialists in the collection of digital evidence is crucial as the admissibility of this evidence before a court requires that the criteria of authenticity, compatibility and persuasiveness need to be met. In order to be convincing, reliable and acceptable to the court, there must be no doubt about the credibility and truthfulness of collected evidence, which can only be provided by financial experts who are specialized in identifying and collecting digital evidence.

However, although financial forensics is a developing discipline and despite the fact that there are more and more financial specialists assisting prosecutors in gathering digital evidence, the issue of defining the procedural capacity of this entity in criminal proceedings remains blurred. In that sense, it is necessary to legally specify that in criminal proceedings the procedural role and capacity of the financial forensics specialists should be subsumed under the tasks of experts. This is particularly important in the context of respecting the rights of the defense, which should be able to comment on the findings and opinion of financial forensics specialists. In any case, since the number of financial cybercrime is on the rise, the idea of applying the knowledge and achievements of financial forensics in criminal proceedings should be positively assessed, along with the acceptance of the proposed suggestions concerning the capacity of these entities, in order to avoid procedural abuses in the criminal proceedings.

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PRIMENA FINANSIJSKE FORENZIKE U BORBI PROTIV FINANSIJSKOG KRIMINALITETA U SAJBER PROSTORU

Savremeno informaciono društvo, kao i brzi razvoj informacionih i komunikacionih tehnologija, utciali su na porast finansijskog sajber kriminaliteta. Ohrabreni dostupnošču različitih mogućnosti za obavljanje finansijskih transakcija u sajber prostoru, izvršioci te vrste krivičnih dela, u poslednje vreme, sve više posvećuju posebnu pažnju napadima usmerenim na kompjuterske podatke i sisteme u cilju sticanja nezakonite materijalne koristi. Među širokim spektrom mogućnosti da izvršioci izvrše delo koje se može svrstati u finansijski kriminalitet u sajber prostoru danas su u porastu sledeća tri oblika: fišing, smišing i višing. Imajući u vidu tu činjenicu, u prvom delu rada analiziramo fenomenoloďke oblike finansijskog kriminaliteta u sajber prostoru. S obzirom na to, da u kontekstu otkrivanja finansijskog kriminaliteta

u sajber prostoru, oblast finansijske forenzike ima poseban značaj u suzbijanju te vrste kriminaliteta, u drugom delu rada se analizira uloga finanansijskog forenzičara kao ličnog oličenja kriminaliteta, institucionalnom okviru službe finansijske forenzike i njenoj ulozi u analizi novčanih tokova i finansijskih transakcija uz osvrt na njegov položaj u krivičnom postupku. U vezi sa tim, pažnja je posvećena i analizi uslova za prihvatljivost digitalnih dokaza u krivičnom postupku. U zaključnim napomenama ukazujemo na značaj primene proaktivnog pristupa u borbi protiv finansijskog kriminaliteta u sajber prostoru kroz primenu znanja i dostignuća iz oblasti finansijske forenzike, kao i korišćenja digitalnih dokaza u krivičnom postupku.

KLJUČNE REČI: finansijski kriminalitet; sajber kriminalitet; finansijska forenzika; kompjuterski sistemi; digitalni dokazi.

THE ROLE OF FINANCIAL FORENSIC EXPERTS AND EUROPOL IN COMBATING FINANCIAL CRIME*

Filip Mirić, LL.D**
Valentina Ranaldi, PhD***

The Act on the Organization and Competences of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption (Official Gazette of the RS, No. 94/2016, 87/2018-other act) provides for the introduction of financial forensic expert. It is a person who assists the public prosecutor in the analysis of money flows, in order to create conditions for the criminal prosecution of perpetrators of crimes in the field of financial crime. However, many other issues related to the work of financial forensic experts remain unclear (probative value of financial reports, the problem of dealing with other participants in criminal proceedings, compensation for the work of financial forensic experts, etc.). Bearing in mind, the character of the paper, the legal-dogmatic method will be applied in it. The comparative law method will be used in the analysis of different legal solutions from the legal systems of other countries. In this way, it will be possible to fully understand the normative framework that is important for the work of financial forensic experts.

The authors will analyze the legal position of financial forensic experts, according to the provisions of the Law on Organization and Competences of State Bodies in Combating Organized Crime, Terrorism and Corruption, as well as the relationship between these legal provisions and the provisions contained in the laws governing criminal proceedings and main role of EUROPOL in combating of financial crime. The aim of the paper is to indicate possible solutions to open issues related to the work and legal status of financial forensic experts. The cooperation of all state bodies is a necessary precondition for the suppression of financial crime and its consequences for the financial stability of the state.

KEYWORDS: legislation; financial crime; financial forensic experts; EUROPOL.

* Paragraph 1 and 2 about social context of financial crime and the role of EUROPOL are by Valentina Ranaldi; paragraph 3, 4 and 5, as well as Introduction and Concluding remarks are by Filip Mirić.

** LL.D, Research Associate, Associate at Post Graduate Studies Services, Faculty of Law, University of Niš, e-mail: *filip.miric@gmail.com, filip@prafak.ni.ac.rs.*

*** Ph.D, Research Fellow at "Niccolò Cusano" University, Faculty of Law, Rome, Italy, e-mail: *valentina.ranaldi@unicusano.it.*

INTRODUCTION

Financial forensic experts have a very important role in those court proceedings that endanger the economy and the state fiscal system. The Law on the Organization and Competences of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption (Official Gazette of the RS No. 94/2016, 87/2018-other law) provides for the introduction of financial forensic expert. It is a person who assists the public prosecutor in the analysis of money flows, in order to create conditions for the criminal prosecution of perpetrators of criminal acts in the field of financial crime. However, many other issues related to the work of financial forensic experts remain unclear (probative value of financial reports, the problem of dealing with other participants in criminal proceedings, compensation for the work of financial forensic experts, etc.). Taking into account the character of the work, the legal-dogmatic method will be applied in it. The comparative law method will be used in the analysis of different legal solutions from the legal systems of other countries. In this way, it will be possible to fully understand the normative framework that is important for the work of financial forensic experts.

The paper analyzes the legal position of financial forensic experts, according to the provisions of the Law on Organization and Competences of State Bodies in Combating Organized Crime, Terrorism and Corruption, as well as the relationship between these legal solutions and the solutions contained in the laws regulating criminal procedure. The aim of this paper is to point out possible solutions to open issues related to the work and legal status of financial forensic experts. The cooperation of all state bodies is a necessary precondition for the suppression of financial crime and its consequences for the financial stability of the state.

1. SOCIAL CONTEXT OF FINANCIAL CRIME

Economic crime is a complex social phenomenon in its patterns, structure, forms and dynamics (Kostić, 1990: 303). Financial crime is one of the emerging forms of economic crime. The social danger of financial crime arises from the fact that it endangers the financial system, and thus the tax system of each country. The functioning of the fiscal system is essential because it provides material resources for public spending.

Determining the category of each of the types of crime is extremely important for its study. It has long been known in criminology that crime typologies do not only have academic significance. They contribute to a better systematization of

certain forms of crime and the creation of preconditions for finding effective ways to combat it. This is especially important when it comes to financial crime, having in mind its social danger and harm to the financial system as a whole (Mirić, 2018: 217). Of all the forms of financial crime, corruption stands out for its harmfulness. Forensic experts of the financial profession also have a significant role in the suppression of corrupt criminal acts, so we believe that it is important to point out some of its most important characteristics here.

The concept of corruption is given different meanings depending on the angle from which it is viewed (as a psychological, sociological, criminological, economic, legal phenomenon). Diversity in defining the concept of corruption, ie the absence of a single definition, makes it much more difficult to identify the problem itself. It also prevents appropriate legislative regulation and taking adequate measures to prevent and suppress this phenomenon. Therefore, it is important to adopt a unique and universal definition, which would be a means of understanding and communication between different entities dealing with this problem.

In the broadest sense, corruption is defined as the abuse of public service for the purpose of gaining private profit (Šoškić, 2004: 19). The emergence and development of corruption can be observed in parallel with the development of society. In each social community, some of its members wanted to gain some property or other benefit by bribery. Although there is a certain tolerance of "petty" corruption in the Serbian public, its harmfulness and social danger cannot be disputed. This corruption causes great damage to the functioning of social institutions, calling into question the basic moral principles on which civilized societies are based - honesty and integrity (Mirić, 2019: 135-136). Also, the activity of financial forensic experts is very important in proceedings due to fiscal crimes, because in this case it is important to monitor the increase in the property of perpetrators of crimes, resulting from the performance of illegal activities.[1] In the continuation of the paper, the legal position of financial forensic experts, the normative framework for their work and some aspects of financial investigations will be analyzed.

2. ROLE OF EUROPOL IN COMBATING OF FINANCIAL CRIME

Financial crime is a form of organized crime. EUROPOL has a very important role in combating of this form of crime as well (Ambos, 2018: 589; Bonifazi, 2000: 15; Marotta, 2011: 271; Nunziata, 1998: 111; Richardot, 2002: 77-86; Vigna, 1998: 951-955). Highly sophisticated cases of money laundering, scams and frauds that

[1] More about fiscal crimes in: Šuput, 2015.

target individuals, companies and the public sector continue to threaten the growth of the economy and the integrity of our financial system.

Every year, law enforcement in the EU carry out hundreds of international financial crime investigations often leading to exceptional results, arrests and dismantling criminal groups (Coman-Kund, 2018: 10; De Amicis, 2007: 309; McDaniel, Stonard, Cox, 2020: 23). But the EU still shows mediocre results when it comes to recovering criminal assets – criminals keep over 98% of their assets.

To respond to this threat, Europol has been entrusted by EU Member States to create the European Financial and Economic Crime Centre (EFECC). This development follows Europol's Strategy 2020+ and has been welcomed by EU institutions and key private financial stakeholders alike. The mission of EFECC is cooperation and support of EU members polices. EFECC will enhance Europol's operational support to EU Member States and EU bodies in financial and economic crime and promote the consistent use of financial investigations. The center will forge alliances with public and private entities to trace, seize and confiscate criminal assets in the EU and beyond.

EFECC Operations is Europol's initiative in the fight against economic and financial crime. It is an operational platform to support Member States in ongoing cases in the areas of tax crime (MTIC and excise), fraud, corruption, money laundering, asset recovery, euro counterfeiting and intellectual property crime. The only pre-requisites to be eligible for EFECC Operations support are that the case affects one or more Member States and involves a criminal offence in respect of which Europol is competent.

EFECC Operations was established in June 2020 to provide EU Member States with a pan-European platform to integrate and analyse dedicated economic and financial crime data. EFECC Operations provides a platform through which operational data pertaining to suspicious transaction/ activity reports filed by financial intelligent units (FIUs), reports on cash detections (usually from customs authorities) and ongoing economic and financial crime investigations from all relevant agencies (including but not limited to: customs, tax and police services) across the EU and beyond are treated, analysed and processed.

This platform serves the primary purpose of supporting and assisting competent authorities on the prevention and investigation of transnational criminal organizations involved in economic and financial crime.

Beyond processing and cross-checking your information, EFECC Operations can provide a more tailored service to assist your investigations and assist in identifying and disrupting serious forms of international economic and financial crimes perpetrated by high-value targets and serious and organized criminal groups.

EFECC Operations will discuss the case with its European liaison offices and field officers to find the best solution depending on the needs of the investigators

and the status of enquiries. All analysis is dependent on the availability of data and the specific needs of the provider. Typically, services provided can include:

- financial intelligence reports: providing a detailed overview of links to financial intelligence (primarily suspicious transaction reporting);
- operational and coordination meetings (funded by Europol): should the need arise, meetings between key countries to plan operational activities and jointly develop cases can be arranged;
- operational analysis reports: for example, reports focusing on intelligence analysis, links analysis, geographical and transaction analysis, social network analysis, dependent on information provided and objectives of the case;
- early warning notifications: rapidly disseminated reports relating to new crime trends and patterns as well as regards unusual criminal modus operandi;
- mobile office deployment (and UFED) for days off action/on the spot expertise: EFECC Operations can deploy Europol systems in support of action days – enabling direct connection to Europol systems on the spot. Forensic expertise and UFED capacity can also be provided;
- situation reports: for example, in cases where numerous Member States are affected, providing a clear global overview of the groups and phenomenon;
- strategic analysis and knowledge products: non-operational analysis of trends, methods and threats relating to money laundering;

EFECC operations provides week-long financial intelligence training courses each year. They also contribute to CEPOL money laundering courses, both in designing preparatory materials and delivering training EFECC Operations builds on Europol's well-equipped Analysis Projects (MTIC, SMOKE, APATE, Corruption, Sustrans, ARO, SOYA and COPY), delivering specialized operational support to national competent authorities with a common goal of countering economic and financial crimes. In this framework, the partnership being established between Europol and the European Public Prosecutor's Office (EPPO) is crucial. The cooperation between Europol and EPPO is considered to be a step forward in the investigation and prosecution of crimes affecting the financial interests of the EU.[2]

Combating of financial crime is a complex task. Cooperation of EU members is pre-condition of it. European Financial and Economic Crime Centre (EFECC) is a solid mechanism for this process.

[2] European Financial and Economic Crime Centre (EFECC), https://www.europol.europa.eu/about-europol/european-financial-and-economic-crime-centre-efecc [6.11.2021.].

3. LEGAL POSITION OF FINANCIAL FORENSIC EXPERTS ACCORDING TO THE LAW ON ORGANIZATION AND JURISDICTION OF STATE AUTHORITIES IN THE COMBATING OF ORGANIZED CRIME, TERRORISM AND CORRUPTION OF REPUBLIC OF SERBIA

The Law on the Organization and Competences of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption also regulates the legal position of financial forensic experts (Official Gazette of the Republic of Serbia No. 94/2016, 87/2018 - other law). The Financial Forensics Service may be established in the Prosecutor's Office for Organized Crime and special departments of higher public prosecutor's offices under this law. The work of the financial forensics service is performed by financial forensic experts. A financial forensic expert is a person who assists the public prosecutor in analyzing cash flows and financial transactions for the purpose of criminal prosecution. Mentioned expert is a civil servant who has special professional knowledge in the field of finance, accounting, auditing, banking, stock exchange and business operations, and who has completed specialized training at the Judicial Academy in the field of criminal law (Article 19 of the Law). Liaison officers and task forces should be distinguished from financial forensic experts.

Tax Administration - Tax Police, Customs Administration, National Bank of Serbia, Anti-Money Laundering Administration, Business Registers Agency, Central Registry, Depot and Securities Clearing, State Audit Institution, Republic Geodetic Authority, Anti-Corruption Agency, Republic Fund for Anti-Corruption Pension and Disability Insurance, the Republic Health Insurance Fund, the Republic Property Directorate of the Republic of Serbia and the Public Procurement Directorate must appoint at least one liaison officer, in order to achieve cooperation and more efficient submission of data of these bodies and organizations to the Prosecutor's Office for Organized Crime and Special Departments. public prosecutor's offices for the suppression of corruption for the purpose of criminal prosecution for criminal offenses prescribed by this law. Exceptionally, at the request of the competent public prosecutor, liaison officers must be appointed in other bodies and organizations. If necessary, liaison officers who have the status of a civil servant may be temporarily transferred to the Prosecutor's Office for Organized Crime and a special department of the Higher Public Prosecutor's Office for the Suppression of Corruption. In case of transfer, it is done at the request of the competent public prosecutor. Temporary transfer lasts for a maximum of three years. The decision on temporary transfer is made by the body from which the employee is sent, with the written consent of the employee and the competent public prosecutor (Article 20 of the Law).

Task forces may be formed in the Prosecutor's Office for Organized Crime and special departments of higher public prosecutor's offices for the suppression of corruption, with the aim of working on detecting and prosecuting criminal acts that are the subject of the work of the task force. The task force is formed by the decision of the Prosecutor, ie by the decision of the competent senior public prosecutor, with the obtained consent of the Republic Public Prosecutor. The decision on education regulates the composition of the task force, the manner of work, the task, the period for which it is formed and other issues of importance for the work of the task force. The task force formed in the Prosecutor's Office for Organized Crime is led by the Prosecutor or his deputy. The task force formed in the special department of the higher public prosecutor's office for the suppression of corruption is headed by the public prosecutor, the head of the special department or the deputy public prosecutor assigned to the special department of the higher public prosecutor's office for the suppression of corruption. Members from the ranks of employees in state and other bodies are appointed to the composition of the task force, depending on the subject of work determined by the decision on the formation of the task force. Employees may be appointed to the task force only with their consent and the consent of the head of the body from which the employee is appointed. An employee may be completely or partially released from performing regular work in the state and other body in which they are employed, based on an agreement between the competent public prosecutor and the head of the state and other body. Functions that perform the function in courts and public prosecutor's offices, ie their departments prescribed by this Law, are obliged to attend the program of permanent training conducted by the Judicial Academy (Articles 22-24 of the Law).

The question is what is the legal position of a financial forensic expert in court proceedings. Is it an expert or an expert? The Criminal Code defines the role in the procedure of the expert advisor of the accused or injured party as a prosecutor, but not of the financial forensic expert, who is the expert assistant of the prosecutor. According to the Code, an expert advisor is a person who has professional knowledge in the field in which the expertise is determined. The law regulates his rights and obligations in criminal proceedings. According to that provision, he has the right to be informed about the day, time and place of the expertise and to attend the expertise which the defendant and his defense counsel have the right to attend, to examine the files and the subject of the expertise during the expertise and to propose to the expert to take certain actions. remarks on the expert's finding and opinion, to ask questions to the expert at the main trial and expert and to be examined on the subject of expertise. According to the current solution, such rights do not belong to the financial forensic expert, although it is justified that the Criminal Code prescribes the same rights for him as well.

Sometimes it is necessary to confront the findings and the opinion of the expert and what is stated in the indictment, which was previously stated by the financial forensic expert in his report. In addition, it is possible that it is sometimes necessary to confront the findings and opinion of a financial forensic expert and expert advisor. The Code does not define the manner of their confrontation and role at the main trial, so arbitrary interpretation is possible, which is inadmissible in criminal proceedings and which can also reflect on the inconsistency of court practice (Matić Bošković & Kostić, 2019: 269-270). Arbitrary interpretation of legal norms can make it difficult to establish the material truth in a specific case, but it can ruin the reputation of the court and the judiciary as a whole. In that case, the law would turn into its negation.

The complexity of detecting and proving financial crime has influenced the legislator to establish new institutes, such as a liaison officer, a financial forensic service and strike teams (strike groups). The new institutes were introduced by a special law and their procedural position and role need to be further specified in the Criminal Procedure Code. Although the aforementioned Code prescribes the obligation for the competent authorities to act on the public prosecutor's orders and submit all data relevant to criminal prosecution and the conduct of the investigative procedure, there is a lack of adequate cooperation. Prosecutorial teams, ie. strike groups have existed as a form of international legal assistance before. Now such a possibility exists at the national level and sinks only for the Prosecutor's Office for Organized Crime, but also for special departments of higher public prosecutor's offices for the fight against corruption. What is missing in this regard are the instructions from the Republic Public Prosecutor's Office which will provide some closer criteria on the basis of which the prosecutor will be able to make a decision on the formation of these groups, with the aim of uniform treatment of public prosecutor's offices. In addition, the provisions of the Code of Criminal Procedure should define at what stage of the procedure liaison officers appear, at which financial forensic experts and what is their attitude towards other subjects of criminal procedure. In particular, it is necessary to define the relationship between a professional advisor and a financial forensic expert, as well as the relationship between a financial forensic scientist and an expert. The new institutes established by the Law on the Organization and Competences of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption represent very useful mechanisms in the fight against financial crime and corruption, but it seems that additional guidelines are needed to achieve this goal (Matic Boskovic & Kostić, 2019: 274).

4. RECOMMENDATIONS FOR IMPROVING FINANCIAL INVESTIGATIONS

In addition to achieving the goals of the Strategy, which impose appropriate implementation obligations, the Strategy also states certain recommendations that refer to government bodies, especially the public prosecutor's office, but are not binding. The purpose of the recommendations is to encourage a proactive way of working of the authorities:

- Use of publicly available information - It is recommended that public prosecutors and deputy public prosecutors use publicly available information. The main sources of this information are the internet and the mass media;
- Use of databases for analysis - Publicly available national and international databases are a significant source of information. These databases contain information from public registers (for example, economic entities, taxpayers, statistical offices), which represent a mechanism for analyzing information. The advantage of these databases is reflected in their easy availability and
- Fundamental checks of officials - It is crucial to monitor changes in the life habits of officials under investigation for corruption.[3] It is recommended to check for signs of previous behavior, cash flow in bank accounts, credit card payments, phone calls, travel, etc. These are just some of the most important recommendations for improving financial investigations, in order to more effectively combat financial crime. The analysis of all phases of financial investigations would require an extensive research, which would greatly exceed the character and scope of this work. For that reason, in the continuation of the paper, there will be some more words about the analysis of the lifestyle of the person under investigation, which is multidisciplinary in nature because it has its legal, criminal, but also psychological aspect.

5. LIFESTYLE ANALYSIS AS A SEGMENT OF FINANCIAL INVESTIGATION

After the last amendments to the Act on Confiscation of Property Derived from a Criminal Offense, in Art. 17 which defines the procedure of financial investigation, it is stated, among other things, that in the financial investigation,

[3] Radna verzija Strategije finansijskih istraga 2015-2016 (Draft version of the Financial Investigation Strategy 2015-2016, https://www.mpravde.gov.rs/files/Radna%20verzija%20-%20Strategija%20finansijskih%20istraga.docx, accessed 10.06.2021.

evidence is collected on the lifestyle of the defendant.[4] This sentence in the Law has a very great meaning for two reasons: 1. As stated at the beginning of the chapter, the public has for many years clearly recognized situations when certain persons engaged in crime lead a luxurious lifestyle that they often do not hide; 2. In the international context, the way of life has long been recognized as one of the bases for proving a crime and confiscation of property of illegal origin. If we start from the basic motive for committing criminal acts of corruption, and that is the acquisition of material wealth and power, we come to one of the most important results, and that is a change in lifestyle. Illegally acquired money is invested in various ways, from buying real estate, expensive cars, through luxury spending, etc. As a rule, this way of life is transferred to other connected persons, and it is often even more pronounced with them. We come to the paradoxical situation that it is easier to hide a purchased real estate or account abroad from expensive cars and high daily expenses. The aim of this analysis is to show the disproportion between assets and income as illustrated by the following bar chart. The diagram shows legal income and acquired assets. The disproportion between these two parameters is clearly stated. The result of this disproportion indicates the possibility of temporary confiscation of property. Additional analysis of this disproportion (for example, the cost of living analyzed through transactions on accounts, income in the form of cash payments to the account, etc.) can be one of the basic elements in proving criminal activity when it comes to money laundering. 2019: 68). This analysis is one of the key segments of financial investigations.

When we talk about the evidentiary basis of the report of financial forensics, several important facts should be pointed out. The evidence on which the verdict is based must be lawful. The CPC has defined evidence on which the verdict cannot be based, but the question of the legality of evidence can also be raised in relation to other evidence whose legality is not explicitly stated in the CPC. In evidentiary actions conducted by the bodies of procedure, legality is assessed on the basis of compliance with the legal procedure of presenting evidence, which includes the competence of the body, the presence of persons whose presence is determined by law, instructions and warnings by the body and acceptance or rejection of the instructed person. and methodologies, ie the manner of presenting evidence and verifications in the form of minutes with the signatures of persons, when the CPC provides for that. In relation to evidentiary actions conducted exclusively by order of a court or public prosecutor, before considering the conditions of authorization of the body conducting them, time limit for the duration of the action and timely reporting - when provided by law - the legality of the order for taking the evidentiary

[4] Zakon o oduzimanju imovine proistekle iz krivičnog dela [Act on Confiscation of Criminal Property], *Official Gazette of the Republic of Serbia*, no. 32/2013, 94/2016, 35/2019.

action is assessed. It must meet all the legal requirements listed in the CPC, but the order must also be reasoned, which is a clear position of the European Court of Human Rights (Sinanović *et al*., 2019: 93).

CONCLUSION

Financial crime is one of the most complex forms of crime because it undermines the economic power of the state. The role of financial forensic experts is especially important in the process of its suppression. The Code of Criminal Procedure prescribes the engagement of experts who assist the court in establishing all relevant facts in court proceedings. Unfortunately, in Serbia, the activity of financial forensic experts is only in its infancy, although there is a very good normative framework for that. The use of publicly available data and information databases, as well as checking the assets of public officials, would, on the one hand, improve the efficiency of the work of financial forensic experts, and on the other hand, affect the suppression of financial crime as a whole.

The work of financial forensic experts is further complicated in the Republic of Serbia by the fact that they are not granted the status of expert associate, although they help prosecutors to a large extent in financial investigations. giving evidence in criminal proceedings). Recognizing the status of financial forensic experts as professionals would greatly contribute to the efficiency of criminal proceedings. This can be a useful suggestion to the legislator during the next amendment of the Criminal Procedure Code.

Specialization and further training of financial forensic experts would create a better condition for their greater engagement in criminal proceedings, which will contribute to more efficient suppression of financial crime, which has a devastating effect on the economy and the living standards of citizens and society as a whole.

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ULOGA FINANSIJSKIH FORENZIČARA I EUROPOLA U SUZBIJANJU FINANSIJSKOG KRIMINALITETA

Zakonom o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala, terorizma i korupcije (Službeni glasnik RS br. 94/2016, 87/2018-dr. zakon) predviđeno je uvođenje finansijskih forenzičara. To je lice koje pomaže javnom tužiocu u analizi tokova novca, kako bi se stvorili uslovi za krivično gonjenje učinilaca krivičnih dela iz oblasti finansijskog kriminaliteta. Međutim, ostaju nejasna i mnoga druga pitanja u vezi sa radom finansijskih forenzičara (dokazna snaga finansijskih izveštaja, problem suočavanja sa drugim učesnicima u krivičnom postupku, naknada za rad finansijskih forenzičara itd). Uzimajući u obzir karakter rada, u njemu će biti primenjivan pravno-dogmatski metod. Uporednopravni metod će biti korišćen prilikom analize različitih zakonskih rešenja iz pravnih sistema drugih zemalja. Na ovaj način omogućiće se potpuno sagledavanje normativnog okvira od značaja za rad finansijskih forenzičara.

Autori će u radu analizirati pravni položaj finansijskih forenzičara, prema odredbama Zakona o organizaciji i nadležnosti državnih organa u suzbijanju organizovanog kriminala, terorizma i korupcije, kao i odnos ovih zakonskih rešenja i rešenja sadržanih u zakonima kojima se reguliše krivični postupak i uloge EUROPOL-a u suzbijanju finansijskog kriminaliteta. Cilj rada je da se ukaže na moguća rešenja otvorenih pitanja u vezi sa radom i pravnim statusom finansijskih forenzičara. Sadejstvo svih državnih organa je neophodan preduslov za suzbijanje finansijskog kriminaliteta i njegovih posledica po finansijsku stabilnost države.

KLJUČNE REČI: zakonodavstvo; finansijski kriminalitet; finansijski forenzičari; EUROPOL.

KAZNENA POLITIKA SUDOVA ZA PORESKA KRIVIČNA DELA U SRBIJI*

Dragan Jovašević**

Osnovno i dopunsko krivično zakonodavstvo u Republici Srbiji predviđa više poreskih krivičnih dela, za čije su učinioce propisane određene kazne, ali i druge krivične sankcije. U radu se analiziraju statistički podaci o obimu, dinamici i strukturi poreskih krivičnih dela, te načinu okončanja krivičnih postupaka prema njihovim učiniocima, kao i konkretno izrečenim kaznama zatvora, novčanim kaznama, te drugim sankcijama u Republici Srbiji u periodu 2006-2018.godine. Ova analiza pruža dragocene informacije o načinu tumačenja i primeni zakonskih propisa na konkretne slučajeve presuđenja poreskih krivičnih dela koja se ispoljavaju u sudskoj praksi koje mogu da daju putokaz zakonodavcu u noveliranju zakonskih rešenja.

KLJUČNE REČI: porez; krivično delo; statistika; propisane kazne; izrečene kazne; kaznena politika sudova.

UVOD

U pravnom sistemu Republike Srbije razlikuju se dve vrste poreskih krivičnih dela, zavisno od vrste zakona koji ih određuju. Svim ovim delima se štiti zakonito, uredno, kvalitetno, efikasno, blagovremeno i celishodno funkcionisanje poreskog (fiskalnog) sistema kao važnog segmenta privrede, odnosno poslovanja u državi uopšte. Evazija poreza ili različiti oblici i vidovi, odnosno načini izbegavanja utvrđivanja, razreza i naplaćivanja poreza i drugih propisanih dažbina predstavljaju štetnu, protivpravnu i opasnu delatnost pojedinaca i grupa kojima se od davnina, kako u našoj, tako i u drugim državama, ugrožavaju osnovni fiskalni interesi društva.

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** Doktor pravnih nauka, redovni profesor Pravnog fakulteta Univerziteta u Nišu, e-mail: *jovas@prafak.ni.ac.rs.*

Tako Krivični zakonik[1] u glavi dvadesetdrugoj pod nazivom: „Krivična dela protiv privrede" predviđa dva krivična dela. To su: a) poreska utaja – član 225. KZ i b) neuplaćivanje poreza po odbitku – član 226. KZ.

Poreska utaja, kao osnovno fiskalno krivično delo, se sastoji u davanju lažnih podataka o stečenim prihodima, predmetima ili drugim činjenicama koje su od uticaja na utvrđivanje obaveza ili u neprijavljivanju istih u slučaju obavezne prijave ili u prikrivanju podataka koji se odnose na utvrđivanje navedenih poreskih obaveza u nameri da se za sebe ili drugog u potpunosti ili delimično izbegne plaćanje poreza, doprinosa ili drugih propisanih dažbina ako visina izbegnute obaveze prelazi iznos od milion dinara (Đorđević, Kolarić, 2020: 130). Za ovo delo zakon je propisao kumulativno kaznu zatvora u trajanju od jedne do pet godina i novčanu kaznu. Zavisno od visine neplaćenog poreza ili drugih javnih obaveza (odnosno težine, visine prouzrokovane štete kao posledice), razlikuju se dva kvalifikovana oblika ispoljavanja ovog krivičnog dela (Stojanović, Delić, 2013: 152).

Neuplaćivanje poreza po odbitku je drugo osnovno poresko krivično delo. Njega čini odgovorno lice u pravnom licu ili preduzetnik – poreski platac koji u nameri da ne izbegne plaćanje poreza po odbitku ili drugih dažbina ne uplati na propisani uplatni račun javnih prihoda iznos koji je obračunat na ime poreza po odbitku, odnosno doprinosa za obavezno socijalno osiguranje po odbitku ili ne uplati druge propisane dažbine (Jovašević, 2018: 152). Za osnovno krivično delo je propisana kumulativna kazna zatvora do tri godine i novčana kazna.

No, poreska krivična dela u Srbiji predviđa i Zakon o poreskom postupku i poreskoj administraciji[2]. To su sledeća dela: a) poreska prevara u vezi sa porezom na dodatu vrednost – član 173a., b) ugrožavanje naplate poreza i poreske kontrole – član 175., c) nedozvoljen promet akciznih proizvoda – član 176. i d) nedozvoljeno skladištenje robe – član 176a. I za ova krivična dela zakonodavac propisuje kaznu zatvora i novčanu kaznu.

1. OBIM, DINAMIKA I STRUKTURA PORESKIH KRIVIČNIH DELA

Zakonski propisi nisu samo apstraktni pojmovi sadržani u pravnim aktima, već nalaze svoje oživotvorenje u svakodnevnoj praksi u različitim oblicima i vidovima ispoljavanja. Stoga je logično da poreska krivična dela posmatramo u konkretnim pojavnim oblicima ispoljavanja u sudskoj (statističkoj) praksi. U ovoj analizi smo koristili statističke podatke objavljene u biltenima Republičkog zavoda za statistiku

[1] *Službeni glasnik RS*, br. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/1 6 i 35/19.

[2] *Službeni glasnik RS*, br. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 63/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 115/15, 15/16, 108/16, 30/18, 95/18, 86/19 i 144/20.

Republike Srbije[3], u periodu 2006-2018.godine (period primene pozitivnog krivičnog zakonodavstva). Prvo ćemo analizirati stanje privrednog kriminaliteta uopšte u Republici Srbiji.

Tabela 1. Učešće privrednih krivičnih dela u ukupnom kriminalitetu u Srbiji

godina	ukupno kriv.dela	priv. kriv. dela	%
2006.	105.701	2.868	2,71
2007.	98.702	2.663	2,70
2008.	101.723	3.099	3,04
2009.	100.026	3.131	3,13
2010.	74.279	2.479	3,34
2011.	88.207	2.957	3,35
2012.	92.879	3.221	3,47
2013.	91.411	3.397	3,72
2014.	92.600	3.347	3,61
2015.	108.759	3.526	3,18
2016.	96.237	3.333	3,43
2017.	90.348	2.939	3,27
2018.	92.874	2.767	2,93

Tabela 2. Učešće poreskih krivičnih dela u ukupnom privrednom kriminalitetu

godina	priv. kriv. dela	poreska utaja	%	neuplaćivanje poreza	%
2006.	2.868	615	21,44	-	-
2007.	2.663	695	26,09	-	-
2008.	3.099	940	30,33	-	-
2009.	3.131	1.092	34,88	-	-
2010.	2.479	658	26,54	-	-
2011.	2.957	938	31,72	105	3,55
2012.	3.221	1.132	35,14	103	3,20
2013.	3.397	1.051	30,94	106	3,12
2014.	3.347	712	21,27	62	1,85
2015.	3.526	715	20,30	63	1,53
2016.	3.333	734	22,02	52	1,50
2017.	2.939	649	22,09	30	1,03
2018.	2.767	967	34,90	39	1,41

[3] Bilten Republičkog zavoda za statistiku broj 490, Beograd, 2009.; Bilten Republičkog zavoda za statistiku broj 502, Beograd, 2009.; Bilten Republičkog zavoda za statistiku broj 514, Beograd, 2010.; Bilten Republičkog zavoda za statistiku broj 529, Beograd, 2010.; Bilten Republičkog zavoda za statistiku broj 546, Beograd, 2011.; Bilten Republičkog zavoda za statistiku broj 558, Beograd, 2012.; Bilten Republičkog zavoda za statistiku broj 576, Beograd, 2013.; Bilten Republičkog zavoda za statistiku broj 588, Beograd, 2014.; Bilten Republičkog zavoda za statistiku broj 603, Beograd, 2015.; Bilten Republičkog zavoda za statistiku broj 617, Beograd, 2016.; Bilten Republičkog zavoda za statistiku broj 630, Beograd, 2017.; Bilten Republičkog zavoda za statistiku broj 643, Beograd, 2018.; i Bilten Republičkog zavoda za statistiku broj 653, Beograd, 2019.

Iz navedenih podataka o tendencijama i dinamici privrednog kriminaliteta uopšte, a time i poreskog kriminaliteta u Srbiji u periodu 2006-2018.godine možemo zaključiti sledeće:

a) u ovom periodu je nastavljen trend opadanja broja izvršenih krivičnih dela uopšte u Srbiji. Tako je najviše krivičnih dela evidentirano upravo prve posmatrane godine – 2006.godine i to 105.701 delo, dok je najmanje krivičnih dela izvršeno 2013.godine – 91.411 delo,

b) nasuprot ovakvom trendu koji je prisutan kod kriminaliteta uopšte, broj privrednih krivičnih dela u ovom periodu pokazuje suprotnu tendenciju i on raste. Tako je 2007.godine izvršeno 2663 privredna krivična dela, a 2013.godine -3.397 dela ove vrste – što pokazuje povećanje za više od 30 %, da bi se ovaj broj do kraja posmatranog perioda smanjivao do 2.767 dela u toku 2018.godine,

c) interesantno je da je u ovom periodu u odnosu na period 1996-2005.godine zabeleženo znatno manje učešće privrednih krivičnih dela u ukupnom kriminalitetu. Sada privredni kriminalitet obuhvata samo 2,70 % ukupnog kriminaliteta - 2007. godine, odnosno maksimalno 3,72 % - 2013.godine, što predstavlja pozitivan pomak u suzbijanju ove vrste kriminaliteta. Ipak se može reći da je udeo privrednih krivičnih dela u ukupnom kriminlitetu gotovo simboličan,

d) u ovom periodu privredna krivična dela pokazuju trend rasta, pa je tako evidentirano 2.868 delo ove vrste 2006.godine, a 2014.godine – 3.347 dela, što pokazuje rast od oko 20 %,

e) u ovom periodu Krivični zakonik predviđa dva poreska krivična dela. To su poreska utaja i neuplaćivanje poreza po odbitku za koje se vodi statistička evidencija. Pri tome treba reći da ovo drugo poresko krivično delo figurira u statistici kriminaliteta tek od 2011.godine (kada je uneto u naš pravni sistem novelom Krivičnog zakonika) i to gotovo na simboličan način sa svega 3,55% učešća u privrednom kriminalitetu 2011.godine do 1,85 % učešća 2014.godine i

f) najznačajnije poresko krivično delo – poreska utaja je u periodu 2006-2018. godine pokazivala različite tendencije. Tako je najmanje dela ove vrste evidentirano upravo 2006.godine kada je izvršeno 615 poreskih utaja, ali koje delo učestvuje sa 21,44 % u privrednom kriminalitetu. To znači da je svako peto privredno krivično delo, zapravo, poreska utaja. Najviše je poreskih utaja evidentirano 2012.godine -1.132 kada ovo krivično delo učestvuje sa 35,14 % u ukupnom privrednom kriminalitetu (dakle, svako treće privredno krivično delo je bila poreska utaja).

2. POLITIKA KRIVIČNOG GONJENJA ZA PORESKA KRIVIČNA DELA

Za efikasnu borbu protiv kriminaliteta uopšte društvu stoje na raspolaganju različita sredstva, mere i postupci, a u prvom redu sistem krivičnih sankcija i ovlašćenja javnog tužilaštva u krivičnom gonjenju učinilaca krivičnih dela. Takva je situacija i sa suzbijanjem privrednog kriminaliteta, a u okviru njega i poreskih krivičnih dela.

Tabela 3. Odnos prijavljenih i optuženih lica za privredna krivična dela i poresku utaju

	Priv. kriv. Dela		Poreska utaja	
Godina	Prijavljena lica	Optužena lica	Prijavljena lica	Optužena lica
2006.	2.868	2.290	615	190
2007.	2.663	1.649	695	284
2008.	3.099	1.838	940	410
2009.	3.131	1.702	1.092	438
2010.	2.479	901	658	208
2011.	2.957	1.499	938	449
2012.	3.221	1.589	1.132	499
2013.	3.397	2.240	1.051	705
2014.	3.347	2.748	712	788
2015.	3.526	2.570	715	778
2016.	3.333	2.375	734	643
2017.	2.939	2.015	649	551
2018.	2.767	1.683	967	417

Tabela 4. Odnos prijavljenih, optuženih i osuđenih lica za poresku utaju

Godina	Prijavljena lica	Optužena lica	Osuđena lica
2006.	615	190	102
2007.	695	284	193
2008.	940	410	279
2009.	1.092	438	293
2010.	658	208	119
2011.	938	449	262
2012.	1.132	499	246
2013.	1.051	705	290
2014.	712	788	400
2015.	715	778	449
2016.	734	643	419
2017.	649	551	392
2018.	967	417	266

Analizirajući podatke o efikasnosti krivičnog progona učinilaca kako privrednih, tako i poreskih krivičnih dela u Srbiji zaključujemo sledeće:

a) kod privrednih krivičnih dela u periodu 2006-2018.godine beleži se trend rasta broja prijavljenih učinilaca od 2.868 lica (2006.godine) do 3.347 lica (2014. godine). Sličnu tendenciju pokazuje i analiza broja optuženih lica za privredna krivična dela gde je 2.290 lica optuženo 2006.godine, a 2014.godine je optuženo 2.748 lice. Pri tome se jasno uočava da je od ukupno prijavljenih lica za privredni kriminalitet, optuženo oko 80 % lica,

b) kod krivičnog dela poreske utaje slična je situacija jer raspoloživi podaci pokazuju trend rasta broja prijavljenih lica za ovo delo od 615 lica (2006.godine) do 1.132 lica (2012.godine). Za razliku od prijavljenih lica, znatno veći trend rasta je zabeležen kod optuženih lica za poresku utaju, pa se taj broj od 190 lica u toku 2006.godine povećao na 788 lica 2014.godine (dakle, povećao se za četiri puta) ili na 967 lica u toku 2018. godine (skoro pet puta) i

c) pored povećanja broja prijavljenih i optuženih lica za poresku utaju, s druge strane, prisutan je trend malog broja osuđivanih lica. Tako je tek svaki šesti prijavljeni učinilac za poresku utaju (615 lica) 2006.godine upravo i bio osuđen za ovo krivično delo (102 lica). Slična je situacija bila i 2012.godine, kada je inače zabeležen najveći broj prijavljenih krivičnih dela ove vrste. Najviše je osuđeno lica – 400 od prijavljenih 712 bilo 2014.godine, što pokazuje da je procenat osuđenih lica prešao 50 % od prijavljenih lica. Ipak, to ne umanjuje opšti zaključak o malom broju osuđenih lica za poreska krivična dela, što može stimulativno da deluje na potencijalne učinioce ovih, kao i drugih privrednih krivičnih dela.

Sledeći podaci nam mogu dati ilustraciju politike krivičnog gonjenja učinilaca privrednih, a time i poreskih krivičnih dela. Tome doprinosi uporedna analiza odnosa broja prijavljenih krivičnih dela ove vrste, u odnosu na koji broj je značajan broj odbačenih prijava iz zakonom predviđenih razloga od srane javnog tužioca, ali je i veliki broj prekida, odnosno obustavljenih istraga. Sve to dovodi do relativno manjeg broja optuženih u odnosu na prijavljena lica za ova krivična dela.

Tabela 5. Kretanje poreskih krivičnih dela

Godina	Poreska utaja	Neuplaćivanje poreza po odbitku
2006.	615	0
2007.	695	0
2008.	940	0
2009.	1.092	0
2010.	658	0
2011.	938	105
2012.	1.132	103
2013.	1.051	106
2014.	712	62
2015.	715	74
2016.	734	44
2017.	649	42
2018.	967	24

Tabela 6. Način rešavanja privrednih krivičnih dela

Godina	Broj prijava	Odbačena prijava	Prekid istrage	Obustava istrage	Optuženje
2006.	2.868	666	16	199	1.944
2007.	2.663	587	28	160	1.809
2008.	3.099	559	37	198	2.221
2009.	3.131	599	38	195	2.181
2010.	2.479	532	4	84	1.759
2011.	2.957	743	1	104	1.992
2012.	3.221	981	3	97	1.977
2013.	3.397	983	0	73	2.104
2014.	3.347	1.459	1	55	1.300
2015.	3.526	1.591	1	65	1.464
2016.	3.333	1.451	5	73	1.450
2017.	2.939	1.239	2	53	1.266
2018.	2.767	1.258	0	58	1.101

Slična je situacija u pogledu analize odnosa broja prijavljenih lica za krivično delo poreske utaje u odnosu na broj optuženih lica jer je relativno veliki broj odbačenih krivičnih prijava za ovo delo, kao i veliki broj prekida (ipak manje u odnosu na obustavu) i obustava istrage iz zakonom predviđenih razloga[4].

[4] Zakonik o krivičnom postupku, *Službeni glasnik RS*, br. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 i 62/21 predviđa: a) prekid istrage (član 307.) i b) obustavu istrage (član 308).

Tabela 7. Način rešavanja krivičnih dela poreske utaje

Godina	Broj prijava	Odbačena prijava	Prekid istrage	Obustava istrage	Optuženje
2006.	615	77	2	13	523
2007.	695	95	17	34	548
2008.	940	109	17	60	752
2009.	1.092	164	22	43	861
2010.	658	95	0	32	529
2011.	938	155	1	37	744
2012.	1.132	283	1	33	391
2013.	1.051	285	0	40	725
2014.	712	341	0	12	357
2015.	715	341	0	24	350
2016.	734	367	4	21	339
2017.	649	309	0	16	318
2018.	967	554	0	11	384

Tabela 8. Odnos broja prijavljenih, optuženih i osuđenih lica za privredna krivična dela

Godina	Prijavljena lica	Optužena lica	Osuđena lica
2006.	2.868	2.290	1.464
2007.	2.663	1.649	1.161
2008.	3.099	1.838	1.287
2009.	3.131	1.702	1.228
2010.	2.479	901	589
2011.	2.957	1.499	999
2012.	3.221	1.589	932
2013.	3.397	2.240	1.169
2014.	3.347	2.748	1.543
2015.	3.526	2.570	1.609
2016.	3.333	2.375	1.592
2017.	2.939	2.015	1.448
2018.	2.767	1.683	1.144

Tabela 9. Način rešavanja privrednih krivičnih dela

Godina	Broj prijava	Obustava postupka	Oslobođenje od optužbe	Odbijena optužba
2006.	2.868	377	215	221
2007.	2.663	187	170	123
2008.	3.099	189	201	152
2009.	3.131	145	177	144
2010.	2.479	113	95	94
2011.	2.957	162	156	179
2012.	3.221	234	206	205
2013.	3.397	298	297	463
2014.	3.347	357	388	446
2015.	3.526	201	355	296
2016.	3.333	192	333	222
2017.	2.939	123	262	141
2018.	2.767	138	247	116

Kod analize efikasnosti krivičnog postupka za privredna krivična dela prikazani podaci nam daju osnova da zaključimo kako je najviše prijavljenih lica za ova dela bilo evidentirano 2013.godine i to 3.397, dok je 2014.godine bilo najviše optuženih lica – 2748 i najviše osuđenih lica – 1.543. No, interesantno je da je 2010.godine samo 20 % (ili 589) lica osuđeno od ukupnog broja prijavljenih lica – 2.479 za privredna krivična dela. Slična je situacija zabeležena i 2011.godine kada je 999 lica osuđeno od 2.957 prijavljenih lica (što čini oko 30 %). Takođe, statistički podaci nam pokazuju da je veliki broj (procenat) presuda kojima se optuženo lice oslobađa od optužbe – najviše je bilo 2014.godine i to 388 lica što predstavlja više od 10 % ukupnog broja prijavljenih lica za privredna krivična dela. Iste godine je je odbijena optužba za 446 lica (što čini oko 15 % prijavljenih lica za ova krivična dela).

Slična je situacija i kod poreske utaje (što pokazuje sledeća tabela). Tako je 2006.godine zabeležen najmanji broj prijavljenih lica za osnovno poresko krivično delo – 615 lica, ali je od tog broja optuženo samo 30 % ili 190 lica, a osuđeno je samo 102 lica (15 % od prijavljenih lica) ili svaki šesti prijavljeni učinilac poreske utaje je i osuđen za ovo krivično delo. Do drugačijeg zaključka ne možemo doći ni kada je u pitanju godina 2012.kada je uopšte najviše prijavljeno lica za krivično delo poreske utaje. Naime, te je godine prijavljeno 1.132 lica od čega je samo optuženo ili 499 lica, dok je broj osuđenih lica te godine iznosio oko 20 % od ukupnog broja prijavljenih lica – ili 246 lica.

Tabela 10. Odnos broja prijavljenih, optuženih i osuđenih lica za poresku utaju

Godina	Broj prijava	Optužena lica	Osuđena lica
2006.	615	190	102
2007.	695	284	193
2008.	940	410	279
2009.	1.092	438	293
2010.	658	208	119
2011.	938	449	262
2012.	1.132	499	246
2013.	1.051	705	290
2014.	712	788	400
2015.	715	778	449
2016.	734	643	419
2017.	649	551	392
2018.	967	417	266

3. Kaznena politika sudova za poreska krivična dela

Poslednji deo ovoga rada predstavlja analiza efikasnosti sprovedenog krivičnog postupka sa aspekta vrste i mere izrečenih kazni i drugih krivičnih sankcija njihovim učiniocima od strane nadležnih sudova. Tu je, zapravo, ispoljena konkretna individualizacija zakonom propisanih visokih kazni za učinioce poreskih krivičnih dela, a tu se ogleda i strogost kaznene politike sudova, što ukazuje na stepen vladavine prava i dostignuti nivo pravne države.

Tabela 11. Način rešavanja krivičnih dela poreske utaje

Godina	Broj prijava	Obustava postupka	Oslobođeno od optužbe	Odbijena optužba
2006.	615	45	18	25
2007.	695	32	34	25
2008.	940	31	57	43
2009.	1.092	42	53	49
2010.	658	24	33	32
2011.	938	57	61	69
2012.	1.132	71	87	94
2013.	1.051	22	110	178
2014.	712	140	96	156
2015.	715	86	88	130
2016.	734	74	46	97
2017.	649	40	52	58
2018.	967	60	54	42

Iz navedenih podataka o načinu rešavanja podnetih krivičnih prijava protiv lica za krivično delo poreska utaja kao najznačajnije poresko krivično delo u Srbiji u posmatranom periodu možemo zaključiti sledeće: a) broj obustavljenih krivičnih postupaka je relativno mali za ovo krivično delo. On se kreće od 5% u toku 2007.godine do 20 % u toku 2014.godine, b) nešto je manji broj lica koja su pravnosnažno oslobođena od optužbe. Taj broj se kreće od 3% u toku 2006.godine ili 10 % u toku 2013.godine i c) slična je situacija i sa odbijanjem optužbe. Ovde se broj presuda kojima se optužba za krivično delo poreske utaje odbija iz zakonom propisanih razloga kreće od 3 % u toku 2007.godine do 5 % u toku 2010.godine ili čak 25 % u toku 2014.godine.

Tabela 12. Izrečene kazne za poresku utaju

Godina	Zatvor od 2-3 god	Zatvor od 1-2 god	Zatvor od 6m -1 god	Zatvor od 3-6 mes	Zatvor od 2-3 mes	Novčana kazna	Sporedna novčana kazna	Rad u javnom interesu
2006.	0	0	0	8	3	12	53	0
2007.	0	2	10	12	2	18	95	0
2008.	1	9	9	11	6	28	144	0
2009.	2	9	15	14	8	33	174	1
2010.	1	4	3	6	3	8	63	0
2011.	2	8	8	6	7	16	183	1
2012.	2	10	11	15	6	8	151	1
2013.	1	9	15	19	6	11	190	0
2014.	6	18	43	40	8	25	228	0
2015.	1	14	28	23	2	23	283	0
2016.	6	12	37	13	4	12	306	0
2017.	3	16	33	18	1	13	301	0
2018.	4	17	18	11	0	14	206	0

U pogledu kaznene politike sudova za krivično delo poreske utaje, iako je zakonodavac kumulativno propisa kaznu zatvora i novčanu kaznu, možemo zaključiti sledeće: a) novčana kazna kao glavna kazna je izricana relativno retko i u malom broju slučajeva. Kao sporedna kazna uz kaznu zatvora kao glavnu kaznu, novčana kazna je izricana nešto češće, iako i ovde nedovoljno s obzirom da je njeno izricanje po zakonu obavezno, b) od ostalih kazni učiniocima krivičnog dela poreske utaje je izricana samo kazna rada u javnom interesu i to izuzetno retko. Naime, samo je po jedna kazna ove vrste izrečena je 2009., 2011 i 2012.godine, a u ostalim analiziranim godinama nije bilo izricanja ove vrste kazne i c) učiniocima najznačajnijeg poreskog krivičnog dela je najčešće izricana kazna zatvora u trajanju od 3-6 meseci (iako je njen posebni zakonom propisani minimum šest meseci za osnovni oblik dela), a potom kazna zatvora od šest meseci do jedne godine. Kazna zatvora u trajanju od 2-3 godine je retko izricana, pa tako 2006. i 2007.godine nije

izrečena nijednom, a po jednom je izrečena 2008., 2010. i 2013.godine. U toku 2014.i 2016.godine ova je kazna izečena u dva slučaja.

Tabela 13. Izrečene ostale vrste krivičnih sankcija za poresku utaju

Godina	Uslovna osuda	Mere bezbedosti
2006.	78	6
2007.	146	0
2008.	213	0
2009.	210	0
2010.	94	0
2011.	212	0
2012.	193	0
2013.	225	0
2014.	255	0
2015.	341	0
2016.	300	0
2017.	264	0
2018.	185	0

Ako se analizira politika izricanja krivičnih sankcija prema učiniocima krivičnih dela poreske utaje, može se zaključiti sledeće: a) od svih raspoloživih krivičnih sankcija sem kazni, učiniocima krivičnog dela poreske utaje izricana je najčešće uslovna osuda i to u relativno velikom procentu. Naime, udeo ove krivične sankcije se kretao od 13 % u toku 2006.godine, preko 20-22 % u toku 2009. i 2011.godine do čak 32 % u toku 2014.godine i b) iako Krivični zakonik dozvoljava mogućnost izricanja čak dve mere bezbednosti učiniocima ovog krivičnog dela (od jedanaest mera koliko ih uopšte poznaje naš krivičnopravni sistem) i to: 1) oduzimanje predmeta i 2) zabrana obavljanja poziva, delatnosti i dužnosti, samo jedne od posmatranih devet godina i to 2006.godine je izrečeno šest mera bezbednosti, bez preciznog navođenja u statističkim podacima o kojoj se konkretno meri radi.

Tabela 14. Izrečene krivične sankcije za neuplaćivanje poreza po odbitku

Godina	Zatvor od 2-3 god	Zatvor od 1-2 god	Zatvor od 6 m – 1god	Zatvor od 3-6 mes	Zatvor od 2-3 mes	Novčana kazna	Sporedna novčana kazna	Uslovna osuda
2011.	0	0	0	0	1	1	8	7
2012.	0	0	0	1	0	0	12	23
2013.	0	1	0	1	0	0	18	20
2014.	2	0	4	4	0	2	21	32
2015.	1	0	2	2	1	2	16	21
2016.	0	0	1	2	0	0	18	15
2017.	0	0	1	0	0	0	13	18
2018.	0	0	0	0	0	0	6	4

Za drugo poresko krivično delo – neuplaćivanje poreza po odbitku - koje je propisano u Krivičnom zakoniku od 2011. godine kada je za ovo delo i vođena kriminalna statistika, možemo zaključiti sledeće: a) kazna zatvora je izricana izuzetno retko i to u trajanju od dve do tri godine samo u dva slučaja i to 2014. godine, odnosno u jednom slučaju 2015.godine, b) kazna zatvora u trajanju od jedne do dve godine je izricana samo jednom i to 2013.godine, c) najčešće je izricana kazna zatvora u trajanju od tri do šest meseci, d) kao glavna kazna novčana kazna je i za ovo krivično delo izricana izuzetno retko – samo jednom 2011. godine i dva puta 2014.i 2015.godine, e) nešto je češće izricana novčana kazna kao sporedna kazna i f) za ovo krivično delo je najčešće izricana uslovna osuda i to 32 puta 2013. godine, odnosno 23 puta 2012.godine, a najmanje 2011.godine - u sedam slučajeva, odnosno 2018.godine sa četiri slučaja.

ZAKLJUČAK

U sistemu zaštite privrede u celini ili pojedinih segmenata privrednog poslovanja poseban značaj imaju poreska krivična dela predviđena u Krivičnom zakoniku i Zakonu o poreskom postuupku i poreskoj administraciji. U sudskoj i statističkoj praksi u Republici Srbiji se izdvajaju dva osnovna dela ove vrste: a) poreska utaja i b) neuplaćivanje poreza po odbitku iz Krivičnog zakonika, o čijim smo pojavnim oblicima ispoljavanja izložili u radu.

Najznačajnije poresko krivično delo – poreska utaja je u posmatranom periodu pokazivalo različite tendencije. Tako je najmanji broj od 615 dela evidentiran 2006.godine sa učešćem od 21,44 % u privrednom kriminalitetu. To znači da poreska utaja predstavlja svako peto privredno krivično delo. Najveći broj ovih dela je evidentiran 2012.godine -1.132 sa učešćem od 35,14 % u privrednom kriminalitetu (gde poreska utaja čini svako treće privredno krivično delo).

U pogledu efikasnosti krivičnog progona učinilaca poreske utaje uočava se trend rasta broja prijavljenih lica, od 615 lica – 2006.godine do 1.132 lica 2012. godine. Sličnu dinamiku pokazuje broj optuženih lica, koji se kreće od 190 lica 2006. godine do 788 lica 2014.godine (uz povećanje za četiri puta) ili na 967 lica 2018. godine. Ali pored povećanja broja prijavljenih i optuženih lica za poresku utaju i dalje je prisutan mali broj osuđivanih lica. Tako je svaki šesti prijavljeni učinilac poreske utaje (615 lica) 2006.godine upravo i bio osuđen za ovo krivično delo (102 lica). Slična je situacija bila i 2012.godine, kada je inače zabeležen najveći broj prijavljenih krivičnih dela ove vrste. Najviše je osuđeno lica – 400 od prijavljenih 712 bilo 2014.godine što pokazuje da je procenat osuđenih lica prešao 50 % od prijavljenih lica.

No, ipak se zaključuje mali broj osuđenih lica za poreska krivična dela, što može stimulativno da deluje na potencijalne učinioce ovih, kao i drugih privrednih krivičnih dela. U prilog tome govori činjenica o značajnom broju odbačenih krivičnih prijava, kao i veliki broj prekida, odnosno obustavljenih istraga za poreska krivična dela. Sve to dovodi do relativno manjeg broja optuženih u odnosu na prijavljena lica za ova krivična dela. Takođe nam podaci pokazuju da je veliki broj (procenat) presuda kojima se optuženo lice oslobađa od optužbe, odnosno kojima se optužba odbija. Tako je 2006.godine zabeležen najmanji broj prijavljenih lica za osnovno poresko krivično delo – 615 lica, ali je od tog broja optuženo samo 30 % ili 190 lica, a osuđeno je samo 102 lica (15 % od prijavljenih lica) ili svaki šesti prijavljeni učinilac poreske utaje je i osuđen za ovo krivično delo. Slična je situacija evidentirana i u drugim godinama. Analiza načina rešavanja podnetih krivičnih prijava za poresku utaju pokazuje mali broj obustavljenih krivičnih postupaka, kao i mali broj lica koja su oslobođena od optužbe, odnosno za koja je optužba odbijena.

Iako je za delo poreske utaje kumulativno propisana kazna zatvora i novčana kazna, ipak je u posmatranom period novčana kazna izricana u malom broju slučajeva, bilo kao glavna ili kao sporedna kazna. Od ostalih kazni za ovo delo je izricana samo kazna rada u javnom interesu i to retko. Najčešće je izricana kazna zatvora u trajanju od 3-6 meseci (iako je njen posebni zakonom propisani minimum šest meseci za osnovni oblik dela). Pored toga, najčešće je izricana upravo uslovna osuda (20-22 % u toku 2009. i 2011.godine do 32 % u toku 2014. godine. Od ostalih sankcija, za ovo delo je takođe izrečeno samo u toku 2006. godine šest mera bezbednosti, bez navođenja o kojoj se konkretno meri radi. Za delo neuplaćivanje poreza po odbitku (koje je uvedeno 2011.godine) sudovi su izricali, pored propisanih kumulativnih kazni zatvora i novčane kazne, retko kako kazne zatvora, tako i novčane kazne. Najčešće se pak izricana uslovna osuda.

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PENAL POLICY OF COURTS OF TAX CRIMES IN SERBIA

Basic and supplementary criminal legislation in the Republic of Serbia envisages several tax crimes, for the perpetrators of which certain penalties are prescribed, as well as other criminal sanctions. The paper analyzes statistical data on the scope, dynamics and structure of tax crimes, and the manner of ending criminal proceedings against their perpetrators, as well as specifically imposed prison sentences, fines and other sanctions in the Republic of Serbia in the period 2006-2018. This analysis provides valuable information on how to interpret and apply legal regulations to specific cases of adjudication of tax crimes that are manifested in court practice that can give a guide to the legislator in amending legal solutions.

KEYWORDS: tax; crime; statistics; prescribed penalties; imposed penalties; penal policy courts.

DA LI STEPEN RIZIKA I KORIŠĆENJA KRIPTOVALUTA ZA PRANJE NOVCA I FINANSIRANJE TERORIZMA OPRAVDAVA NJIHOVU ZABRANU? **

Marko S. Novaković*

Nakon serije mera usmerenih ka ograničavanju bitkoina i ostalih kriptovaluti, Centralna banka Kine je 24.09.2021. objavila da su sve transakcije vezane za kriptovalute nelegalne – što je nastavak suzbijanja bitkoina sa kineskog tržišta koji traje godinama, a posebno je bio aktivan 2013 i 2017. Pored činjenice da je taj potez doveo do naglog pada vrednosti kriptovaluti (istina kratkotrajnog), ponovo je aktuelizovalo pitanje koja je uloga kriptovaluti u pranju novca i finansiranju terorizma i da li njihova zabrana predstavlja pravo rešenje. Sa druge strane, nepunih 20 dana ranije, 07.09.2021. je El Salvador uveo bitkoin kao zvanično sredstvo plaćanja pored američkog dolara. Imajući ovu činjenicu na umu, autor će u ovom radu ukratko predstaviti razvoj kriptovaluti – pre svega bitkoina ali i izvršiti uporedno-pravnu analizu regulisanja kripto-valuti u preko 20 država na svetu. Nakon toga, posebni akcenat biće stavljen na potencijal i ulogu kriptovaluta u pranju novca i finansiranju terorizma, pogotovo u kontekstu ostalih finansijskih institucija.

KLJUČNE REČI: kriptovalute; bitkoin; pranje novca; pravna regulativa; zabrana; AML; finansiranje terorizma.

UVOD

Od kada su nastankom bitkoina kriptovalute postepeno postajale deo finansijskih tržišta[1] posmatrane su sa velikom skepsom. I danas, kada bitkoin

* Rad je nastao u okviru naučnoistraživačkog projekta „Srbija i izazovi u međunarodnim odnosima 2021. godine", koji finansira Ministarstvo prosvete, nauke i tehnološkog razvoja Republike Srbije, a realizuje Institut za međunarodnu politiku i privredu tokom 2021. godine.

** Doktor pravnih nauka, viši naučni saradnik, Institut za međunarodnu politiku i privredu, Beograd, e-mail: *marko@diplomacy.bg.ac.rs.*

[1] Početak ere kriptovaluta vezuje za 2009. godinu i misteriozni identitet(e) koji se krije iza pseudonima Satoši Nakamota, kreatora Bitkoin-a.

postoji punih 12 godina, kada je prihvaćen kao sredstvo plaćanje ne samo od brojnih kompanija već i od država, skepticizam ne jenjava i konstantno se predviđa njegov „kraj".[2] Posebno negativno nastrojene prema bitkoin-u a kasnije i ostalim kriptovalutama su države i tradicionalne finansijske institucije. Ovo je i razumljivo, kako iz objektivnih tako i iz subjektivnih razloga. Objektivni su činjenice da su kriptovalute veoma volatilne po prirodi, za većinu su obavijene velom misterije (često se ne zna ko je njihov osnivač) i nisu pod nikakvom institucionalnom kontrolom. Upravo ova poslednja činjenica je posebno važna za države jer je državama inherentno da u okviru svog centralnog aparata regulišu i kontrolišu sopstvene valute. Sa jedne strane, ova centralizovan sistem, daje dosta mogućnosti za kontrolu i manipulaciju (kako u negativnom tako i u pozitivnom kontekstu) sa druge, nosi barem dve značajne mane i rizika, koji pogotovo dolaze do izražaja u modernom, informatičkom svetu:

1) *SPOF (Single point of failure)*
2) Sva moć je u rukama jedne (centralne) vlasti

Koncentracija i monopol vlasti, pogotovo kada je u pitanju monetarna politika, inherentna je samoj prirodi država. Ipak, odavno je postalo jasno koliko rizika nosi ovakva sloboda i suverenost, pogotovo kada su u pitanju nesigurna vremena. Inflacija u SRJ sa početka devedesetih upravo je, između ostalog, posledica pomenute neograničene vlasti u štampanju novčanica. U skorijoj praksi, možemo videti neke druge vidove restriktivne monetarne politike, poput recimo ograničenja uvedenog tokom krize u Grčkoj 2015 godine, kada je bilo moguće podići najviše 60 evra u jednom danu (Reuters Staff, 2015). Navedeno ograničenje, uprkos brojnim spekulacijama da će biti kratkog daha (neki ekonomisti su čak predviđali kolaps bankarskog sistema u kratkom roku (Ammerman, 2015), trajalo je pune tri godine (Associated press staff, 2018) Prema nekim istraživanjima, fiskalna decentralizacija ne utiče na nivo inflacije (Treisman, 2000: 845). Upravo je nesigurnost i nedostatak kontrole, koja je posledica decentralizacije koju donosi blokčein tehnologija koja stoji iza Bitkoin-a i ostalih kriptovaluti je glavna zamerka (uz neke druge koje vremenom dobijaju na značaju, činjenice da se za rudarenje Bitkoin-a na globalnom nivou godišnje potroši energije koliko i cela Finska, (Huang, O'Neil & Tabuchi, 2021)). Upravo nove mogućnosti i decentralizovanost kakva do sada nije bila moguća a koju omogućuje blokčein tehnologija (Iansiti & Lakhani, 2017), predstavlja novu eru u razvoju ne samo finansijskih tržišta, već ima primenjivost koja ih značajno nadilazi.

Mnogi autori porede ulogu bitkoina XX veku sa ulogom koju je do sada imalo zlato, i nalaze brojne sličnosti. Bitkoin izgleda kao verzija zlata iz 21. veka - sličnost,

[2] Od 2009 do vreme pisanja ovog članka, u septembru 2021 godine, Bitkoin je "proglašen mrtvim" 429 puta - https://99bitcoins.com/bitcoin-obituaries/. [15.7.2021.].

za početak, dolazi i kroz svesno kreiranu terminologiju „rudarenja". Baš kao što je cena zlata zavisila od činjenice da je bio potreban veliki ljudski napor da se izvuče iz velikih količina zemlje na udaljenim lokacijama, bitkoin zahteva velike količine računarske energije koju pokreće (još uvek) jeftina električna energija. Mnogi autori ovo percipiraju kao promenu fundamentalnih vrednosti da umesto nekada kroz ljudski rad u rudnicima, vrednost danas stvara kroz blokčein tehnologiju, odnosno, da se vrednost odražava kroz kombinaciju uskladištene energije i kompjuterske inteligencije (James, 2018). Ipak, bitkoin i mnoge druge kriptovalute su tu da ostanu, i njihov značaj će, ma koliko kripto-tržište bilo nepredvidivo, samo da raste. Ovo se pre svega odnosi za bitkoin imajući u vidu *lightening network* (Wilser, 2021).[3] U nastavku će biti analizirano u kojoj meri su države to uvidele i na koji način su (i da li) regulisale poslovanje kripto valutama na svojim teritorijama.

1. MICA PREDLOG EVROPSKE KOMISIJE

Evropska komisija je u sklopu svoje strategije digitalnih finansija, predložila uredbu o „Tržištima kripto-imovine" u septembru 2020. Ovaj predlog, koji je trenutno u prvom čitanju u Savetu Evropske unije, nastoji da stvori potpuno usklađeno evropsko tržište kripto imovine. Osnovni cilj nove regulative jeste da se obezbedi pravna sigurnost za kripto-imovinu koja nije obuhvaćena postojećim zakonodavstvom EU o finansijskim uslugama i uspostavi jedinstvena pravila za pružaoce usluga i izdavaoce kripto-imovine na nivou EU. Predložena uredba će zameniće postojeće nacionalne okvire koji se primenjuju na digitalnu imovinu koja nisu obuhvaćena postojećim zakonodavstvom EU o finansijskim uslugama.

Kako je u pitanju dokument od skoro 170 strana, koji je još u fazi čitanja, a pri tom ne predstavlja fokus analize ovog rada (iako sama MICA zavređuje ne samo članak posvećen njoj već seriju istih), ovde će biti istaknuto samo da je cilj ove direktive da zaokruži regulativu kripto-tržišta u cilju povećanja pravne sigurnosti, olakšavanja pre svega potrošačima i pružaocima usluga kroz već dovoljno komplikovan i dinamičan kripto-svet, uz povećanje njihove zaštite i informisanosti. Shodno tome, definišu se novi pojmovi (poput „*asset-referenced tokens*", „*e-money tokens*").[4]

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[3] https://www.coindesk.com/tech/2021/07/12/the-lightning-network-is-going-to-change-how-you-think-about-*bitcoin*/ [15.7.2021.].

[4] Serija definicija se nalazi na u članu 3, strani 34 - Brussels, ali je značajnije ono što se kroz sam tekst definiše i reguliše – videti više u: 24.9.2020 COM(2020) 593 final 2020/0265 (COD) Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (Text with EEA relevance) {SEC(2020) 306 final} - {SWD(2020) 380 final} - {SWD(2020) 381 final}. [15.7.2021.].

2. UPOREDNI PRIKAZ REGULISANJA KRIPTOVALUTA U DRŽAVAMA

Kao što je navedeno u prethodnom poglavlju, države su oduvek držale čvrsto u svojim rukama kontrolu sopstvenih valuti. Otuda i ne čudi što su države bile vrlo skeptične, često i otvoreno neprijateljski nastrojene prema kriptovalutama, pre svega inicijalno otelotvorenim u bitkoinu. Neke države i dalje imaju izrazito negativan stav prema (aktuelnim) kriptovalutama, neke tek planiraju da regulišu svoja tržišta a druge su veoma aktivno pristupile pravnom regulisanju. U narednom poglavlju, sledi strukturisani uporedni prikaz navedenih razlika u stepenu i vrsti pravnog regulisanja kripto tržišta. Srbija je donela Zakon o digitalnoj imovini kojim je regulisala najvažnije elemente vezane za kriptovalute, uključujući postupak izdavanje digitalne imovine, pružanje usluga povezanih sa digitalnom imovinom i nadležnost Komisije za hartije od vrednosti i Narodne banke Srbije.[5] Time se Srbija svrstava u red država koje su zakonski regulisale kriptovalute – a njihov broj je značajno manji nego što bi se moglo pretpostaviti nakon 12 godina njihovog postojanja i sve većeg uticaja (pozitivnog ili negativnog) na društva. Ovaj broj će svakako ubrzo biti sve manji, jer će države morati u najskorije vreme da se aktivno uključe u regulisanje ovog tržišta.

2.1. Države koje su usvojile neku kriptovalute kao zvanično sredstvo plaćanja

El Salvador je 7. septembra ove 2021.godine postao prva država na svetu koja je usvojila neku kripto valutu (bitkoin) kao zvanično sredstvo plaćanja (pored američkog Dolara). Zakon o bitkoinu znači da će građani moći da plaćaju porez u bitkoinu a prodavnice će moći da prikazuju cene u ovoj digitalnoj valuti. Posebno je značajno da novac razmenjen u bitkoinu neće biti podložan porezu na kapitalnu dobit. El Salvador takođe ima 700 bitkoina, koji vrede na dan pisanja ovog članka oko 27 miliona evra.

2.2. Države koje su regulisale tržište kriptovaluta

Među evropskim državama koje su regulisale kriptovalute na jedan sveobuhvatniji način izdvaja se Ujedinjeno Kraljevstvo, u kome se, u skladu sa vrstom pravnog sistema, postepeno razvija kako normativna regulativa tako i sudska praksa. Sve kompanije koja se bave aktivnostima vezanim za kripto imovinu

[5] Zakon o digitalnoj imovini, *Službeni glasnik Republike Srbije*, br. 153/2020.

u Velikoj Britaniji moraju da se registruju u britanskoj FCA (*Financial Conduct Authority*) i da se prijave za licencu „Ovlašćenih platnih institucija". FCA je u junu 2021 odlučila da Binance Markets Limited –u (deo Binance grupe) nije dozvoljeno preduzimanje bilo koje regulisane aktivnosti u Velikoj Britaniji (Benveniste, 2021). Ovu zabranu, koja može delovati *prima facie* kontradiktorna, treba posmatrati samo kao ono što i jeste – odluka u jednom slučaju. Naime, viši sud u Velikoj Britaniji je u 2020, u slučaju AA v persons unknown odlučio da kripto-imovina, poput Bitkoina, predstavlja vrstu svojine u skladu sa engleskim pravom (AA vs. Person Unknown, 2020).

U Singapuru je trgovanje kriptovalutama legalno i reguliše ga Monetarna uprava Singapura (u daljem tekstu MAS)[6] a u skladu sa Zakonu o platnim uslugama[7](u daljem tekstu PAS). PSA je stupio na snagu 28. januara 2020. godine i reguliše tradicionalna i digitalna plaćanja. Početkom januara 2021. godine, MAS je uveo dodatne izmene PSA - kako bi bio u toku sa tržišnim i regulatornim fluktuacijama i kako bi se dodatno umanjio rizik od pranja novca i finansiranja terorizma. Novi amandmani daju nove i proširuju postojeće definicije ali i proširuju nadležnosti MAS.[8] Singapur je odličan primer države koja reguliše tržište valuta na jedini mogući način – aktivno. Tržište i oblast kriptovaluti uopšte se konstantno menjaju, te je neophodno da i države, kako bi izašle u susret svim promenama, izađu iz svoje komforne zone i budu spremne na česta prilagođavanja i izmene pravne regulative. To jedini način, u ovoj ranoj fazi regulative kripto-tržišta, da zaštite i sebe i ostale učesnike na tržištu a da pitom ostvare benefit od kriptovaluti.[9]

Zanimljiv je primer Indonezije, koja je inicijalno zabranila kriptovalute, a zatim ih legalizovala. U januaru 2018, Indonezija je zabranila svim operaterima platnog sistema i operaterima finansijske tehnologije obradu transakcija u virtuelnim valutama. Međutim, indonežanska vlada je 2019. godine objavila propise kojima se reguliše trgovanje kripto imovinom kao robom pod nadzorom Regulatorne agencije, dok se subjekti koji učestvuju u trgovini takođe moraju prijaviti indonežanskom Centru za izveštaje i analizu finansijskih transakcija. [10]

Kanada nije detaljno regulisala kripto valute u odvojenim normativnim aktima, već ih reguliše kripto valute u sklopu regulacije hartija od vrednosti i sa prevashodnim

[6] Monetary Authority of Singapore (Monetarna uprava Singapura)

[7] Payment Services Act 2019 (No. 2 of 2019) - https://sso.agc.gov.sg/Acts-Supp/2-2019/Published/20190220?DocDate=20190220 [15.7.2021.].

[8] Više o porceduri dobijanja licence videti u PAS, odsek 6, strana 22.

[9] Upravo to je Singapur uradio, jer je nekoliko indijskih startupa u kriptovalutama i blokčeinima migriralo je u Singapur poslednjih godina. Jedna od najvećih indijskih berzi kriptovaluta, CoinDCKS, preselila je svoju holding kompaniju u Singapur. Uzrok za ovo je, naravno, i sve nepovoljnija klima za kompanije koje posluju kripto-valutama u Indiji, ali opet- uslovi u Singapuru su takvi, da su te kompanije baš Singapur izabrale za svoje sedište.

[10] Draft-Perban-tentang-SMPI.pdf (bssn.go.id) [15.7.2021.].

ciljem zaštite javnosti. Shodno tome, kanadski zakon o pranju novca zahteva od svih subjekata koji se bave virtuelnom valutom da se registruju u Kanadskom centru za analizu finansijskih transakcija i izveštaja („FINTRAC") i primene primenljive mere SPN/FT. Najbolja demonstracija pasivnosti kanadskog pristupa jeste činjenica da je Kanadska uprava za hartije od vrednosti (CSA) najaktivniji u regulaciji pitanja vezanih za kriptovalute na nivou cele države – a u pitanju je neformalna organizacija koja predstavlja sve regulatore koji imaju jurisdikciju nad hartijama od vrednosti u okviru kanadskih pokrajina i teritorija.[11] CSA je 2018. godine objavila objašnjenje u kojem se pojašnjava da će se zakoni o hartijama od vrednosti primenjivati na kripto-kompanije koja nude kako digitalne koine tako i tokene, a sličnim obaveštenjem je u januaru 2020. pojašnjena primena zakon o hartijama od vrednosti na platforme koje olakšavaju trgovanje kripto-imovinom.

2.3. Zemlje koje su predložile regulisanje kriptovalute

Mnoge države, među kojima su neke na vodećim mestima u tehnološkim inovacijama i digitalnom razvoju, još uvek su na „repu" pravnog regulisanja tržišta kripto valuti. Tako, Francuska trenutno ne reguliše trgovanje kriptovalutama, iako se polako se kreće ka opsežnijoj regulaciji. U cilju borbe protiv anonimnosti transakcija kriptovalutama, predložen je novi Pravilnik sa strožim normama BPPN i BPFT, koji obezbeđuje obavezno poštovanje standarda Radne grupe za finansijske akcije (FATF). Još jedna članica EU, Holandija, se odlučila samo da sprovede EU regulative u ovoj oblasti i da ne ode značajno dalje u regulisanju. Shodno tome, u maju 2020. donet je holandski Zakon o primeni AMLD5.

Što se tiče država van EU, brazilski zakon Predlog zakona koji ima za cilj definisanje kriptovaluta trenutno je u raspravi u brazilskom parlamentu, ali kripto valute nisu u potpunosti neregulisane, već se koriste smernice iz postojećeg zakonodavnog okvira, poput onih koje objavljuje brazilska centralna Banka.

Regulisanje kripto tržišta u SAD predstavlja veliki izazov, kako zbog državnog uređenja tako i zbog izuzetno velikog broja „igrača" na tržištu sa različitim aspiracijama pa samim tim i drugačijim percepcijama kako to regulisanje treba izvršiti. Neke države u SAD -u su regulisale kriptovalute, dok druge razmatraju zakone za regulisanje. Njujork je predložio okvir uslovnog licenciranja kako bi početnicima koji se bave virtuelnim valutama olakšao rad. Vajoming već usvojio zakon koji dozvoljava stvaranje banke koja je posebno namenjena da omogući preduzećima da sigurno i legalno drže digitalnu imovinu. Oklahoma je predstavila zakon kojim se dozvoljava upotreba,

[11] https://www.securities-administrators.ca/ [15.7.2021.].

prodaja i razmena kriptovaluta u okviru državnih agencija. Mreža za sprovođenje finansijskih zločina Ministarstva finansija SAD - a izdala je nacrt zakona koji od operatora virtuelne valute zahteva da vodi evidenciju i proverava identitet klijenta u transakcijama koje uključuju virtuelne valute ili digitalnu imovinu. Američko ministarstvo pravde takođe je predložilo buduće strategije za borbu protiv nezakonite upotrebe kriptovaluta, uključujući promovisanje svesti i stručnosti u primeni zakona o tehnologiji kriptovaluta za efikasno sprovođenje istraga. Jedna od poslednjih inicijativa dolazi od strane senatora Pat Toomey (Pet Tumi) koji je zahtevao da se preduzmu koraci ka pojašnjavanju zakona koji se tiču digitalnih valuta i blokčejna. U okviru Senata, zadatak da istraži ovo pitanje dobio je Odbor za bankarstvo, stanovanje i urbana pitanja, koji će sakupljati predloge od 26. avgusta do 27. septembra 2021. godine.[12]

Švajcarska klasifikuje kriptovalute kao imovinu i prihvata bitkoine kao zakonsko sredstvo plaćanja u nekim regionima. Švajcarski parlament usvojio je 2020 godine „Savezni zakon o prilagođavanju saveznog zakona razvoju tehnologije distribuiranih elektronskih registara", koji postavlja prošireni okvir za regulisanje blokčein tehnologije. Švajcarska je bila jedna od prvih zemalja koja je uvela progresivne propise za poslovanje sa kriptovalutama i imala je ogromnu korist. Posebno razvijena i povoljna regulativa je u kantonu Zug, koj i se još naziva popularno i „Kripto dolina". U njemu se nalazi više od 900 kompanija, a kombinovana procena prvih 50 kompanija iznosi oko 37,5 milijardi USD. Švajcarska glavna berza, SIX Swiss Exchange, objavila je u januaru da je njen promet trgovanjem kripto proizvodima premašio milijardu dolara 2020 (Faridi, 2021). Kriptovalute i rad platformi za trgovanje spadaju u okvir švajcarskog zakona o BPPN -u. Ovim zakonom uređena su i lica koja menjaju kriptovalute za fiat novac i obrnuto.

U ovom kantonu, već je omogućeno da se opštinske usluge (poput registracija rezidenta) u iznosu do 200 CHF mogu se platiti bitkoinom. Počevši od 2021. godine, sve poreske obaveze u kantonu Zug mogu se plaćati pomoću kriptovaluta bitkoin i ethereum. To je omogućeno zahvaljujući saradnji sa bitkoin Suisseom. Naplata poreza putem kriptovaluta uskoro će biti dostupna kompanijama i fizičkim iznosima do iznosa od 100.000 CHF.

Regulisanje tržišta kriptovaluta u Nemačkoj je izuzetno zanimljivo a ujedno je i pravi pokazatelj da države još uvek nisu sigurne na koji način pristupaju regulisanju ovog pitanja, iako je već odavno jasno da nije pitanje da li regulisati kripto valute već na koji način to treba uraditi – jer su kripto valute tu da ostanu i njihov značaj će samo rasti. Posebna i razvijena zakonska regulativa kriptovaluta u Nemačkoj ne postoji. Osnov za regulisanje pitanja povezanih sa kriptovalutama kako u Nemačkoj tako i u ostalim državama EU leži u Uredbi (EU) 2017/1129 Evropskog parlamenta i Saveta od 14. juna 2017. o prospektu koji će biti objavljen

[12] Više videti na: https://www.banking.senate.gov/ [15.7.2021.].

kada se hartije od vrednosti nude javnosti ili se prihvataju trgovanja na regulisanom tržištu[13] (u daljem tekstu Uredba 2017/1129). Kripto valute se prema nedavno usvojenom nemačkom zakonu tretiraju kao finansijski instrumenti. U Nemačkoj nadležnost za izdavanje dozvola ima Savezna agencija za finansijski nadzor BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht Suchtext). Od 1. januara 2020. godine, sve kompanije koje žele da pružaju usluge vezane za kripto valute moraju dobiti odobrenje od BaFin-a. U praksi se pojavilo mnogo nedoumica kada je regulisanje poslova povezanih sa kriptovalutama u pitanju, pa je BaFin izdao seriju smernica kako bi olakšao sve procese, uključujući i proces izdavanja dozvole.

U Južnoj Koreji trgovina kriptovalutama je dozvoljena, ali prilično striktno regulisana. Poslednja u nizu restrikcija doneta je u martu 2021. koje U martu 2020. južnokorejski parlament je usvojio novi zakon kojim je pojačan nadzor nad kritpovalutama i uvedena obavezna registracija svim pružaocima usluga u sferi kriptovaluta (Stangarone, 2021). Ovo je za samo 6 meseci dovelo do gubitaka od preko 2,4 milijarde dolara.

Prema japanskim propisima, kripto-imovina je definisana i regulisana Zakonom o platnim uslugama iz 2009 (PSA 2009). Svi poslovni subjekti zainteresovani za upravljanje uslugama razmene kripto-imovine moraju biti registrovani u Japanskoj agenciji za finansijske usluge.. Prema Zakonu o sprečavanju prenosa prihoda stečenog kriminalom, usluge razmene kripto imovine moraju biti u skladu sa naprednim procedurama KIC. Japan traži od kompanija koje trguju kriptovalutama da provere identitet kupaca, evidentiraju i verifikuju zapise transakcija i prijave sumnjive transakcije nadležnim organima.

2.4. Zemlje koje su zabranile kriptovalute

Nakon inicijalnog talasa ignorisanja ili zabrane kriptovaluti, mnoge države su se okrenule ka njihovoj regulativi. Ipak, neke države istravaju u otporu, a među njima je posebno značajna uloga Kine.

Kina je država od posebnog značaja za kripto valute, ne samo zbog velikog broja stanovnika i činjenice da predstavlja drugu najveću ekonomiju u svetu, već i zbog činjenice da je Kina centralno središte za rudarenje bitkoina. Skoro polovina (48%) svetskog rudarenja bitkoina se obavlja u Kini (Crawley, 2021). Ipak, ovaj procenat je počeo da opada a ubrzao se sredinom 2021, nakon što je Kina postavila značajna ograničenja rudarenja bitkoina (Global Ttimes Staff, 2021). Ova odluka kineske Vlade direktno je uticao i na cenu najveće kriptovalute, bitkoina (Browne,

[13] Tekst uredbe se nalazi na: http://data.europa.eu/eli/reg/2017/1129/oj [15.7.2021.].

2021). Ono što je karakteristično za Kinu jeste da je ona vrlo rano uvidela značaj kriptovaluti (tada samo bitkoina) i krenula je za delimičnom zabranom 2013, kada je zabranila bankama da trguju bitkoinom ali nije zabranila trgovinu bitkoinom *per se*. U 2021, Kina dodatno pojačava mere protiv bitkoina (sada i ostalih kriptovaluti) kroz zatvaranje lokalnih berzi, navodeći kriptovalute u pranju novca, trgovini drogom i krijumčarenju. Ovaj postupak se opet značajno odrazio na vrednost bitkoina (Ghosh, 2021), demonstrirajući još jednom volatilnost kriptovaluta i podložnost promenama kroz poteze država (i ne samo država).

Centralna banka Bangladeša je 2017 godine izdala je obaveštenje u kojem se navodi da su kriptovalute ilegalne u Bangladešu, mada sam način sprovođenja ove zabrane nije bila naveden (Mowla, 2017). Kao razlog je navedena činjenica da transakcije sa kriptovalutama krše postojeće propise o devizama, pranju novca i finansiranju terorizma.

Slično su postupile i zemlje Magreba, poput Alžira[14] i Maroka. Tunis je takođe zabranio kriptovalute ali postoje jasne indicije o nameri da se one dekriminalizuju (Ligon, 2021). Libija, sa druge strane jeste zabranila kriptovalute, ali su uprkos tome one su izuzetno popularne u toj zemlji. To ih povezuje pre svega sa drugim državama koje su u vrtlogu konflikta i nestabilnosti, pogotovo sa drugim državama gde je teško doći do stranih valuta, gde postoje česte restrikcije od strane banaka, poput Palestine, Sirije ili Kube (Inman, 2021).

Indija je posebno zanimljiva država. Naime, za sada kripto valute dozvoljene ali Vlada ima nameru da napravi zvaničnu kripto valutu – a jedan od koraka za koje se smatra od strane Vlade neophodnim jeste i zabrana ostalih, „konkurentskih" kripto valuti. Upravo zato, predložen je jedan od najstrožijih zakona protiv kripto valuti, koji je trenutno u proceduri (Ahmed & Anand, 2021).

U Evropi (ako izuzmemo Tursku), trenutno postoji samo jedna država koja je zabranila kriptovalute – Severna Makedonija. Narodna banka Makedonije je 2016. godine izdala saopštenje kojim se rezidentima Makedonije zabranjuje ulaganje u kriptovalute (Jozipović, Perkušić & Ilievski, 2021).

Turska je takođe u aprilu 2021 godine zabranila kriptovalute, a kao razlog je naveden da kriptovalute „nisu subjekt bilo kakve regulacije, nadzornog mehanizma ili centrale regulatorne vlasti" tako i konkretne strahove (Toksabay, 2021).

Centralna banka Bolivije je zabranila kriptovalute, navodeći da je upotreba kovanica koje nisu izdale ili regulisale zemlje ili zone, kao i obrada elektronskih naloga za plaćanje u valutama i novčanim apoenima koje ona nije odobrila u oblasti nacionalni platni sistem, nezakoniti su i zabranjeni.[15]

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[14] Putem zakona (Finance Act, 2018 (FL2018)) koji je usvoji alžirski Parlament a koji zabranjuje kupovinu, prodaju, korišćenje i posedovanje virtuelne valute.

[15] Saopštenje se može videti na: Banco Central de Bolivia Prohibe el Uso del *Bitcoin* y Otras 11 Monedas Virtuales [Central Bank of Bolivia Prohibits the Use of *Bitcoin* and Other 11 Virtual Currency], Enlaces Bolivia

3. KRIPTOVALUTE KAO SREDSTVO ZA PRANJE NOVCA I FINANSIRANJE TERORIZMA

Od pojave bitkoina, kriptovalute prati glas da su sredstvo koje koriste kriminalne organizacije. Ministarka finansija SAD Janet Yellen,[16] isticala je više puta u kojoj meri su su kripto-valute opasne, a anonimnost u trgovanju kriptovalutama predstavlja jednu od najvećih potencijalnih pretnji. Anonimnost prilikom trgovanja kriptovalutama se često uzima kao neosporna činjenica i predstavlja kao njihova najveća mana, odnosno opasnost. Jasno je da je anonimnost posebno primamljiva osobama koje posluju u ilegalnim sferama, ali anonimnost može biti značajna i za ljude koji žele da ostanu bezbedni od potencijalnih pretnji koje za njih mogu predstavljati činjenica da poseduju veliku količinu novca. Dobar primer za to su autoritativne države, poput Kine ili Indije, koje teže da imaju kontrolu i saznanja o količinama novca pogotovo kod „nepodobnih" stanovnika.

Bez daljeg ulaska u pitanje da li (i kome) anonimnost kripto valuti predstavlja problem a kome benefit, neophodno je istaći da se ne može reći da su kriptovalute anonimne – već je bliže istini da se okarakterišu kao pseudo-anonimne. Jedan od glavnih razloga za ovo je sama priroda i način funkcionisanja blokčein tehnologije, koja podrazumeva da se podaci ne mogu izbrisati, već da mogu samo da se prave izmene ali prethodne „verzije" ostaju zauvek zapisane. Čak i ova pseudo-anonimnost nestaje kada se trguje preko berzi koje podležu AML i ostalim pravilima, a preko kojih se obavlja pre 99% kripto transakcija.

Bitkoin adrese možda nemaju registrovana imena, ali u praksi se mogu povezati sa identitetima u stvarnom svetu. To je zato što je svaki investitor dužan da zabeleži svoje lične podatke pre nego što kupi kriptovalutu. Upravo zbog ovog činjeničnog stanja, jasno je da postoji još neki razlog za strah od kriptovaluti, a on se tiče upravo njihove prirode – one predstavljaju nov i revolucionaran način plaćanja. Kao takvom ulogom, jasno je kriptovalute predstavljaju opasnost tradicionalnim finansijskim institucijama, koje pritom, posluju sa većim stepenom anonimnosti. Ovo možemo videti kada uporedimo transparentnost trgovanja kriptovalutama a pre svih bitkoina sa transparentnošću tradicionalnih finansijskih institucija.[17] Pored pitanja anonimnosti, neophodno je istražiti i u kojoj meri se u praksi kriptovalute koriste za ilegalne aktivnosti.

(Apr. 2017), http://www.enlaces bolivia.net/9263-Banco-Central-de-Bolivia-prohibe-el-uso-de-*bitcoin*s-y-otras-11-monedas-virtuales, archived at https://perma.cc/GFR6-7JSK. [15.7.2021.].

[16] https://www.washingtonpost.com/us-policy/2021/08/25/yellen-crypto-bitcoin-defi/ [15.7.2021.].

[17] Bitcoin anonymity is just a big myth - and using it to launder dirty money is stupid, a crypto ATM chief says Shalini Nagarajan Jun. 13, 2021, 07:30.

3.1. Situacija u praksi

Prema nekim istraživanjima, nedozvoljene aktivnosti predstavljaju manje od 1% celokupnih kripto transakcija, dok finansiranje terorizma predstavlja manje od 0.05% od navedenih 1%.[18] Ovaj podatak je posebno upečatljiv ako se uzme u obzir da je sajber kriminal značajno porastao u toku pandemije COVID19. Ipak, uprkos tom globalnom trendu, udeo kriminalnih aktivnosti u kojima su korišćenje kriptovalute opao je sa 2.1% u 2019 na pomenutih manje od 1% u 2020. Skoro svih 100% transakcija kriptovalutama se vrši preko zvaničnih berzi koje podležu KYC i AML regulativama i preko kojih je moguće znati identitet osoba koje trguju. Sa druge strane, UN procenjuje da se između 2 i 5% svetskog GDP, dakle oko 2 triliona dolara, opere kroz tradicionalni finansijski sistem svake godine.[19] Zanimljiva je lista država koje primaju najveći broj kriptovaluta sa adresa koje su sumnjive: - Sjedinjene Američke Države - Rusija - Kina - Južna Afrika - Velika Britanija - Ukrajina - Južna Koreja - Vijetnam - Turska – Francuska.[20]

Iz navedenih statističkih podataka, jasno je da se kripto valute značajno strožije posmatraju u svelu kriminalnih aktivnosti od tradicionalnih finansijskih sistema. To ide dotle, da se smatra da kriptovalute imaju primarnu svrhu u podržavanju kriminalnih aktivnosti. Vlade država širom sveta sve više traže sprovođenje provera kako bi se osiguralo da se kriptovalute poput bitkoina ne mogu koristiti za pranje novca ili finansiranje terorizma. Iako su ovakvi napori svakako opravdani, pitanje je da li zašto se tradicionalni finansijski sistemi ne dovode u pitanje u skladu sa njihovim učešćem u kriminalnim aktivnostima. Štaviše, postoje li dokazi koji ukazuju na to da je veća verovatnoća da će korisnici bitkoina učestvovati u takvim vrstama ilegalnih aktivnosti? Kako se ispostavilo, nema. U stvari, istina je suprotna: bitkoin se manje koristi za pranje novca i generalno se manje koristi u kriminalnim poslovima od gotovine. Prema izveštaju kompanije Chainalisis, u 2020. godini došlo je do naglog smanjenja kriminala povezanog sa kriptovalutama, pri čemu su nedozvoljene aktivnosti činile samo 0,34% ukupnog obima transakcija (u poređenju sa 2,1% u 2019. godini). Međutim, treba napomenuti da je u istom periodu došlo do trostrukog povećanja količine aktivnosti kriptovaluta. Nedavni izveštaj je otkrio da je samo 270 adresa blokčejna odgovorno za 55% pranja novca povezanog sa kriptovalutama. Uprkos relativno niskom procentu nezakonitih aktivnosti koje uključuju kriptovalute, vlasti

[18] https://www.livemint.com/market/cryptocurrency/terrorist-financing-just-0-05-of-all-illicit-crypto-transactions-report-11632295198513.html [15.7.2021.].

[19] https://www.paymentsjournal.com/cryptocurrency-is-better-for-anti-money-laundering-than-you-might-think/ [15.7.2021.].

[20] Grauer, Updegrave, The 2021 Crypto Crime Report, Chainanalysis, p.11., February, 2021.

širom sveta nastoje da povećaju svoj nadzor. Ovo je svakako opravdano, ali nije posledica činjenice da se kriptovalute koriste više za kriminalne aktivnosti od drugih finansijskih opcija. [21]

Povećanjem informacija neohodnih za trgovinu kriptovalutama, poput onih koje su u predloženoj MICA regulativi, smanjuje se prostor za ilegalno korišćenje kriptovalutama. Takođe, priroda blokčein tehnologije podrazumeva da svako može videti transakcije koje su se ikada dogodile. Kako da je jedan od glavnih ciljeva pranja novca prikrivanje odakle novac dolazi i kuda ide, relativna transparentnost kriptovalute čini je kontraproduktivnom za potrebe pranja novca. Kriptovaluta je stekla reputaciju kao roba izbora za pranje novca i kriminalce. Međutim, kako pokazuju brojke, ilegalne aktivnosti čine minimalan procenat transakcija. Ovo ne znači da pranje novca putem kriptovalute ne postoji, niti znači da kompanije treba da ignorišu rizik koji kripto valute potencijalno nose. S druge strane, važno je zapamtiti da je gotovina i dalje preferirani medij za pranje novca. Iako ljudi mogu anonimno obavljati transakcije koristeći bitkoin.

4. UMESTO ZAKLJUČKA – DA LI ĆE DETALJNIJA REGULACIJA NEGATIVNO UTICATI NA VREDNOST KRIPTOVALUTA?

Predviđanje budućnosti bitkoin-a i kriptovaluti *en general* predstavlja nezahvalan zadatak. Ipak, blokčein tehnologija predstavlja budućnost – a bitkoin po svojoj dugovečnosti, rastu i potencijalnoj primeni, pogotovo u „novoj eri" interneta, zavređuje posebnu pažnju. Nakon uporedne analize pravne regulative kripto tržišta, jasno se može videti ne samo da je regulacija veoma heterogena već i da je to proces koji je u toku. Neki autori konstatuju da preterana regulativa, pogotovo ona koja se sprovodi bez prethodno postavljanih jasnih pravila može značajno da naškodi kriptovalutama (Wall street Journal, 2021). Ipak, za sada se pokazalo da dodatno regulisanje kripto-tržišta, iako utiče na vrednost u prvom talasu, ne škode kriptovalutama kao konceptu. Fajnstajn smatra da ne postoje sistematski odliv trgovaca kriptovalutama (Feinstein, 2021) kada se dodatno reguliše neka jurisdikcija, što jasno pokazuje zanemarljiv udeo aktivnosti kojima bi svojstva poput anonimnosti ili nedostatka AML procedura smetale.

Ono što je sigurno jeste tačno jeste da je dodatna regulacija neophodna, kako bi se zaštitili svi učesnici na tržištu. A ta regulacija, ako se sprovede na pravi način, doprineće pojačanom poverenju regularnih i legalnih investitora i značajno smanjiti prostor za „pranje novca" koji predstavlja jednu od najvažnijih oblasti

[21] https://blog.chainalysis.com/reports/2021-crypto-crime-report-intro-ransomware-scams-darknet-markets [15.7.2021.].

zabrinutosti kada su u pitanju kriptovalute. Konačno, dodatna regulacije otkloniće i mitove da su kriptovalute prevashodno sredstvo za ilegalne radnje.

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CRYPTOCURRENCIES AND COMPARATIVE ANALYSIS OF THEIR LEGAL REGULATIONS

The adoption of Bitcoin as a legal tender in El Salvador in September 2021, symbolically completes the circle of Bitcoin development from its emergence in 2009. From the inception of cryptocurrencies, they were mostly ignored or explicitly denied

by governments around the world. However, the development of cryptocurrencies forces governments to take action and address the surge of numerous cryptocurrencies. However, governments throughout the world took different positions towards cryptocurrencies, ranging from adoption as a legal tender by El Salvador, to banning them as China, Bolivia, or Maghreb countries. Cryptocurrencies are highly volatile and one can track the value amplitudes to the various factors, including (but not limited to) government regulation. After many years, European Union proposed regulation of its crypto-market, and many other countries are easing restrictions. On the other hand, other countries are taking regulation in the opposite directions. This article will analyze the legal regulations of the most important countries regarding cryptocurrencies and assess both consequences and reasons behind some of those regulations.

KEYWORDS: cryptocurrencies; bitcoin; money laundering; law regulation; ban; AML; terrorist financing.

RISE AND FALL OF CORRUPTION CONTROL IN BRAZIL: Public Institutions, Corporations, Compliance, and the "Post-Car Wash Operation"

Matheus de Alencar e Miranda[*]
Leonardo Simões Agapito[**]
Túlio Felippe Xavier Januário[***]

The paper is dealing with the main corruption problems and institutions in charge of prevented it in Brazil. First of all, normative legislation will be presented - the main criminal laws and criminal procedure laws. In the second part of the paper, the authors analyze the Car wash Operation which disclose several articulations between companies and political agents in different levels of administration and legislative houses. Later, it is explained how the concept of corruption has evolved, with further details regarding different corporations and their respective directors. Finally, the focus is on the post-Car wash Operation period. In this part, authors explain different targets that were achieved when new political figures emerged and even sentences were reviewed as exaggerated and abusive. Accordingly, it became clear that Brazilian corruption criminal policy rose from a legislative change that allowed the criminal justice system to go further. Unfortunately, strategic limitation for structural changes and control development accompanied with judges and prosecutors' moral beliefs prevented further success in preventing corruption in Brazil.

KEYWORDS: Brazilian law; corruption; Car wash Operation; criminal policy; corruption control.

[*] Ph.D, Candidate in Criminal Law at the State University of Rio de Janeiro – UERJ, Brazil, e-mail: *matheus.alencarm@gmail.com.*

[**] Ph.D, Student in Latin Amer*ican Integration at the University of São Paulo – USP, Brazil,* e-mail: *leoagapito@gmail.com.*

[***] Ph.D, Fellow of the Fundação para a Ciência e a Tecnologia – FCT - at the University of Coimbra, Portugal, e-mail: *tuliofxj@gmail.com.*

INTRODUCTION

In Brazilian politics, corruption has always played a historical role. In the Brazilian Empire, there was a popular quatrain that said, "those who still a little are thieves/ those who still a lot are barons"[1]. The history of our Republic has been marked by promises that privileges will end, and the 'old ways' will be overcome. As examples of vows to change this *status quo,* Jânio Quadros (President of Brazil from January to August of 1961) had a campaign jingle that named him as "little broom" (*Vassourinha*), implying that he was the one who would "clean up" the Brazilian politics, and the first democratically elected President after the military regime (1964-1984), Fernando Collor (President of Brazil from 1990 to 1992), used to refer to himself as the "Maharajah hunter" (*Caçador de marajás*), during his presidential campaign. Both didn't even end their terms, surrounded by, or involved in, corruption scandals. Many authors, including jurists, in different moments, described corruption as "endemic" or "systemic" in Brazil, a culture failure or habit.

As pointed out by Nieto Martin (2013: 191), the judicial debate and the socio-moral responsibility created a common perception that corruption is a matter of political parties and public agents. Such perception created two main issues: (a) the lack of instruments for internal control; (b) the inability to identify corporations and specific agents that promote illegalities, as well as the main beneficiaries of these schemes. At some point, corruption was even defended as important and necessary to business if companies intended to grow overseas.

However, in the last two decades, the criminal policy has changed, urged by many scandals in the United States and Europe. Companies have outgrown the federal or state regulatory capabilities and this complexity has demanded multinational cooperation and their complexity demanded international cooperation. Therefore, OECD and UN started to promote different global agendas for sustainable development through ethical business. In criminal law and criminal procedure debates, Tiedemann, Arroyo Zapatero, and Nieto Martín, as many others, brought a new perspective for dogmatic and criminal policy reflecting on Euro-delicts and EU-members' cooperation (De La Mata Barranco, Hernández, 2013: 143).[2] This movement made by central countries has changed corruption conception in the Latin American countries, urging to a new model of economic criminal law (Agapito, Alencar e Miranda, Januário, 2020: 293-297).

[1] The original popular quatrain is: "Quem furta pouco é ladrão/ quem furta muito é Barão/ quem furta mais e esconde/ passa de Barão a Visconde" (Carvalho, 1987: 89).

[2] The Group of States against Corruption (GRECO), created by the European Council has also been important to enforce a new perception of corruption, motivating different countries to align their criminal policies.

This new perspective of corruption as an economic issue, promoting inequality, and threatening democracies, certainly has a more solid basis, offering concrete examples and data, increasing public awareness. However, all this movement could not overcome the classic view of corruption as a moral issue (Saad-Diniz, 2017: 725), which still stigmatizes certain groups, people, and activities. So, the moral element not only creates a license to exceed legal limits, but may also "overexcite" the public agents in their "fight against corruption". This is exactly the context of rise and fall of corruption control in Brazil.

In 2005, the Brazilian political scenario was marked by the *Mensalão* scandal, which involved different political parties that had been bribed to vote for the government's agenda. This case was investigated by a special commission composed by senators and federal deputies in the same year. In 2012, the Brazilian Supreme Federal Court judged 37 public and private agents, with 25 of them condemned by bribery, money laundering, criminal association, multiple frauds, and undue appropriation. This case brought a new perspective to public corruption, and the votes of Ministers, transmitted by national television, went on for months. It had become the greatest criminal judgment until then, demonstrating the importance of compliance programs and the limitation of many legal concepts, as *organized crime* and *money laundering*. At least five new laws were enacted within this context (2011-2013), increasing the judicial competence to produce proves.

In 2014, the Car Wash Operation[3] started to disclose several articulations between companies and political agents in different levels of administration and legislative houses. It became the "new biggest scandal" and the most recent criminal procedure instruments were largely employed, especially the plea bargain and collaboration agreements with corporations and their directors. These investigations evolved in multiple levels and agencies, in different states, until they reached the candidate leading the Presidential race. This election was held in 2018 and, next, the Car Wash Task Force shrank, after its most famous judge accepted to be the new Minister of Justice. The end of this operation is marked by President Bolsonaro's frequent talk, that is: "the corruption has ended!", while different scandals have surrounded him and his family. During the Covid-19 pandemic, a new serious investigation was undertaken by a group of senators. After its conclusion, an unwillingness to carry out the next investigative procedures was perceived on the part of the Attorney General, nominated by the same Bolsonaro, against Procecutors' desire. The moral perspective of corruption is reduced, here, to a personal populist

[3] We have used here the literal translation for "Operação Lava-Jato". However, it's important to mention that the word "Lava-Jato" carries another meaning in Brazilian Portuguese, equivalent to "really fast clean-up". Both meanings are good references for the operation name: the original one because the operation was started because of an investigation of a net of gas stations/car wash used to move illicit money of a criminal organization and the second meaning because it's a reference to the really high speed of money-laundering in the corruption schemes.

level, in a way that the public figures can still assume a savior's messianic role, just like *Vassourinha* and *Caçador de Marajás*.

The report elaborated by Sally S. Simpson, Melissa Rorie, Mariel Alper, and Natalie Schell Busey (2014: 40), points out that punitive sanctions and law has had a low impact on corruption deterrence, especially when focused on personal level. On the other hand, it says, regulatory policies and multiple interventions would certainly achieve a significant effect. In conclusion, corruption is not a matter of morality or punishment, but a matter of control and authority sharing. By this, the current essay intends to demonstrate how the Car wash Operation has resulted in no advance for Brazilian criminal policy, without any institutional literacy on corruption or judicial permanent development. This is evidenced by two articulated movements: a) the judicial main role played on the "fight against corruption", including systematic violations of fundamental rights; b) the judicial roll-back, indicated by different disarticulations, legal reforms, and Supreme Court's decisions.

According to Transparency International (2019: 3):

> " Brazil had become an inspiration for many countries as a successful case of confronting systemic corruption and impunity. The reversal of this progress will therefore have an impact beyond its borders, particularly in Latin America."

The report mentions the initial success of Car wash after "adoption of key anti-corruption laws and the strengthening of law enforcement and other bodies at the federal level…" (Transparency International, 2019: 3). However, it also reports that all advances have changed fast, since "decisions by the government, parliament and the judiciary also threaten Operation Carwash…" (Transparency International, 2019: 3). These advances became questionable, for being so vulnerable to small changes (particularly, the change of main characters). Transparency International perception of anti-corruption systems is based on short-term actions, such as legislative changes, not on expectation of their real impact or measures. The main hypothesis of the present essay is that those changes were actually a convenient manipulation of institutions for different objectives. Corruption prevention depends on institutional resilience and surveillance, which means a *long-term* change.

First, it will be presented the main criminal laws and criminal procedure laws promulgated, demonstrating the influence of common law institutes. Then, we will approach the Car wash Operation and how the concept of corruption has evolved, including different corporations and their respective directors. Finally, we will focus on the post-Car wash Operation period, in which different targets were achieved, new political figures emerged, and even the sentences were reviewed as exaggerated and abusive. In view of this, it became clear that Brazilian corruption

criminal policy rose from a legislative change that allowed the criminal justice system to go further, however, the moral argument used by prosecutors and judges turned out to be the Achilles' heel of their work, together with strategic limitation for structural changes and control development.

1. BRAZILIAN LAWS ON CORRUPTION IN THE LAST DECADE

Brazilian criminal code uses the term *corrupção* (corruption) to define the bad influence over a child, when including him or her in a criminal action, as fraud or theft (Article 218 – Corruption of Minors). The same term is also used to refer to drinking water pollution (Article 271), food contamination (Article 272), and medical supplies violation (Article 273). The term corruption in Brazilian Portuguese means deterioration. However, bribery is defined as *corrupção* only, without specifications (Articles 317 and 333). Many other actions of public corruption receive different names, as *prevaricação* (prevarication), a crime perpetrated by a public agent when not doing or delaying, unduly, his activities or achieving them against the Law to satisfy his personal needs or interests (Article 319), *tráfico de influência* (influence peddling), to provide bribery to exert influence over a public agent (Article 332).

Before Carwash Operation, specially, the legal frameworks that deserve attention are: (1) the Act 12.527/2011, the Access to Information Law; (2) the Act 12.683/12, that changed Brazilian Anti-Money Laundering system; (3) the Act 12.846/2013, the Brazilian Antibribery Law for Corporations; and (4) the Act 12.850/12, the Criminal Organizations' Law. Contemporary to the Carwash operation, it is worth highlighting the (5) Act 13.303/2016, the State Companies Law. More recently, a new law was passed, the (5) Act 13.303/2016, the Public Procurement Law, which will be approached at the end of this essay.

The (1) Act 12.527/2011 is known as Access to Information Law. It is the Brazilian legal framework that regulates access to information provided for in the Brazilian Constitution, besides amending other legal frameworks that set state financial obligations and public officers' duties. According to Article 37 of the Constitution, publicity is one of the principles of public administration. With the Act 12.527/11, confidentiality was delimited as exception, regardless of the public sphere or the agency, defining maximum deadlines that need to be publicly justified by public administration.

Enacted in the first year of Dilma Rousseff Government, the law brought the concept of transparency to public law (Michener, 2018: 611). The focus was primarily the strengthening of democratic institutions and the compliance with

Constitution. With its enactment, there would be a commitment of transparency by the State, which would be capable of promoting the informal[4] social control over the government accounts and actions, with potential to prevent mismanagement and corruption from a more general and institutional perspective.

This strengthening of State institutions, however, didn't prove to be promptly sufficient. In the face of a context of (a) street demonstrations in June 2013 (moralizing movement) in Brazil, and (b) international pressure for approval of a regulation against bribery practiced by companies, after the approval of the United Kingdom Bribery Act (international standardization of International Penal Law), it was necessary the enactment of (2) the Act 12.846/2013, the Brazilian Antibribery Law for Corporations. Since the United Kingdom was the last developed country resistant to regulation, when its acceptance occurred, pressure turned to developing countries. The demand to comply their legislations with the terms of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD) has increased dramatically.

In less than a year, Brazil also complied with the regulations.

The (2) Law 12.683/12 presented two new challenges to Brazilian Judiciary. First, the Law withdrew the list of background crimes from the Art. 1st, which restrained the possible applications of the crime. In this sense, in the absence of legal provision, it would be left to courts to delineate the possibility of "self-laundering" (Callegari, 2001: 75) and to elucidate the analysis criteria of the background crime (Fernandes, 2014) and clarify criteria to differentiate money laundering from other similar malpractices such as tax evasion and tax avoidance. (Rodrigues, Law, 2013: 249).

The second challenge came in the overhaul of Articles 9th to 12th, amplifying the list of people compelled to notify control agencies about suspicious transactions, and expanding, also, the kinds of penalties foreseen in case of non-compliance. Therefore, individual service providers were also obliged to know their clients and send information to the "*Conselho de Valores Imobiliários* – CVM" (Brazilian Securities and Exchange Commission) and to the COAF (Brazilian Financial Intelligence Unit). The Judiciary was provoked, then, to redefine under clear criteria the difference between administrative violations and joint perpetration in the money-laundering crime itself. (Pires, 2015: 178 & ss.).[5]

[4] We use this terminology as a synonym of every kind of control of bad practices that is not done by the State itself. The terminology is taken from: Saad-Diniz, 2019, passim.

5 Among the categories that were included, were the lawyers (Art. 9th, XIV), that so provide consulting services. The National Confederation of Liberal Professionals (representing accountants and advisers in general) filed the Direct Unconstitutionality Action n. 4.841 by reason of professional confidentiality, which would be undermined before the demands imposed by the new drafting of Art. 9th, XIV. In the same period, for the same reasons, the Brazilian Bar (OAB) decided to file another Action on lawyers' behalf, but expressing themselves against ADIn n. 4.841, for considering that the other categories of liberal professionals wouldn't need such privilege. So far, the referred Action hasn't been judged. Responding to OAB public demonstrations,

This Law was passed a little over a month before the beginning of the judgment of the Penal Action 470/MG by the Supreme Court, pointing, therefore, the importance of money laundering in corruption schemes.[6] The Law reform didn't have thus the production of a precedent by the judgment, but was conceived within the context of "Mensalão" and had its importance highlighted by the Court in the face of demonstration of goods flows and occultation procedures perpetrated by banks and marketing companies.

The (3) Brazilian Anti-bribery Law for Corporations (Law n. 12.846/13) addresses civil and administrative liability of legal entities for the practice of actions against national or foreign public administration. Although the liability model for companies is restricted to civil and administrative spheres, it is important to emphasize that criminal consequences may fall upon individuals, since it is a Law that regulates something considered to be a crime.

Furthermore, it is worth highlighting the particularity of the Brazilian context: as it was ascertained during the follow-up of the legislative process, the Law was maintained as "non-criminal" in a deliberate way to ease accountability and avoid obstacles and difficulties of a criminal-procedure model, as proposed by the President of the Republic at that time. This was sustained under the allegation that it is difficult to prove individual malpractices and, only then, sanction business enterprises. It is also alleged that there is a great difficulty proving legal entities' intention or negligence. However, it is also necessary to consider the companies' side, which will certainly be affected in criminal and economic aspects, without effectiveness being really assured through this support to an excessive *jus puniendi*. In Silveira's and Saad-Diniz's words:

> Anyway, it is possible, once again, to see a legislative policy that seeks to answer to socio-economic problems based on liability expansion, instead of regulating strategic sectors and organizations that enable corruption (but, not only this, also accounting frauds, diversion of funds, frauds in bidding procedures are relevant here). Creating mechanisms of approximation of its management to interests of public regulation, the new Anti-Corruption Law provides more interference on business activities' operations for objective, administrative and civil responsibility of legal entities for practice of acts of national or foreign public administration, reaching even the person of their managers. (Silveira; Saad-Diniz, 2015: 309) [Free translation].

the COAF issued a resolution excluding lawyers from the list of obliged professionals, since they are already submitted to their own control institution. On lawyer's duties and analysis of their participation in money laundering, see: Salgado, 2017.

[6] In her vote, Minister Carmen Lúcia made use of a comparison: "money is to crime, what blood is to a vein, that is, if it doesn't flow with volume and without obstacles, there won't be criminal schemes like these" (STF, 2012: 3351).

Certainly, this objective responsibility creates enormous difficulty for the company to defend itself.[7] If, as mentioned, there is a penal logic within the Law, it is inevitable to question the restraint to defense when instituting the strict liability in this Law (Scaff, Silveira, 2014). This legislative preference revived the debate about the models of corporate accountability[8].

Despite all the criticism, it is worth pointing out the preventive initiative of this Law, which can actually be effective in corruption prevention through incentive to compliance policies. The positive effect of this policy is commented by Adán Nieto Martin:

> "...In some occasions, they are even bound to comply with the company anti-corruption policy if they want to do business. This mechanism seems to me to be a very powerful tool in the expansion of the fight against corruption. If, in a region of Africa or Asia, a big multinational company imposes adoption of anti-corruption policies on its providers and partners, this measure can be more effective than many legislative changes"[9] [free translation].

Therefore, notwithstanding all the criticism, the subject is in line with international trends and the aim in preventing corruption. As respects to the proposals of alternatives in the face of criticisms, "the foreign example must, therefore, be taken into account, even to know the possible range of the Law, with State control and preservation of rights, under penalty of violation and assault against companies" (Scaff, Silveira, 2014). The example from abroad may indeed be useful either to adhere to or depart from certain legal provisions. Adhesion, however, should be questioning and critical, drawing on comparative law, but able to adapt legislation and problem solutions to national scenario. Up to the present moment, that has not been the case in Brazil.

In this respect, see the 5th Article of Anticorruption Law, which lists the offensive acts against national or foreign public administration. They are many and varied, from bidding frauds to bribery of governmental authority. "Such proceedings would constitute themselves in those against the national or foreign public patrimony that aim at, generically, promising, offering or giving, directly or indirectly, undue

[7] For a critical analysis of the Brazilian model of criminal liability of legal entities, see: Januário, 2020; Januário, 2019b: 345 & Ff.; Januário, 2018a: 211 & ff.).

[8] On this debate, see: Canestraro; Januário, 2018: 269 & ff.; Januário, 2016; Januário, 2018b.

[9] The text in foreign language is: "En ocasiones obligan incluso a que se acepten, si quieren hacer negocios, la política anticorrupción de la empresa. Este mecanismo me parece un arma muy poderosa de extensión de la lucha anticorrupción. Si en una zona de África o Ásia una gran multinacional obliga a todos sus provedores y socios, si quieren serlo, a adoptar medidas anticorrupción, esta medida puede ser más efectiva que muchos cambios legislativos" (Nieto Martín, 2013: 205).

advantage to public agents." (Scaff, Silveira, 2014) [free translation]. So, initially, two concerns present themselves: (I) ample prescription of conducts, with many vague judicial concepts and great confluence between descriptions of criminal practices provided for in the Brazilian Legislation and the "offensive acts" foreseen by law; and (II) the emphasis on sanctioning acts committed against foreign public administration, which shows the far extent and the influence of *Foreign Corrupt Practices Act*[10] in the creation of the Brazilian Law.

As to the (I) ample prescription of conducts by the Law, with many vague judicial concepts and great confluence between descriptions of criminal practices provided for in the Brazilian Legislation and the "offensive acts" foreseen by Law, Eduardo Saad-Diniz presents the confluence in a very relevant synthesis:

> "Regardless of greater or smaller consistency that can be drawn from the Law in the Brazilian theoretical field, it is in Davi Tangerino's analysis that we can find a well-elaborated design about the confluence between the description of criminal conducts envisaged in the Brazilian legislation and the offensive acts foreseen in the new Law. Tangerino outlines the comparative charter in two columns (Offensive Acts against Public Administration cf. the New Anti-Corruption Law; and Criminal Types), classifying in 5 lines the equivalent pairs, summarized here: 1) Undue Advantage Offered to Public Officers would match "Active Corruption, combining with the Article 29, CP, therefore, Privileged Passive Corruption and Prevarication, with no harm of extravagant legislation", (2) Incentive to any of the acts provided for in Anti-Corruption Law, which could provide the setting for the types foreseen in the topic (1) by virtue of agents' cooperation; (3) use of legal entities, to conceal or disguise the real interests or the identity of the recipients of the perpetrated acts, which "in general terms, the wilful omission of information that should be registered in a public or private document gives effect to misrepresentation crime or money-laundering"; (4) biddings and contracts, equivalent to practices

[10] "The Anti-Corruption Foreign Corrupt Practices Act (FCPA) prohibits corruption of public agents and foreign government officials in order to obtain, retain or direct business. It outlaws bribery of foreign governmental authorities to obtain or retain business. Any company that has international business as a strategy must develop and implement a policy in accordance with the Anti-Corruption Law FCPA, besides, of course, the Anti-Corruption Laws of its country" (Coimbra, Manzi, 2010: 64) [free translation]. Worthy of additional comments is the fact that such a Law, originated from the US, has been used as a parameter for regulation in many countries and can strike companies that have shares quoted in North American stock markets, regardless of where the malpractice has been committed. For this reason the Brazilian companies must have a special concern if they have international business activities. Any act of corruption related to US jurisdiction can be sanctioned. In this respect, the Law no. 12.846/2013 may indirectly compel such companies to comply with a FCPA, contributing to many Brazilian economic protagonists.

> "incriminated by the types defined in Law no. 8.666/93", without, particularly in sub-paragraphs "f" to "g", falling on malpractices against public administration; 5) hinder investigation or monitoring, even within the scope of regulatory and inspection agencies, would be equivalent to "resistance, disobedience, in their several respects" (Saad-Diniz, 2017: 739-740 [free translation]).

It can be noted, on the layout above, the recourse to Criminal Law, even though the Law deals only with the non-criminal responsibility of the companies. This recourse happened exactly in the form of an increment of the sanction rules.

We can see, as a result, (II) the emphasis on sanctioning acts committed against the foreign public administration, what demonstrates the wide range and influence of Foreign Corrupt Practices Act in the construction of the Brazilian Law. Beyond legal standards, the increase of the punitive intervention reproduces the sort of repression against corporate scandals largely applied in the United States of America[11]. The similarity between the Anti-Corruption Law and the Foreign Corrupt Practices Act is preserved, not only in the legislative technique, but also in the very "obsessive persecutory strategies for intimidation" (Saad-Diniz, 2017: 740).

It happens that this integral internalization of the patterns brought along with it several problems that are evident today. There are, initially, two reasons for this occurrence: (a) the poor result of penal intimidation in the country of origin of regulation and (b) this regulatory standard needs to go through legitimacy filters before being internalized, aiming at an appropriate internalization.

As to (a) the poor result of penal intimidation in the country of origin of regulation, for some time, it has been insisted that the effectiveness of penal intimidation is poor and the major investigations didn't fulfill its potential in terms of positive changes in the governance structures of the organizations in several places in the world, notably in the USA and in Italy. As a matter of fact, there are no elements of empirical evidence showing that the increase of the penal intimidation has guaranteed greater effectiveness in those places. The investigative and legislative reinforcement has been treated by some North American authors even as an illusion sold to ensure the recovery of confidence on the market (Laufer, 2016). As we will see ahead, something similar has been seen in Brazil.

As regards (b) the necessity of legitimacy filters for this regulatory standard before its internalization, aiming at the appropriate internalization, this occurs because there is a sense of uncertainty about the law enforcement institutional conditions and the regulatory potential of the legislation. In Eduardo Saad-Diniz's words:

[11] On the U.S. debate, see: Laufer, 2016: 13-14.

> "On the one hand, there has been little or no discussion about the incompatibilities between legal instruments proper of the Common Law tradition and the Brazilian constitutional order. On the other hand, the specificities of the organizational culture must be taken into account to avoid a mere transposition of standards of compliance duties to a social reality that may not be definitely able to accommodate it" (Saad-Diniz, 2016: 735-736) [free translation].

The law enforcement reality in Brazil is completely different from the one in the US, which is why the mere internalization of the foreign standard is complex. A system of administrative sanctions against companies, strongly linked to Penal Law, was created in a country where the old moralizing intervention perspective hasn't replaced, but overlapped with, the new one, focusing on institutions and companies, which occurs to date. Furthermore, the utility of liability prevention measures

> "(…) is also questionable as to the interpretation criteria inserted in the new Law. In fact, besides poor effectiveness, what we have are negative impacts, an ambience averse to risk and potential investors' drain" (Saad-Diniz, 2016: 741) [free translation].

Following the analysis of the Law, the Art. 6th, in its turn, lists the administrative sanctions set forth in it for commitment of illicit acts: a fine of 0,1% to 20% of the gross revenue or 6 thousand to 60 million *reais*, being the amount not inferior to the advantage obtained, not excluding full compensation for the perpetrated damage when possible. Another foreseen sanction is the publication of the convicting sentence, which is interesting from the perspective of social reproach.

The fact that the fines will never be smaller than the advantages obtained has been praised due to being an intelligent way of punishing illicit acts committed by companies (Souza, 2014). Such perspective even approaches what was defended by Klaus Tiedemann in the sense that if the offenders risked losing their illicit advantages only, or their illicit products, they would practically be at no risk and thus wouldn't feel the special preventive effects of the sanction. A preventive effect could only be produced if the fine comprised a sum well above the value of the illicit benefit earned, in a way that the illicit act wouldn't be advantageous to the company (Tiedemann, 1995: 24-25).

Saad-Diniz, on the other hand, criticizes the common assertion that the introduction of rational logic choice between costs and benefits in Law was positive, or innovative by offering a gradation to the sanction attributed in terms of objective liability. The author substantiates his view by pointing that there is a lack of studies

validating the quality or consistency of such an argument and that, even in terms of competitive advantage, the compliance policies would be of very little significance. The current context of economic crisis per se doesn't help in investment inputs to the productive sector. The resources end up being scarcer for adhesion to vague and strict regulatory standards, which are optional and expensive. It wouldn't be surprising that a company alleged state of need to justify its non-compliance with the integrity standards required by the Law. Additionally, the risk of small and medium-sized companies being wiped out by strict sanctioning mechanisms is real, bearing in mind that even the biggest Brazilian companies were threatened by them during the Car Wash Operation (Saad-Diniz, 2016: 741-742).

Next, in the civil sphere, the sanctions can be found in the four clauses of Article 19. They are: (I) the forfeiture of money, assets, or anything else of value that constitutes advantage or profit obtained, directly or indirectly, through the illicit, safeguarding the rights of the adversely impacted or bona fide third parties[12]; (II) the suspension or partial prohibition of their activities; (III) the compulsory dissolution of the legal entity; and (IV) prohibition of receiving incentives, subsidies, grants, donations or loans from governmental agencies, entities, governmental financial institutions, or government-controlled organizations, for a minimum period of 1 (one) year and maximum of (5) years. The paragraph 1st also raises the two hypothesis, which, when proved, can lead to the compulsory dissolution of the legal entity: (a) when the legal entity is regularly used to facilitate or promote practices of illegal actions; b) when it is created to conceal or disguise illicit interests or the identity of beneficiaries of such illicit acts. They are provisions with too severe penalties, what makes us question whether it isn't precisely the severity of sentences imposed to companies that would justify a system of more guarantees for them in the Anti-Corruption Law cases, and, also, whether this model wouldn't be a motivator to denunciation by the company, handing its employees over to criminal liability, seeking to avoid its own responsibility.

It is at this stage that compliance becomes especially important. In this sense, the Article 7th sets parameters to be considered when assessing the sanction. Worthy of note is the subparagraph VIII, citing, as a means of mitigating sanctions, "the existence of internal mechanisms and procedures of integrity, auditing and incentive to reports of irregularities and the effective application of Codes of Ethics and Business Conducts within the framework of the legal entity" (Scaff, Silveira, 2014 [free translation]), referring here to compliance programs.

[12] On the historical evolution of the loss of assets, see: Januário, 2021: 211-219.

> "Recognizing its failure to act, the State chose not to try an externally imposed regulation, but what has been referred to as regulated self-regulation. Some premises are provided (by the State), leaving it up to the companies to implement their internal conduct codes to better adapt themselves to the new context." (Scaff, Silveira, 2014)[13].

It turns out that this accountability framework is specific of the self-responsibility models (that can even be criminal) of the companies. Thus, regardless the fact that liability in the Anti-Corruption Law cannot really be referred to as a criminal liability of the legal entity, particularly because the Law has expressly adopted the nomenclature of objective, civil and administrative liability, even so, the criminal nature of the Law has been extensively discussed. The great consequence of the debate refers to its strict liability provision (Bottini, Tamasauskas, 2014), whose constitutionality is doubtful, although it has never been questioned.

Apart from that, this provision consolidated the companies' accountability and their adhesion to compliance programs as a way of preventing corruption in Brazil.

As to the objective parameters of analysis of compliance standards, there was, initially, a concern about the inexistence of parameters that the State would provide or demand as a counterpart of the regulation since the law delegates its detailing by decree[14]. It took almost two years for this regulation to be implemented.

In that period, there was an acceptance of the ambiguous liability formulation of different responses for different precautions took by companies (those who take precaution measures shall not be punished as those who do not).[15] Finally, in 2015, the Federal Regulatory Decree no. 8.420/2015 was promulgated, aiming at resolving the question. This, for its part, was criticized for replacing "the state of uncertainty of the 'empty' regulatory provision for the 'excessive one'. After generically defining the 'integrity program' (Art. 41), it inserted sixteen clauses that would be more suitable to demonstrate the company's due caution. The most severe criticism pointed to a "strong commercial appeal, by linking each of the Clauses to a product to be sold in order to 'avoid' or 'mitigate' the company's culpability, albeit limited to the formality of the punitive Administrative Law" [free translation] (Saad-Diniz, 2016: 742-743). This regulation ended up creating a great compliance market in

[13] For more details on compliance programs and possible incentives for their adoption in Brazil, see: Januário, 2019a: 119-147; Canestraro; Januário, 2021: 24 & ff.; Canestraro; Januário, 2020, passim; Januário, 2019c: 221-228.

[14] "Law 12.846/13: (...) Art. 7th - Will be taken into account in the application of sanctions: (...)VIII – the existence of internal mechanisms and procedures intended to ensure integrity, auditing and incentive to irregularity reports and the effective enforcement of the Code of Ethics and Conduct within the Legal Entity framework; (...) Sole Paragraph. The assessment parameters of the mechanisms and procedures foreseen in clause VIII of the caput will be set under regulation of the Federal Executive Power".

[15] This is ambiguous because any measure or key concepts to be verified were offered, which means that any compliance program might be equal, even the most cosmetic and inefficient.

Brazil, without any compelling evidence about the institutional improvement of corruption in Brazil.

The landmark decree is criticized because it demonstrates the reproduction of the definition that compliance programs are in themselves effective once they meet certain formal requirements. The sixteen items that sought the criteria for the interpretation of what "effectiveness" would be, the main compliance mechanisms can be summarized as (I) tone at the top; (II) conduct protocols; (III) code of ethics; (IV) integrity measures; (V) third-party compliance; (VI) training and monitoring; (VII) periodic risk assessment; (VIII) accountability control; (IX) internal controls, reaction strategy and immediate interruption due to irregularities; (X) specific models for irregularity hypotheses and; (XI) communication channels and due diligence (SAAD-DINIZ, 2016, p.743). These mechanisms, as can be seen, only refer to procedures, that is, to what is formally required for compliance as a structure and process. However, none of this allows for true efficiency metrics, since, for example, it does not mean that the training content has been internalized and is followed by the employees. That is, the existence by itself of one of the requirements does not guarantee that the compliance program will work better.

Concerning collaboration with the authorities in investigations, the law provides for it through self-denunciation by the legal entity itself and not through whistleblowing. Initially, it was pointed out that this could lead to an attempt by the company to hide the crime instead of reporting it (Souza, 2014: 4-5). On the other hand, the regulatory decree provided for the protection of the whistleblower. According to him, an adequate compliance program would have an incentive structure that proposes a business environment committed to private-public cooperation. The problem would then be found in the sphere of encouraging denunciation by linking the various benefits of leniency agreements to the company's self-reporting (Silveira, Saad-Diniz, 2015: 349).

In addition, the self-report, which by law must be made by business entities (whistleblower reports only internally, to the company itself, which reports itself to the government), is not accompanied by the possibility of extending the benefits of collaboration to criminal responsibilities of individuals. According to Renato de Mello Jorge Silveira and Eduardo Saad Diniz:

> "... An undeniable obstacle present, however, [...] concerns the failure to provide for attenuation or exemption from criminal responsibilities to be extended to individuals, as was the case, albeit in a limited way, in the antitrust legislation. Without the necessary complementary guarantee, the legal measure is not considered very fruitful, which is limited solely to the corporate sanctioning scope. In this way, such rules, despite being foreseen in some sort of forecast, can ultimately

> generate a reverse effect, that is, to transform the leniency agreement, from a fundamental pillar, now of the anti-corruption policy, into a true Achilles' heel of the system." (Silveira, Saad-Diniz, 2015: 350) [free translation]

In the current regulatory decree, what would be of most interest to the company would be self-reporting to get rid of its punishment. The bad practical consequences of this mainly refer to a tendency towards individual accountability and treatment of corruption from the classical perspective, as a moral deviation, despite the use of the sophisticated and current mechanisms of institutional treatment of corruption. These effects were just the ones noticed throughout Operation Car Wash, as will be shown below. It can be noted, therefore, that Law 12,846/2013 was the normative apparatus that allowed for the huge projection of the operation (the rise) and at the same time posed an obstacle to the creation of an institutional and corporate anti-corruption culture in Brazil and, consequently, the maintenance of earnings from the Car Wash Operation (the fall).

Then, (4) Law n.12.850/13 came to offer new criminal descriptions and, mainly, more modern instruments of investigation, adapting to the standards of the Convention of Palermo, from the United Nations (Greco Filho, 2014: 8). The Brazilian penal code already provided for the figure of an organized crime group or gang, which consisted of the association of three or more people to commit crimes of any nature (art. 288, CP). This figure was renamed as a criminal association, failing to adopt such a stigmatizing term that better defines the concept of the figure. In turn, a second criminal category was created, called criminal organization, characterized by three elements: a) four or more people; b) orderly structure with a clear division of tasks; c) with the intention of committing offenses with a maximum penalty of more than four years or transnational nature.

Also in 2012, the Mensalão judgment explored and applied the concept of "criminal organization" of the Palermo Convention to characterize money laundering. Limited by the then existing list of previous wrongs, laundering could be recognized if the previous offense was committed by a criminal organization (art. 1, VII, Law n.9.613/98), even though the Brazilian legal system didn't offer any definition of its own of this figure. Despite the ratification of the Convention by Brazil, the definition of "serious crime" (art. 2, b, of the Palermo Convention) was not clear in the legal system and may be limited to transnational offenses and the traffic of drugs, people, and weapons (theme of greater attention of the Convention), as explained by the votes of the Supreme Court Judges (STF, 2012: 1206 and 1210).

The Mensalão trial thus ended with the conviction of ten defendants for the crime of "crime organizado" (organized crime), but at different times it demonstrated the existence of a system organized into three main cores, they are: political,

operational, and financial (STF, 2012: 5). Therefore, this division of tasks and subordination between different actors were not particularly valued due to the lack of a legal definition of its own but was presented as an important mechanism for the success of this achievement.

On the other hand, the instruments of investigation thus inserted in the Brazilian legal system were (article 3 of Law n.12850/13): a) the awarded collaboration; b) the controlled action; c) infiltration of police agents. In addition to these, when investigating criminal organizations, the possibilities of: a) environmental capture of sounds and transmissions were made more flexible; b) access to the record of calls and message communications, including databases; c) interception of calls and message communications; d) access to financial, banking and tax records; e) cooperation between different public institutions, regardless of hierarchy or administrative instance. It would then be the task of the judiciary to continue defining minimum standards of legality given the new probationary possibilities developed.

It happens that, once these means of producing evidence were available under the new law, there was fear that the position of the Prosecution and the Judiciary would extend the application of Law 12,850/13 to compensate for the delimitation of the minimum standards of legality for use of these means of proof. In this sense, Silveira (2013: 169 *et seq*.) criticized the extension of the dogmatic interpretation of the crime of criminal organization to the use of procedural institutes that were only applicable to this type of association of people for the commission of crimes, in particular, temporary detention and the means of producing evidence provided for in art.3 of Law n.12.850/13. During the Carwash Operation, it was noted that the use of these devices was a critical success factor for the operation, being criticized precisely for this excessive use of temporary detention and turn state's evidence instruments.

Then, (5) Law 13.303/2016 was promulgated during the Car Wash Operation. This law is also known as the State-owned Companies Law and was clearly aimed at operating to avoid new problems at Petrobras, as Brazil's State-owned oil company was at the center of the corruption schemes revealed by the operation.

In this regard, it is important to emphasize that Petrobras is historically one of the most important and profitable companies in Latin America, in addition to practically monopolizing the extraction of crude oil and the refining of fuels in Brazil. For this reason, it is also one of the most important companies on the continent in carrying out works with economic purposes and infrastructure improvement. As it is an economic center and carries out many works (contracts that allow additives, variations, and price increases), it is expected that there is a focus of corruption there, according to the criminological literature on corporate crime (Nieto Martín, 2015: 54 *et seq*.). The facts denounced at the Car Wash Operation, therefore, should not

be surprising, even if they needed an adequate response to avoid the maintenance and reproduction of corruption in the company.

In this scenario, while the application of punishments in the Car Wash Operation was the response method chosen by the Judiciary, the enactment of Law 13.303/2016 was the response chosen by the Brazilian National Congress. With a focus on preventing corruption, the provisions of articles 9, paragraph 1, and 17, paragraph 2 are highlighted in the law. Art. 9, §1 requires state-owned companies (public companies and mixed-capital companies) to implement a code of ethics and an "integrity program" (the sum of the compliance program and other internal control measures that align the 3 lines of defense against risks corruption). Art. 17, §2º prohibits the appointment of political figures or those related to politics, union organizations, and other conflicts of interest for senior positions in the administration of state-owned companies. There is, therefore, an attempt to strengthen the prevention of corruption at the institutional level, with a focus on ethical conflicts, conflicts of interest, and structuring of prevention against corruption in state-owned companies.

Although these changes, the Car Wash Prosecutors' Task Force proposed in 2015 a legislative change entitled "Ten Measures Against Corruption". Under the argument that the Brazilian criminal procedure was excessively full of guarantees and slow, leading several corruption crimes to the statute of limitations and impunity, the prosecutors thus proposed, among other measures[16], the typification of new conduct (such as illicit enrichment), flexibilization of the criteria for enforcement of procedural arrest and creating objective accountability of political parties if their accountability were rejected by the electoral justice. This proposal ended up not becoming law, but it is noteworthy for having had great repercussion during the operation, demonstrating its importance and national and political projection during its heyday.

Finally, the latest important legislation modified in the last decade in Brazil that relates to the prevention of corruption at the institutional level is (6) Law 14.133/2021, the New Public Procurement General Law, enacted after the end of the Carwash Operation. This law came to replace the former Law 8.666/1993, which already provided for several financial and non-financial controls for public purchases very similar to those provided for by the annexes of ISO 37001 for corporations (International Organization for Standardization, 2006). With the reform, the new law not only has deepened these controls, requiring, for example, division of functions in the requisition, authorization, payment and internal and external inspection (to the institution) of public contracts, double verification

[16] The project received its own website, where the ten measures were thus systematized. See: Ministério Público Federal (2021, online). The "popular initiative" law project (PL 3855/2019) was endorsed by different judiciary bodies and is available on the Chamber of Deputies website: Câmara dos Deputados (2016, online).

for payment, and rules for maintaining the greater competition and favoring the lowest possible price for purchase by the government, but it also brought several provisions on integrity programs. In art. 25, §4, the Law requires companies that are contracted by the State in contracts exceeding R$ 200,000,000 (two hundred million reais) to implement an integrity program in six months. In art. 60, the law provides that, in the event of a tie in the competition, companies that already have an integrity program in place have the advantage of a tiebreaker against those that have not implemented it yet. In art. 156, §1, the integrity program is placed as a factor to observe the application of administrative sanctions in case of deviations during public contracts. Finally, the sole paragraph of article 163 of the Law provides that the implementation of the integrity program will be mandatory if a company that infringed the competitive bidding wishes to rehabilitate itself to participate in a new bid.

The sum of all these measures were aimed at avoiding the creation of people and bribery schemes, overpricing in public contracts, and space for arbitrary decisions in favor of companies. The focus is to avoid corruption and damage to public coffers. It is yet another attempt to block the misuse of public resources, again providing for measures from an institutional perspective, and at the initiative of the Brazilian Parliament. The reasons for this change at this time, however, are not only due to the Car Wash Operation, but the negative effects after it was finished, which were made evident after the publicity of corruption scandals in the purchase of health equipment and vaccines for the covid-19 pandemic treatment. More about this will also be indicated in the final topic of this paper.

It is noted, therefore, that many legislative changes were carried out in Brazil aiming at the treatment of corruption from an institutional perspective. However, at the level of law enforcement, the traditional interpretation that interprets corruption from a moralistic and individual perspective remains strong in the country and, together with gaps in current legislation, prevents the mature and institutional treatment of corruption at a national level. Finally, it is also noted that except for Law 12,527/2011 (Access to Information Law), which can publicize data on salaries received by public employees, and the limitations on hiring for the administration of state-owned companies by Law 13.303/2016, the other legislative amendments said nothing about the hiring of personnel by the government, another measure that would be advised as an important control against corruption. This regulatory void was also another problem for the Post-Car Wash Operation, as will be seen at the end.

2. *CAR WASH* NEW STANDARDS OF INTEGRITY AND DUE DILIGENCE

Commenting on the "Car Wash Operation", Eduardo Saad Diniz points out that, despite the operation reaching global dimensions, the intimidating reinforcement did not necessarily reflect in transformations that present:

> "Convincing results of improvement in the ethical environment in politics or the market. The trend seems to form part of an international agenda, introducing into the daily routine of the criminal justice system, sophisticated practices of awarding whistleblowing, leniency agreements and compliance programs." (Saad-Diniz, 2016, p.722) [free translation]

This international trend is also verified by the positive reinforcement offered by international institutions, as was the case with the *Transparency International Anti-Corruption Award* given to Carwash Prosecutors' Task Force in 2016 (Transparency International, 2016). As said by the institution, the convictions obtained and the "10 Measures against Corruption" project proposed to demonstrate how the group assumed the main role in Brazilian's transformation (*Ibidem*).

Although it does not discredit the process of changing the paradigm in the treatment of corruption in Brazil, it is worrisome given the efforts that have been undertaken to change this reality.

Another important issue about the efficiency in transforming the Brazilian corporate culture concerns the reproduction of the regulation of the Foreign Corrupt Practices Act in Brazil during and after the Car Wash Operation. In this regard,

> "Even though there is widespread mobilization in the provision of legal services, making certain that the fear of company directors concerning the extraterritorial reach of the American legislation is made, the impact of the FCPA (Foreign Corrupt Practices Act) is small, with a relatively low incidence of cases involving Brazilian actors. Not only in Brazil but also in Latin America, the reference to the FCPA was limited to "cosmetic" appropriation as derived from the imposition of multinationals, representing a mere reaction to crises or as a mechanism for extortion and business strategies, without effective results in terms of improving the business environment." (Saad-Diniz, 2016: 735) [free translation]

The situation, at this point, is more sensitively aggravated. If adherence to the compliance culture only takes place through "cosmetic" compliance programs to ensure economic benefits for a few agents, something wrong is being identified. Furthermore, in economic terms, the extraterritorial reach of the Anti-Corruption Law would have the potential to harm the allocation of international investments. This effect affects emerging markets more drastically, as is the case in Brazil. Furthermore, if the central point of defending the legislation is due to the preventive potential of the regulatory incentive to compliance, on the other hand, "most of the compliance programs already structured in national companies make references to The FCPA Guide's recommendations." As previously criticized, "although there is a certain reception of the American legislation in the configuration of the Brazilian law, it is wrong to believe that the simple adherence to the North American standard would justify a behavior 'in conformity with the Brazilian legislation." (Saad-Diniz, 2016: 736). The regulatory standards, institutional conditions for implementation, and the corporate culture of the countries are different, which is why the operation cannot be automatic.

What is exposed here is also added to the particular conditions of Brazilian capitalism. Brazilian dependent development is evidenced when it denotes the internalization of external legal standards. Brazil adheres to the standards imposed to guarantee the maintenance of its condition of (deficit in) development (Fernandes, 2008). At the same time, even the country's corporate and legal cultures adopt external standards, even though their conditions are evidently particular and tragically national.

Furthermore, in economic terms, it is notable that in Brazil there is a greater need for economic and social development than in the USA, the country that originated the FCPA. The country can't adopt the same regulatory standards as a country with a consolidated production matrix and consumer capacity. This happens not only because Brazil materially cannot do it, but mainly because it has not politically agreed that it should do it. Adherence to US standards during the Car Wash Operation for the interpretation of Law 12,846/2013 was automatic and not discussed.

Since the Brazilian elite's resource to compensate for the deficits in economic development is the isolation of the State (Fernandes, 2008), it is equally not to be expected that the standards of practice of corruption and infringement of democratic ideals are the same in Brazil and the central economies. The regulation, therefore, needs to be adapted to the national reality and justify itself not only by what it protects but also as guardianship, given the context in which it operates (Shecaira, 2012: 603 *et seq*).

Compliance regulation, therefore, cannot be innocently treated as a reinvention of the wheel. It must be recognized that economic activity cannot

be made unfeasible. For these reasons, anti-corruption regulation needs to be in contact with producers, especially those with less potential to invest in corporate controls, usually smaller companies. On the other hand, none of this can justify greater burdens on the working class, as occurred from 2016 onwards in Brazil, with the cut in labor and social security rights as a way to "compensate" for the loss of illicit advantages that the pursuit of corruption by half of the Car Wash Operation would have caused. It is necessary to be careful with the worker in the compliance regulation, especially when it is placed in a situation of criminal risk and the counterpart is the adherence to cosmetic compliance practices (Miranda, 2019: 125-126).

Thus, now, with the Car Wash Operation concluded, all regulation and enforcement of corruption in Brazil is in a space of uncertainty regarding the political-criminal parameters that the country wishes to adopt. If the existence of the operation was important to affirm that the laws exist and apply to everyone, on the other hand, it is even more important to know "what comes after the Car Wash Operation". The operation introduced regulatory parameters to be applied in the day-to-day activities of all companies. In the media spotlight, the operation's problems were hidden by the fetish that the spectacle of the arrests of politicians promoted, but the results after the operation could highlight the worst of the collective "anti-corruption" hysteria: the restriction of rights, the exchange of "politicians" by "scapegoats" and new waves of corruption with more tragic consequences.

3. THE POST "CAR WASH OPERATION": RISE OF POLITICAL FIGURES AND FALL OF ENFORCEMENT AGAINST CORRUPTION

One of the very important concepts for the analysis of power in Latin American countries is the coloniality of power. It is a concept that demonstrates how colonial structures are sustained to the present day, keeping a distance from the people (and their social identity) away from those who exercise power (including the judiciary) (Quijano, 2005). Commenting on this concept, Haesbaert points to the need to overcome binomials, one of them being the opposition between command and obedience (Haesbaert, 2021: 113). Thus, he cites as an example the Zapatista premise of *mandar obedecendo* (to command while obeying) - power is only legitimately exercised to such extent as it is representative of the popular will - which would require the restructuring of institutions of "multi or trans-territoriality articulated at different scalar levels" (Haesbaert, 2021: 113).

On different occasions, the Car Wash Operation presents itself as a turning point in Brazilian republican history. However, the fact that its members were

elevated to the status of "national heroes"[17] echoed the well-known story of maharaja hunters and broomsticks. The control, the surveillance and even the truth remain a privilege of some men in a small room (or Telegram group).

The fall of the Car Wash Operation ironically started when people involved in the anti-corruption enforcement focused on individuals and not institutions in the fight against corruption. This moment was when, according to the Brazilian Supreme Court Judge Gilmar Mendes, prosecutors and judges of the Car Wash Operation aided Jair Bolsonaro in the Presidential elections (Passarinho, 2021).

Above the personal political alignment of the members of Car Wash Operation and their anti-corruption agenda, there was an extra key factor to explain this so said support. Judge Sergio Moro, the main figure of this operation, wanted it to go beyond "Mani Pulite", the Italian operation that inspired the Brazilian one. The idea was to take his "perspective of implementing a strong anti-corruption and anti-organized crime agenda, with respect for the Constitution, the law and the rights" (Gragnani, 2018) in the new Government.

Things went exactly the way Judge Sergio Moro wanted, until a certain point in history. The Car Wash Operation was able to remove from the election the most important figures of the Workers' Party (Partido dos Trabalhadores, PT), creating the opportunity for a change in power and the victory of the opposition. When the opposition prevailed in the election of the President Jair Bolsonaro and many Senators and Deputies of his party or of conservative allies, massacring the Brazilian leftists, it was expected Sergio Moro to be part of the new government. And so he did. Sergio Moro became what the press called the "Super-Minister of Justice" in Bolsonaro's Government and was one of the most important figures in the first year of the new government (Soares, 2018).

Things, however, didn't turn out the way Moro wanted once he was in the government. The problems started when the Rio de Janeiro District Attorney Office started to investigate two of the President's sons for the practice of corruption. They were basically accused of employing people with no capacities for the job in their staff of public employees of unconditional hiring, with the condition these people repassed part of their wages back to their employers. This scheme was called "rachadinha" (Borges, 2020).

When this happened, corruption control became personal. First, the President started with speeches about the new corruption-free government because he was the most important and honest figure leading the country. After that, he started to try to interfere in the institutions, with several actions, which two deserve special

[17] In addition to the fame achieved by the then judge Sérgio Moro, the task force of the Public Ministry also claimed a place in the pantheon of the national political imagination. One of the most famous episodes was the hiring of an advertising billboard with a photo of the promoters, paid directly by one of its members. The case did not suffer any administrative sanction (Angelo, 2020).

mention: (1) he nominated an Attorney General and a Supreme Court Minister aligned with his agenda, acting like government members, not Estate members, and avoiding any accusations against government people and allies; (2) tried to nominate a new chief to the Rio de Janeiro Federal Police Department who was friends with the Bolsonaro family, hoping he could "help" in the investigations against his sons. Suddenly, there was already an observed context of enforcement institutions weakening, compromising corruption control in Brazil (Shalders, 2020).

When the President (2) tried to nominate a new chief to the Rio de Janeiro Federal Police Department that was friends with the Bolsonaro family, hoping he could "help" in the investigations against his sons, Sergio Moro got especially angry and got away from the government (Shalders, 2020). After going home, Moro aimed for the compliance industry he so well built in the Car Wash Operation and became not only a compliance consultant but also a monitor of the bankruptcy reinstatement of one of the corporations the Carwash operation devastated when applied the law 12.846/2013 (UOL, 2020).

Bolsonaro then became unstoppable and went deep in his mission of protecting people around him against corruption accusations. One of the measures was the burial of the Car Wash Operation itself. Augusto Aras, the nominated Attorney General, despite not being someone voted by the Prosecutors (the PT government established a good practice of nominating as Attorney General the Prosecutor elected by the Prosecutors themselves) (El País Brasil, 2019), was the one with the power and the will to finish off the operation and so he did in January 2021 (Shalders, 2020).

When all those things were already a fact for Brazilians, the OECD started to show how much it was worried about Brazil and its throwback in the fight against corruption (OECD, 2019).

In the current state, things not only didn't get better but, in fact, they look worse. People around the whole world know that the Covid-19 pandemics caused an even worse tragedy in Brazil. It included the arising of a new variant of the virus in the country and many restrictions of various countries over the circulation of people that were in Brazil during the time of the toughest measures against the virus. Corruption played a central role in this tragedy. It's not a coincidence that right after all the dismantling of the institutions of corruption control, the Brazilian Senate is now discussing the Covid-19 crisis in the country and has opened a Parliamentary committee to investigate the reasons behind it. According to the Senate Investigation Commission, Brazil took this much time to solve the Covid-19 crisis because there were corruption problems in the acquisition of some vaccines. They were delayed because people were trying to ask for bribes and only some sellers were up to it (Rezende, 2021). In the middle of this delay, the government tried to impose hydroxychloroquine treatment in many places, both public and

private, aiding private actors willing to take it forward. The result was that lots of people died, mainly elderly people and vulnerable indigenous (G1 SP, 2021 and Juca, 2021). At this moment, some people, including the President himself, are being indicted for practices that look so much like those of the Nazi regime, but also corruption is at the core of these problems (Brito, 2021).

Now, in response to the Senate commission appointments, comes the President with his new Presidential Compliance Program, in a signal of institutional maturity (Brasil, 2021). However, he repeatedly affirms the "end of corruption" because of, in his own words, his "incorruptible honesty" (Shalders, 2020). It's still happening mainly because, in response to the moralism in the treatment of corruption by the Car Wash Operation, corruption became a person, an enemy, a political party, a name which prison or depossession would solve all problems. In this scenario, the President put himself beyond any moral doubt and acted like he was above any kind of accusations. Obviously, his fellow government mates acted in the same way. Therefore, corruption and personified ethics come before control mechanisms and start to adopt a post-truth model of administrative probity. We are not talking about verification, but about personal beliefs (not to say messianic faith) without institutional mechanisms capable of controlling them. The results are basically corruption in the core of the sanitary crisis and the maintenance of the toxic narrative of personal honesty.

Institutional immaturity is also manifested in the lack of regulation of the hiring of people to exercise public positions of unconditional designation. Coincidence or not, this issue is never questioned by the President of the Republic, even though it is a critical success factor for the occurrence of corrupt practices of improper appointment of public servants who then pass on their salaries to holders of elective positions that were appointed. As noted in the regulatory analysis, this institutional control mechanism is precisely the one that has been missing from legislative changes in Brazil over the last 10 years.

In a general way, the Brazilian situation shows institutions must be above people if controlling corruption is really important. The focus on corporations and the responsive regulation aiming the prevention are still the best options for good institutional arrangement and achieving results against corruption in an efficient way.

Finally, in a similar vein, it is worth mentioning Saad Diniz, for whom the change of perspective only occurs when corruption is given a more open treatment to embrace the multiple forms of its manifestation. Among the different possible perspectives in which corruption can manifest itself, Saad Diniz highlights the micro and macro forms, valued by the degree of vulnerability of the Rule of Law, the level of disruption of governance and interaction networks (Saad-Diniz, 2017: 722). This distinction is important when trying to verify the degree of institutional disruption (public or market sector, corporate) of corruption and think about

more sophisticated sanctioning controls, always focusing on institutions and less on individuals, even though they also deserve the attention of the Law.

CONCLUSION

This article attempted to demonstrate how a scenario of strong reaction to corruption can so quickly transform into a scenario of authoritarianism and inefficiency. The Car Wash Operation, although performed after the 2013 protests (which was a popular movement), actually originates from a series of legislative changes. In this way, they are the movements of the State itself (trial of the *Mensalão* and the introduction of new investigation mechanisms) that led to the emergence of an "unprecedented" operation, but which kept the same moral perspective of corruption.

The lack of change in perspective led the operation to launch its own legislative ("Ten Measures Against Corruption") and electoral endeavors, without generating sensitive changes in the organizational culture or even offering a new regulatory model guided by prevention through compliance instead of criminal repression. Moral speeches led to a conservative shift in national politics and the abuse of procedural instruments despite evidence. Ironically, the operation itself is dismantled by the system it helped to elect and sees a new institutional adjustment between the powers to guarantee the emptying of the "advances" that were once recognized.

In addition to the ineffectiveness of the moral speech and the short-term metrics used, for example, by Transparency International, this article concludes that the problem of corruption is not overcome by cooperation between the powers or by the articulation of "political projects". Considering what has been said, if the protection of public administration must be guided by the adequate provision of services by the State and the adequate provision is guided by the correct intervention of the State in the social and economic spheres, aiming at maintaining the democratic legitimacy of the institutions, it comes to an initial idea of what is intended to protect and on what basis the strategies to fight corruption will be implemented. These reasons seem to be, in principle, adequate to what the Constitution of the Federative Republic of Brazil provides, especially in its article 37.

Control and surveillance mechanisms must be democratized. It is necessary to decentralize decisions and overcome the personification of solutions. Messianic speeches must be overcome, as well as the North American techniques of "negotiation", which only privatize the conflict by putting it in the hands of a few inexperienced public agents. The nation does not need to be saved from its people, but by its people.

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USPON I PAD KONTROLE KORUPCIJE U BRAZILU: Javne institucije, korporacije, usklađenost i stanje nakon "Car Wash" akcije

Autori se u radu bave analizom problema korupcije i rada nadležnih institucija u Brazilu. U prvom delu rada su predstavljene relevantne odredbe krivičnog materijalnog i procesnog zakonodavstva. U drugom delu rada autori su analizirali "Car Wash" akciju koja otkriva nekoliko primera povezanosti kompanija i političara. U sledećem delu autori objašnjavaju kako se koncept korupcije razvio u institucijama i korporacijama u Brazilu uz navođenje relevantnih informacija koje se tiču njihovih direktora. Zatim se osvrću na period nakon "Car Wash" akcije. U tom delu objašnjavaju različite ciljeve koji su realizovani dolaskom novih političara. U pogledu toga izveden je zaključak da je brazilska kriminalna politika u vezi sa suzbijanjem korupcije unapređena izmenom zakonovadavstva, a što se najviše odrazilo na rad krivičnog pravoduđa. Nažalost, strateško ograničenje u pogledu strukturnih promena i dalji razvoj kontrole, praćeni moralnim ubeđenjima sudija i tužilaca sprečili su dalji uspeh u suzbijanju korupcije u Brazilu.

KLJUČNE REČI: Brazilsko pravo; korupcija; "Car wash" aktivnost; kriminalna politika; kontrola korupcije.

ULOGA AGENCIJE ZA PREVENCIJU KORUPCIJE I KOORDINACIJU BORBE PROTIV KORUPCIJE U BORBI PROTIV KORUPCIJE U BOSNI I HERCEGOVINI

Ljubinko Mitrović*
Gojko Pavlović**

Korupcija jeste negativna, sveprisutna, društveno opasna, socijalnopatološka i kriminogena pojava koja ima značajne komponente: moralnu, socijalnu, kriminološku, ekonomsku, istorijsku i druge, kao značajan oblik različitog ispoljavanja. Korupcija ugrožava demokratiju, slabi institucije, ekonomski i društveni razvoj i borbu protiv siromaštva, uništava političku stabilnost i stoga je krajnje vrijeme da se preduzmu energične i oštre mjere kako bi se ova pojava iskorijenila. Zakonom o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije iz decembra 2009. godine (u daljem tekstu: Agencija) osnovana je Agencija za prevenciju korupcije i koordinaciju borbe protiv korupcije sa zadatkom prevencije uticaja korupcije na razvoj demokratije i poštovanja osnovnih ljudskih prava i sloboda, kao i uticaja na podrivanje ekonomskog i privrednog razvoja Bosne i Hercegovine, te svih ostalih oblika uticaja na društvene vrijednosti, kao i za koordinaciju borbe protiv korupcije. U odredbi člana 5 navedenog zakona pobrojani su ciljevi osnivanja Agencije, i to su: a) identifikovanje i eliminisanje uzroka korupcije; b) odvraćanje lica od činjenja krivičnih djela u vezi sa korupcijom; c) obezbjeđivanje i unapređenje pravnog okvira za prevenciju korupcije; d) podsticanje učešća civilnog društva u prevenciji korupcije; e) podizanje svijesti javnosti i stvaranje odnosa netolerancije prema korupciji; f) edukacija i bolje upoznavanje društva o uzrocima i posljedicama uticaja korupcije, te o aktivnom učešću u njenoj prevenciji i g) promovisanje transparentnog i odgovornog rada organa i institucija u Bosni i Hercegovini. Agencija je nezavisna i samostalna upravna organizacija, koja za svoj rad odgovara Parlamentarnoj skupštini Bosne i Hercegovine. Agencija u skladu sa zakonom dva puta godišnje dostavlja Komisiji za izbor i praćenje rada Agencije svoje izvještaje o radu.

KLJUČNE RIJEČI: korupcija; Agencija za prevenciju korupcije i koordinaciju borbe protiv korupcije; Bosna i Hercegovina.

* Doktor pravnih nauka, Ombudsmen za ljudska prava Bosne i Hercegovine i redovni profesor na Fakultetu pravnih nauka Panevropskog Univerziteta APEIRON u Banjoj Luci, e-mail: *ljubinko58@gmail.com.*

** Doktor pravnih nauka, Istraživački centar Banja Luka. e-mail: *pavlovicgojko@gmail.com.*

UOPŠTE O KORUPCIJI

Upravo zbog toga što još uvijek ne postoji jedinstveni i opšteprihvaćeni pojam i definicija korupcije (Derenčinović, 2001: 1465-1468), iako se radi o pojavi davnašnjeg porijekla u pravnoj, sociološkoj (Polšek, 1999: 443-455), filozofskoj, bezbjednosnoj, politikološkoj i drugoj literaturi se mogu pronaći različita određenja ovog pojma[1]. Pri tome pojedini autori daju jasne, precizne i koncizne definicije, za razliku od onih koji opisnim putem pokušavaju da što širi krug različitih oblika pojavnog manifestovanja korupcije podvedu pod obilježja i karakteristike ovog pojma. Ima i onih autora koji se zadovoljavaju prostim tumačenjem zakonom određenog pojma korupcije (kroz krivična djela primanja mita i davanja mita), i to najčešće zbog pojma kako je on određen u odredbama krivičnog zakonodavstva odnosne države. Naravno da pri tome možemo razlikovati definicije ovog pojma u međunarodnoj, odnosno u unutrašnjoj ili nacionalnoj literaturi (Alibunarić, 2002; Sačić, 2003).

Korupcija se smatra patološkom pojavom, nemoralnom i štetnom po društvenu zajednicu. U pravnom smislu, korupcija se definiše na razne načine i kroz razna krivična djela (primanje i davanje mita, protivzakonito posredovanje, zloupotreba službenog položaja, i dr.). U literaturi ima mnogo definicija korupcije, a jedna od njih (koju je dao *Carl Freidrich*), korupciju definiše kao *«devijantno ponašanje povezano sa specifičnim motivom – da se pribavi privatna dobit na račun javnog ovlašćenja» (Mitrović, 2019: 344).*

Korupcija, odnosno podmićivanje jeste negativna, sveprisutna, društveno opasna, socijalnopatološka i kriminogena pojava koja ima značajne komponente: moralnu, socijalnu, kriminološku, ekonomsku, istorijsku i druge, kao značajan oblik različitog ispoljavanja. Korupcija ugrožava demokratiju, slabi institucije, ekonomski i društveni razvoj i borbu protiv siromaštva, uništava političku stabilnost.

Korupcija je negativna društvena pojava, koja se manifestuje različitim oblicima zloupotrebe položaja ili ovlaštenja radi sticanja imovinske ili druge koristi, za sebe ili drugoga, bilo da je riječ o javnom, bilo da je riječ o privatnom sektoru.

[1] O korupciji danas govori niz međunarodnih dokumenata poput Konvencije Ujedinjenih nacija za borbu protiv korupcije (koju je Bosna i Hercegovina potpisala septembra 2005. godine, a ratifikovala 26. oktobra 2006. godine), Krivičnopravne konvencije o korupciji iz 1999. godine i Dodatnog protokola na Krivičnopravnu konvenciju o korupciji iz 2003. godine, Preporuke REC (2003) 4 Savjeta Evrope – Komiteta ministara zemljama članicama o zajedničkim pravilima protiv korupcije u finansiranju političkih partija i izbornih kampanja iz 2003. godine, Građanskopravne konvencije o korupciji iz 1999. godine, Deklaracije o 10 zajedničkih mjera za suzbijanje korupcije u Jugoistočnoj Evropi iz 2005. godine, Helsinške deklaracije iz 2007. godine, Makao deklaracije iz 2010. godine, Oradea deklaracije iz 2010. godine, Rezolucije (97) 24 Savjeta Evrope – Komiteta ministara o dvadeset vodećih principa u borbi protiv korupcije, Statuta Mreže Evropskih partnera za borbu protiv korupcije itd. (Vidjeti više kod: Mitrović, Lj. (2019) "Paying and Receiving Bribes in Bosnia and Herzegovina", *Economic Criminology* 18, 342-349).

Korupcija predstavlja prijetnju vladavini prava, demokratiji i ljudskim pravima, podriva dobru vladavinu, pravičnost i socijalnu pravdu, uništava konkurenciju, ometa ekonomski razvoj i ugrožava pravilno i pošteno funkcionisanje tržišne privrede, ugrožava stabilnost demokratskih institucija, moralne osnove društva, etičku vrijednost i pravdu.[2]

Korupcija je, u suštini, sticanje materijalne ili društvene koristi bez pravnog osnova, pa korupciju u užem smislu čine sljedeća krivična djela, i to: zloupotreba službenog položaja, davanje i primanje mita, protivzakonito posredovanje, prevara u službi, posluga, falsifikovanje službene isprave, nesavjestan rad u službi, kao kvalifikovani oblici krivičnih djela – zaključenje štetnog ugovora i izdavanje i neovlašteno pribavljanje poslovne i službene tajne (Mitrović, Tomašević, 2019: 97).

Dakle, neki oblici koruptivnog ponašanja definisani su kao krivična djela u pozitivnim zakonodavstvima. Pored navedenih, postoje i drugi oblici koruptivnog ponašanja koja nemaju obilježja krivičnog djela, ali svakako zaslužuju da budu spriječeni ili kažnjeni. Naime, vrlo teško je otkriti korupciju, budući da se korupcija uglavnom realizuje između dvije strane, u tajnosti, bez svjedoka, rijetko uz učešće posrednika, ali uvijek uz pribavljanje nedopuštene koristi. Takođe, korupcija je transnacionalna pojava koja pogađa sva društva i prisutna je od najranijih epoha razvoja ljudske civilizacije (Mitrović, Tomašević, 2019: 98).

Ono što je interesantno Zakon o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije u odredbi člana 2 daje definiciju korupcije kao izuzetno negativne društvene pojave[3]. Naime, ovim zakonom korupcija označava svaku zloupotrebu moći povjerene javnom službeniku ili licu na političkom položaju na državnom, entitetskom, kantonalnom nivou, nivou Brčko distrikta Bosne i Hercegovine, gradskom ili opštinskom nivou, koja može dovesti do privatne koristi. Korupcija posebno može uključivati direktno ili indirektno zahtijevanje, nuđenje, davanje ili prihvatanje mita ili neke druge nedopuštene prednosti ili njenu mogućnost, kojima se narušava odgovarajuće vršenje bilo kakve dužnosti ili ponašanja očekivanih od primaoca mita.

1. AGENCIJA ZA PREVENCIJU KORUPCIJE I KOORDINACIJU BORBE PROTIV KORUPCIJE U BOSNI I HERCEGOVINI

Korupcija u Bosni i Hercegovini predstavlja sveprisutnu pojavu kojoj se bosanskohercegovačko društvo do sada nije bilo u stanju efikasno suprotstaviti.

[2] Strategija borbe protiv korupcije u Republici Srpskoj od 2018. do 2022. godine, Banja Luka, jul 2018. godine, 4.

[3] Zakon o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije, *Službeni glasnik Bosne i Hercegovine*, broj 103/2009 i 58/2013.

Korupcija je i dalje široko rasprostranjena, a politička opredijeljenost po ovom pitanju nije pretočena u konkretne rezultate (stav Evropska komisija, 2015). Pravni i institucionalni okvir je i dalje slab i neadekvatan, a nedostatak provedbe zakona negativno utiče na građane i institucije. Posljednji Indeks percepcije korupcije, koji na godišnjoj osnovi provodi Transparency International, ukazuje na činjenicu da se Bosna i Hercegovina nalazi na 111. mjestu, od ukupno 180 zemalja, sa ocjenom 35 na skali od 0 do 100, te je nazadovala u odnosu na prošlu godinu, kada je ocjena iznosila 36. Primjetan je i konstantan pad na ljestvici, počevši od 2012. godine, kada je Bosna i Hercegovina bila rangirana na 72. mjestu i imala ocjenu 42.

Agencija za prevenciju korupcije i koordinaciju borbe protiv korupcije uspostavljena je krajem 2009. godine sa zadatkom prevencije uticaja korupcije na razvoj demokratije i poštovanja osnovnih ljudskih prava i sloboda, kao i uticaja na podrivanje ekonomskog i privrednog razvoja Bosne i Hercegovine, te svih ostalih oblika uticaja na društvene vrijednosti, kao i za koordinaciju borbe protiv korupcije.

U odredbi člana 5 Zakona o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije[4] pobrojani su ciljevi osnivanja Agencije, i to su: a) identifikovanje i eliminisanje uzroka korupcije; b) odvraćanje lica od činjenja krivičnih djela u vezi sa korupcijom; c) obezbjeđivanje i unapređenje pravnog okvira za prevenciju korupcije; d) podsticanje učešća civilnog društva u prevenciji korupcije; e) podizanje svijesti javnosti i stvaranje odnosa netolerancije prema korupciji; f) edukacija i bolje upoznavanje društva o uzrocima i posljedicama uticaja korupcije, te o aktivnom učešću u njenoj prevenciji; g) promovisanje transparentnog i odgovornog rada organa i institucija u Bosni i Hercegovini.

Agencija je nezavisna i samostalna upravna organizacija, koja za svoj rad odgovara Parlamentarnoj skupštini Bosne i Hercegovine. Agencija u skladu sa zakonom dva puta godišnje dostavlja Komisiji za izbor i praćenje rada Agencije svoje izvještaje o radu.

U obavljanju poslova iz svoje nadležnosti utvrđenih Zakonom, Agencija se pridržava sljedećih antikorupcijskih principa, i to:

a. princip zakonitosti - mjere za prevenciju korupcije sprovode se u skladu sa Ustavom i zakonima Bosne i Hercegovine, na način koji obezbjeđuje poštovanje ljudskih prava i osnovnih sloboda.
b. princip transparentnosti, odnosno javna kontrola rada Agencije - rad Agencije je u potpunosti transparentan i svakako podliježe javnoj kontroli.
c. principi jednakog tretmana, odnosno nediskriminacije - svi imaju pravo na jednak pristup pri obavljanju aktivnosti od javnog interesa i jednak tretman od strane javnih službenika, bez korupcije.

4 Zakon o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije, *Službeni glasnik Bosne i Hercegovine*, broj 103/2009 i 58/2013.

d. princip interakcije - efikasnost mjera za prevenciju korupcije obezbijeđena je koordinacijom aktivnosti svih organa, razmjenom informacija među njima, te uzajamnom saradnjom.
e. princip kontinuiteta - uspostavljanje i sprovođenje efikasnih mjera za prevenciju korupcije njihovim kontinuiranim nadzorom i pregledom.

Pored navedenih, Agencija u svom radu primjenjuje i dodatne principe, i to: efikasnosti, ekonomičnosti, odgovornosti i dosljednosti.

Agencija je nadležna za prevenciju korupcije i koordinaciju borbe protiv korupcije u institucijama javnog i privatnog sektora kod:

a. nosilaca funkcija u zakonodavnoj, izvršnoj i sudskoj vlasti na svim nivoima vlasti u Bosni i Hercegovini;
b. javnih službenika, zaposlenih i policijskih službenika u institucijama vlasti na svim nivoima;
c. članova uprave, ovlaštenih i drugih lica u privrednim društvima, javnim preduzećima, javnim ustanovama i privatnim preduzećima;
d. članova organa i drugih ovlaštenih lica u političkim partijama;
e. ovlaštenih lica u kulturnim i sportskim ustanovama, fondacijama, udruženjima i nevladinim organizacijama.

Nadležnosti Agencije propisane su u odredbi člana 10 Zakona, i to su:

a. izrada Strategije za borbu protiv korupcije u Bosni i Hercegovini[5], te izrada Akcionog plana za prevenciju korupcije;

[5] Strategija za borbu protiv korupcije u Bosni i Hercegovini za period 2015 – 2019. godinu (u daljem tekstu Strategija) i prateći Akcioni plan predstavljaju peti strateški antikorupcijski dokument koji je donesen u Bosni i Hercegovini s ciljem planskog i strateškog suprotstavljanja korupciji. Strategija i Akcioni plan su usvojeni 7. maja 2015. godine na 6. sjednici Savjeta ministara Bosne i Hercegovine. Strategija je imala za zadatak stvaranje opšteg okvira za sveobuhvatnu borbu protiv korupcije, što svakako podrazumijeva utvrđivanje prioriteta na planu prevencije korupcije i borbe protiv korupcije, principa i mehanizama zajedničkog djelovanja svih institucija u Bosni i Hercegovini kao i svih segmenata društva na tom polju, te stvaranje, odnosno unapređenje pretpostavki za smanjenje stvarnog i percipiranog nivoa korupcije i afirmaciju pozitivnih društvenih vrijednosti poput integriteta, odgovornosti i transparentnosti. Iz ovako definisanog opšteg cilja proizilaze i strateški ciljevi koji se u Bosni i Hercegovini trebaju postići provođenjem Strategije: 1. uspostavljanje i jačanje institucionalnih kapaciteta i unapređenje normativnog okvira za borbu protiv korupcije; 2. razvijanje, promovisanje i provođenje preventivne antikorupcijske aktivnosti u javnom i privatnom sektoru, 3. unapređenje djelotvornosti i efikasnosti pravosudnih institucija i organa za provođenje zakona u oblasti borbe protiv korupcije, 4. podizanje javne svijesti i promovisanje potreba za učestvovanjem cjelokupnog društva u borbi protiv korupcije i 5. uspostavljanje efikasnih mehanizama za koordinaciju borbe protiv korupcije, te praćenje i evaluaciju provođenja Strategije. Agencija za prevenciju korupcije i koordinaciju borbe protiv korupcije ima obavezu vršenja monitoringa sprovođenja Strategije i Akcionog plana. Više u: Mitrović, Lj. (2019) „Paying and reciving bribes in Bosnia and Herezegovina, *Economic Crminology,* 18, 324-349.

b. koordinacija i nadzor nad sprovođenjem Strategije i Akcionog plana[6], te davanje mišljenja i instrukcija o pitanju njihovog sprovođenja;
c. koordinacija rada javnih institucija u sprečavanju korupcije i sukoba interesa, te analiza pravosnažnih odluka nadležnih organa za procesuiranje sukoba interesa s ciljem sagledavanja pojava koruptivnog djelovanja, obavještavanje nadležnih institucija o zatečenom stanju, kao i preduzimanje ostalih neophodnih mjera u skladu sa zakonom;
d. praćenje sukoba interesa, davanje preporuka za strategiju upravljanja sukobom interesa u pojedinačnim slučajevima, te izdavanje smjernica za politiku upravljanja sukobom interesa u institucijama vlasti;
e. propisivanje jedinstvene metodologije za prikupljanje podataka o imovinskom stanju javnih službenika;
f. u koordinaciji sa nadležnim organima, analiziranje dostavljenih podataka s ciljem utvrđivanja pojava koruptivnog djelovanja, te preduzimanje neophodnih mjera u skladu sa zakonom;
g. prikupljanje i analiziranje statističkih i drugih podataka, te informisanje svih relevantnih subjekata u Bosni i Hercegovini o rezultatima istraživanja;
h. postupanje po zaprimljenim podnescima sa indicijama koruptivnog ponašanja u skladu sa važećim propisima;
i. koordinacija rada institucija sa javnim ovlaštenjima u suzbijanju korupcije;[7]

[6] Vlastite strategije borbe protiv korupcije imaju i entiteti, kantoni i Brčko distrikt Bosne i Hercegovine. Tako je, primjera radi prva Strategija za borbu protiv korupcije i organizovanog kriminala Republike Srpske donesena za period od 2008. do 2012. godine. Drugi strateški dokument u ovoj oblasti jeste Strategija za borbu protiv korupcije u Republici Srpskoj za period od 2013. do 2017. godine. Ministarstvo pravde Republike Srpske je kao koordinator antikoruptivnih aktivnosti u Republici Srpskoj, uporedo sa sačinjavanjem Informacije o realizaciji Strategije za borbu protiv korupcije u Republici Srpskoj za period od 2013. do 2017. godine, analizom stanja i prikupljanjem podataka o problemu korupcije u različitim sferama društva, pristupilo izradi Strategije i Akcionog plana borbe protiv korupcije u Republici Srpskoj od 2018. do 2022. godine.

[7] Institucionalni okvir za borbu protiv korupcije u Republici Srpskoj čine, prije svega, pravosudne institucije, i to: Vrhovni sud, sedam okružnih sudova, 20 osnovnih sudova, a od sudova posebne nadležnosti jedan Viši privredni sud i šest okružnih privrednih sudova. Posebno ističemo da je pri Okružnom sudu Banja Luka uspostavljeno Posebno odjeljenje za suzbijanje korupcije, organizovanog i najtežih oblika privrednih kriminala, te da je pri Vrhovnom sudu uspostavljeno Posebno vijeće za odlučivanje po žalbama na odluke tog posebnog odjeljenja Okružnog suda u Banjoj Luci. Zatim, u Republici Srpskoj funkcioniše Republičko javno tužilaštvo, koje je osnovano za područje cijele Republike Srpske i sedam okružnih javnih tužilaštava za područja koja pokrivaju okružni sudovi. Posebno ističemo da je u okviru Republičkog javnog tužilaštva Republike Srpske osnovano i funkcioniše Posebno odjeljenje za suzbijanje korupcije, organizovanog i najtežih oblika privrednih kriminala. Pored pravosudnih institucija, za borbu protiv korupcije su od izuzetnog značaja i Ministarstvo unutrašnjih poslova Republike Srpske, Republička uprava za inspekcijske poslove, Agencija za upravljanje oduzetom imovinom, RKUSI, te Glavna služba za reviziju javnog sektora Republike Srpske. Institucionalni okvir za borbu protiv korupcije u Republici Srpskoj dodatno je pojačan osnivanjem i radom Komisije u aprilu 2014. godine, kao stalnog radnog tijela Vlade za koordinaciju i evaluaciju sprovođenja Strategije za borbu protiv korupcije sa pripadajućim Akcionim planom, te jačanje međuinstitucionalne i međusektorske saradnje u svim oblastima borbe protiv korupcije u Republici Srpskoj. U cilju obezbjeđenja sveobuhvatnog sistemskog i sistematskog pristupa u borbi protiv korupcije Komisija je sačinjena od predstavnika različitih sfera društva: ministri, predstavnici pravosudnih institucija, odbora Narodne skupštine, GSRJS RS, RKUSI,

j. praćenje efekata sprovođenja zakona[8] i podzakonskih akata čiji je cilj prevencija korupcije i davanje mišljenja i instrukcija o pitanju njihovog sprovođenja, iniciranje aktivnosti u vezi sa izmjenama i dopunama postojećih zakonskih rješenja, i njihovo usklađivanje;
k. saradnja sa domaćim naučnim i stručnim organizacijama, medijima i nevladinim organizacijama o pitanju prevencije korupcije;
l. saradnja sa međunarodnim organizacijama, institucijama, inicijativama i tijelima;
m. uspostavljanje i vođenje baze podataka prikupljenih u skladu sa ovim zakonom;
n. razvoj edukativnih programa o pitanju prevencije korupcije i borbe protiv korupcije, te nadzor nad njihovim sprovođenjem;
o. javno publikovanje informacija o stanju korupcije;
p. informisanje nadležnih institucija i javnosti o obavezama po osnovu međunarodnih pravnih akata, te davanje preporuka za njihovu realizaciju u vezi sa prevencijom korupcije;
q. propisivanje jedinstvene metodologije i smjernica za izradu planova integriteta i pružanje pomoći svim javnim institucijama u njihovoj realizaciji;
r. i drugi poslovi u vezi sa prevencijom korupcije.

Agencijom rukovodi direktor i on ima dva zamjenika. Direktor predstavlja Agenciju, izrađuje godišnji plan rada Agencije i prijedlog budžeta i upućuje ih u propisanu proceduru. Isto tako, direktor Agencije rukovodi i usmjerava obavljanje poslova iz nadležnosti Agencije, obezbjeđuje zakonito funkcionisanje i trošenje sredstava Agencije. Direktor Agencije odlučuje o pravima, obavezama i dužnostima zaposlenih u Agenciji, u skladu sa zakonom. I na kraju, direktor Agencije obavlja i druge poslove i zadatke u skladu sa zakonom.

Direktora Agencije imenuje Parlamentarna skupština Bosne i Hercegovine na prijedlog posebne Komisije za izbor i praćenje rada Agencije, putem javnog konkursa, u skladu sa Zakonom o ministarskim imenovanjima, imenovanjima

sindikata i udruženja poslodavaca, medija i novinara nevladinog sektora, akademske zajednice i udruženja studenata Republike Srpske. Administrativno-tehničku podršku Komisiji pruža Ministarstvo pravde, koje je zaključkom Vlade određeno za koordinatora antikoruptivnih aktivnosti u Republici Srpskoj. U narednom strateškom periodu neophodno je obezbijediti jačanje i unapređivanje rada institucionalnih kapaciteta Republike Srpske u borbi protiv korupcije, ali i promovisati pozitivne rezultate i rad ovih institucija, kao i povećati povjerenje građana u njihov rad. Više u: Strategija borbe protiv korupcije u Republici Srpskoj od 2018. do 2022. godine, Banja Luka, jul 2018. godine, 7-8.

[8] Najznačajniji dio pravnog okvira za borbu protiv korupcije u Republici Srpskoj čine sljedeći zakoni: Zakon o suzbijanju korupcije, organizovanog i najtežih oblika privrednog kriminala, Krivični zakonik Republike Srpske, Zakon o zaštiti lica koja prijavljuju korupciju, Zakon o krivičnom postupku Republike Srpske, Zakon o sudovima Republike Srpske, Zakon o sprečavanju sukoba interesa u organima vlasti Republike Srpske, Zakon o zaštiti svjedoka u krivičnom postupku, Zakon o slobodi pristupa informacijama, Zakon o državnim službenicima, Zakon o radu, Zakon o oduzimanju imovine stečene izvršenjem krivičnog djela, Izborni zakon Republike Srpske, Zakon o stečaju, Zakon o javnim tužilaštvima Republike Srpske, Zakon o advokaturi, Zakon o notarima.

Savjeta ministara i drugim imenovanjima Bosne i Hercegovine, uz provjere koje se primjenjuju prilikom imenovanja članova Savjeta ministara Bosne i Hercegovine. Direktor Agencije imenuje se na mandat od pet godina, sa mogućnošću još jednog ponovnog izbora. Direktor Agencije bira se između priznatih stručnjaka u odgovarajućoj oblasti. Za direktora Agencije može biti imenovano lice koje, pored opštih uslova za rad u državnim institucijama Bosne i Hercegovine, ima visoku stručnu spremu, najmanje pet godina radnog iskustva na rukovodnim poslovima u odgovarajućoj oblasti i visok profesionalni i moralni ugled. Procedura izbora novog direktora Agencije pokreće se šest mjeseci prije isteka mandata.

Prema odredbama člana 17 Zakona važno mjesto u pogledu funkcionisanja Agencije ima Komisija za izbor i praćenje rada Agencije. Radi se o nezavisnom tijelu koje imenuje Parlamentarna skupština Bosne i Hercegovine i ono ima devet članova, i to: tri predstavnika iz Predstavničkog doma Parlamentarne skupštine Bosne i Hercegovine, tri predstavnika iz Doma naroda Parlamentarne skupštine Bosne i Hercegovine, dva predstavnika iz akademske zajednice i jedan predstavnik nevladinog sektora.

Komisija se ne smije miješati u svakodnevni rad Agencije, niti smije zatražiti informacije o pojedinačnim slučajevima, a ima sljedeće nadležnosti:

1. prati rad Agencije;
2. pokreće postupak imenovanja direktora i zamjenika direktora Agencije u skladu sa zakonom;
3. pokreće postupak razrješenja direktora i zamjenika direktora Agencije u skladu sa članom 15 Zakona;
4. razmatra izvještaje o radu Agencije najmanje dva puta godišnje ili po potrebi i
5. razmatra izvještaje o reviziji finansijskog poslovanja Agencije.

2. AKTIVNOSTI AGENCIJE ZA PREVENCIJU KORUPCIJE I KOORDINACIJU BORBE PROTIV KORUPCIJE U BOSNI I HERCEGOVINI NA SUZBIJANJU I PREVENCIJI KORUPCIJE

U skladu sa zakonskim nadležnostima Agencije i ulogom koju ima u procesu provođenja strateških antikorupcijskih dokumenata (inicijator, koordinator aktivnosti i neposredni provodilac aktivnosti), Agencija vrši monitoring provođenja Strategije za borbu protiv korupcije i pratećeg akcionog plana[9]. Evaluacija Strategije

[9] Primjera radi, vizija Strategije za borbu protiv korupcije u Bosni i Hercegovini za period 2015 – 2019. godinu definisana je na sljedeći način: *Bosna i Hercegovina je, kroz izgradnju i unapređenje institucionalnog i normativnog okvira, aktivnostima na planu jačanja svijesti o štetnosti korupcije, smanjenju tolerancije ka*

za borbu protiv korupcije se ne provodi zbog nedovoljnih kadrovskih kapaciteta i zakonskih pretpostavki. Svrha monitoringa nije samo prikupljanje podataka o napretku ili neuspjesima u provođenju aktivnosti na planu suprotstavljanja korupciji, nego i preduzimanje mjera kako bi se uklonili ili smanjili nedostaci, te identifikovali novi elementi koji bi se ugradili u postojeće ili nove strateške dokumente. S tim u vezi, neophodno je osigurati relevantne i pouzdane informacije o provođenju Strategije i Akcionog plana kao preduslov za proces monitoringa provođenja.

Agencija radi i na prikupljanju i analiziranju statističkih i drugih podataka u vezi sa prevencijom korupcije u Bosni i Hercegovini, daje preporuke i pruža podršku procesu izrade i implementacije planova integriteta u svim institucijama u Bosni i Hercegovini i na svim nivoima. Takođe, Agencija prati i efekte primjene zakona i podzakonskih akata čiji je cilj prevencija korupcije. Pored pomenutog, Agencija doprinosi provođenju aktivnosti u vezi sa izmjenama i dopunama određenih zakonskih rješenja i njihovom usklađivanju, kao i razvoju digitaliziranih edukativnih programa u vezi sa prevencijom korupcije, te ostvaruje saradnju sa domaćim naučno-obrazovnim i stručnim organizacijama, medijima i organizacijama civilnog društva.

Na osnovu nadležnosti utvrđenih Zakonom o Agenciji, Agencija svake godine analizira osposobljenost i informisanost državnih službenika zaposlenih u javnim institucijama u vezi sa prevencijom korupcije i koordinacijom borbe protiv korupcije. Na osnovu zaprimljenih podataka, Agencija, u saradnji sa agencijama za državnu službu Bosne i Hercegovine, Federacije Bosne i Hercegovine i Republike Srpske, izrađuje harmonizirane programe obuke prema planovima obuke za svaku godinu, za sve javne institucije u Bosni i Hercegovini. Pomenuti harmonizovani programi iz oblasti prevencije korupcije, etike i integriteta, zaštite prijavilaca korupcije, i drugih se posebno usklađuju prema potrebama državnih institucija i njihovih službenika.

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koruptivnom ponašanju, prevenciji korupcije, njenom proaktivnom otkrivanju i neselektivnom i efikasnom procesuiranju, prepoznata po uvjerljivim naporima i rezultatima u borbi protiv korupcije, višem stepenu vladavine prava i povećanom povjerenju građana u institucije vlasti. Opšti cilj Strategije je definisan na sljedeći način: *Opšti cilj Strategije u Bosni i Hercegovini je ustanoviti prioritete na planu prevencije korupcije i borbe protiv korupcije, principe i mehanizme zajedničkog djelovanja svih institucija u BiH kao i svih segmenata društva na tom polju, te stvoriti, odnosno unaprijediti pretpostavke za smanjenje stvarnog i percipiranog nivoa korupcije i afirmisati pozitivne društvene vrijednosti poput integriteta, odgovornosti i transparentnosti".* Opšti cilj Strategije se sastoji od pet strateških ciljeva koji se namjeravaju postići provedbom Strategije i oni su: 1. Uspostavljanje i jačanje institucionalnih kapaciteta i unapređenje normativnog okvira za borbu protiv korupcije (ovaj strateški cilj je razrađen kroz 14 prioritetnih strateških programa); 2. Razvijanje, promovisanje i sprovođenje antikorupcijskih aktivnosti u javnom i privatnom sektoru (ovaj strateški cilj je razrađen kroz 19 prioritetnih strateških programa); 3. Unapređenje djelotvornosti i efikasnosti pravosudnih institucija i organa za sprovođenje zakona u oblasti borbe protiv korupcije (ovaj strateški cilj je razrađen kroz 14 prioritetnih strateških programa); 4. Podizanje javne svijesti i promovisanje potreba za učestvovanjem cjelokupnog društva u borbi protiv korupcije (ovaj strateški cilj je razrađen kroz 15 prioritetnih strateških programa); 5. Uspostavljanje efikasnih mehanizama za koordinaciju borbe protiv korupcije, te praćenje i evaluacija sprovođenja Strategije (ovaj strateški cilj je razrađen kroz sedam prioritetnih strateških programa).

U dosadašnjem radu Agencije, kao značajan posao na prevenciji korupcije svakako je potrebno izdvojiti aktivnosti na uvođenju planova integriteta. Planovi integriteta su interni preventivni antikorupcijski dokumenti kojima se sprečavaju i otklanjaju mogućnosti za nastanak i razvoj različitih oblika koruptivnog ponašanja, ali i drugih oblika narušavanja integriteta u okviru institucije kao cjeline, pojedinih organizacionih jedinica i pojedinačnih radnih mjesta. Donošenje planova integriteta bilo je propisano svim Strategijama za borbu protiv korupcije na svim nivoima vasti u Bosni i Hercegovini.

Inače, integritet je riječ latinskog porijekla (*integritas*) i znači jedinstvo, cjelinu, poštenje, čestitost, potpunost, usklađenost, ona je suprotnost značenju riječi potkupljivost i korupcija (Maljević *et al*, 2017: 99). Integritet označava cjelovitost, odnosno sveobuhvatnost ili potpunost. Integritet predstavlja skup vrijednosti i postupanja organa javne vlasti, drugih organizacija i pravnih lica koji omogućavaju da javni funkcioneri, zaposleni i radno angažovani poštuju zakone, kodekse ponašanja i etički djeluju s ciljem izbjegavanja korupcije i poboljšanja rada (Smernice za izradu i sprovođenje plana integriteta Agencije za borbu protiv korupcije, 2016: 1).

Pojam korupcije u sebi uključuje upravo kršenje integriteta, ali i drugo neetičko ponašanje i druge prakse koje se, ako se koriste od strane javnog funkcionera, obično smatraju korupcionim (npr. sukob interesa i sl.) (Selinšek, 2015: 11). Prevencija korupcije, ali i drugih štetnih ponašanja koja mogu da naškode instituciji, se postiže, između ostalog, planovima integriteta u kojima su precizirane mjere i aktivnosti koje određena institucija, odnosno njeni zaposleni treba da konstantno sprovode s ciljem jačanja njihove otpornosti, tj. radnih procesa na sve forme nepravilnosti.

Plan integriteta je interni antikorupcioni dokument koji sadrži skup mjera pravne i praktične prirode i kojim se sprečavaju i otklanjaju mogućnosti za različite oblike nepravilnosti u radu, kao i koruptivnog ponašanja, a predstavlja rezultat samoprocjene podložnosti institucije na koruptivno djelovanje i druge nepravilnosti (Transparency International BiH, Priručnik: uvođenje planova integriteta na lokalnom nivou, 2015: 9). Cilj usvajanja plana integriteta ogleda se u povećanju transparentnosti i javnosti rada, a time i jačanju povjerenja građana u rad organa javnih vlasti.

Plan integriteta predstavlja preventivnu antikorupcijsku mjeru, to je dokument koji nastaje kao rezultat samoprocjene stepena izloženosti institucije rizicima za nastanak i razvoj korupcije, kao i izloženosti etičkim i profesionalno neprihvatljivim postupcima (Selinšek, 2015: 37). Cilj donošenja plana integriteta jeste jačanje integriteta institucije, koji podrazumijeva individualnu čestitost, profesionalizam, etičnost, institucionalnu cjelovitost, kao i način postupanja u skladu sa moralnim vrijednostima. Jačanjem integriteta institucije smanjuje se rizik da se javna ovlašćenja obavljaju suprotno svrsi zbog kojih su ustanovljena

(Krunić *et al*, 2015: 8). Ovo dalje doprinosi poboljšanju kvaliteta rada institucije, a time i povećanju povjerenja javnosti u njihov rad.

Izrada i implementacija plana integriteta se izvodi po sljedećim fazama: (Pavlović i Maričić, 2017: 215 – 226)

1. Faza pripreme (imenovanje radne grupe, donošenje programa izrade plana integriteta, prikupljanje podataka potrebnih za prepoznavanje rizika);
2. Faza procjene i ocjene postojećeg stanja – ocjena izloženosti (prepoznavanje, analiziranje i ocjena rizika);
3. Faza predlaganja mjera za poboljšanje integriteta (određivanje mjera za upravljanje rizicima, njihovih nosilaca i rokova – popunjavanje obrasca) i
4. Faza praćenja i ažuriranja plana integriteta (redovno praćenje sprovođenja plana integriteta od strane rukovodioca i lica zaduženog za monitoring, izvještavanje Komisije, uključivanje u elektronski registar, nadzor od strane Komisije).

Prema nadležnostima Agencije koje su propisane odredbama člana 10 Zakona o Agenciji, a koje su vezane za sektor prevencije, može se konstatovati da se provođenjem aktivnosti samoprocjene institucija na uticaj korupcije tj. izrade i usvajanja planova integriteta, kao jednog od glavnih alata u borbi protiv korupcije vodilo kao dugoročna aktivnost, tj. u cijelom periodu realizacije strategije.

S tim u vezi potrebno je istaći da su na zajedničkom nivou vlasti Bosne i Hercegovine, 73 institucije usvojile plan integriteta, dok su dvije institucije u završnoj fazi izrade (Predsjedništvo Bosne i Hercegovine i Centralna banka Bosne i Hercegovine). Takođe, Agencija aktivno učestvuje u procesu pripreme četvrtog kruga evaluacije GRECO-a za Bosnu i Hercegovinu na temu "Suzbijanje korupcije među članovima parlamenata, sudijama i tužiocima". U cilju ispunjavanja preporuka iz četvrtog kruga GRECO evaluacije za Bosnu i Hercegovinu i jačanja mehanizama odgovornosti i integriteta, Visoki sudski i tužilački savjet Bosne i Hercegovine je u saradnju sa Agencijom kreirao i usvojio Pravosudne smjernice, Metodološko uputstvo za izradu planova integriteta, Model plana integriteta, a koji će se primjenjivati u pravosudnim institucijama na svim nivoima vlasti u Bosni i Hercegovini.

S druge strane, u Republici Srpskoj su usvojeni planovi integriteta u cjelokupnom javnom sektoru Republike Srpske.

Istovremeno na federalnom nivou vlasti tj. u Federaciji Bosne i Hercegovine ukupno je 13 planova integriteta završeno, a četiri su u izradi, dok na nivou kantona timovi za prevenciju korupcije vode evidencije o javnim preduzećima i ustanova koje su donijele planove integriteta, a koji te planove dostavljuju Agenciji na mišljenje (APIK, Treći izvještaj monitoringa provođenja strategije za borbu protiv korupcije 2015-2019. i akcionog plana za provođenje strategije za borbu protiv korupcije 2015-2019, 2018: 55). Tako su u 15 kantonalnih Institucija sa javnim ovlaštenjem usvojeni

planovi integriteta, dok je sedam usvojenih u kantonalnim javnim preduzećima na koja je Agencija dala mišljenja. U Brčko distriktu Bosne i Hercegovine jedna institucija sa javnim ovlaštenjem usvojila je plan integriteta, na koji je Agencija dala mišljenje (APIK, Izvještaj o radu Agencije za prevenciju korupcije i koordinaciju borbe protiv korupcije za period 01.01.-31.12.2019 godine, 2020, 55).

ZAKLJUČAK

Imajuću u vidu činjenicu da je aktivnost vezana za uvođenje planova integriteta jedna od značanijih aktivnosti koje je do sada radila Agencija, a koja je dugoročnog karaktera, potrebno je da Agencija preduzme aktivnosti na uvezivanju tzv. menadžera integriteta. Naime, da bi se adekvatno sprovodio Plan integriteta propisano je da staranje o sprovođenju preuzima menadžer integriteta, kojeg postavlja i razrješava rukovodilac institucije posebnim rješenjem. Za menadžera integriteta rukovodilac imenuje lice sa visokim stepenom integriteta, stručnog autoriteta i ugleda, koje poznaje instituciju i koje je svojim radom pokazalo proaktivni pristup u identifikaciji i rješavanju nepravilnosti i drugih problema u radu. Menadžer integriteta je odgovoran rukovodiocu institucije za stalno praćenje i periodične preglede (kontrolu) rizika i ažuriranje plana integriteta, kao i za predlaganje edukacije, izrade internih pravila i kodeksa etike, podsticanje integriteta i spriječavanja korupcije, sukoba interesa i drugih oblika pristrasnog postupanja zaposlenih. Menadžer integriteta ima obavezu da najmanje svaka tri mjeseca izvještava rukovodioca institucije o izvršenju plana integriteta. S druge strane, zaposleni u instituciji su dužni da menadžeru integriteta, na njegov zahtjev, dostave potrebne podatke i informacije od značaja za izradu i provođenje plana integriteta. Takođe, svi zaposleni bez izuzetka, dužni su obavijestiti menadžera integriteta o svakoj situaciji, pojavi ili radnji za koje na osnovu razumnog uvjerenja procijene da predstavlja mogućnost za nastanak i razvoj korupcije, sukoba interesa, odnosno drugih oblika nezakonitog ili neetičkog postupanja.

Uvezivanjem menadžera integriteta bi se stvorila, po prvi put, jedna mreža ljudi u javnim institucijama vlasti, zaduženih za prevenciju korupcije. Imajući u vidu činjenicu da cilj donošenja plana integriteta i njegovog sprovođenja nije rješavanje pojedinačnih slučajeva korupcije, već da se unutar institucija uspostave takvi mehanizmi koji će otkloniti okolnosti i smanjiti rizike za nastanak korupcije, ali i svih drugih vidova neetičkih i neprofesionalnih postupanja zaposlenih u svim oblastima funkcionisanja institucije, uspostavljanje mreže, odnosno uvezivanje ljudi odgovornih za prevenciju korupcije u institucijama javne vlasti bi sigurno doprinijelo prevenciji ove negativne pojave.

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THE ROLE OF THE AGENCY FOR THE PREVENTION OF CORRUPTION AND THE COORDINATION OF THE FIGHT AGAINST CORRUPTION IN THE FIGHT AGAINST CORRUPTION IN BOSNIA AND HERZEGOVINA

Corruption is a negative, ubiquitous, socially dangerous, sociopathological and criminogenic phenomenon that has significant components: moral, social, criminological, economic, historical and others, as a significant form of various manifestations. Corruption threatens democracy, weakens institutions, economic and social development and the fight against poverty, destroys political stability and therefore it is time that vigorous and drastic measures be taken to eradicate this phenomenon. The Law on the Agency for Prevention of Corruption and Coordination of the Fight against Corruption from December 2009 (hereinafter: the Agency) established the Agency for Prevention of Corruption and Coordination of the Fight against Corruption with the task of preventing the impact of corruption on democracy and respect for basic human rights and freedoms, as well as the impact on undermining the economic development of Bosnia and Herzegovina, and all other forms of influence on social values, as well as for the coordination of the fight against corruption. The provision of Article 5 of the law lists the objectives of the establishment of the Agency, namely: a) identification and elimination of the causes of corruption; b) deterring persons from committing criminal offenses related to corruption; c) providing and improving the legal framework for the prevention of corruption; d) encouraging the participation of civil society in the prevention of corruption; e) raising public awareness and creating a relationship of intolerance towards corruption; f) education and better acquaintance of the society on the causes and consequences of the impact of corruption, and on active participation in its prevention, and g) promotion of transparent and responsible work of bodies and institutions in Bosnia and Herzegovina. The Agency is an independent

and autonomous administrative organization, which is accountable for its work to the Parliamentary Assembly of Bosnia and Herzegovina. In accordance with the law, the Agency submits its work reports to the Commission for Selection and Monitoring of the Agency's Work twice a year.

*KEYWORDS***:** *corruption; Agency for Prevention of Corruption and Coordination of the Fight against Corruption; Bosnia and Herzegovina.*

EFIKASNOST PRAVOSUĐA U PROCESUIRANJU KORUPCIJE U BOSNI I HERCEGOVINI

Veljko Ikanović*

Već duže vrijeme finansijski kriminalitet privlači posebnu pažnju krivičnopravne nauke, zakonodavca, pravosudnih organa i opšte javnosti. To je razumljivo jer on podriva temelje svakog društva ali i svjetske ekonomije u cjelini. U okviru toga kriminaliteta centralno mjesto pripada krivičnim djelima korupcije jer su ona u tijesnoj vezi sa nosiocima najviših funkcija vlasti pojedinih država i ovlašćenja u međunarodnim organizacijama. Upravo sprega vlasti i kriminala kroz zloupotrebu ovlašćenja dovodi u opasnost normalno odvijanje privrednih procesa, funkcionisanje i opstanak svake države. Zbog toga se preduzimaju brojne mjere na međunarodnom, regionalnom i lokalnom nivou, kako bi se ova pojava svela na najmanju mjeru i po mogućnosti potpuno iskorijenila. Korupcija je predmet interesovanja univerzalnih i regionalnih konvencija i slijedom toga domaćeg krivičnog zakonodavstva. Za sprovođenje normativnog okvira borbe protiv korupcije potreban je jak i efikasan pravosudni sistem, koji nije podložan korupciji i političkim uticajima. Izgradnju takvog sistema pomažu brojne međunarodne organizacije dajući stručnu i finansijsku pomoć, razmjenom podataka i iskustava između država i olakšavanjem međunarodne saradnje u gonjenju i procesuiranju počinilaca ovih krivičnih djela. U ovom radu se razmatra sposobnost pravosuđa u Bosni i Hercegovini da efikasno odgovori izazovu procesuiranja krivičnih djela korupcije i time doprinese njihovoj prevenciji. Polazna pretpostavka u traženju odgovora na ovo pitanje jeste činjenica da je uspješno suprotstavljanje korupciji, kao posebnom obliku finansijskog kriminaliteta, jedan od prioriteta postavljenih pred Bosnom i Hercegovinom na putu prema evropskim integracijama. Za ostvarenje toga cilja neophodna je politička volja, odgovarajuća finansijska sredstva, dobro i savremeno zakonodavstvo, efikasna organizacija pravosudnih organa, njihova kadrovska osposobljenost i motivisanost zaposlenih. S obzirom da je Bosna i Hercegovina složena država, sa specifičnim ustavnim uređenjem i teritorijalnom podjelom, kako bi se shvatila suština problema u radu se razmatraju osnove pravosudnog sistema, njegova organizacija, efikasnost i osposobljenost da odgovori

* Doktor pravnih nauka, sudija Vrhovnog suda Republike Srpske, e-mail: *veljko.ikanovic@pravosudje.ba.*

izazovu efikasnog i blagovremenog procesuiranja korupcije. Sve se to posmatra kroz prizmu organizacionog, materijalnog i procesnog krivičnog zakonodavstva, u međuzavisnosti sa opredjeljenjem zakonodavne i izvršne vlasti da obezbijedi potrebne zakonodavne, materijalne i finansijske uslove za ispunjenje obaveza pravosuđa u borbi protiv korupcije. U tom smislu ukazuje se na objektivne poteškoće i unutrašnje slabosti sa kojima se pravosuđe susreće u svome radu, daju se određene sugestije za odgovarajuće promjene i poboljšanja kako bi ono u toj borbi dostiglo onaj nivo koji mu omogućava da ispuni svoje obaveze i dostigne cilj koji se od njega očekuje. U izvođenju zaključaka autor se služi i najnovijim dostupnim statističkim podacima o procesuiranju koruptivnih krivičnih djela.

KLJUČNE RIJEČI: korupcija; politikčka volja; zakonodavstvo; organizacija pravosuđa.

UVODNA RAZMATRANJA

Jedan od od izazova ili opasnosti, koja se kao tamna sjenka nadvija nad svim svjetskim ekonomijama, urušavajući njihovu stabilnost i stabilnost državnog uređenja jeste korupcija. Zato bismo mogli reći da bauk korupcije kruži svijetom. Bauk je biće iz mitologije Južnih Slovena, opisan kao zastrašujuće stvorenje koje nespretno korača i krije se na tamnim mjestima (u rupama ili napuštenim kućama) gdje čeka da zgrabi, odnese i proždere svoju žrtvu. Jedini način na koji se bauk otjera jeste sa jakim svjetlom i bukom.[1] Korupcija je zastrašujuća opasnost za koju se kaže da će uništiti društveni poredak, kako pojedinih zemalja tako i univerzalni svjetski poredak ("proždire svoju žrtvu"), ako se ne iskorijeni ili svede na podnošljivu mjeru. Ona je prikrivena, tajna, najčešće se odvija na neviđeno između dva lica ("na tamnom mjestu"). Jedini način za njeno iskorjenjivanje jeste odlučna, sistematska, trajna i bespoštedna borba, od prijavljivanja koruptivnih dijela i zaštite lica koja to čine, do njenog procesuiranja i medijskog predstavljanja njene pogubnosti i prikazivanja rezultata te borbe ("jakim svjetlom i bukom"). Korupcija nije nepoznata pojava jer je prisutna od najranijih vremena i poslije prostitucije i špijunaže našla se na trećem mjestu najstarijih profesija na svijetu. U socijalističkom sistemu korupcija, pogotovo visoka ili srednja, nije bila raširena što potvrđuju i podaci dobijeni istraživanjem da period prije rata građani Bosne i Hercegovine (BiH) percipiraju kao vrijeme u kom je korupcija bila najmanje prisutna (Studija percepcije korupcije, 2002: 18). U novim okolnostima, nastalim poslije raspada države i starog društveno ekonomskog uređenja, kada se rasplinuo stari moral, a novi nije izgrađen niti je jasno definisan,

[1] https://sr.wikipedia.org/sr-ec/%D0%91%D0%B0%D1%83%D0%BA.

kada se izgubila i oslabila kontrolna uloga države i institucija pravosuđa, korupcija se na ovim prostorima posebno raširila. Zbog malog broja presuđenih krivičnih djela korupcije možemo samo govoriti o percepciji javnosti da je korupcija u BiH postala raširena pojava u svim oblastima društvenog života. Zbog korupcije se gubi povjerenje u državni, upravni i pravosudni aparat, čime se stvara nepovoljan politički, pravni i ekonomski ambijent za domaća i strana ulaganja u privredu. O štetnosti korupcije vlada nepodijeljeno mišljenje da je ona zlo protiv koga se treba boriti kako bi se obezbijedio ekonomski opstanak, pravna sigurnost i normalan život stanovništva (Ikanović, 2020: 77).

Da bi se odredila uloga pravosuđa u procesuiranju i suzbijanju korupcije neophodno je ispuniti nekoliko uslova: a) iskrena i jaka politička volja b) savremeno, kvalitetno i primjenjivo zakonodavstvo i c) efikasna, kadrovski nezavisna i ekonomski održiva organizacija pravosuđa. Od usklađenosti ova tri segmenta direktno zavisi otkrivanje, gonjenje i presuđenje učinilaca krivičnih djela korupcije.

1. POJAM I VRSTE KORUPCIJE

Ciceron se u svojim sudskim govorima ili filozofsko-političkim spisima bavi korupcijom kao jednim od glavnih uzroka pada rimske republike, oblikujući pritom vlastitu, filozofskim spoznajama nadahnutu, antikorupcijsku strategiju baziranu na ideologiji uma, srčanosti i vjernosti te pozvanoj da odgaja moralno savršene građane čija bi časnost i nepotkupljivost trebala biti etički jamac pravne države (Jaramaz Reskušić, 2014: 42-43). Korupcija prije svega predstavlja moralni, a tek potom ekonomski, kriminalni i drugi problem, jer predstavlja povredu moralnih osnovnih društvenih normi i načela. Ovdje se oslanjamo na savremenu, Šilerovu definiciju prema kojoj je korupcija „odstupanje javnog vršioca dužnosti od obveza svog položaja u privatnom interesu", pri čemu se „privatno" ne mora poistovijetiti s individualnim, već može značiti i grupni interes, kao što se i „javno" može odnositi na državu, ali i na političke stranke i druge institucije kod kojih je djelovanje orijentisano prema ostvarenju nadprivatnih ciljeva[2]. Upravo zbog izigravanja povjerenja društva korupcija se i definiše kao zloupotreba ovlašćenja koja su pojedincu povjerena za sticanje privatne koristi ili kao "devijantno ponašanje službenika javne uprave (izabranih ili imenovanih) koje nije u skladu s njihovim zadacima po službenoj dužnosti, a primjenjuje se u cilju sticanja privatnog bogatstva

[2] V. W. Schuller, "Probleme historischer Korruptionsforschung", u: *Der Staat, Zeitschrift für Staatslehre* Öffentliches *Recht und Verfassungsgeschichte*, bd.16, Berlin, 1977., 373-392, navedeno prema I. Jaramaz Reskušić: "Sudska korupcija u republikanskom Rimu: problem i rješenja", *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 21, broj 1/2014, 42.

ili statusa pojedinca, uže porodice ili povezane grupe ljudi" (Joseph Nye, 1967)[3]. Pojedini autori smatraju da je ona endemska u svim vladama.[4] Smatra se da je najpotpuniju definiciju korupcije dao Vito Tanci po kojoj je korupcija "zloupotreba javnih ovlašćenja za privatnu korist" (Tanzi, 1998).

Zakonodavac pojam korupcije određuje[5] kao svaku zloupotrebu moći povjerene javnom službeniku ili licu na određenom političkom položaju. Zakon određuje da korupcija posebno može uključivati direktno ili indirektno zahtijevanje, nuđenje, davanje ili prihvatanje mita ili neke druge nedopuštene prednosti ili njenu mogućnost, kojima se narušava odgovarajuće obavljanje bilo kakve dužnosti ili ponašanja očekivanih od primaoca mita. Ovim se elementima korupcija svodi na krivično djelo zloupotrebe službenog položaja, što jeste njena suština ali se nužno ne iscrpljuje samo u tome već je dijapazon njenih elemenata mnogo širi i razgranatiji, pa prevazilazi i većinu do sada poznatih krivičnih djela.

Svaka korupcija je štetna ali nije jednako opasna po društvo, pa se moraju utvrditi određeni kriterijumi za njeno rangiranje. Misija OEBS u BiH u projektu "Procjena potreba pravosuđa u procesuiranju korupcije kroz praćenje rada na krivičnim predmetima" po težini dijeli predmete korupcije na predmete visoke, srednje i sitne korupcije. Ova podjela se zasniva na dva glavna kriterijuma: statusa (položaja) optuženog i težine kažnjivog postupanja.

Prvi kriterijum jeste položaj optuženih prema njihovim značaju kao javnih ličnosti i stepenu moći koji zbog tog položaja imaju. Drugi kriterijum se zasniva na težini posljedice koje koruptivno krivično djelo ima za oštećene i društvo uopšte ili visini pribavljene koristi. Kombinovanjem ova dva kriterijuma vrši se ocjena svakog predmeta koji se onda razvrstavaju u skladu sa njihovom ukupnom težinom. Ukoliko se predmeti ne ocijene istovjetno u skladu sa ova dva najvažnija kriterijuma tada se pribjegava korišćenju dodatnih kriterijuma kao što su: više (odnosno najmanje tri) optuženih, sistematska priroda kažnjivog postupanja, izuzetno visok položaj optuženog ili izuzetna težina djela.[6]

[3] Više o tome u: J.S.Nyee, *Coruption and political development: A cost benefit analysis*, https://www.jstor.org/stable/1953254, [17.08.2021].

[4] C.J. Friedrich, „Man and His Government (New York, 1963)", 167, u J.S.Nyee, *Coruption and political development: A cost benefit analysis*, https://www.jstor.org/stable/1953254, [17.08.2021.].

[5] Član 2 Zakona o Agenciji za prevenciju korupcije i koordinaciju borbe protiv korupcije, *Službeni glasnik BiH*, broj 103/09 i 58/13.

[6] OSCE, Misija u Bosni i Hercegovini, *Procjena potreba pravosuđa u procesuiranju korupcije kroz praćenje rada na krivičnim predmetima* (ARC), 20018, 12-14.

2. POLITIČKA VOLJA

Politička volja za borbu protiv korupcije je kategorija čije postojanje još zvanično nije priznato ali se sve češće spominje u pojedinim stručnim i naučnim radovima i na savjetovanjima o borbi protiv korupcije. Prvi put je javno pomenuta od strane najviših nosilaca javnotužilačke funkcije na sastanku glavnih tužilaca u BiH o temi "Procesuiranje predmeta organizovanog kriminala i korupcije". Tada je glavni republički tužilac Republike Srpske izjavio da je za procesuiranje "većih riba" u krivičnim djelima organizovanog kriminala i korupcije potrebna politička volja i podrška na svim nivoima u BiH, jer tužilaštva ne mogu da iznesu sav teret. On tvrdio "problem je u političkoj volji da se nešto rješava" i prema njegovom mišljenju, bez dodatnih sredstava, opremanja tužilačkog i policijskog kadra nema većeg rezultata u borbi protiv organizovanog kriminala i korupcije.[7] Upravo činjenica da je „problem u političkoj volji da se nešto rješava" govori o težini problema, jer u pravosuđu su u trci sa korupcijom političari obuli olovne cipele.

U prilog tome govori i Izvještaj stručnjaka EU o pitanjima vladavine prava u Bosni i Hercegovini, u kome se zaključuje da je Visokom sudskom i tužilačkom savjetu BiH, koji imenuje sudije i tužioce (VSTS) potrebna temeljita reforma i radikalna promjena ponašanja jer „VSTS se široko poima kao moć koja nikome ne polaže račune, u rukama osoba koje služe interesima mreža političkih pokrovitelja i uticaja". Zapaža se da je „evidentan nedostatak političke volje u Federaciji BiH da se uspostave posebni i nezavisni odjeli za borbu protiv korupcije i organizovanog kriminala u okviru Federalnog tužilaštva i Vrhovnog suda FBiH. Međutim, ovakvi odjeli su od suštinskog značaja za složene predmete korupcije."[8]

Politička volja, kao presudan faktor u borbi protiv korupcije, znači iskrenu opredijeljenost nosilaca političke vlasti da obezbijede efikasno zakonodavstvo, finansijska sredstva, kadrovsku popunjenost i stručnu osposobljenost organa otkrivanja i gonjenja, odgovornost svih za efikasan rad u zakonom propisanim granicama, bez političkog uticaja kojim se narušava nepristrasnost i objektivnost.

3. FINANSIJSKA SREDSTVA

Za sprovođenje zakona i efikasnu borbu protiv korupcije potrebno je u budžetima obezbijediti značajna sredstva. Možemo primijetiti da su vlasti svih nivoa u BiH do sada u budžetima obezbjeđivale neophodna sredstva za borbu

[7] https://www.atvbl.com/svraka-potrebna-politicka-volja-i-podrska, [17.08.2021.].

[8] Izvještaj stručnjaka o pitanjima vladavine prava u Bosni i Hercegovini, Brisel, 05.12.2019. godine.

protiv korupcije. Značajna sredstva donacijama kroz opremu, stručno usavršavanje i slično, obezbijedila je međunarodna zajednica (EU i SAD). Evropska unija finansira tri nova projekta za borbu protiv korupcije u vrijednosti oko 3,5 miliona evra iz Instrumenta za pretpristupnu pomoć (IPA), u okviru tekuće podrške Bosni i Hercegovini u području vladavine prava. Projekat „Institucionalna podrška za borbu protiv korupcije – IPAK" u vrijednosti od 750,000 evra će obezbijediti pomoć nadležnim institucijama za borbu protiv korupcije na svim nivoima. Projekat „EU4Justice – podrška borbi protiv korupcije i organizovanog kriminala" vrijedan 2,2 miliona evra će se realizovati u saradnji s francuskom agencijom Justice International Cooperation s ciljem jačanja efikasnosti istrage i krivičnog gonjenja ozbiljnih slučajeva korupcije i organizovanog kriminala.[9] Praćenjem procesuiranja predmeta korupcije, seminarima i praktičnim priručnicima, značajnu pomoć pružili su OSCE, SE i USAID[10]. Svaki naredni korak zahtijeva i dodatna sredstva[11] koja će država sa slabom ekonomijom teško moći obezbijediti i biće prinuđena da se oslanja na pomoć međunarodne zajednice.

4. ZAKONODAVSTVO

Ustavna struktura BiH odredila je postojanje četiri različita zakonodavna i pravosudna sistema: jedan na državnom nivou, po jedan u svakom od entiteta, Republici Srpskoj (RS) i Federaciji BiH (FBiH) i jedan u Brčko distriktu BiH (BD). Ovi sistemi djeluju paralelno i kako navodi Venecijanska komisija „razvili su se u velikoj mjeri autonomno u zadnje dvije decenije"[12], što je za rezultat imalo fragmentisanu strukturu na nekoliko nivoa vlasti.

Da bi u okviru ustavnih nadležnosti pravosudni sistem u BiH postao efikasniji 2003. godine pristupilo se reformi krivičnog zakonodavstva kojom je ostvarena određena usklađenost materijalnog krivičnog i krivičnog procesnog ali i organizacionog zakonodavstva na svim nivoima. Krivična djela korupcije nezavisno su definisana u svakom od četiri krivična zakona u gore navedena četiri nivoa vlasti. U prethodnom periodu je postignut značajan uspjeh na ovom polju, posebno u vezi sa inkriminisanjem pranja novca, ali krivični zakoni još uvijek

[9] https://europa.ba/?p=62029, [18.08.2021.].

[10] Vidi: Procjena potreba pravosuđa u procesuiranju korupcije kroz praćenje rada na krivičnim predmetima (ARC), Treći godišnji izvještaj o odgovoru pravosuđa na korupciju: Sindrom nekažnjivosti, 2020.

[11] Strategija borbe protiv korupcije u Republici Srpskoj od 2018. do 2022. godine, Banja Luka, 2018. godine. Odluka o usvajanju Strategije borbe protiv korupcije u Republici Srpskoj od 2018. do 2022. godine, *Službeni glasnik Republike Srpske*, broj 66/18.; Vlada Tuzlanskog kantona, Strategija za borbu protiv korupcije 2021-2024. godine i slično.

[12] Mišljenje broj 648/2011, Strasbour, 18.6.2012. godine.

nisu potpuno usklađeni sa međunarodnopravnim standardima. Treba ukazati na neusklađenost krivičnih sankcija za krivično djelo zloupotrebe položaja, jer se njegova definicija i kazne za osnovni i kvalifikovani oblik propisane u Krivičnom zakoniku Republike Srpske[13] (KZ) znatno razlikuju od kazni u ostalim krivičnim zakonima. Bez obzira na ove razlike i nedosljednosti u propisivanju i određivanju bića krivičnih djela, što upućuje na potrebu unapređenje zakonodavnog okvira, možemo reći da su krivični zakoni odgovarajući kada se radi o definiciji i obimu krivičnih djela korupcije (Ikanović, 2020: 82).

Pored klasične korupcije u vidu zloupotrebe službenog položaja i bliskih krivičnih djela primanja i davanja mita, koja spadaju u širi pojam korupcije, korupcija može obuhvatiti i druga krivična djela, poput pronevjere, nezakonitog otuđenja imovine, trgovine uticajem, zloupotrebe položaja, nezakonitog bogaćenja, pranja novca, prikrivanja, ometanja pravde i saučesništva (OSCE, Misija u Bosni i Hercegovini, Priručnik o borbi protiv korupcije, 2016: 199.). Ova djela definisana su u Konvenciji Ujedinjenih nacija protiv korupcije i Krivičnopravnoj konvenciji protiv korupcije Savjeta Evrope, koje je BiH ratifikovala. Kriminalizacija korupcije u krivičnom zakonodavstvu BiH pretežno je usklađena sa ovim konvencijma.

Shodno navedenom proizilazi da koruptivna krivična djela čine djela protiv službene dužnosti: zloupoteba službenog položaja (član 315 KZ); trgovina uticajem (član 321 KZ); primanje mita (član 319 KZ) i davanje mita (član 320 KZ) (Jovašević, Mitrović, Ikanović, 2017, 243). Osim navedenih krivičnih djela nesporno je da u koruptivna krivična djela takođe spadaju i djela iz drugih glava posebnog dijela Krivičnog zakonika Republike Srpske (u daljem tekstu: KZ). To su krivična djela: zloupotreba položaja odgovornog lica (član 249 KZ); primanje mita u obavljanju privredne delatnosti (član 256 KZ) i davanje mita u obavljanju privredne delatnosti (član 257 KZ) iz glave krivičnih dela protiv privrede i platnog prometa; zatim podmićivanje pri izborima ili glasanju (član 220 KZ); povreda tajnosti glasanja (član 221 KZ) i uništavanje izbornih isprava (član 223 KZ) iz glave krivičnih djela protiv izbornih prava kao i sprečavanje i ometanje dokazivanja (član 337 KZ) iz glave krivičnih djela protiv pravosuđa. Pojedini autori smatraju da bi, s obzirom na njihovu prirodu, u ova krivična djela trebala svrstati još neka krivična djela iz glave krivičnih djela protiv službene dužnosti kao što su kršenje zakona od strane sudije (povreda zakona od strane sudije i javnog tužioca član 346), pojedina kivična djela iz glave kivičnih djela protiv pravosuđa kao krivično djelo neizvršenje sudske odluke (član 341), kao i krivična djela iz glave protiv sloboda i prava čovjeka i građanina čiji teži oblici postoje ukoliko je kivično djelo učinilo službeno lice (Delić, 2019: 8-9). S obzirom da su koruptivna krivična djela u krivičnom zakonodavstvu u BiH u osnovi ista, ovdje smo ukazali na ta krivična djela u KZ Republike Srpske i to

[13] *Službeni glasnik Republike Srpske*, broj 64/17 i 15/21.

ćemo činiti za potrebe ovog rada, a na značajnije razlike ćemo posebno ukazati ako bude potrebno.

Važan segment u otkrivanju, procesuiranju i prevenciji koruptivnih krivičnih djela predstavalja krivično procesno zakonodavstvo. Bosna i Hercegovina je 2003. godine uvela tužilačku istragu (Simović, 2005: 157) i niz instituta nepoznatih evropskom kontinentalnom pravu, kao što su pregovaranje o krivici, priznanje krivice, kazneni nalog, davanje imuniteta, posebne istražne radnje i slične institute preuzete iz američkog pravnog sistema (Jovašević, Ikanović, 2016: 185-187). Rezultati ostvareni tim izmjenama su za sada skromni zbog nedorečenog zakonodavstva koje je preuzelo određene institute u njihovim obrisima, a nije ih jasno razradilo tako da budu efikasni i lako primjenjivi u praksi. Pojedini instituti se ne mogu primjenjivati bez reforme drugih zakona ali i institucija sistema. Odredba o tužilačkoj obavezi da otkriva krivična djela, a sa policijom kojoj je neko drugi nadređen i koja nije ni u jednom segmentu pod njegovom direktnom kontrolom je teško sprovodiva. Ovdje treba ukazati na činjenicu da je na čelu američkog Ministarstva pravde glavni tužilac SAD i da je u okviru tog ministarstva Federalni istražni biro (FBI), kao moćna poluga otkrivanja krivičnih djela i njihovih učinilaca. Zato su kod nas naredbe tužioca policiji često skok u prazno, jer policija ima svog direktora i ministra, koje stvarno biraju političke stranke, bez čije volje nema efikasnog sprovođenja istrage u dijelu otkrivanja krivičnih djela i njihovih učinilaca. To znači da se tužilačkom istragom malo učinilo u pravcu efikasnosti procesuiranja ovih krivičnih djela, što potvrđuje i činjenica da su procesni zakoni do sada pretrpjeli preko petnaest izmjena.

Bez obzira na određene nedostatke pozitivni zakonski propisi pružaju zadovoljavajuću osnovu za gonjenje učinilaca ovih krivičnih djela korupcije, zaprijećene kazne su veoma visoke, međutim, praksa pokazuje da je kaznena politika sudova prema izvršiocima krivičnih djela korupcije i dalje blaga. „Blagost" kazni je više uzrokovana činjenicom da se ne procesuiraju predmeti visoke i srednje korupcije, već samo predmeti niske korupcije, što daje lažnu sliku o „blagoj" sudskoj kaznenoj politici. Posebnu pažnju trebalo bi posvetiti oduzimanju imovine i imovinske koristi pribavljene izvršenjem krivičnog djela jer se pokazalo da je oduzimanje imovine stečene izvršenjem krivičnog djela nekada važnije od same osude za krivično djelo i često učinioce više pogađa od same osude.

5. PRAVOSUĐE

U BiH postoje četiri značajno različita pravosudna sistema što je rezultat njenog ustavnog uređenja kao decentralizovane federalno-konfederalne države. Zbog naknadnih intervencija Visokog predstavnika u BiH u ustavne nadležnosti

države i entiteta u oblasti pravosuđa odnos između pravosudnih sistema nije jasno definisan, što daje povoda različitim tumačenjima zakona. Rascjepkanost pravosudnih i tužilačkih sistema posebno je naglašena i problematična u vezi sa procesuiranjem predmeta visoke korupcije, koji se mogu suditi na državnom, entitetskom i nivou BD.

Sud BiH ima posebno krivično Odjeljenje II koje je odgovorno za organizovani kriminal, privredni kriminal i korupciju. Slično je organizovano i Tužilaštvo BiH i u njemu na predmetima korupcije radi Posebno odjeljenje za organizovani kriminal, privredni kriminal i korupciju. Sud BiH ima i prvostepena i apelaciono odjeljenja, jer na nivou BiH ne postoji Vrhovni sud niti drugostepeni sud koji bi odlučivao po žalbama na presude Suda BiH. Osim nadležnosti za krivična djela propisana Krivičnim zakonom BiH i drugim njenim zakonima, uključujući koruptivna djela kada su počinioci nosioci funkcija u državnim institucijama, bez obzira na njihovu težinu, Sud ima tzv. „proširenu nadležnost". Proširena nadležnost se odnosi na krivična djela propisana zakonima u RS, FBiH i BDBiH, uključujući i koruptivna krivična djela. Ova odredba je neodređena i zbog svoje proizvoljnosti i arbitrenosti vodi pravnoj nesigurnosti i selektivnom gonjenju pojedinih učinilaca krivičnih djela. Zbog toga je bila predmet različitih tumačenja i sporenja što se, u krajnjoj liniji, negativno odražava na procesuiranje predmeta korupcije.

Pravosudni sistem u entitetima je organizovan na klasični način i u Republici Srpskoj ga čine: Vrhovni sud RS, šest okružnih i 21 osnovni suda. Tužilačka organizacija slijedi organizaciju do nivoa okružnih sudova i sastoji se od: Republičkog javnog tužilaštva i šest okružnih tužilaštava sa teritorijalnom nadležnošću u svojim područjima. Kao dio unutrašnje organizacione strukture okružnih tužilaštava formirana su Posebna odjeljenja za organizovani i privredni kriminal (uključujući korupciju). Zakonom o suzbijanju korupcije, organizovanog i najtežih oblika privrednog kriminala RS U okviru Okružnog suda u Banjoj Luci formirano je Posebno odjeljenje i Posebno vijeće Vrhovnog suda RS, koja su nadležna da u prvostepenom i žalbenom postupku odlučuju, između ostalog, u predmetima korupcije. Ova nadležnost je veoma široka tako da obuhvata sve slučajeve primanja i davanja mita i trgovine uticajem bez obzira na njihovu težinu, a za zloupotrebu položaja samo ako je počinilac nosilac funkcije koga je postavila Vlada ili Narodna skupština. U skladu sa tim istim Zakonom, u okviru Republičkog javnog tužilaštva osnovano je Posebno odjeljenje za suzbijanje korupcije, organizovanog i najtežih oblika privrednog kriminala koje je nadležno za krivično gonjenje ovih djela.

Slična je organizacija krivičnih sudova u FBiH i sastoji se od: Vrhovnog suda FBiH, 10 kantonalnih i 31 opštinskog suda. Organizacija tužilaštava je prilagođena organizaciji sudova kao i u RS. Unutrašnja specijalizacija u krivičnom gonjenju predmeta korupcije je sprovedena uspostavljanjem posebnih odjeljenja u

kantonalnim tužilaštvima za rad na predmetima privrednog kriminala, uključujući korupciju. Zakon o suzbijanju korupcije i organizovanog kriminala u FBiH je stupio na snagu u februaru 2015. godine ali se još ne primjenjuje. On predviđa osnivanje Posebnog odjeljenja u okviru Vrhovnog suda FBiH i Posebnog odjeljenja u okviru Federalnog tužilaštva sa isključivom nadležnošću na teritoriji Federacije nad velikim brojem teških krivičnih djela predviđenih Krivičnim zakonom FBiH, među kojima su i krivična djela korupcije kada je učinilac izabrani ili postavljeni nosilac funkcije ili kada se radi o vrijednosti u iznosu koji prelazi 100.000 BAM (oko 50.000 EUR).

Osnovni sud BDBiH i Apelacioni sud BDBiH nadležni su za sva krivična djela predviđena Krivičnim zakonom BDBiH, a Tužilaštvo BDBiH je nadležno za krivično gonjenje pred ovim sudovima.

Prema podacima Republičkog javnog tužilaštva – Posebnog odjeljenja za suzbijanje korupcije, organizovanog i najtežih oblika privrednog kriminala (Republike Srpske), od osnivanja, 1. jula 2016. godine, do 2019. godine na zatvorske kazne od godinu dana, odnosno 5 mjeseci osuđene su samo dvije osobe za koruptivna krivična djela, a izrečeno je novčanih kazni u ukupnom iznosu od 62.500 maraka. Osim dvije zatvorske kazne i novčanih kazni, četiri osobe su osuđene na uslovnu kaznu dok je jedna oslobođena krivice. Najveći broj predmeta okončan je naredbom o nesprovođenju istrage.

Što se tiče predmeta koji su bili u radu u 2020. godini po sudovima u Republici Srpskoj situacija je sljedeća[14]:

1. Okružni sud u Banjoj Luci: 20 predmeta-visoka korupcija, od toga 14 presuđeno, ostali predmeti u radu; 8 predmeta sitne korupcije, od toga tri presuđeno, ostali u radu. Izrečena je jedna kazna zatvora u trajanju od jedne godine i dvije kazne zatvora od po pet mjeseci, ostalo uslovne osude i sporedne novčane kazne;
   a) Osnovni sud u Banjoj Luci: ukupno 45 predmeta, od toga 2 krupne korupcije, 18 srednje korupcije i 25 sitne korupcije; presuđeno 14 predmeta, ostali u radu.
   b) Osnovni sud u Gradišci: 6 predmeta, od toga dva srednje i 4 niske korupcije. Pet presuđeno, a jedan predmet u radu.
   c) Osnovni sud u Mrkonjić Gradu: 2 predmeta srednje korupcije, oba presuđena, izrečene novčane kazne.
   d) Osnovni sud u Kotor Varošu: 1 predmet niske korupcije, presuđen, izrečena uslovna osuda.
   e) Osnovni sud u Prnjavoru: 5 predmeta niske korupcije, 2 presuđena, ostali u radu.
2. Okružni sud u Bijeljini: nije imao predmeta.
   a) Osnovni sud u Zvorniku: 8 predmeta, od toga 5 krupna korupcija, 1 srednja

[14] Zbog svoje obimnosti koja prevazilazi okvir ovog rada podaci nisu mogli biti predstavljeni potpuni podaci u tabelarnom prikazu.

korupcija i 2 sitna korupcija; jedan presuđen, ostali u radu.
b) Osnovni sud u Srebrenici: 1 predmet sitne korupcije, u radu.

3. Okružni sud u Doboju: jedan predmet u radu-visoka korupcija.
   a) Osnovni sud u Doboju: 5 predmeta, od toga 3 srednje korupcije i 1 niska, presuđen 1 predmet.
   b) Osnovni sud u Derventi: 10 predmeta, od toga 5 niska i 5 srednja korupcija; presuđeno 6 predmeta, ostali u radu,
   c) Osnovni sud u Teslići: 4 predmeta srednje korupcije, 1 presuđen.
4. Okružni sud u Istočnom Sarajevu: nema predmeta.
   a) Osnovni sud u Sokocu: 6 predmeta, 1 krupna, 2 srednja i 3 sitna korupcija, 3 presuđena.
   b) Osnovni sud u Višegradu: 2 nepresuđena predmeta srednje korupcije,
   c) Osnovni sud u Vlasenici: 3 predmeta niske korupcije, jedan presuđen.
5. Okružni sud u Trebinju: nema predmeta.
   a) Osnovni sud u Trebinju: 2 predmeta srednje korupcije (nepresuđeno).
   b) Osnovni sud u Foči: 3 predmeta niske korupcije (presuđeno).
6. Okružni sud u Prijedoru: nema predmeta.
   a) Osnovni sud u Prijedoru: 1 predmet sitne korupcije i 1 predmet srednje korupcije (presuđen-oslobađajuća presuda).

Kada se ukratko analiziraju ovi podaci uočava se činjenica da se sudovi bave uglavnom niskom, pomalo srednjom i izuzetno rijetko visokom korupcijom. Vjerovatno zbog toga i izrečene kazne zatvora su na nivou statističke greške, dok su neopravdano izricane uslovne osude, koje sudovi „pokrivaju" opravdanim izricanjem sporednih novčanih kazni. Uslovna osuda bi trebala kod ovih krivičnih djela da bude izuzetak, a kazna zatvora i novčana kazna pravilo, kao što vidimo nije slučaj. Zapažamo i da se među predmetima nalazi određen broj onih koji su kategorisani kao visoka korupcija i koje iz nerazumljivih razloga ne procesuiraju Posebno odjeljenje Republičkog tužilaštva i Okružnog suda u Banjoj Luci, kao specijalizovana. Podaci za drugi entitet, Distrikt i nivo države nam nisu bili dostupni ali smo skloni vjerovati da se mnogo ne razlikuju od onih koje smo predstavili za Republiku Srpsku.

Sve to opravdava zaključak iz izvještaja sudije Pribea da se krivično pravosuđe u BiH ne bori protiv teških oblika kriminala i korupcije i da ni jedan od četiri krivičnopravna sistema ne funkcioniše na adekvatan način. Sud BiH u proteklih nekoliko godina ne vrši svoju zakonom propisanu nadležnost za krivična djela koja su propisana zakonima entiteta i BD. Tu nadležnost jeste potrebno pravilno odrediti u skladu sa preporukama Evropske i Venecijanske komisije. [15]

[15] Izvještaj stručnjaka o pitanjima vladavine prava u Bosni i Hercegovini, Brisel, 05.12.2019. godine.

Suđenja u predmetima korupcije jesu složena ali ona zbog odsustva koncentracije dokaza, dugih i nepotrebnih odlaganja pretresa, procesne nediscipline, neodazivanja pozivu optuženih i slično traju predugo. Ovo stvara utisak da „sudije ne žele ili nisu u stanju provoditi vladavinu prava kada su suočeni s odlučnim protivljenjem osoba optuženih za teška krivična djela“[16].

Poražavajući je zaključak iz izvještaja OEBS o praćenju korupcije da se ukupna slika koju nudi praćenje teških predmeta korupcije (tj. onih predmeta koji su kategorizovani kao predmeti visoke i korupcije srednjeg nivoa) može jednostavno opisati kao zatajenje krivičnopravnog sistema koje je dovelo do de facto nekažnjivosti za počinioce brojnih teških djela (Treći godišnji izvještaj o odgovoru pravosuđa na korupciju: Sindrom nekažnjivosti, Misija OEBS u BiH, novembar 2020: 5).

ZAKLJUČAK

Borba protiv korupcije posebno se ogleda kroz efikasnost pravosuđa koja zavisi od raznih faktora, kako unutrašnjih tako i spoljnih. Statistički podaci ukazuju da efekat rada pravosuđa nije zadovoljavajući. Ovo iz razloga što se radi o predmetima sitne korupcije, dok su izvan domašaja pravosuđa ostali predmeti srednje i visoke korupcije. Posebno zabrinjava što među procesuiranim i presuđenim predmetima nema predmeta visoke korupcije po položaju izvršilaca. To ozbiljno ukazuje na nedostatak „političke volje“ koja bi tužilaštvima omogućila da se ovi predmeti gone. Pored navedenog od ključnog značaja za borbu protiv korupcije jeste kaznena politika sudova jer se samo izricanjem odgovarajućih krivičnih sankcija šalje jasna poruka da se takvo ponašanje ne isplati i da će odgovorni biti kažnjeni. Ovo jeste cilj ostvarivanja specijalne i generalne prevencije ali on zavisi i od procesuiranja počinilaca krivičnih djela visoke korupcije jer se stroga kaznena politika za srednju i nisku korupciju pokazuje kao smokvin list za propuštanje sankcionisanja visoke korupcije. Pozitivni zakonski propisi pružaju dobru osnovu za kažnjavanje učinilaca ovih krivičnih djela, zaprijećene kazne su dosta visoke, ali je kaznena politika sudova relativno blaga, jer se izriču minimalne zatvorske kazne ili niske novčane kazne, a suviše često i uslovne osude. Oduzimanje imovine i imovinske koristi stečene izvršenjem krivičnog djela mora pratiti svako izricanje krivičnih sankcija jer je često važnije od same osude i više pogađa učinioca od same osude. Pored oduzimanja imovinske koristi potrebno je češće izricanje mjera bezbjednosti, posebno zabrane vršenja poziva, djelatnosti ili dužnosti.

[16] *Ibid.*

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EFFICIENCY OF THE JUDICIARY IN PROCESSING CORRUPTION IN BOSNIA AND HERZEGOVINA

For a long time now, financial crime has been attracting special attention from criminal law science, the legislature, the judiciary and the general public. This is understandable because it undermines the foundations of every society but also the world economy as a whole. Within this crime, the central place belongs to the criminal acts of corruption because they are closely related to the holders of the highest functions of government of individual states and powers in international organizations. It is the combination of government and crime through the abuse of power that endangers the normal course of economic processes, the functioning and survival of every state. Therefore, a number of measures are being taken at the international, regional and local levels, in order to reduce this phenomenon to a minimum and, if possible, completely eradicate it. Corruption is a subject of interest to universal and regional conventions and, consequently, to domestic criminal law. The implementation of the anti-corruption normative framework requires a strong and efficient judicial system, which is not subject to corruption and political influence. The construction of such a system is assisted by numerous international organizations by providing professional and financial assistance, exchanging data and experiences between

states and facilitating international cooperation in the prosecution and prosecution of perpetrators of these crimes. This paper discusses the ability of the judiciary in Bosnia and Herzegovina to effectively respond to the challenge of prosecuting corruption offenses and thus contribute to their prevention. The starting point in seeking an answer to this question is the fact that successfully combating corruption, as a special form of financial crime, is one of the priorities set before Bosnia and Herzegovina on the path to European integration. Achieving this goal requires political will, adequate financial resources, good and modern legislation, efficient organization of judicial bodies, their staff training and motivation of employees. Given that Bosnia and Herzegovina is a complex state, with a specific constitutional order and territorial division, in order to understand the essence of the problem, the basics of the judicial system, its organization, efficiency and ability to respond to the challenge of efficient and timely prosecution of corruption are considered. All this is viewed through the prism of organizational, substantive and procedural criminal legislation, interdependent with the commitment of the legislature and the executive to provide the necessary legislative, material and financial conditions to meet the obligations of the judiciary in the fight against corruption. In that sense, the objective difficulties and internal weaknesses that the judiciary encounters in its work are pointed out, certain suggestions are given for appropriate changes and improvements in order for it to reach the level that enables it to fulfill its obligations and achieve the goal that is achieved. expects from him. In drawing conclusions, the author also uses the latest available statistical data on the prosecution of corrupt crimes.

KEYWORDS: corruption; political will; legislation; organization of the judiciary.

BUSINESS CYCLES AND CRIMINAL LAW

Zoran Pavlović, PhD*
Istvan Laszlo Gal, PhD**

Our starting hypothesis is that criminality is likely to increase from 2021, and this increase will continue for at least 1-2 years, after 2022. The only question is the extent of the rise and how we can slow or moderate the rise. In the time of the economic crisis the criminal law is a necessary but not sufficient tool for combating crime. If we know the past tendencies, we can prepare for the challenges of the future.

KEYWORDS: business cycle; crime, trend; ecomomy; unemployment; GDP; criminal policy; econopmic policy.

INTRODUCTION

The question of the relationship between the development of the economy and of crime became important when attention was given to the question of the social effects of economic cycles. The economic crisis in the second half of the nineteenth century led to the relations between economic situations growth and crime, to be examined for the first time, with particular reference to the question whether there was a connection between the trends of industrial production and the situation of lower classes. On the basis of their practical experience the crime statisticians recognized the social implications of economic cycles for public morality and tried to establish statistically casual connections between economic and social indicators. The limitations of their statistical methods only enabled them to derive simple theoretical models from their statistics – e.g. high levels of unemployment as a cause of increasing crime (Heiland, 1983: 13).

The recent economic crisis has a great impact on the intense of crime and thus on the Criminal Law as well. As the criminal policy and economic policy is

* Ph.D, Full Professor at the University of Business Academy, Novi Sad, Faculty of Law, e-mail: *zoran.pav@hotmail.com.*

** Ph.D, Full Professor, University of Pecs, Faculty of Law, e-mail: *gal.istvan@ajk.pte.hu.*

in constant interaction with each other. Before analysing the presumable impacts of economic crisis on criminal law, we should examine the concept of the criminal policy and economic policy, their connections, and effect on each other, furthermore review schematically the reason of economic crisis.

1. ABOUT THE CRIMINAL POLICY AND THE ECONOMIC POLICY

The criminal policy is still not considered as an independent science, just an independent sub-plot within the criminal sciences. As the part of the state's overall policy, specifically of the legal policy it is the collective term of response strategies be given to crimes. The criminal policy directs the criminal legislation (for example, the the creation of constituent elements of new criminal laws, increase or reduce the sentences etc), and it has role also in legislation.

It is responsibility of the state to protect the interests of society, and to ensure the social coexistence,. To accomplish this task, though we need the tools of criminal law are used. Conditions and manner for the use of these tools is determined by the criminal law (Földvári, 1987: 32-33). The criminal policy shall define those criteria, which *inter alia*, which concerns the application of the provisions of criminal law. The criminal policy always adjusts to the quantitative and qualitative changes of crime and the feeling of security in society; therefore it is a constantly changing, dynamic activity, of which tools are not determined by the quantitative and qualitative changes of crime, but the level of civilized society (Farkas, 1998: 81).

The criminal policy prevails especially on the fields of the legislation. In the law enforcement (at least in the constitutional rule of law) only that criminal policy could be prevailed, which has been formulated to criminal laws by the legislative power, so the courts could not be controlled directly. As the judicial system is independent, separate branch, the judges are subject only to the law (Finszter, 2006: 12). For that reason criminal case policy is not mentioned as specifically area of criminal justice policy.

The economic policy is rather a practical activity than a science, although as applied economics it has a strong theoretical background. It can be defined as the active state intervention in the economy, all the conscious, coherent and targeted actions, which concern the production, the consumption, the exchange and the capital formation. The main components of economic policy are the following:

- main objectives/aims: e.g. growth, full employment, the current account balance, reducing of imbalances, price stability, sustained (and sustainable) development;

- ranking objectives of development: some goals are incompatible, so there should be an order of priority;
- analysis of the links between objectives: the economic policy takes into account those economic relations which have been detected among the given variables by economists;
- choosing the tools: economic policy requires the use of devices to reach the aims. (monetary or fiscal toolbar, etc) (Napvilág, 2005: 165-166).

The relationship between economic policy and criminal policy in the field of combating against economic crime may be described as rather the criminal policy should take into consideration the economic aspects, than vice versa. A badly chosen criminal policy does not necessarily assisted in the development of the economy, the aspects of criminal and economy policy must be carefully coordinated. The criminal policy of course, also has to take into account other factors,besides the economic aspect but the criminal policy applicable regarding economic crimes shall absolutely consider the medium- and long-term economic objectives.

Although the criminal law should show relative stability, the regulation of economic crime control often changes, as it is understandable under transitive economic conditions. Severe penalties should not be envisaged, but a basic aspect should be to ensure the consistent ultima ratio (last resort) role of the criminal law in the economy. This should be pursued even if we still are confronted with doubts of the economic agents regarding the economic efficiency of criminal law - is not always baseless.

At the beginning of the 21st century seemed that international terrorism would be the cause of main economic troubles, instead of this, at the end of 2007 we were greeted by a "classic" global financial crisis. By 2007-2008, the world economy turned into the descending branch of the so-called Kondratyev cycle, and many disasters worsened the situation. For example, the hurricane in New Orleans. Because of the impregnation of the credit market, banks turned to secondary debtors. There was no severe credit review; real estate prices continuously raised. In 2006, more and more credit collapsed, so several real estate agencies became bankrupted, which also took some banks along with them. Out of these bankruptcies the most well-known is the Lehman Brothers. The crisis soon spilt over into the real economy. The root causes of the crisis are still being debated by leading economists. Yet, President Bush's big tax cuts program, which has suddenly left billions of dollars within the population, has undoubtedly played a role, further boosting credit supply to banks. Since the Great Depression of the 20th century, the situation called the most significant economic crisis emerged in 2008 from a global financial crisis that preceded it. The resultant of this the mortgage crisis in the United States, which affected the real estate market for the first time. The real causes of the economic

crisis of 2008 have been explained by several experts in many ways. Investigations have often come to very different and not infrequently contradictory conclusions. Overall, it can be said that a complex process has resulted in a global economic crisis by 2008, which has spread from the Americas to the whole world in a short time. There is also a broad consensus among some theories that the immediate cause of the economic crisis was the collapse of the US mortgage bubble (Halm, 2009: 57).

The global economic crisis that erupted in 2020 first started as a health crisis in China (Wuhan) and according to the already mentioned pessimistic scenario is expected to shake the world economy, and in particular Europe, more than the financial crisis of 2008 or crisis caused by the terrorist attacks on September 11, 2001.[1] What can be seen from the current crisis without any special visionary skills:

1) the coronavirus is expected to claim more deaths worldwide than international terrorism has so far collective in world history;
2) the global economic crisis generated by COVID-19 will be comparable with 2008, and with the 1929-33 crisis. The current situation can be even more severe than the other two downfalls and
3) like any economic crisis, this will also have an impact on crime, and the number of known crimes in specific categories of crimes will be increased at least temporarily.

2. RECESSIONS AND CRIME RATES

Looking for a correlation between economic indicators and crime is not a recent research topic. Between 1835 and 1861, based on Bavarian data series, Georg von Mayr showed a quantifiable relationship between changes in grain prices and the number of thefts. The rise in the amount of grain has led to an increase in thefts and vice versa (Martens, 1978: 5-6).

[1] IMF, Managing Director, Kristalina Georgieva has painted a devastating picture of the economic impact of the epidemic, according to her even 2021 will not necessarily be about recovery. According to her, the 9 trillion dollars that various governments have already voted for so far will not be enough. Barely a month ago, we had been expecting a definite increase in per capita income in more than 160 of our member states. Today, everything was on top of our heads; we can already see that per capita growth will be negative in more than 170 countries – Georgieva said. The IMF director noted that because it is not known how long the epidemic will last, the outlook is very uncertain, she believes that if the pandemic subsides in the second half of the year, 2021 may already be a year of partial recovery, but the situation may worsen. Investors have already withdrawn more than a hundred billion dollars from these economies, three times as much as during the 2008 economic crisis.
https://index.hu/gazdasag/2020/04/09/imf_igazgato_nagy_gazdsagi_vilagvalsag_ota_nem_volt_ekkora_recesszio_jarvany/ [15.7.2021.].

In the 1880s, Lacassagne, a famous French criminal lawyer and criminologist, also examined the relationship between economic factors and the development of crime. He sought to discover that changes in wheat prices go in parallel with changes in the number of crimes against property and that the effects of economic crises are also evident (Lacassagne, 1881).

Crime statistics indicated similarly during the USA's economic crisis of the 1890s. "At the start of the crisis, newspapers reported a huge increase in corruption. On January 1, 1895, article, the Chicago Daily Tribune reported the largest number of embezzlement schemes in 1894 since 1878, which had also been a year of serious depression." (Akerlof , Shiller , 2011: 91).

According to German research led by Exner after the First World War, (Exner, 1926) he came to the following correlation: the number of thefts with will increase with ten thousand cases with every one million new unemployed people.

Between 1882 and 1914, rye and bread prices moved almost entirely together with the number of known thefts in Germany, according to research by Eduard Joachim. (Joachim, 1933: 19).

At the beginning of the 20th century, between the two world wars, Dorothy Swaine Thomas examined the correlation between economic cycles and various categories of crime between 1865 and 1915 (Dorothy Swaine, 1927: 134). Demonstrable links have been found (Dorothy Swaine, 1927: 134). between the cyclical changes of the economy and the following groups of criminal offences:

- every known criminal offence,
- non-violent offences against property,
- violent offences against property,
- intentional vandalism,
- violent offences against the person.

She proved that economic cycles move almost in the opposite direction to each crime category: crime decreases in the case of recovery and increases in a recession.

During the Great Depression of 1929-33, according to research, (Gleitze, 1941: 7) while crime overall in Germany decreased, the increase after 1929 is clearly visible for certain crime groups.

After the Great Depression, the relationship between economic crises and crime has also been examined in the United States. Thorsten Sellin draws attention to the following exciting contexts in her book on the subject (Sellin, 1937: 19-20):

1. Not all types of crime respond sensitively to changes in economic indicators; therefore, investigations should be carried out separately for certain types of crime.

2. Economic changes do not affect all areas to the same extent.
3. Not all classes of society are equally adversely affected by the economic crisis. The impact of the crisis is more visible in the crime of groups more affected by the disaster.
4. Finally, it is essential to underline that less potent economic downturns have less effect on crime rates than greater ones.

It is interesting to note that Thomas Robert Malthus had come to the same conclusion centuries earlier as the American author in the first half of the 20th century that not all classes of society are equally adversely affected by economic crises. "Unfortunately, although working classes benefit from the general boom, but not as much as in the general downturn. They suffer the greatest need in times of low wages, but cannot receive adequate compensation in times of high salaries neither. For them, (economic) surges always do more harm than good, and keeping the well-being of the majority of the society in mind, our goal has to be to maintain peace and equal spending."[2]

After World War II, crime rates and the number and duration of prison sentences increased along with economic indicators. There seemed to be no connection between financial crises and crime.

In 1978 Ulrich Martens analysed the previous research with a critical approach. According to him, "no general statement can be made in time or space that whether and if so, what impact does the economic situation, and in particular, unemployment, have on the development of crime?" (Martens, 1978: 36). In the literature, hesitation can be seen in the 1970s, when researchers began to question the effect of economic crises on crime. "In the early 1970s, as the value system controlling the whole society in financial crises changed, the relationship between economic conditions and crime was again on the list. The most comprehensive research - including international comparisons - was conducted within the framework of the Council of Europe, and its results were published in 1985." (Gönczöl, 1985: 3). Research of the 1970s and 1980s did not prove any correlation between economic crises, recessions, recessions and crime in time, as Katalin Gönczöl points out in a study:

Contrary to the usual methods of the investigation so far, they have not been based on indicators of the social status of offenders, but have sought to show the impact of changes in the above factors, which are most characteristic of the economies of the countries concerned. The analysis covers the period from 1963 to 1981. During this period, the number of perpetrators per 100,000 people at fault in the Federal Republic of Germany increased from 2,920 to 6,600, in France

[2] Cited by Szentes, Tamás, Ki, és miért van válságban? (Who is in crisis and why?). Napvilág Kiadó (2009), Budapest, 108.

from 1,350 to 5,370, and in England and Wales from 2,250 to 5,660. In addition to the steady rise in crime, economic development was not even in any country. While national incomes increased to varying degrees between 1950 and 1960, they increased in all three countries, and then declined to a stagnating level in the second half of the 1970s. Unemployment reached 10% and then fell sharply as a result of favourable developments. In the early 1960s, for example, the Federal Republic of Germany did not reach the 1% level. From 1975, however, it rises again, and in 1980 it approached its former highs.

Researchers have found that the cyclical development of the economy has no direct correlation with the evolution of crime. The delayed response to the improvement or deterioration of economic conditions in crime changes is not apparent. Thus, the research did not confirm the hypothesis that the effect of economic terms does not appear in the actual crime, but the statistical series of a later period. Crime has steadily increased in all three countries. This increase, in turn, resulted in countries starting from very different situations in terms of per 100,000 offenders by the end of the investigation period, 1981. Specifically, crime has risen by 400% in France, 230% in the Federal Republic of Germany and 250% in England and Wales in 18 years to reach roughly the same level by 1981. From Katalin Gönczöl: Contrary to the findings of the cited works, international scientific literature based on research completed in the second half of the 1970s once again confirms that crimes against property and economic crime are on the increase during the financial crisis.

In 1976, UNSDRI (United Nations Social Defense Research Institute), based in Rome, showed that during special economic downturns and disasters, some specific forms of economic crime are increasing. In such cases, effective countermeasures must be taken, which, of course, are not limited to criminal law enforcement.

In 1983, a German study showed the inverse relationship, that is, during the economic boom, the prison population and the number of people in psychiatric treatment decreased.

The author of a monograph published in 1987 found the following correlations between the occurrence of unemployment and certain serious crimes:

- burglary 0.572,
- violent crimes against persons,
- vandalism 0.494,
- theft 0.423
- robbery 0.342
- fraud 0.338
- sexual offences 0.158.

From this, it can be seen that, apart from sex crimes, there is a significant relationship between crises and several types of serious crime. Indeed, high unemployment has a robust correlation with economic recessions, a typical and systemic consequence of the crisis.

Another American study (Fadei-Ttahraniés, 2002) aimed to develop a model that explains the evolution of the crime rate against the property by using economic variables. Dependent variables used to measure the speed of property crime were obtained from the FBI›s Uniform Crime Reporting Program. Independent variables include public education, the unemployment rate, the GDP rate, the poverty rate, the average income and the amount of heroin and cocaine seized.

A correlation model was used for dependent and independent variables. With the use of a linear regression model, all independent variables were analysed. The results were as follows:

A negative correlation can be found, for example, in the following way: As the amount spent on public education increases, the rate of crime against property decreases. So there is an inverse relationship between the two variables. These relationships are usually felt or inferred by intuition, except the negative correlation between the unemployment rate and the rate of crime against property.

After the onset of the economic crisis in 2008, the fear of crimes against property and violent criminality has grown significantly in society. This was also supported by crime statistics, as a significant increase could be seen in thefts, burglaries and robberies. Between 2009 and 2011 the number of known thefts and burglaries grew by 33%-, from 72,658 to 96,925. Meanwhile, robberies increased by 41%, from 4,708 to 6,636.[3]

According to a report of the United Nations Office on Drug and Crime 2010, monitoring the Impact of Economic Crisis on the Crime (Rapid Impact and Vulnerability Analysis Fund), the economic crisis that broke out in 2007 can be proven by statistical models (especially ARIMA models). Volume. This conclusion was reached based on statistics from 15 countries. The conclusion of the research was:

1) Economic factors have a demonstrable impact on crime statistics and crime trends.
2) In the case of 11 out of the 15 countries examined, there was a significant change in the economic indicators during 2008/2009, which can be called an economic crisis. In 8 of these 11 countries, the deterioration of economic indicators had an impact on crime.
3) Crimes of violence, such as robbery, have shown the closest correlation with

[3] Sappho, X. and Cheliotis Leonidas K. *The politics of crime and the financial crisis in Greece*, 2 August 2012 http://www.opendemocracy.net/sappho-xenakis-leonidas-kcheliotis/politics-of-crime-and-financial-crisis-in-greece [15.7.2021.].

economic factors. In addition, in the case of deliberate killings and motorcycle thefts, the relationship was confirmed by statistical methods.

4) The model always indicates a time lag between a change in economic indicators and a change in crime statistics. On average, adverse economic events in criminal statistics show a 4-6 month time shift.
5) On average, for three months, you can predict well the prospective future development of crime at the national level or for a city based on historical crime statistics and economic variables.[4]

The increase in the number of intentional homicides is clearly visible in the timeline based on Mexican crime statistics data. In the year of the outbreak of the economic crisis, the steadily declining trend visibly broke and turned into growth. So the crisis has also increased the number of intentional homicides. A co-movement of robbery and unemployment has been observed in Canada, with the timeline moving almost entirely together.[5]

We agree with the concept that not only economic crises, but economic recovery can often act as a factor in increasing the crime rate.

"A sudden unfavourable change of the economy – the increase in poverty, the increasing number of poor people – can be blamed for the cause of deviance, and rise of crimes, as well as the positive economic growth, if the process is rapid." (Durkheim, 1967: 250-251).

3. POSSIBLE TRENDS IN THE CRIMINALITY AFTER 2020

The question is not that; there will be a global economic crisis after 2021 or not, economists are only debating how big it will be, whether the pace of growth will slow down, or even the entire world economy could go into recession. Let's look at the latter, on its own, regardless of the previous four factors.[6] Based on my earlier research in 2012, the following are probable:

1) the crime rates will increase (on average) 4-6 months later after the economic crisis especially in the third quarter of the year of 2020;
2) starting from the world economic crisis of 2008, the number of crimes against persons will increase from the end of 2020, but also in the next 1-2 years;

[4] www.unodc.org/documents/data-and-analysis/statistics/crime/GIVAS_Final_Report.pdf [15.7.2021.].

[5] www.unodc.org/documents/data-and-analysis/statistics/crime/GIVAS_Final_Report.pdf [15.7.2021.].

[6] Obviously, complete independence is not true, as these explanatory variables may also have some degree of stochastic relationship with each other.

3) there will be a definite reduction in the name of offences against traffic regulations in 2020 due to travel and travel restrictions as well as quarantine measures and the reduction of tourism to zero;
4) crimes against public order will first show a decreasing (due to quarantine measures) and then an increasing trend (after the lifting of access restrictions);
5) an increase in the number of economic crimes is expected, especially in crimes committed with the help of information technology;
6) crime against the property will first decrease, and then it will also turn into a definite increase, especially from 2021 and
7) the number of murders is also expected to increase.

All we can add to this undoubtedly true finding is that criminal law is a necessary but not sufficient tool for combating crime. If we know the past tendencies, we can prepare for the challenges of the future. We can respond before, during, or after problems arise. The earlier we move, the higher the efficiency can be. mIf crime policymakers forecast an increase in crime, first of all, it is possible to consider increasing the number of the investigating authority and raising salaries in connection with the existing staff. In addition to all these proposals, as Franz Liszt put it: "The best criminal policy is good social policy." That is, a lot will depend on how the government handles the social policy effects and consequences of the crisis. Together, they will help reduce the negative effects of the crisis on crime and, in the long run, flatten not only the epidemic curve but also the growth waves on time series showing an increase in total offence and individual crimes in the coming years.

CONCLUSION

The question must be raised whether there is a reason for the existence of criminal law in the economy? I am convinced that there is. I confess this despite that I can imagine a well-functioning economy without the intervention of criminal law. In my opinion, other administrative measures besides the criminal law could be used to protect the economy, if the following two conditions are met:

- business culture of high moral level under consolidated circumstances, and
- determination of the upper limit of the financial penalties, which should be multiple than the offender's realized or pursued illegal profits.

Under such circumstances, economic criminal law would not be needed at all. However, none of the conditions are met in our country, and realistically only

the second may be changed in the near future. Therefore economic criminal law is needed, and will be necessary in an incalculably long term.

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POSLOVNI CIKLUS I KRIVIČNO PRAVO

U ovom radu autori polaze od pretpostavke da će se kriminalitet verovatno povećati od 2021. godine, kao i da će taj porast biti prisutan još najmanje dve godine, odnosno i nakon 2022. godine. Zbog toga je potrebno razmotriti način na koji se može usporiti ili ublažiti njegov rast. U vreme ekonomske krize krivično pravo je neophodno, ali ne i dovoljno sredstvo u borbi protiv kriminaliteta. Stoga je potrebno imati u vidu tehndencije iz prethodnog perioda. Jedino je na takav način moguće pripremiti društvo za suočavanje sa izazovima koji tek slede.

KLJUČNE REČI: poslovni ciklus; kriminalitet; trend; ekonomija; nezaposlenost; bruto društveni proizvod; kriminalna politika; ekonomska politika.

LANGUAGE PROBLEMS IN COMPLEX (WHITE-COLLAR CRIMINAL) PROCEEDINGS: SOURCES OF ERRORS AND ERROR PREVENTION

Manfred Dauster*

Criminal proceedings in white-collar crime are inherently complex. In assessing the question of guilt, criminal courts are often required to unravel and prove networks of relationships between the various parties involved in the crimes in question (e.g. money laundering). Economic crimes are committed within a national framework and extend - as in the case of money laundering - into the territories of other states. This determination is usually accompanied by necessary inter-national cooperation in criminal matters. The evidence obtained in this way, but often also the evidence obtained domestically, in the form of documents, is in foreign languages. Required witnesses, conceivable accomplices and accessories do not always speak the language which national laws define as the "language of the court". These documents and statements must therefore be translated into this "court language". Interpreting and translating is a complex process to which criminal courts often do not pay due attention in the preparation and conduct of main hearings. Language problems are often underestimated. Mistakes in the translation from foreign languages into the "language of the court" can have fatal consequences for the course of main hearings and, in extreme cases, lead to the fact that main hearings have to be interrupted and have to start anew. Using the legal situation in Germany as an example, this article aims to present the national and international framework conditions for transcription from foreign languages and also to look for practical ways of avoiding procedural errors within this framework.

KEYWORDS: white-collar crime; language problems; criminal proceedings.

* Ph.D, Presiding Judge of the Supreme Court of Bavaria, Presiding Judge at the Higher Regional Court of Munich, Member of the Institute for Economic Crime, European and International Criminal Law at the University of Saarland in Saarbrücken, e-mail: *manfred.dauster@oblg.bayern.de.*

INTRODUCTION

Economic crimes are an evil for all societies; the damages caused by them reach billions of euros[1]. When they are dealt with in court, the images from courtrooms are no less spectacular than the amounts of damage. Entire shelves of evidence files are set up, and legions of defense attorneys crowd the courtroom. The far-reaching dimensions of these proceedings can be imagined when it comes to the cross-border interconnections between the crime and the perpetrators and their accessories. In the case of money laundering (Section 261 of the German Criminal Code[2] [Strafgesetzbuch (StGB)] or tax evasion (Section 370 of the German Fiscal Code[3] [Abgabenordnung (AO)]), the criminal spider's web is often woven across Europe, sometimes worldwide. "Tax havens" and "secretive" banks located there are best parking places for fraud profits. These cobwebs are also reflected on the shelves of courtrooms as evidence. It can look similarly colorful with the witnesses or the victims. They, too, can come from all over the world. This results in language and translation problems, which shall not be underestimated in forensic practice. Not paying required attention to that may cause tremendous troubles in courtroom, may impede proceedings and – in worst cases – may result in a restart of the entire trial.

1. THE LEGAL FRAMEWORK: SELECTION OF LANGUAGE MEDIATORS AND PROCEDURAL MANAGEMENT CHALLENGES

This description of the state of affairs, which testifies to the complexity of white-collar criminal proceedings, comes up against the German provision of § 184, 1st sentence of the Court Constitution Act (Gerichtsverfassungsgesetz [GVG][4]), which is impressive in its simplicity when it states that the language of the court

[1] Bundeskriminalamt (editor), Wirtschaftskriminalität. Bundeslagebild 2019, Wiesbaden November 2020, pp. 5 et seqq.: 40.484 cases, 22.290 suspects and total damage 2,973 Billion € for Germany only. - Summary data for all EU member states are lacking, so that an estimated extrapolation - based on the German data for 2019 – to an order of magnitude of well over € 10 billion for the entire Union is rather a conservative assumption. OLAF, the European Anti-Fraud Office, has reported 181 cases identified in 2019 to the detriment of EU finances and a proposed recovery of € 485 million.

[2] In the version published on November 13th, 1998 (BGBl. 1998 I p. 3322), as last amended by Article 2 of the Act of June 19th, 2019 (BGBl. 2019 I p. 844).

[3] In the version published on October 1st, 2002 (BGBl. 2002 I p. 3866; 2003 I p. 61), as last amended by Article 17 of the Act of July 17th, 2017 (BGBl. 2017 I p. 2541)

[4] In the version published on May 9 th , 1975 (BGBl. 1975 I p. 1077), as last amended by Article 8(1) of the Act of July 8 th , 2019 (BGBl. 2019 I p. 1002). In general, on the problem of foreign languages in German courts: Jürgen Weith, Gerichtssprachenproblematik im Straf- und Bußgeldverfahren, Marburg 1994.

is German[5]. In other countries[6], the legal situation is not different. German is mandatory for the (criminal) courts. They may not hear cases in another language, even if the judges understand the foreign language.[7] § 184 2nd sentence GVG makes

[5] § 23(1) of the (Federal) Administrative Procedure Act (in the version last promulgated on January 23rd, 2003 [BGBl. 2003 I p. 102], amended by Article 4(8) of the Act of May 5th, 2004 [BGBl. 2004 I p. 718]) (Verwaltungsverfahrensgesetz [VwVfG]) simply states that the official language of the German administration shall be German.

[6] In contrast to other countries (out of the EU Member States see Article 8(1) of the Constitution of *Austria*; Article 4(1) of the Constitution of *Belgium*; Article 3 of the Constitution of *Bulgaria*; Article 3 no. 1 of the Constitution of Cyprus; § 6 of the Constitution of *Estonia*; § 17(1) of the Constitution of *Finland*; Article 2(1) of the Constitution of *France* [cf. Rainer Haas, Französische Sprachgesetzgebung und europäische Integration, Berlin 1991]; Article 8 of the Constitution of *Ireland*; Article 4, 1st sentence of the Constitution of *Latvia*; Article 14 of the Constitution of *Lithunia*; Article 5(1) of the Constitution of *Malta*; Article 27, 1st sentence of the Constitution of *Poland*; Article 11(3) of the Constitution of *Portugal*; Article 13 of the Constitution of *Rumania*; Article 6 of the Constitution of *Slovakia* (Ingo von Münch, Gedanken zum Sprachgebrauch und zur "political correctness", in: Ingo von Münch [ed.], Rechtspolitik und Rechtskultur. Kommentare zum Zustand der Bundesrepublik Deutschland, Berlin 2011, p. 69/74); Article 11 of the Constitution of *Slovenia*; Article 3 of the Constitution of *Spain*) (Stefan Oeter, Die Entwicklung der europäischen Sprachenvielfalt und die Rolle der Minderheiten. Der völkerrechtliche und nationale Schutz, in: Christopf Bergmer/Matthias Weber (ed.), Aussiedler- und Minderheitenpolitik in Deutschland. Bilanz und Perspektiven , München 2009, pp. 151 et seqq.), the Constitution of the Federal Republic of Germany, the Basic Law of May 23, 1949 (in the revised version published in the Federal Law Gazette [BGBl.] Part III classification number 100-1, as last amended by Article 1 of the Act of March 28th, 2019 [BGBl. 2019 I p. 404]) does not contain any regulations on which language is the official language of the country. There are, however, efforts to supplement Article 22 of the Basic Law with a corresponding provision (cf. Andreas Dietz, Deutsche Sprache im Grundgesetz, BayVBl. 2007, pp. 40 et seqq.; Ingo von Münch, cit. loc., p. 69/79 and p. 80; Philipp Dreesen, Staatsziel "Deutsch". Die deutsche Sprache im Grundgesetz aus verfassungspolitischer Perspektive, Aptun Zeitschrift für Sprachkritik und Sprachkultur 2010 no. 1, pp. 37 et seqq.). Whether German is to be inserted into the constitution as the national language of Germany can be debated with good reasons (Ingo von Münch, ibid., p. 80). It may also be that a certain " super alienation " of German by Anglicisms can be observed as well as that English has also come to the fore as the language of German (natural) scientists (Ingo von Münch, ibid., p. 75 et seqq.). In any case, a regulation on the national language does not reflect the German constitutional tradition. The preceding constitutions of the Basic Law got along without such a regulation. Moreover, it is suspicious and worrying that in recent years corresponding demands have increasingly been raised from the rows of the extreme right (cf. draft bill of the parliamentary group of the Alternative für Deutschland of March 2nd, 2018 [BT-Ds 19/951]; motion by the faction of Alternative für Deutschland [BT-Ds 19/25801] to declare 2021 the Year of the German Language, its motion to establish a German Academy of Language and Culture to "preserve the German language and culture" [BT-Ds 19/28764], the motion by the same faction in the State Parliament of Baden-Württemberg to establish German as a compulsory colloquial language in schools ["Schulhofsprache"] [B-WLT-Ds 16/1526 of January 30th, 2017] or the AFD (= Alternative für Deutschland) parliamentary group's draft bill of April 11th, 2016 [ThürLT-Ds 6/1979] to amend the Constitution of the Free State of Thuringia and to include a provision "The language of the Free State of Thuringia is German") (cf. the widely acclaimed book by linguist Henning Lobin, Sprachkampf: Wie die Neue Rechte die deutsche Sprache instrumentalisiert, Berlin 2021, pp. 21 et seqq, pp. 110 et seqq.).

[7] However, in the event that an (administrative) court introduces foreign-language means of evidence into the proceedings and a party to the proceedings does not understand the foreign language, an adjournment of the hearing is reasonable in order to allow for a translation of the documents that have been referred to (BayVGH decision of August 25th, 2016 - file no.: 14 ZB 16.30133, in Beck-RS 2015, 51752).- For undefended defendants, Art. 3(III) of Directive 2010/64/EU on the Right to Translation has brought significant restrictions. Even if they make submissions in their mother tongue, the courts are required to have them translated ex officio (ECJ, judgment of October 15th, 2016, NJW 2016, p. 303 with comments by Dominik Brodowski, StV 2016, p. 210; Lutz Meyer-Goßner/Bertram Schmitt, Strafprozessordnung, 63th ed., München 2020, § 184 margin. 2 a with further evidence).

an exception to this principle in that the provision states: "The right of the Sorbs to speak Sorbian before the courts in the home districts of the Sorbian population shall be guaranteed"[8]. The exception of § 184 2nd sentence GVG has only local effect in South-East of Eastern Germany. For the greater rest of the country, the other parties to the proceedings, but also the public, have a claim to expect the court conducting the proceedings in German solely[9].

[8] The *Sorbs* (Upper Sorbian Serbja, Lower Sorbian Serby, especially in Lower Lusatia in German also Wenden, German obsolete or in the Slavic languages to this day Lusatian Serbs) are a West Slavic ethnic group living mainly in Lusatia in eastern Germany. It includes the Upper Sorbs in Upper Lusatia in Saxony and the Lower Sorbs/Wends in Lower Lusatia in Brandenburg, who differ linguistically and culturally. The Sorbs are recognized as a national minority in Germany. In addition to their language, they have an officially recognized flag and anthem. Sorbs are generally German citizens. Sorbs, their language and their culture are particularly protected by Article 25 of the Constitution of the Land of Brandenburg of August 20th, 1992 (BdgGVBl. 1992 I p. 298) and by Article 5 of the Constitution of the Free State of Saxony of May 27th, 1992 (SächsGVBl. 1992 p. 243). Although Article 5 of the Saxon Constitution expressively singles out the Sorbian minority, it extends the protection of minorities to all members of other minorities who are legally resident in Saxony. - The other national minorities in Germany (the *Danes*, who number up to 100,000, especially in northern Schleswig-Holstein), the around 60.000 *East Frisians* (east of the German-Dutch border in Lower Saxony in East Frisia, Oldenburg Frisia, Satesland, Butjadingen and Land Wursten) and the *North Frisians* (on the west coast of Schleswig-Holstein, on the Halligen islands and the island of Helgoland) are recognized as minorities under the European Framework Convention for the Protection of National Minorities of Feburary 1st, 1995 – in force since February 1st, 1998 (European Treaties Series no 157; cf. Stefan Oeter, Die Entwicklung der europäischen Sprachenvielfalt und die Rolle der Minderheiten. Der völkerrechtliche und nationale Schutz, in: Christoph Bergmer/Mattias Weber [ed.], Aussiedler - und Minderheitenpolitik in Deutschland. Bilanz und Perspektiven, München 2009, pp. 151 et seqq.; Kirsten Lampe, The Protection of Minorities in the EU, in: Kirsten Lampe (ed.), Human Rights in the Context of EU Foreign Policy and Enlargement, Baden-Baden 2007, pp. 132 – 146, and The European Framework Convention on the Protection of Minorities of 1995, op. cit., p. 169 - 172), the Danish minority is even exempted from the 5% clause in the elections to the Landtag (State Parliament) of Schleswig-Holstein, but otherwise their constitutional protection does not come close to that of the Sorbs. Additional protection, especially for the German Romanes (Sinti and Roma), is granted by the European Charter for Regional or Minority Languages of November 5th, 1992 (European Treaties Series no. 148).

[9] There had been pilot projects to "internationalize" civil and commercial proceedings before German courts and to conduct them in English (cf. Barbara Mayer, Englisch als Gerichtssprache, Der Wirtschaftsführer 2015, pp. 26 et seqq.; Hermann Hoffmann, Kammern für internationale Handelssachen. Eine juristisch-ökonomische Untersuchung zu effektiven Justizdienstleistungen, Baden-Baden 2011, pp. 180 et seqq.). On February 12th 2010, the Länder of Hamburg and Nordrhein-Westfalen submitted a law initiative on "international commercial chambers" to the Bundesrat, the constitutional body through which the Federal States (Länder) participate in the Federal legislation and administration, for adoption. The draft foresaw the establishment of special international chambers within regional courts (and senates within the Regional High Courts of Appeal), before which upon agreement with the parties civil proceedings could be conducted in English. The Bundestag, the national Federal Parliament, did not pass any resolution on the Bundesrat initiative during the 17th legislative period, so that it became obsolete due to the discontinuity of parliament (cf. BT-Drs 17/2163). Further Bundesrat initiatives followed, with the States of Bavaria, Lower Saxony and Hesse additionally supporting them (see initiative of February 20th, 2018 [BR-Ds 53/18]. To date, the Länder plans have not become federal law (cf. BT-Drs 19/1717). Internationally active private law firms support the plans broadly (see also Hanns Prütting,In Englisch vor deutschen Gerichten verhandeln? Den Justizstandort Deutschland stärken. Nicht nur deutsch als Gerichtssprache zulassen, AnwBl. 2010, p. 113 – 115; position paper of the Corporate and Business Law Committee of the American Chamber of Commerce – https://www.amcham.de/fileadmin/user_upload_alt/Policy/Corporate/Law/10111_POP_Englisch_als_Gerichtssprache.pdf - retrieved on April 30th, 2021). Nevertheless, the critical voices against such plans cannot be ignored and also carry weight (cf. Ingo von Münch, cit. loc., p. 81 et seqq.; Tobias Handschell, Die Vereinbarkeit von Englisch als Gerichtssprache mit dem Grundgesetz und europäischem Recht, DRiZ 2010, p. 395/399; Philipp Dreesen/Lars T. Hoffmann,

If people who do not understand German or do not understand it sufficiently are involved in criminal proceedings (what is sufficient, does the standard for this result from the complexity and/or the complexity of the subject matter of the proceedings?), the judicial duty to use the German language collides with the prohibition under Article 3(3) of the Basic Law of May 23rd, 1949, the German Consitution, (Grundgesetz) of not being discriminated because of language[10]. Given the supreme constitutional principle of Article 1(1) and (2) GG, the protection of human dignity, and under the rule of the right to be heard (Article 103(1) GG)[11], it is absolutely inconceivable, irrespective of the prohibition of discrimination, to conduct criminal proceedings in which parties to the proceedings are unable to follow the progress of the proceedings for reasons of lack of language ability.[12] This would degrade them in an unbearable way to procedural accessories only[13]. After this statement it is already superfluous to say that under these conditions a procedure would blatantly contradict a fair procedure, which for its part is again covered by the constitutional requirement of the Rule of Law according to Article 20(2) GG. These constitutional aspects are supplemented and secured by obligations under international law[14] that Germany has entered into and by the requirements of the

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Sprache als immanenter Teil der Rechtsordnung: linguistische, rechtspraktische und verfassungsrechtliche Anmerkungen zur Zulassung von Englisch als Gerichtssprache in Kammern für internationale Handelssachen, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft vol. 94[2] [2011], p. 194 – 210). English may be so agreed with the parties to the proceedings, who in civil procedural law - unlike in criminal procedural law - have a greater power of disposition over the structure of the proceedings. The goal of such pilot projects also seems legitimate, since the aim of such international chambers is to ensure that interesting private disputes do not end up before (private) arbitration courts as frequently. "Internationalization" would also serve the legal policy purpose of "exporting" the advantages of the German Rule of Law to other countries. But whether this would then still do justice to the principle of publicity of the proceedings can rightly be questioned. Everybody working in a foreign language knows well that one will never be perfect in the foreign language. Foreign languages are best sources for mistakes and for any kind of misunderstanding.

[10] Robert Esser, in: Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar, ed. by Volker Erb/Robert Esser/Ulrich Franke/Kirsten Graalmann-Scheerer/Hans Hilger/Alexander Igor, 11th vol., 26th ed., Berlin-Boston 2012, Art. 6 EMRK margin. 830; BVerfGE 40, 95; BVerfG, NJW 2004, p. 50; BVerfG, NJW 2004, p. 1095; Lutz Meyer-Goßner/Bertram Schmitt, cit. loc., Art. 6 MRK margin. 23a.

[11] BVerfG, NJW 1990, p. 3072; BayObLG, NJW 1996, p. 1836; Robert **Esser**, cit. loc., Art. 6 EMRK margin. 830; BVerfG, NJW 1983, p. 2762; Helmut Diemer, in: Rolf Hanisch (ed.), Karlsruher Kommentar zur Strafprozessordnung mit GVG, EGGVG und EMRK, 8th ed., München 2019, § 184 margin. 3.

[12] Thomas Wickern, in: Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar, ed. by Volker Erb/Robert Esser/Ulrich Franke/Kirsten Graalmann-Scheerer/Hans Hilger/Alexander Igor, 10th vol., 26th ed., Berlin/New York, Vor § 184 margin. 2; Helmut Diemer, cit. loc., § 184 margin. 1 – Needless to say that the (increasing) costs of proceeding may not be an argument. It does not matter whether the defendant is able to afford language mediation (Robert Esser, cit. loc., Art. 6 EMRK margin. 828; EKMR, EuGRZ 1977, p. 467.

[13] BVerfG, NJW 1983, 2762; Helmut Diemer, cit. loc., § 184 margin. 3.

[14] In particular by Article 6(3) lit. e of the European Convention on Human Rights. It is to be noted that the European Court of Human Rights, ex officio, examines national judgements appealed to the ECHR whether the national authorities paid sufficient respect to the rule, see Robert Esser, cit. loc., Art. 6 EMRK margin. 835.

European Union, which Germany - under Union Law - is obliged to transpose into national law.[15]

German law responds to the tension between the German language of the court and foreign-language participants in the proceedings through the provisions of §§ 185, 187 GVG.[16] § 185(1), 1st sentence GVG rules that interpreters shall be appointed in case that a participant in the proceeding does not speak German (sufficiently[17]).[18] However, German procedural law does not have any regulations on which language mediators (interpreter, translator) can be used to overcome the existing language barriers. The term of interpreter and translator is not defined in more detail. Language mediators are those persons who have a command of both the German and the foreign language(s). Translators deal with written texts, while interpreters transfer the spoken word from one language to the other, either consecutively or simultaneously. In the absence of any other legal definition under §§ 185 et seq. GVG, language mediator can be anyone who claims to be capable of transmitting communication in a foreign language. Whether the persons in question actually have the ability can hardly be assessed by a court, and if only with difficulty.

[15] Cf. EU Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings of October 20th, 2010 (Official Journal L 280/1); European Commission: Report on the implementation of Directive 2010/64/EU of October 20th, 2010 of December 18th, 2018 - COM(2018)857/F1 - EN (eurocrim.org). For the transposition of the directive in Germany, Poland and Spain see Magdalena Kotzurek, Die Richtlinie 2010/64/EU zum Dolmetschen und Übersetzen in Strafverfahren: Neues Qualitätssiegel oder verpasste Chance, retrieved from: https://nbn-resolving.org/urn:nbn:de:bsz:15-qucosa2-716525; Sandra Silva, The right to interpretation and translation in Criminal Proceedings: the situation in Portugal, retrieved from *https://ler.letras.up.pt/uploads/ficheiros/13620.pdf*; Caroline Morgan, The new European directive on the right to interpretation and translation in criminal proceedings, in: Sabine Braun/Judith L. Taylor (ed.), Videoconference and remote interpreting in criminal proceedings, Guildford, University of Surrey 2012, p. 5 – 10; Erik Hertog, Directive 2010/64/EU of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings: Transposition Strategies with Regard to Interpretation and Translation, MonTI.Monografias de Traducion e Interpretacion no. 7, 2015, p. 73 – 100; Maciej Fingas, The Right to Interpretation and Translation in Criminal Proceedings – Challenges and Difficulties Stemming from the Implementation of the Directive 2010/64/EU, EuCLR Vol. 9, 2/2019, p. 175 – 186.

[16] § 186 GVG deals with language mediation in the case of hearing-impaired or speech-impaired parties to proceedings.

[17] The assessment of this characteristic depends primarily on the personal abilities of the person concerned. However, these must then be put into context with the subject matter of the facts and the evidence, which must be dealt with in the criminal proceedings. The more complex the subject matter of the proceedings, the more urgent it is for the court to call upon the services of language mediators (Robert Esser, cit. loc., Art. 6 EMRK margin. 833).

[18] In this context, provisions in other regulations relevant to criminal law shall be paid attention to, which in certain constellations can raise a national procedure to a level relevant to international law (cf. for example Art. VII(9) lit. b and f of the NATO Status of Forces Act of 19 June 1951 [BGBl. 1961 II p. 1190]) (Robert Esser, cit. loc., Art. 6 EMRK margin 841, footnote 2144) – It should be noted that in the case of persons who do not speak the court language, the solution to the existing language problem must not lie in the assignment of a (mandatory) defense counsel. The lacking language abilities per se do not constitute the necessity of assigning a mandatory defense counsel (BGHSt 46, 178; Robert Esser, cit. loc., Art. 6 EMRK margin 832). The assignment of a defense counsel may additionally be necessary if the statutory requirements under § 140 StPO are met (Robert Esser, ibid.).

Only when mistakes occur do the inabilities become apparent, whereby in cases affected, it is then too late or the deficiency can only be corrected with considerable effort. Language mediation is not only a business in Germany. Anyone can make it their trade and earn money with it under the constitutional protection of Art. 12(1) Sentence 1 GG (freedom of occupation). The rarer, i.e. more exotic, a language is, the more lucrative such a job can be. Legal training and qualification requirements are largely absent. Against the background of globalization and against the background of the already existing importance of language mediation, not only in court proceedings, this is an astonishing finding. Failure to successfully integrate immigrant populations makes the finding even more stark. It cannot be denied that in large parts of a first generation of immigrants, even after years of residence in Germany, their knowledge of German is rudimentary. In everyday life, these people often resort to the language skills of the second generation, whose members have passed through the German school system but their use as language mediator in court proceedings is inconceivable.[19] For the sake of clarification, it should also be added: The language skills of the chosen or appointed defense counsel do not relieve the court of the obligation to make use of a language mediator; because it is a matter of the ability to communicate from the court to the defendant, and vice versa.[20]

German law places the "publicly appointed and sworn interpreters and translators" in this problem area around the "free profession" of language mediators. Roughly speaking, they are linguists who undergo a language education at universities, an examination of their skills and, if successful, they are then "publicly appointed and sworn in" by German authorities.[21] When publicly appointed and sworn language

[19] Robert Esser, cit. loc., Art. 6 EMRK margin. 834.

[20] Robert Esser, cit. loc., Art. 6 EMRK margin. 834. On the other hand, lacking language skills alone may not justify the assignment of a mandatory defense counsel (Lutz Meyer-Goßner/Bertram Schmitt, cit. loc., Art. 6 MRK margin. 25).

[21] In Bavaria, as well as in the other federal states of Germany, interpreters and translators are publicly appointed and sworn in (Art. 1(1) of the Law on the Public Appointment and General Swearing-in of Interpreters and Translators [Bayerisches Dolmetschergesetz (BayDolmG)] of October 21st, 1953 [GVBl. 1953 p. 179] as last promulgated on August 1st, 1981 [BayRS IV p. 515]), without imposing any obligation on courts and other authorities to make use of the lists of generally sworn and publicly appointed interpreters and translators being kept at the regional courts and accessible on the internet. The president of the regional court at the interpreter's or translator's place of residence or professional establishment in Bavaria is responsible for the appointment and general swearing-in of interpreters and translators, otherwise the president of the Munich I Regional Court (Article 2 BayDolmG). The appointment is made upon application under the conditions specified in Article 3(1) BayDolmG (for Germans) (for foreigners and stateless persons according to Article 3(2) BayDolmG; for nationals of EU member states, Article 3(3) BayDolmG regulates the special, simplified recognition procedure). It is essential for applicants under Article 3(1) and (2) BayDolmG to have passed an examination in accordance with the regulations issued by the State Ministry of Education and Cultural Affairs or to have passed an examination recognized by it as equivalent (Article 3(1) (b) BayDolmG). - The factual and personal requirements for the interpreter and translator examination can be found in the Examination Regulations for Translators and Interpreters of May 7th, 2001 ([ÜDPO] - GVBl. 2001, p. 255 [the authorization for this is derived from Article 15(1) and (2) BayDolmG]). Admission requirements are, in addition to the university

mediators are used in accordance with § 185(1) 1st sentence GVG, they generally offer a guarantee of professional, unobjectionable language mediation - in terms of their training and examination. German courts are well advised to secure their services in criminal proceedings.[22] However, if we look at complex white-collar criminal

or technical college entrance qualification and sufficient knowledge of German, training in professionally qualifying training centers or correspondingly proven professional practice (§ 8; § 9 of the ÜDPO). After admission to the examination (§ 11(1), (3) ÜDPO), the examination consists of a written part (§§ 14; 15 ÜDPO [Translators]) and an oral examination (§ 16 ÜDPO [Translators]; § 17 ÜDPO [Interpreters]). Successful translators and interpreters receive an examination certificate (§ 21 ÜDPO) and may use the professional title "state-certified translator"/"state-certified interpreter" (Article 16 BayDolmG). Pursuant to Article 5 BayDolmG, certified and sworn translators and interpreters use the professional title described therein and receive a certificate of certification (Aricle 6(1) BayDolmG). Unauthorized use of the professional title is punishable as an administrative offense (Article 12 BayDolmG). Interpreters and translators are bound to professional secrecy (Article 10 BayDolmG). Translations made must be provided with the certification described in more detail in Article 11 BayDolmG. (focusing on education issues see: Joanna Osiejewicz, Legal Education of Court Interpreters and Sworn Translators upon the Directive 2010/64/EU, International Journal on New Trends in Education and Their Implications 2015 vol. 6, p. 151 – 159; Daniele Orlando/Mitja Giuluz, From academia to courtroom: Perception of and expectations from the legal translator's role, Intl J Legal Discourse 2017; 2(2), pp. 195 – 208; … Christl, NStZ 2014, pp. 381 et seqq.). - The Federal Act on Modernizing Criminal Procedure of December 10t, 2019 (BGBl. 2019 I 2121) has also brought in its Article 6 a law on the general swearing-in of court interpreters (Court Interpreter Act - GDolmG), which will enter into force on July 1st, 2021 according to Article 10 Sentence 2 of the Modernization Act. The Act aims to create uniform federal requirements and procedures for the swearing in of interpreters who are to be called upon under § 185 GVG for the purpose of transmitting languages in court proceedings. The courts, however, remain at liberty to swear in interpreters called in pursuant to § 189(1) GVG in public hearings (Federal Government's draft bill "Entwurf eines Gesetzes zur Modernisierung des Strafverfahrens," p. 51). §§ 3 and 4 GDolmG standardize the requirements for swearing in and concentrate the responsibility for swearing in with the Higher Regional Courts and the Court of Appeal in Berlin. What is new, however, is that the general swearing-in period ends after five years, but can be extended on application for a further five years in each case (§7(1) GDolmG). The provisions of state law, in particular on interpreter examinations, remain unaffected.

[22] Investigations in the area of petty and medium crime are in fact in the hands of the police. As a rule, the public prosecutor receives the files only after the police have handed over their investigations to him as completed. If language problems arise in the delinquency area for which the police are largely and solely responsible, they are not resolved strictly along the paths laid out by the provisions of §§ 185; 187 GVG. Those rules address the courts, while the police laws of the States (*Länder*) are silent in this respect (for example, the Federal Police Act of October 19th, 1994 [BGBl. 1994 I, p. 2978] - last amended by Article 26(1) of the Act on the Implementation of Directive (EU) 2016/680 in Criminal Proceedings [BGBl. I, p. 1724] and by Article 26 of the Eleventh Jurisdiction Adjustment Ordinance of June 19th, 2020 [BGBl. 2020 I, p. 1328]; Bavarian Police Duties Act in the version promulgated on September 14th, 1990 [BayGVBl. p. 397]). In the case of language mediation problems, which are often enough coupled with time problems, the criminal investigator "helps" himself to find what he considers to be an adequate solution. It is not uncommon that language mediators are used, whose qualifications may well be questioned. Pursuant to § 1(1) No. 1 of the Act on the Remuneration of Experts, Interpreters, Translators and the Compensation of Honorary Judges, Witnesses and Third Parties (= JVEG) of May 5th, 2004 (BGBl. 2004 I p. 718, 776), as last amended by Article 6 of the Act of December 21st, 2020 (BGBl. 2020 I p. 3229), JVEG applies only to cases in which language mediators are called in by courts, public prosecutors' offices, tax authorities in which they conduct the investigative proceedings independently, administrative authorities in proceedings under the Administrative Offences Act or bailiffs. The JVEG does not apply to the use of language mediators by police authorities (Paul Meyer/Albert Höfer/Wolfgang Bach/Henning Oberlack, JVEG. Die Vergütung und Entschädigung von Sachverständigen, Zeugen, Dritten und von ehrenamtlichen Richtern, 26th ed., Köln 2014, § 1 margin. 7). Their use may also be due to the fact that a publicly appointed and sworn interpreter is not available at the time when the language mediation is to take place. The use of language moderators, who are not sworn may go well in many, perhaps even in most cases, communication is possible, instructions are understood as well as the accusations made. Concrete data on this are unfortunately lacking. However, things can go dramatically

proceedings, it cannot be overlooked that even German, the language of the court, is already dominated by a special linguistic "jargon", the specification of which is not always accessible to even a native speaker of German. For a criminal court affected by this, this means the obligation to select the language mediator particularly carefully, even if he belongs to the circle of publicly appointed interpreters and translators. As a rule, the courts make use of publicly appointed and sworn interpreters and translators; there is no legal stipulation to proceed in this way under German law. If not taken from those language mediators, the appointed language mediator called upon in court proceedings is to be sworn in in accordance with §§ 188; 189 GVG taking the oath "that he will translate faithfully and conscientiously". In order to ensure qualified language transmission in complex criminal proceedings with difficult evidence, it may be necessary under given circumstances to seek linguistic expertise outside the ranks of publicly appointed and sworn language mediators, for example at corresponding university chairs. An insight into judicial practice in Germany leads to the realization that the language problem is not always viewed with the seriousness with which it must, however, be viewed. According to §§ 185(1), 187(1) GVG, the judges having jurisdiction shall make the selection decision.[23] The practice found in lower courts however, where the judge orders to summon an interpreter, but leaves the actual selection to his clerk, who then uses official lists or lists he has drawn up himself, is difficult to reconcile with the ideas of the law. This may do no harm in simple cases of petty and medium crime and in cases of simple evidence. In proceedings involving the type of white-collar crime referred to here, however, it is out of the question to leave the choice to the clerk of the court's office.

While the wording of § 185(1) 1st sentence GVG focuses "on the court", and courts come regularily into play after the filing of indictments, Germany's obligations under international law are wider. "*Language in court*" according to Article 6(3) lit. e ECHR has to be in a meaning that comprises the entire criminal proceeding – from the first filing of a criminal report with Police until the end, the final appeal decision of the competent highest judicial authority as stipulated by law.[24] Translation is required in the entire proceeding, not only in its different procedural segments.[25]

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wrong. The police usually use interpreters and translators on the basis of remuneration agreements that are concluded with certain translators and interpreters on the occasion of the specific individual case or generally by the police administration (see Paul Meyer/Albert Höfer/Wolfgang Bach/Henning Oberlack, cit. loc. § 1 margin. 9a). The remuneration agreements grant remuneration rates that frequently or even regularly fall short of the remuneration rates of § 9 JVEG.

[23] Manuel Cebulla, Sprachmittelstrafrecht: Die strafrechtliche Verantwortlichkeit der Dolmetscher und Übersetzer, Berlin 2007, pp. 34 et seqq.

[24] Robert Esser, cit. loc., Art 6 MRK margin. 837; EKMR, EuGRZ 1977, p. 467; Lutz Meyer-Goßner/Bertram Schmitt, cit. loc., Art. 6 MRK margin. 23a.

[25] Robert Esser, cit. loc., Art 6 MRK margin. 838 et seq.

The law is silent on the number of interpreters used in criminal proceedings with language barriers. Pursuant to § 185(1) 1st sentence; § 187(1) GVG, the court shall decide on the involvement of interpreters and translators and shall exercise its discretion in this regard. The provisions of § 185 (1) sentence 1; § 187 (1) GVG assume that a court order is required that names the interpreter and translator and also describes the scope of the work expected of him or her.[26] A provision corresponding to § 142(1) StPO on the assignment of a mandatory defense counsel is not found for translators and interpreters, so that the party to the proceedings who is not familiar with the language has no expressive claim to appointing a specific interpreter and translator, as he or she wishes.[27] Nevertheless, the court has the discretion to hear the defendant's and his counsel's opinion prior to appointing language mediators. The law gives the court flexibility, but in complex, large-scale proceedings, such as in criminal proceedings concerning economic offences (but also in proceedings dealing with criminal liability in the area of state protection), it can pose a problem of procedural management. Procedural management in itself, to which the legal literature in Germany has so far paid little attention, although it is a daily issue in large-scale proceedings is widely neglected. Before the start of an extensive main hearing, which is often scheduled to last for months, a decision must be made as to whether the court wishes to have optimal language transmission in the form of simultaneous interpreting or whether it considers consecutive interpreting to be sufficient. Simultaneous interpreting requires a larger number of interpreters, while consecutive interpreting is more time-consuming because the proceedings must be repeatedly paused to give the interpreters an opportunity to transmit the material that has been covered in the proceedings. Depending on the importance of the proceedings, also for the defendants, the court will be tempted to allow simultaneous interpreting. This requires the courtroom to be appropriately equipped with audio technology, which is not always available and must therefore be installed before the start of a main hearing. It also requires the willingness on the part of all parties to the proceedings, which cannot be enforced by legal means, to follow the proceedings with headphones for months if necessary and to use microphones for every intervention. In particular, however, in the case of simultaneous interpretation, the court must be aware of the fact that this cannot be provided by everyone, not even by every publicly appointed and sworn interpreter. It requires experience and practice; this limits the number of interpreters available for selection. The court must also be aware of the fact that simultaneous language transmission can be an extremely strenuous activity for the simultaneous interpreters used. German is a language that is difficult to transmit simultaneously; this is due to the syntax of sentence

[26] Thomas Wickern, cit. loc., § 187 margin. 15.

[27] Thomas Wickern, cit. loc., § 187 marginal 16.

structure in German (the defining predicate or verb often comes only at the end of the sentence to be transmitted). If the language in question has a different syntactic structure, the problems of simultaneous transmission may increase significantly. In order to do justice to these efforts, a single simultaneous interpreter will, in case of doubt, not be sufficient in large-scale proceedings with many parties involved in the proceedings. The participation of the interpreters in the proceedings presupposes that the court makes the subject matter of the proceedings known to them and is keeping them comprehensively informed throughout the entire proceeding. In best case, the court establishes a stable and constant communication line between itself and the language mediators employed. Before a main hearing begins, it is imperative that they know the indictment. Even during a trial that is scheduled to last for months, it is almost imperative that the interpreters learn in good time before each day of the court session what trial material the court is planning for the specific day of the session. For their preparation, they must receive court decisions to be pronounced in good time before the pronouncement; likewise, if witnesses or experts are to be heard, they must know what the evidentiary topics are. Procedural communication between the parties to the proceedings and the court takes place in a main hearing on the basis of "application" and "court decision". It is a question of an understanding with the parties to the proceedings, which the court cannot enforce, that they provide the interpreters with their requests to be made in good time in advance for preparation. The interpreters' duty of confidentiality [28] also towards the court may facilitate their decision. If defense and defendant refuse such a procedural understanding, they bear the risk that the court will have to interrupt the session again and again with the corresponding loss of time in order to give the interpreters the opportunity to prepare for interpretation the motions of the defense attorneys, which are often several tens of pages long and which must be read out by the defense attorneys due to the principle of orality prevailing in Germany. In the end, the defense attorneys do not take this risk. However, it takes a certain length of proceedings to make the refusing defense attorneys aware of the temporal consequences of their refusal. Finally, in large-scale proceedings with complex evidence to be taken the court will give way for best solutions and assign more than one language mediator.[29]

In Germany, it is part of the legitimate tools of the defense to test the court's reactions by having the defense file motions. In difficult, large-scale proceedings, the criminal court must also expect and include in its procedural management that the interpreters used will be "tested". The defense's means of testing is to object to the accuracy or/and completeness of a translation. In this context, it is important

[28] See footnote 21.

[29] Robert Esser, cit. loc., Art. 6 MRK margin. 840.

to consider the function of the transmission of the spoken word (as in contrast to the translation of written texts). There is no "word for word" translation of the spoken word. Simultaneous translation has to transfer the content of a linguistic contribution completely and according to its contextual meaning. A word fixation does not do justice to this. On the part of the simultaneous interpreter, this implies an interpretive element. Language mediation is not the transfer of a foreign-language text word for word into German, but ultimately an act of interpretation for which the language mediator is responsible, through which he or she transfers the meaning of a foreign-language text into the court language as best as possible, whereby this interpretation is shaped by socio-cultural circumstances as well as by linguistic habits and dialectical idiom insertions, which allow conclusions to be drawn about the understanding of the content of the person speaking in the foreign language. This is often overlooked or ignored by objecting defense attorneys. Nevertheless, in the event of a translation objection, the court is required to clarify this and, if necessary, to request a remedy. This is usually done by simply asking the criticized interpreter, who is at the same time given the opportunity by the court to make corrections. If this does not lead to a satisfactory solution, the court only has the option of an expert review of the translation. Since the spoken and transmitted speech is by its nature fleeting and not repeatable and there is often also disagreement about what the content of the concrete transmission says, it can be of decisive advantage in the given procedural situation that several simultaneous interpreters are present in the concrete procedural situation, whom the court can use as linguistic experts (after appropriate instruction in accordance with § 72 StPO).

"Language" in the courtroom is not just about the main hearing or trial. There are also linguistic disadvantages of a party to the proceedings that need to be compensated for - also in relation to the defense attorneys who do not speak the foreign language, whose task is fixed on the main hearing, but in practical reality extends far beyond it. If the client of the defense counsel is in pre-trial detention, it is a matter of the conditions of detention. The defense also includes communication between the detained defendant and his family and with other social reference persons, who in turn are not proficient in German. Often enough, families do not understand why their brother, father, etc. is being held in pre-trial detention. It is also a matter of contacts with the former employer or the fact that the defendant's incarceration has made his family socially needy. Courts sometimes lose sight of this broad view on the challenges of a defense attorney. In this area, too, a defense attorney who does not speak the foreign language is dependent on language mediation. It must also be taken into consideration that criminal proceedings are an actual event that can change with every action of the court or with every request of the public prosecutor and the defense. Criminal proceedings are events that are in a state of flux. Therefore, it is not sufficient that the defendant receives a translation of the arrest order or of the

indictment before the beginning of a trial and thus knows how to defend himself at that time. He must be put in a position to react appropriately to procedural developments, for example by filing motions of bias against the court or experts. Because that is what effective defense is all about. Taking this into account, the support of the defense by language mediators is mandatory throughout the entire proceeding.[30]

§ 187(1) GVG creates the possibility of assigning an "interpreter of confidence" to a defendant who does not speak the language and to his defense counsel for their communication.[31] It is part of efficient procedural management to decide in good time whether such language mediation support for the defense is to be ordered on a case-by-case basis only or on a permanent basis. In complex proceedings, the permanent assignment of an interpreter will usually be necessary. If there are several defendants who do not speak the same language, the question also arises as to whether each of them should be assigned his or her own interpreter of confidence. Even if the defense interests of all defendants are uniform and pursue the same goal, it is still true that conflicts of interest can arise among the various defendants. In the case of only one interpreter of confidence for all language-unfamiliar defendants, it is not excluded that he "takes along" knowledge from one language transmission into the next language transmission between the defense counsel and another defendant and that this influences his language transmission there. It should be remembered that the transmission of the spoken word also requires an interpretative act of transmission between one defense counsel and his client, which may influence the next language transmission. No interpreter can completely free himself from acquired prior understandings - no matter where he acquired them. In complex, long-term criminal proceedings, the solution can only be to provide each defendant with his own interpreter of confidence for communication with his defense counsel, regardless of the costs![32] However, it is also the court's procedural management to clearly define the tasks of the "interpreters of confidence" in such a case. In particular, the assignment of such a "confidential interpreter" must not lead to the interpreter being misunderstood as a "watchdog" for good translation vis-à-vis the interpreters appointed by the court in the main hearing. Because of the possible conflicts of interest, it is also forbidden for the court interpreters appointed for the main hearing to perform additional tasks as "interpreters of confidence".[33]

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[30] Robert Esser, cit. loc., Art. 6 MRK margin. 838, 841.

[31] Lutz Meyer-Goßner/Bertram Schmitt, cit. loc., § 187 margin. 1; OLG Celle, NStZ 2011, p. 718; LG Freiburg, NStZ-RR 2012, p. 292.

[32] Thomas Wickern, cit. loc. § 185 margin 11; Robert Esser, cit. loc., Art. 6 MRK margin. 840; OLG Frankfurt StV 1996, p. 166; Frank Meyer, in: Ulrich Karpenstein/Franz C. Mayer (ed.), Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar, 2nd ed., München 2015, Art. 6 margin. 219.

[33] This applies in the same way to those language mediators who are deployed in the letter and visit control of foreign-language remand prisoners (Thomas Wickern, cit. loc., § 187 margin. 2). Avoiding conflicts of interest is

2. DEALING WITH FOREIGN LANGUAGE DOCUMENTS AND THE SCOPE OF THE COURT DOCUMENTS TO BE TRANSLATED

White-collar criminal proceedings are complex. They are characterized by the fact that the evidence against the defendants is essentially based on documents that have been seized and evaluated and on expert reports prepared. If the crimes in question are committed on a commercial basis (predominantly) or even by gangs (very frequently), the results of surveillance measures under § 100a StPO (telephone surveillance), online surveillance under § 100b StPO or other covert surveillance measures (business and surveillance of dwellings [§ 100c StPO]) come into play. The results of these surveillance measures shall be recorded in the form of minutes, which shall also be considered as documents as evidence in the main hearing. In white-collar criminal proceedings with a foreign connection, this evidence is often in foreign languages. This also applies to the results of communications monitoring if the participants in the conversation are speaking in foreign languages. The court cannot take cognizance of these foreign-language documents, even if it is familiar with the foreign languages, so that the basis of the judicial findings are the translations of these documents. According to § 249(1) StPO, the standard case of evidence by documents in the main hearing is their reading. In the case of foreign language documents, it is their translations. A criminal court is well advised to follow this path and not to fall into the trap of listening to the foreign-language audio recordings in the main hearing. This should be the absolute exception, because this equally feasible way of providing evidence requires that the intercepted passages be translated from the foreign into the German language almost in parallel with the listening. This can be a source of time delays in the proceedings if poorly comprehensible

a constitutive element of fair proceedings (this is the legal idea behind § 191 1st sentence GVG: Disqualification of an interpreter). Hardly conceivable in white-collar criminal cases, but frequent in state protection proceedings (see § 120 GVG), communication between defense counsel and the detained defendant is monitored in accordance with § 148a(1) StPO. In the case of multilingualism, language mediators are also used in this segment of criminal proceedings. § 148a(2) 1st sentence StPO only excludes the surveillance judge from dealing with the substance of the criminal case. The law is silent about the language mediator used. It is a matter of principle under procedural and constitutional law that he or she may not be employed insofar as the substance of the criminal proceedings is concerned (Thomas Wickern, cit. loc., § 185 margin. 11). - The surveillance measures are controversial. They are acceptable if they are handled with due caution and if, despite the monitoring of confidential communications between defense counsel and the accused, the latter's sphere of privacy is preserved vis-à-vis the recognizing court, the public prosecutor's office, the police and others. The surveillance judge must therefore pay particular attention to which language mediator he employs (Thomas Wickern, cit. loc., § 187 margin. 2). If it happens that surveillance judges use "any" language mediator and do not prohibit him from passing on the translation order to third interpreters, the surveillance chain is no longer controllable. In state protection cases, the interests of foreign states are often (co-)involved and thus the interest of their secret services is aroused. If the commissioned linguist passes on his charge, the translation can end up in the foreign country whose secret service is showing an interest. What disadvantages it can have if the foreign intelligence service has the possibility to read the defense strategy of a politically persecuted defendant in Germany is conceivable and depends in its damaging consequences on the type of the reading regime abroad (c.f. Thomas Wickern, cit. loc., § 187 margin. 2 and 11).

recordings have to be played back and forth and translated again and again. Listening is also a source of error, for example if the oral translation of the interviewee differs from the written version of the transcript. The transcriptionist prepared the transcripts under special acoustically shielded working conditions, which differ significantly from the situation in the courtroom. He was able to hear and understand more or better than his colleague in the courtroom, who, under the psychological pressure of the court, parties of the proceeding and the public, has to live up to an expectation set by the protocol prepared in silence and shieldedness. Even if the interpreter in the courtroom and the protocol translator are the same person, there is a risk of divergence. During the preparation of the minutes, which often lasted for months, the interpreter had the language and the manner of speaking of the participants in the conversation in his ear; they were familiar to him. The main hearing, however, takes place months after the preparation of the minutes; the familiarity with the language and the manner of speaking of the participants in the conversation has been lost in the meantime. Therefore, the reading of prepared minutes is the easier, often also safer way. However, the defense can force the court to examine any audio recordings by filing motions for evidence. In doing so, they must demonstrate a lack of clarification if the court restricts itself to the admissible reading of the minutes - an extremely difficult undertaking.

However, the principle of official clarification under § 244(2) StPO forces the criminal court to be certain that the available translations are "correct". If the investigating authorities had commissioned publicly appointed and sworn translators in the preliminary proceedings, the court may rely on their confirmation that "faithful and conscientious translations" were made. The defense can only shake this certification of correctness with concrete evidentiary attacks and thus force the court to take further clarifying measures. The situation is different in the case of translations which were prepared during the preliminary proceedings by translators other than publicly appointed and sworn translators. They cannot issue the certificates of correctness which the publicly appointed and sworn translators are authorized by law to attach to their translations. One procedural possibility of verification is that the translator in question is heard as an expert pursuant to §§ 70 et seq. StPO with regard to the translations made by him and can, if necessary, make up for what he was not legally authorized to do in the preliminary proceedings. The other and also more time-consuming examination involves language experts for the language in question. Thousands of pages of translations may be involved, which no linguist can review in a reasonable amount of time. It is therefore procedurally unobjectionable that the court limits itself to the review of exemplary translations of the protocols in question by language experts and draws its conclusions for the rest of the protocols from the expert opinion rendered thereon. However, depending on the expert's findings, it is possible in such cases that the principle of § 244(2) StPO compels the court to have new translations made.

The reading of documents pursuant to § 249(1) StPO is a time-consuming and, as a result, also tiring way of taking evidence for all parties to the proceedings. In contrast to German civil proceedings and in contrast to other countries, German criminal courts are not allowed to refer "to the contents of the file". § 249(2) StPO therefore permits the so-called self-reading procedure.[34] Judges and lay judges take note of the wording of the document; the other parties to the proceedings are given the opportunity to take such note (§ 249(2)) 1st sentence StPO). After expiry of the time limit set by the presiding judge, the judges and lay judges shall declare whether they have taken note of the wording of the document to be specified; the presiding judge shall establish that the other parties to the proceedings have had the necessary opportunity to do so (§ 249(2), 3rd sentence StPO).

If foreign-language documents have been obtained in the pre-trial proceedings, the self-reading procedure may reach its limits in main trial. This is because the foreign-language defendant understands the original foreign-language texts, but does not understand their translations into German, which however are the basis of the judge's findings. If it comes to the opportunity to take note according to § 249(2) 1st sentence StPO, the translation would logically have to be translated back to him in his foreign language. The fact that he might find divergences in the translation is only the one side of the coin. The other side is that such back-translations cannot be achieved to the extent required in the individual case and in the time available. If criminal proceedings have to be brought to a conclusion within the flexible but nevertheless binding framework provided by Art. 6(1) 1st sentence ECHR, there is nothing else to do in this constellation than to return to the reading according to § 249(1) StPO. However, it is then a question of prudent and efficient procedural management to check each document in question as to whether it is to be read out from beginning to end or only in excerpts. Often, a reading in excerpts is sufficient.

With regard to the scope of the court documents to be compulsorily translated, section 187(1) 1st sentence GVG is rather vague and focuses on the criterion of whether the documents in question are necessary for the exercise of the defense. In this context, § 187(2) 1st sentence GVG mentions - in addition to the instructions on the legal means of defense (remedies) - the custodial measures, bills of indictment, orders of summary punishment and non-final judgments as non-exhaustively enumerated documents.[35] It already follows from this that the defendant who does

[34] The so-called self-reading procedure was and is not without controversy because the public cannot participate in this. Without the self-reader procedure, however, large-scale proceedings, whether in the area of economic or narcotics crime or in the area of state protection, would be unfeasible today. The self-reading procedure has made a decisive contribution to increasing the efficiency of state prosecution.

[35] Robert Esser, cit. loc., Art. 6 MRK margin. 847; Lutz Meyer-Goßner/Bertram Schmitt, Strafprozessordnung, 63th ed., München 2020, Art. 6 MRK margin. 18; BGH StraFO 16, p. 148. An oral translation of the indictment is not sufficient (OLG Hamm, StV 2004, p. 364; OLG Karlsruhe, StraFO 2005, p. 370; different opinion OLG Düsseldorf, NJW 2003, p. 2766; OLG Hamburg, StV 2006, p. 175/177. – Article 3(III) of Directive 2010/64/EU

not speak the language has no legal claim to have the entire criminal file translated for him, including the evidence in white-collar criminal cases, which often comprises hundreds of standing files. Nothing else follows from international obligations of Germany, as stipulated by Article 6(3) lit. e ECHR or Article 14(3) lit. f of the International Covenant on Civil and Political Rights of November 15th, 1966.[36] As already stated elsewhere, the additional costs incurred for such translations, on the one hand, would not be a valid argument. No judicial system, on the other hand, can provide such a service if courts pay attention to the legal requirement (Article 6(1) 1st sentence ECHR; § 121(1) StPO) to bring criminal proceedings to a criminal verdict, at least at first instance, within a reasonable period of time. § 187(2) GVG restricts the obligation to translate the documents listed in sentence 1 of the provision to the effect that an excerpt translation may also suffice if this does not limit the possibilities of defense. An oral translation into the defendant's own language may also be sufficient, especially if he has a defense lawyer (§ 187(2) sentence 5 GVG).[37] The question of whether a defendant is entitled to have the written reasons for the verdict translated in full pursuant to section 187(2) GVG is disputed.[38] Criminal sentences in Germany are pronounced at the end of the criminal proceedings and reasons are given orally by the presiding judge (section 268(1) 2nd sentence StPO). It is up to the presiding judge to decide how extensive and detailed the opening of the oral reasons for the verdict should be. He or she will be cautious in giving details referring to the evidence evaluation, orally. The oral reasons are translated simultaneously in the courtroom. The written reasons for the judgement, which incidentally form the basis of the challenge by appeal, are however to be placed on file within the period of time as set out in section 275(1) of the Code of Criminal Procedure. Depending on the number of days of the hearing, this deadline may expire weeks or months later. Then consequently the foreign-language defendant no longer has the oral reasons in his ear or memory. In any case, a defendant who is determined to challenge the verdict is not helped by referring to the oral reasons for the verdict. The case law of the Federal Supreme Court of Justice on the question of the complete translation of the written reasons for the verdict is restrained and, in the case of the defendant with a defense counsel assigned, tends to see in the lack of a complete translation no legal error that is significant in the appeal proceedings.[39] However, the case law of the

[36] BGBl. 1973 II p. 1534 ; Robert Esser, cit. loc., Art. 6 MRK margin. 848 ; BGH Decision of February 18th, 2020 (file no. 3 StR 430/19), margin 10.; Frank Meyer, in: Ulrich Karpenstein/Franz C. Mayer (ed.), Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar, 2nd ed., München 2015, Art. 6 margin. 218a; ECHR judgement of December 19th, 1989 – 9783/82 margin. 74 – Kamasinski).

[37] Lutz Meyer-Goßner/Bertram Schmitt, cit. loc., § 187 margin. 3; OLG Hamburg, StV 2014, p. 354 with critical v comment by Jan Bockemöhl, StV 2015, p. 379 and p. 383 et seq.

[38] For the state of dispute see Robert Esser, cit. loc., Art. 6 MRK margin. 849. Affirmative OLG München, wistra 2014, p. 532.

[39] BGH, decision of February 18th, 2020 [file no. 3 StR 430/19], margin. 10 et seqq.; on this decision see also comments by Hans-Heiner Kühne, StV 2021, pp. 79 - 81.

Federal Court of Justice does not provide any mandatory instructions to the courts of instance on how to deal with the question of the translation of written reasons for verdicts. Ultimately, it is the responsibility of the courts of instance to decide whether they attach an official translation version, so to speak, to their German reasons for judgement. Reasons can be found for this in individual cases. Less in white-collar cases, more in the politically controversial ones, an "official translation" can prevent versions of a judgement from circulating that have little to do with the German reasons for the verdict. In this respect, as with all other judicial documents, it is the perceived responsibility of the court to decide which judicial or court documents are to be translated to the foreign-language defendant's native language or into a language understood by him. There are no generally applicable guidelines for this. The only point of orientation remains the well-understood defense interest of the defendant.

CONCLUSION

The paper is based on my own decades of experience as a trial judge at the Regional Court and the Higher Regional Court. The awareness of the importance of "language in the courtroom" has grown over the years. Through their good or bad contribution, interpreters and translators can at least decide the course of criminal proceedings, speeding them up or slowing them down. For this reason alone, they deserve judicial respect in the "case of success". Moreover, anyone who uses a foreign language knows how exhausting, even draining, translating and interpreting can be when it is done in an effort to deliver the best possible results. This is another reason for the highest judicial esteem and the need of judges to consider concerns of language mediators better. Beyond that, however, it is a concern of this paper, which does not claim to be exhaustive, to raise awareness among judges, prosecutors and police of the situation of the foreign-language defendant to whom the proceedings against him should not be somehow linguistically conveyed. Not only is he subjected to criminal procedural measures, the submission is made in a language of which he is not proficient. The respect owed to the accused as a human being demands that his linguistic deficits do not turn into a disadvantage at the end of the procedure. Finally: The success of any judicial endeavor depends to a large extent on procedural management, which no university and no training at judicial training centers can bring closer to the extent that extensive proceedings demand from the judge. It is time to address these deficits as well. Criminal proceedings can be managed rationally; some of these proceedings, for example in the prosecution of white-collar crime, called and call for it. That, too, would be a contribution to strengthening the rule of law - not only in Germany.

JEZIČKI PROBLEMI U REŠAVANJU SLOŽENIH (KRIMINALITET BELOG OKOVRATNIKA) SUDSKIH PREDMETA: IZVORI GREŠAKA I MOGUĆNOSTI ZA NJIHOVO PREVENIRANJE

Krivični postupci u vezi sa kriminalitetom „belog ovratnika" *su per* se složeni. Kada utvrđuju krivičnu odgovornost, od krivičnih sudova se često traži da razotkriju i dokažu mreže odnosa između različitih strana uključenih u krivična dela o kojima je reč (npr. pranje novca). Krivična dela koja se ubrajaju u privredni kriminalitet se vrše u nacionalnim okvirima, ali se po pravilu protežu – kao i u slučaju pranja novca – i na teritorije drugih država. Ovakvo stanje stvari zasigurno iziskuje odgovarajuću međunarodnu saradnju u krivičnim stvarima. Dokazi pribavljeni na ovaj način (u sklopu međunarodne saradnje), a često i oni koje možemo označiti kao domaći, u vidu dokumenata, su na stranim jezicima. Svedoci i eventualni saučesnici ne govore uvek jezikom koji nacionalni zakoni definišu kao „jezik suda". Ovi dokumenti i izjave stoga moraju biti prevedeni na tzv. "sudski jezik". Usmeno i pismeno prevođenje je složen process kojem krivični sudovi često ne poklanjaju dužnu pažnju u pripremi i vođenju glavnih pretresa. Jezički problemi se često potcenjuju. Greške u prevodu sa stranih jezika na „jezik suda" mogu imati kobne posledice po tok glavnog pretresa i u ekstremnim slučajevima dovode do toga da se glavni pretresi moraju prekidati i otpočinjati iznova. Sa posebnim osvrtom na situaciju u Nemačkoj, ovaj rad nastoji da predstavi nacionalne i međunarodne okvirne uslove za transkripciju sa stranih jezika, kao i da potraži praktične načine za izbegavanje proceduralnih grešaka u tom procesu.

KLJUČNE REČI: kriminalitet belog okovratnika; jezički problem; krivični postupak.

ILLICIT ENRICHMENT AS A CRIMINAL OFFENSE: POSSIBILITY OF IMPLEMENTATION IN THE NATIONAL CRIMINAL LEGISLATIONS

Aleksandar Stevanović*
Laura Maria Stănilă**

The authors analyze the criminalization of illicit enrichment in order to examine the possibilities for the implementation of this crime in national legislations. The incrimination in question has existed for a long time as a mechanism for combating corruption and other forms of economic crime characterized by a dark figure, but it is practically unrepresented in Europe (especially EU countries) as well as in the United States. The reason why some countries are reluctant to introduce the crime of illicit enrichment into their legislation is mainly related to allegations that it violates important human rights and guarantees in the criminal process. The literature specifically mentions the risks of violation of the presumption of innocence, violation of the right to silence, violation of the privilege against self-incrimination, violation of the burden of proof principle, violation of the lege certa principle, violation of ownership rights etc. After a brief look at the historical background, we also analyzed the essential elements of incrimination. We pointed out that adequate nomotechnics can avoid the risks of violating the principles listed above, but we have singled out the issue of determining the threshold of enrichment in order to mark the criminal zone / dealing with the lege certa principle and the issue of the competent authorities capacity to continuously determine all important circumstances when it comes to the criminalization of illicit enrichment as a critical spots of the incrimination that we analzyed that should be carefully addressed.

KEYWORDS: illicit enrichment; unexplained wealth; human rights; due process safeguards; corruption.

* Research Assistant, Institute of Criminological and Sociological Research, Belgrade, Serbia, e-mail: *aleksandar.stevanovic993@gmail.com.*

** Ph.D, Assistant Professor, Faculty of Law, Center for Research in Criminal Sciences, West University Timisoara, Romania, e-mail: *laura.stanila@e-uvt.ro.*

INTRODUCTION

Nations often face huge procedural challenges in successfully detecting and prosecuting their officials when the officials engage in corrupt activities (Boles, 2013: 836). Difficulties in detecting cases and initiating anti-corruption proceedings have led many governments, and consequently international organizations, to consider alternative measures that go beyond the classic provisions of criminal law and address the risks of corruption. One of the difficulties when dealing with a hidden crime like corruption is its detection. Using traditional investigative techniques can take years and a highly sophisticated team of experts with spending tremendous resources. Even after spending a considerable time on investigations it is not unusual for the prosecuting authorities to drop a case owing to lack of evidence (Carr, Lewis, 2010: 38).

Determining the existence of corrupt crimes is, as a rule, associated with problems in finding relevant and credible evidence. Therefore, on the one hand, we have a situation where it is extremely difficult to accuse for corrupt crimes and then to convict the defendant, while on the other hand it is indisputable and ubiquitous that many people, especially those who hold public office often have property and material benefits that is much higher and is significantly disproportionate to their legal and declared income.

Corruption appears to be a kind of "business offer" made to the public authorities. Therefore, corruption is able to provide a sphere of interest for both sides of corrupt relationships, making them interested to extend such relation in confidence. Because of this, it is extremely difficult to detect and even harder to get to any kind of evidence that could be used in court proceedings (Stevanović, 2019: 115).

In the case of corrupt crimes, the most visible and the most immediate consequence is the fact that officials may amass luxury cars, buy homes that look like palaces and enjoy exotic vacations. Such social, economic and political anomalies could be labeled as "illogicalities" that are clear indicators of high degree of corruption in one society.

Having in mind the paradoxical situation that individuals show off wealth with disputable origin in terms of legal acquisition, the idea arose to incriminate, ie target precisely the amount of wealth that could not possibly have come from official salary or other legal income. One of the first attempts to pass a bill on the concept of 'illicit enrichment' was made by a 1930s Argentinian congressman, Rodolfo Corominas Segura, after being inspired by an encounter he had with a public official who openly displayed an amount of wealth that was in a huge disproportionate to his legal and declared income (Muzila *et al*, 2012: 7). Such attempt most likely failed due to a lack of political will, but it certainly influenced the concept of *illicit enrichment* to be codified in various international documents in the decades that followed, and then implemented in numerous national legislations.

The idea of sanctioning illicit enrichment is not inherent only to the criminal law. On the contrary, it has developed in civil law in order to regulate the situation when in a quasi-contractual relationship one party without a legal basis increases its property at the expense of the other(s). Furthermore, a similar concept is related to public, more precisely tax law, where in many legislations there is a possibility to determine the origin of property and within that process the possibility to tax the part of the property for which the legal origin is not proven, with special tax rates which are far more intrusive than the regular tax rates. However, having in mind that criminal law implies the most powerful form of legal (formal) social control known to modern civilization (Clark, Marshall 1967, 23), and that it most directly attacks the goods and interests of persons who violate criminal norms, it is indisputable that precisely in the domain of criminal law, illicit enrichment as a crime causes the most controversy in the professional and general public. This is mostly because the formulation of incrimination of illicit enrichment, as proposed in the *United Nations Convention Against Corruption* (UNCAC),[1] according to some scholars, but also the views of some constitutional courts, is contrary to proclaimed constitutional guarantees and "due process" principles. For the reason of divergent attitudes towards this legal concept, the main focus of our article will be put on considering the relationship between incrimination in question with a set of guaranteed human rights and especially with guarantees in criminal proceedings, which are considered as an indispensable civilizational heritage of the rule of law.

1. HISTORICAL BACKGROUND AND DEVELOPMENT OF THE IDEA

We mentioned the unsuccessful but certainly significant attempt of the Argentine congressman to target and criminalize unexplained wealth. Thereafter, In the early 1950s, Hong Kong introduced a regulation that outlined disciplinary offences for public officials that could not explain how they managed to own assets or maintain a standard of living that was disproportionate to their official salaries (Dornbierer, 2021: 22).

In the coming decades, many other countries such as: Egypt, Sénégal, India, Cuba, Turkey, Niger etc. have introduced a laws to prevent possession of unexplained property (Dornbierer, 2021: 22).

International recognition at the regional level, for the concept of illicit enrichment was made when the *Inter-American Convention Against Corruption*[2]

[1] United Nations Convention Against Corruption, Article 20.

[2] The IACAC adopts an aggressive approach in treating illicit enrichment as a mandatory offense.

(IACAC)[3] became the first convention to include illicit enrichment under Article 9, describing the concept as a "significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions..." It was 1996 and seven years later, in 2003, the *African Union Convention on Preventing and Combating Corruption* (AUCPCC)[4] became the second convention to include a provision on illicit enrichment, describing the concept in the same manner.

Finally, in the year 2003, the UNCAC also included a provision on illicit enrichment in Article 20 stating that: "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income." With this, the international recognition of a concept got a universal dimension. However, due to the existence of numerous controversies that are reflected in conflicting views when it comes to the violation of important criminal law principles, the crime of illicit enrichment is provided as an option, ie. states are only obliged to consider the possibility of introducing it into their legal systems if this is not contrary to its constitution and the fundamental principles of its legal system. Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe (Muzila *et al*, 2012: 9).

At the heart of the whole idea of legally sanctioning illicit enrichment is the fact that any increase in property must have its legal basis. When it comes to the criminal aspect of the fight against unexplained capital, two main goals prevail.[5] The first one is to recover property acquired through crime, and the second one is to punish the perpetrators by fulfilling the preventive role of criminal law. Following the nature of the incrimination itself, it seems that illegal enrichment fully corresponds to the challenges posed by the fight against corruption, ie. represents a simplified form of preventive mechanism. From the aspect of criminology, it was pointed out in the XVIII century that it is more important that the punishment is fast and certain, than to be severe, because only in that way the necessary efficiency could be achieved (Ignjatović, 1997: 9).

The introduction of illicit enrichment in criminal law legislation could possibly cast a shadow over many so-called corruption offenses (Taking / Offering Bribes, Trading in Influence and Abuse of Office…) for the reason that punishment would be possible if it is proven that in a certain period a certain person knowingly owns property that significantly does not correspond to his legal income. This

[3] Inter-American Convention Against Corruption, Article 9.

[4] African Union Convention on Preventing and Combating Corruption, Article 1.

[5] Argentina and India became the fi rst countries to criminalize illicit enrichment (Muzila *et al*, 2012: 8).

does not mean that the mentioned corruption crimes, which UNCAC prescribes as mandatory, lose the purpose of their existence, on the contrary, they would be applied on the basis of the *principle of specialty* when prosecuting authorities can prove the fulfillment of all elements, ie. when it is possible to provide the necessary evidence. There should be a more sever threatened punishment for those criminal acts. Moreover, the offence of illicit enrichment should be seen as a tool of last resort. When enforcement authorities can pursue cases by prosecuting regular corruption offences, the illicit enrichment offence, with its implied limitations of defendants' rights, should not be considered a proportionate response On the other side, illicit enrichment as an incrimination, seeks to cover all those situations in which an official with a salary of $ 1,000 per month, has a car that costs $ 150,000 and is unable to explain where he got the funds to buy it.

In above mentioned simplification of the proceeding lies the potential danger of abuse and violation of not only important principles of criminal procedure, but also of human rights in criminal procedure. This danger can be eliminated only with a careful criminal-political strategy and careful nomotechnics.

However, when it comes to the criminal-political justification for the implementation of this crime, it should be emphasized that the Organization for Security and Co-operation in Europe considers the existence of such an offense to be one of the best practices for combating corruption. For instance, In Hong Kong, where the offense has existed for nearly 40 years, the Court of Appeal found that it has "implemented its effectiveness in the fight against corruption". Finally, a recent study by the World Bank / UNODC's StAR Initiative notes that some jurisdictions were able to recover large sums of money thanks to the offense of illicit enrichment (Perdriel-Vaissiere, 2012: 3).

2. DEFINING ILLICIT ENRICHMENT

Despite the fact that illicit enrichment has now become a widely adopted legal concept, there is still a significant amount of uncertainty amongst practitioners over what the concept actually refers to (Dornbierer, 2021: 25).

Based on the definitions found in the UNCAC, AUCPCC, and IACAC it could be said that five core elements comprise the offense: (1) *a public official who* (2) *during the relevant time period* (3) *experiences a significant increase in assets* (4) *knowingly* and (5) without justification (Muzila *et al*, 2012: 13).

2.1. Potential perpetrators

Given the importance of their duties, as well as access to the public budget and the ability to dispose of it, most international and national definitions of illicit enrichment see public officials as potential perpetrators and *persons of interest.* There are two issues that arise in this context as controversial. The first relates to the scope of the term public official, while the second concerns to the related persons. We suggest a broad view of "public official" that includes anyone who provides a public service or performs a public function.[6]

Much bigger problems than defining the term public official occur when an official *de facto* controls a certain property that is formally transferred to another person, as a rule to a family member. That is the reason why a number of countries also scrutinize the financial dealings of the family members and close associates of the public official (Boles, 2013: 853).

This problem can also be solved by adopting the model that Lithuania[7] has decided on, as the only EU member state that has criminalized illicit enrichment. According to this model, the target person is not a public official exclusively, but any person (it also applies to legal entities) who realizes the remaining elements that make up illicit enrichment.

2.2. The relevant time period

The "period of interest" refers to the period during which a person can be held liable for having illicitly enriched himself. Knowing that in the most legislations where there is an incrimination of illicit enrichment, it targets public officials, the logical consequence is that the period in which a crime can be committed coincides with the period of performing public duty.

Since it is not an unusual situation to maintain the socio-political influence even after the period of office, officials can commit this crime for several years (depending on the legislator's choice) after leaving office. We can label this as

[6] According to UNCAC: 'Public official' shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a 'public official' in the domestic law of a State Party." See Article 2(a).

[7] Lithuania is not an isolated case. While most states have enacted illicit enrichment legislation directed toward public officials, some have extended it to the private sector.

a second approach that is more intrusive than the first, but better responsive to reality. However, there are also legislations that have opted for an open-ended period approach which, in our opinion, violates the principle of obsolescence of prosecution in criminal law. The period of interest should be distinguished from the period forming the basis of an investigation or indictment (Muzila *et al*, 2012: 17).

2.3. Significant increase in assets

It is indisputable that the reaction of the criminal law mechanism in the given context deservs only significant increase in assets. In the practice of countries that have criminalized illicit enrichment, the notion of significant is generally not defined in detail. Nevertheless, after a comparative insight, it can be concluded that most countries link a significant increase in assets to the legal and reported income. HoweverMeđutim, most legislators do not define what is considered "disproportionate", thus leaving this to be determined by prosecutors and the courts, that due to insufficient specificity, directly violates the principle *lege certa.*

An appropriate approach would be to set a threshold expressed as a percentage of legal income. We point out that the threshold needs to be set at the level that justifies the punitive reaction. This, of course, does not mean that unjustified increases in property below that threshold should be ignored by the competent authorities, but that it does not deserve a response from the criminal mechanism. Such illegal increases in assets could be treated by special tax rates or by disciplinary measures.

Although in the practice of some countries (Hong Kong, Malawi, Nepal, Lesotho…) a lifestyle that is not in accordance with legal income is criminalized, we argue that it should not be an element of the crime. Rather, the "lifestyle" triggers an investigation because this is the only visible manifestation of illicit enrichment (Muzila *et al*, 2012: 17).

Another important issue that arises here is the notion of property. The meaning of "assets" and similar terms in illicit enrichment statutes dictates what types of evidence prosecutors may introduce to prove illicit enrichment (Boles, 2013: 835). There is a consensus that assets should include liquid assets, real property, income-generating instruments, and the like. Many jurisdictions only legislate for a limited definition of illicit enrichment, and only take into account situations in which someone has acquired traditional tangible and/or intangible assets that cannot be justified in reference to their lawful income (Dornbierer, 2021: 25). In addition, it should include all legal forms of property acquisition in accordance with national laws regulating the acquisition of property. As it is the case in Argentina,

the relevant provision defines an enrichment in terms of net worth, taking into account debts or other obligations that have been canceled (Muzila *et al*, 2012: 19), what we consider to be an adequate solution.

At the widest end of the spectrum, many jurisdictions define illicit enrichment to include the unjustifiable enjoyment of anything of pecuniary value (Dornbierer, 2021: 26) what certainly si not in line with basic criminal law principles such as the principle of *lege certa*.

2.4. Intent

The UNCAC explicitly requires a demonstration of intent in the offense of illicit enrichment by incorporating the element "when committed intentionally." We argue that it is not unduly to emphasize the intention as a subjective element of the crime, but this is not necessary at all, since it is difficult to imagine that someone increases his property with no intention. This is also the reason why IACAC and AUCPCC expressly do not identify intent as an element of the crime. Furthermore, intent is usually considered an overarching element in the defi nition of criminal off enses within a criminal code and, as such, does not need to be spelled out in each and every case (Muzila *et al*, 2012: 21).

2.5. Unjustifiability

The final element requires that the enrichment lacks any legitimate explanation or justification. When it comes to the legitimate explanation, as we have already stated, the legal basis for acquiring property should only be taken into account. This is generally not disputable, but the problem is the burden of proof. Illicit enrichment prosecutions can potentially be challenged constitutionally on the basis that the reversal of the burden of proof violates the defendant's right to a due process (Fagan, 2012: 3). We will address this issue in more detail in the next chapter where we analyze the criminalization of illicit enrichment in the context of human rights and due process safeguards.

3. ILLICIT ENRICHMENT OFFENSE AND HUMAN RIGHTS VIOLATIONS – HOW TO AVOID PROBLEMS

As the Human Rights Council observed the promotion and protection of human rights is essential to the fulfillment of all aspects of an anti-corruption strategy.[8] There are a large number of theorists and practitioners who argue that criminalizing of illicit enrichment raises serious questions of civil liberties protection and criminal proceedings safeguards.[9] Taking into account the previous statements from the available literature, but also a certain views of the courts,[10] the following problems related to the criminalization of illicit enrichment stand out:

- violation of the presumption of innocence;
- violation of the right to silence;
- violation of the privilege against self-incrimination;
- violation of the burden of proof principle;
- violation of the *lege certa* principle and
- violation of the ownership rights.

As we mentioned before, in order to avoid listed potential violation of the core principles of the proclaimed human rights and due process safeguards it is necessary to have adequate nomotechnics. With careful selection of legal solutions, the listed risks could be avoided while ensuring efficient implementation.

In fact, an optimal starting point is to prescribe properly the act of committing the crime. It is possible to take into account the following acts: 1) failure to declare the acquired assets 2) possession or owning assets that significantly exceed lawfully gained income 3) the act of acquiring the assets itself (Stojanović,

[8] Human Rights Council Res. 7/11, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 1, 2008 U.N. Doc. A/HRC/7/78, at 31 (July 14, 2008).

[9] For instance, J. Boles has labelled this offence as "perhaps the most controversial criminal offence" (Boles, 2013: 838).

[10] "In 2010, in Romania, the body in charge of fighting corruption (ANI) was able to directly request from the court the confiscation of assets in cases where it was deemed that there was a significant disproportion (exceeding the amount of EUR 10,000) between the acquired assets and legal wage of a public official. However, in April 2010, the Constitutional Court of Romania found that such legal solution was unconstitutional in terms of several elements. It concluded, among other things, that that way the constitutional presumption that the assets have been legally acquired unless proven otherwise was violated." (Stojanović, 2019: 27). In 1994, Italy's Constitutional Court overturned the illicit enrichment provisions of Law no. 356 of 1992 on grounds that a presumption based on the status of the accused violated the presumption of innocence.47 In 2004 in the Arab Republic of Egypt, the Cassation Court addressed the question of whether the illicit wealth off ense is compatible with legal principles and held that the second paragraph of Article 2 of the Illicit Enrichment Law, which defi nes as an off ense whenever such increase is not consistent with the public offi cial's resources and the public offi cial fails to prove the legitimate source for it, violated the constitution regarding the genesis and presumption of innocence (Muzila *et al*, 2012: 29).

2019: 30). The third solution should be categorically written off. The first and the second, although seemingly similar, are in fact different solutions, since the failure to declare the acquired assets for the persons to whom the law imposes an obligation to do so (public officials) criminalizes this omission. This is due to the fact that these persons have to show an increased degree of transparency in performing duties and income, since they control and dispose of public funds.

When it comes to the possession or owning assets that significantly exceed the lawfully earned income the situation is completely opposite. At the same time, the parallel existence of the first and the second solution do not exclude each other.

The *ratio* of the second solution is to criminalize social illogicality that indicates illegal actions in the sphere of acquiring property. This should not have any negative implications for the acquisition of property and in general for doing business. Simply, if, as an official who earns $ 1,000 a month, you own a yacht worth $ 300,000, and you cannot justify it with any legal way to acquire property, then, in our opinion, it is justified to direct the criminal law mechanism to such an official.

All in all, if we start from the fact that the act of committing the crime is possession or owning assets that significantly exceed the lawfully earned income, there can be no violations that we listed above. The burden of proof is on the prosecution, which must prove that the property owned significantly exceeded the lawfully earned income. However, we argue that the solution proposed in Article 20 of the UNCAC, which includes in the element of the act of committing the crime the requirement that the defendant "... cannot reasonably explain in relation to his or her lawful income" a significant increase in his assets is wrong.[11] If the legislator accepts the solution from the mentioned Article of the UNCAC, then we can really end up at the shifting of the burden of responsibility field. As we have seen, this is certainly not necessary to ensure the *ratio* of illicit enrichment within the limits set by the basic principles of criminal procedure.

Violation of the presumption of innocence, the right to silence, the privilege against self-incrimination and the burden of proof principle can be avoided with the above proposed norming. It remains to consider the compatibility of criminalizing illicit enrichment with the principle of *lege certa*. The scope of persons who can be potential perpetrators of a crime can be questioned here. However, the problem could be easely solved by prescribing what falls under the notion of public official, civil servant, etc. When it comes to the violation of principle of *lege certa,* the main task is to set the threshold[12] to determine a significant increase in the assets in accordance with the requirements of precision and sufficient clarity. It is therefore

[11] It is possible to prescribe that the perpetrator will not be punished for the basic criminal offense if he reasonably explains his earnings on the legals basis.

[12] India, for instance, has set a threshold of 10 percent known sources of income through its jurisprudence (Muzila *et al*, 2012: 18).

necessary that the norm is in accordance with the "principle of legality" which requires that offenses be clearly defined under the law, so that "the individual can know from the wording of the relevant provision what acts and omissions will make him liable" (Kokkinakis v. Greece, European Court of Human Rights, 1993) (Perdriel-Vaissiere, 2012: 3). There is no universally acceptable solution and this issue cannot be solved without a multidisciplinary approach and cooperation first with economists and financial experts.

In addition, a significant increase in assets cannot be observed only in relation to legal revenues, but also in expenditures. Namely, the competent authorities would have to determine the expenses of the defendants so that they could measure the average possible savings from which the defendant, for example, bought an expensive car. This further raises the question of the capacity of the competent authorities to monitor and determine all the circumstances of the incrimination, what appears to be a much bigger problem than the problem of violating the presumption of innocence for instance. However, specifying a threshold for illicit enrichment in statutes may prevent prosecutions where the amounts concerned are trivial - *de minimis non curat praetor* (Muzila *et al*, 2012: 18). In order to focus time and resources on investigating major cases, petty cases involving very small amounts should be the subject of misdemeanor or disciplinary proceedings, while criminal law needs to keep *ultima ratio* nature.

After our brief analysis, we can single out the following problems that seem to to be the biggest challenges for the implementation of the crime of illicit enrichment:

- the issue of determining the threshold of enrichment in order to mark the criminal zone/ dealing with the *lege certa* principle and
- the issue of the competent authorities capacity to continuously determine all important circumstances.

CONCLUSION

Criminal response to such severe social deviations as systemic corruption is, requires a certain proactivity of the competent authorities. Traditional anti-corruption mechanisms, while indispensable, have proved insufficient. In the fight against especially corrupt crime, it is necessary to find instruments again and again that will have a preventive effect on potential perpetrators.

It seems to us that potential perpetrators of particularly corrupt crimes have realized that applying a number of principles in traditional criminal proceedings,

such as those relating to legality and gathering evidence, can often help them to stay unpunished. Of course, this does not mean that these principles should be abandoned, on the contrary, they need to be further developed, but respecting them, legislators and competent authorities should focus their energy and resources on implementing instruments that would respond more effectively to the spread of corruption.

When it comes to the illicit enrichment as a criminal offence, we concluded that it can be an important part of the criminal law mechanism in the fight against corruption. The implementation of this crime in national legislation has been compromised by the statements that it violates important principles of criminal procedure and guaranteed human rights. The analysis in this paper has shown that the criminalization of illicit enrichment does not necessarily violate the criminal process safeguards. However, we pointed out much more significant practical problems that should be overcome in order for illicit enrichment as a criminal offense to achieve its full purpose. Those are the issue of determining the threshold of enrichment in order to mark the criminal zone/ dealing with the *lege certa* principle and the issue of the competent authorities' capacity to continuously determine all important circumstances. Zakonodavac u okviru kriminalne politike u svakom slučaju has to put in balance competing rights and interests in prosecuting the crime of illicit enrichment

Finally, if we start from the fact that criminalizing illegal enrichment is a universal cure for corruption, then expectations will certainly not be met. If, on the other hand, we assumed that this incrimination is a corrective that serves to ensure that unexplained wealth does not stay unpunished (indisputable consequence of corruption) when there is no evidence for conviction for another corrupt crime.

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NEZAKONITO BOGAĆENJE KAO KRIVIČNO DELO: MOGUĆNOST IMPLEMENTIRANJA U NACIONALNA ZAKONODAVSTVA

Autori u radu analiziraju mogućnost inkirminisanja nezakonitog bogaćenja u okviru nacionalnih zakonodavstava. Iako je odnosno krivično delo već dugo prisutno u „katalogu" krivičnih dela pojedinih zemalja, ali i u više međunarodnih dokumenata, ono ipak nije u široj primeni u zemljama EU kao i u SAD. Razlog tome su glasni stavovi o tome da se krivično delo nezakonitog bogaćenja suprotstavlja važnim principima krivičnog postupka (presumpcija nevinosti, pravo na odbranu ćutanjem, pravila o teretu dokazivanja itd.) čiji je cilj da okrivljenom obezbede fer suđenje kao i da krši brojna zajemčena ljudska prava. Nakon kraćeg istorijskog osvrta na razvoj ideje o samoj inkriminaciji i njenom postepenom razvoju ka konvencijskom krivičnom delu, razmotrili smo elemente bića krivičnog dela, a pošli smo od formulacije koja je data u članu 20. UNCAC-a. Ukazali smo da se pravilnom nomotehnikom mogu izbeći rizici koji se u literature najčešće pominju i koji se odnose na povrede osnovnih krivičnopravnih principa. Sa druge strane, izneli smo tezu da su osnovna pitanja koja bi trebalo da budu rešena ona koja se odnose na obezbeđivanje principa lege certa prilikom formulisanja ove inkriminacije kao i na kapacitete nadležnih organa da

kontinuirano utvrđuju sve relevantne okolnosti od značaja za ovo krivično delo. U svakom slučaju, ohrabrili smo tendenciju uvođenja nezakonitog bogaćenja u sistem krivičnih dela nacionalnih zakonodavstava i to ne kao supstitut tradicionalnim koruptivnim krivičnim delima, već kao samostalno krivično delo sa sopstvenim raciom, čija je svrha da vidljive koruptivne posledice ne ostanu nekažnjene.

KLJUČNE REČI: nezakonito bogaćenje; nelegalan capital; ljudska prava; procesne garancije; korupcija.

KRIVIČNA DELA PORESKE UTAJE-KRIVIČNOPRAVNI I KRIMINOLOŠKI ASPEKT*

Jasmina Igrački**

Jedno od najtežih krivičnih dela protiv privrede, a direktno usmerena protiv poresko-finansijskog sistema države, jeste poreska utaja. U prvom delu rada analiziraju se osnovni elementi ovog krivičnog dela, pojmovno određenje kao i način izvršenja. Predstavljeni su podaci, Evropske komisije koji pokazuju da su tokom 2017. godine države članice Evropske unije izgubile prihod od 137,5 milijardi EUR od poreza na dodatu vrednost zbog poreskih prevara, kojoj su pogodovali nedostaci u nacionalnim sistemima naplate poreza. Podaci Evropske komisije obuhvataju isključivo jednu vrstu poreskog kriminaliteta, a to su prevare u vezi sa PDV-om. U drugom delu rada ukazujemo, da i pored pooštravanja kaznene politike, i dalje postoji visok procenat izvršenja krivičnog dela poreske utaje. Osim toga, u navedenom delu rada predstavljene su i njegove karakteristike u nacionalnom zakonodavstvu Republike Srbije.

KLJUČNE REČI: krivično delo; utaja poreza; krivični zakonik; krivična sankcija.

UVODNA RAZMATRANJA

Pravne i društvene norme stvaraju ljudi. Od čovekove svesti, koja je uobličena uslovima života čoveka u određenoj društvenoj sredini, kao i od njegovog mesta u toj društvenoj zajednici zavisi upravo, njegov odnos prema toj normi, tj. njeno poštovanje ili nepoštovanje. Svaki pojedinac ima slobodan izbor da normu poštuje ili ne poštuje, te shodno tome biva sankcionisan u skladu sa važećim propisima. Na našim prostorima, prve podatke o postojanju krivičnog dela, utaja poreza, pravna istorija beleži još u ranom srednjem veku (Nikolić, Đorđević: 2002). Od nastanka

* Rad je nastao kao rezultat istraživačkog angažovanja prema Planu i programu rada Instituta za kriminološka i sociološka istraživanja za 2021. godinu, koji je odobrio Ministarstvo prosvete, nauke i tehnološkog razvoja.

** Doktor pravnih nauka, naučni saradnik u Institutu za kriminološka i sociološka istraživanja, Beograd, e-mail: *jasminaigracki@yahoo.com.*

prvih država pa do danas, pokušavano je da se suzbije to protivpravno ponašanje nesavesnih i neodgovornih pojedinaca.

Obaveza plaćanja poreza postojala je još u starim civilizacijama (Karličić, 2015: 95-96)[1] i inkorporirana je u sve savremene pravne sisteme. Odredbe o obavezi plaćanja poreza, na našem prostoru, mogu se naći od perioda Dušanovog zakonika[2] kojim je predviđeno ubiranje carskog dohotka (Novaković, 1870: 9-10)[3], a zatim u svim kasnijim zakonskim propisima koji uređuju ovu oblast. Kako bi država obezbedila nesmetano funkcionisanje, plaćanje poreza je regulisano i Ustavom Republike Srbije.[4]*Ratio legis* zabrane izbegavanja plaćanja poreza nalazi se u činjenici da se takvim ponašanjem direktno ugrožava ostvarivanje fiskalnih prihoda države, dok to indirektno utiče na sve građane s obzirom na to da se iz javnih prihoda finansira rad institucija čija je delatnost od javnog interesa (škole, bolnice, sudstvo, policija itd.), pa se deficit poreskih prihoda može negativno odraziti na obim i kvalitet njihovih usluga (Tomaš, 2010:46). Ranije krivičnopravno rešenje zakonitost prihoda predstavljalo je kao *conditio sine qua non* za postojanje krivičnog dela poreske utaje. Danas, zakonodavac više ne propisuje zakonitost prihoda kao jedan od ključnih uslova za postojanje tog dela, te tako izlazi iz okvira njegovog tradicionalnog poimanja. Međutim, to je dovelo do nedoumica u vezi sa tim da li su nezakoniti prihodi obuhvaćeni poreskom utajom, ali i uspostavljanjem obaveze na prijavljivanje nezakonitih prihoda ili predmeta i obaveze plaćanja poreza u odnosu na prihode ili predmete stečene na nezakonit način.

1. PORESKA KRIVIČNA DELA

Osobenost poreskih krivičnih dela, a naročito poreske utaje, tj. izbegavanja plaćanja poreza kako u našem krivičnopravnom sistemu, tako i u sistemima razvijenijih evropskih zemalja, ogleda se upravo u tome, što usled različitih pojavnih oblika i vidova ispoljavanja, nanose štetu značajnim društvenim interesima. Zavisno od vrste povrede, odnosno prouzrokovane posledice u pogledu obima i intenziteta

[1] Prema Karličiću, trgovci u Kini su za vreme dinastije Han bili opterećeni visokim porezima. U Rimu su birana dva cenzora koji su procenjivali imovinu u cilju ubiranja poreza, a od perioda vladavine Julija Cezara sakupljanje poreza nalazilo se na visokom mestu među bitnim zadacima upravnog aparata.

[2] Prema Novakoviću kao najznačajniji pisani pravni izvor na našem području ističe se Dušanov zakonik koji je donet na Saborima 1349. i 1354. godine. O značaju tog zakonika govori i činjenica da je on donet skoro dva veka pre nemačkog zakonika *Constitutio Criminalis Carolina* iz 1543. godine, koji je regulisao krivična dela poreske utaje i neplaćanja poreza.

[3] Novaković navodi da je Dušanov zakonik propisivao da carski dohodak koji može biti soća, odnosno žitni danak caru, namet i harač, daje svaki čovek i to pola na Mitrovdan i pola na Božić. Davao se novčani danak i danak u žitu. Žitni danak je mogao da se platiti i novcem (perperom).

[4] Član 91. Ustava Republike Srbije, *Službeni glasnik RS*, broj 98/2006.

ugrožavanja zaštićenih društvenih vrednosti, zakon je predvideo i različite sankcije zavisno od toga da li se u konkretnom slučaju radi o krivičnom delu, privrednom prestupu ili prekršaju (Jovašević, Hašimbegović: 2004).

2. POJAM I ELEMENTI KRIVIČNOG DELA PORESKA UTAJA

Poreska utaja (Marković, 2007: 115-117), (eng.- *tax evasion*, franc. - *fraude fiscale*, ital.- *omesso versamento di imposte*), predstavlja ponašanje kojim se krše propisi i na taj način neposredno ili posredno ugrožavaju finansijski interesi cele društvene zajednice (Đerek, 2003: 83-112; Kočo Vukadin, 2007: 435-493 i Pogarčić, 2003: 141-147). Integritet fiskalnog sistema ima veliki značaj za razvoj društva i države. Primenom različitih mera, sredstava i postupaka država se suprotstavlja neplaćanju, prikrivanju, neprijavljivanju, i izbegavanju plaćanja poreza, doprinosa i drugih propisanih obaveza koje predstavljaju javne dadžbine, odnosno javne prihode (Stanković, 1993: 80-82 i Allix, 1937: 559).

Poresku utaju karakteriše blanketna dispozicija te je za dokazivanje potrebno konsultovanje drugih propisa koji ne pripadaju oblasti krivičnog prava[5](Mrvić Petrović, 2018: 120; Radulović, 2010: 466), što nam ukazuje na kompleksnu strukturu ovog krivičnog dela. Izbegavanjem zakonske obaveze plaćanja novčane nadoknade u korist države, ugrožavaju se ustanove socijalne zaštite, fondovi, tj. funkcionisanje svih budžetskih institucija i poslova (Kesner Škreb, 1995: 267-268). Treba istaći da se, tek kada se radi o izbegavanju poreskeobaveze u većem obimu (težim slučajevima), ispunjavaju uslovi za postojanjesamog poreskog krivičnog dela. Svi drugi slučajevi manjeg značaja (poreske ne discipline i poreske evazije) označavaju se kao protivpravno i kažnjivo ponašanje, ali imaju zakonsko obeležje drugih delikata (privredni prestupi i prekršaji). Kada je iznos niži od iznosa propisanog Krivičnim zakonikom (1.500.000,000), neće postojati krivično delo poreska utaja već poreski prekršaj propisan Zakonom o poreskom postupku i poreskoj administraciji. Taj iznos je objektivni uslov inkriminacije koji se vezuje za jednu kalendarsku godinu (Kulić, Milošević, 2011: 328).

Objekt zaštite krivičnog dela poreska utaja je fiskalni sistem koji čini osnovu ekonomskog sistema svake zemlje. Sam objekt napada je alternativno određen usmislu da on može biti porez, doprinos ili druga propisana dažbina kojapredstavlja javni prihod.

[5] S tim u vezi ZPPPA propisuje relevantne činjenice koje se odnose na postupak utvrđivanja, naplate i kontrole javnih prihoda, zatim prava i obaveza poreskih obveznika, registracija poreskih obveznika (čl. 1). Drugi propisi su od značaja za utvrđivanje da li je određeno lice u konkretnom slučaju izvršilo ovo krivično delo, tj. drugi propisi upotpunjuju blanketnu dispoziciju poreske utaje.

Obaveza ispunjenja neke radnje određene poreskopravnim odnosom propisana je za fizička i pravna lica (član 12. Zakona o poreskom postupku i poreskoj administraciji), ali se kao izvršioci poreske utaje mogu naći i njihovi zakonski zastupnici[6]. Što se tiče radnje izvršenja, zakonodavac nije ograničio broj i varijetete s obzirom na to da je upotrebio formulaciju „ko na drugi način prikrije...", a što listu radnji čini znatno širom budući da se njome, osim najčešćih radnji izvršenja, obuhvata i neodređeni broj radnji koje se do sada nisu pojavile u praksi, ali se mogu očekivati. Krivično delo poreska utaja može da se izvrši davanjem lažnih podataka, odnosno radnjom činjenja, ili tako što se ne prijave stečeni prihodi, predmeti ili druge činjenice koje su od bitnog značaja za određivanje poreza, doprinosa ili drugih dažbina, odnosno radnjom nečinjenja. Kada je radnja izvršenja preduzeta neprijavljivanjem, poreski obveznik uopšte ne navodi činjenice koje su od značaja za utvrđivanje poreza ili propušta da u propisanom roku podnese poresku prijavu[7] (Nicević, Ivanović, 2013:142).Primeri pojavnih oblika poreske utaje su veoma različiti. Neki od njih su: davanje lažnih podataka o broju zaposlenih lica, davanje lažnih podataka o broju članova domaćinstva ili davanje lažnih podataka o broju dece koja se školuju ili o radnom statusu bračnog partnera (Anđelković, Jovašević, 2006: 195; Radulović, 2010: 467 i Jovašević, 2017: 124), neprijavljivanje prihoda poreskom organu ili prijavljivanje nižih prihoda od ostvarenih, prijavljivanje odbitaka po osnovu rashoda koji su lažni ili su bili manji od navedenog iznosa ili isticanje odbitaka čija svrha nije istinita (Popović, 2012: 624), nepravilno obračunavanje poreskih obaveza, lažno bilansiranje pojedinih pozicija, vođenje dvojnog knjigovođstva (Nicević, Ivanović, 2013: 143) i slično.Takvim postupcima, poreski obveznik dovodi u zabludu nadležni organ u vezi sa činjenicama koje su od bitnog značaja za pravilno određivanje visine poreske obavezete tako postoji mišljenje da poreska utaja predstavlja poseban modalitet prevare (Lazarević, 2006: 625), kao i da postoje mišljenja da je poreska utaja lakša od krivičnog dela prevare (Stojanović, Perić, 2006: 197). Namera je subjektivno obeležje krivičnog dela, tj. psihički fenomen koji utiče na preduzimanje određenih delatnosti radi postizanja određenog cilja. Ukoliko kod učinioca nije postojala namera da delimično ili u potpunosti izbegne plaćanje poreza, doprinosa ili drugih dažbina onda ne možemo govoriti o ispunjenosti subjektivnog elementa poreske utaje, pa samim tim neće postojati ovo krivično delo (Škulić, Delibašić, 2018: 71).

[6] Zakonski zastupnici fizičkog lica mogu biti roditelji maloletnog lica, staralac poslovno nesposobnog lica i dr.; zakonski zastupnik pravnih lica je fizičko lice koje je kao takvo upisano u propisani registar. Osim toga, poreske obaveze lica koje zastupaju ispunjavaju i poslovođa preduzetnika i privremeni staralac zaostavštine (ZPPPA, čl. 15).

[7] Pojam, sadržina poreske prijave, način i rok podnošenja kao i mogućnost njene izmene određeni su ZPPPA čl. 38-40.

Ukoliko postoji jedan od dva kvalifikovana oblika poreske utaje zakonodavac propisuje da kod učinioca treba da postoji umišljaj, odnosno svest i želja izbegavanja obaveze u većem iznosu, ali nemora da postoji svest o tačnom iznosu. Zakonodavac propisuje kaznu zatvora uz koju se uvek kumulativno izriče i novčana kazna. Za osnovni oblik dela zaprećena je kazna od jedne do pet godina. Kazna zatvora za prvi kvalifikovani oblik može se izreći u rasponu od dve do osam godina, dok je za najteži oblik propisana kazna zatvora od tri do deset godina (KZ, čl. 225, st. 2 i 3).

Iako je kaznena politika pooštrena, prema statističkim podacima Republičkog zavoda za statistiku[8] učinioci i dalje vrše veliki broj krivičnih dela iz oblasti privrednog ili finansijskog poslovanja. Krivična dela koja je policija evidentirala tokom 2020. godine, od ukupnog broja 72.491, 1714 čine krivična dela protiv privrede.[9]

Po odluci javnog tužilaštva, za krivična dela protiv privrede za 2020. godinu, podignuta je optužnica u 1.814 slučajeva.[10] Kada govorimo o sudovima i njihovim odlukama,za krivična dela protiv privrede doneto je ukupno 1166 odluka, od toga je osuđujuća presuda doneta u 842 slučaja, oslobađajuća presuda u 132 slučaja, odbijajuća presuda u 72 predmeta, a postupak je obustavljen u 82 predmeta. Prema raspoloživim podacima u tim presudama mere bezbednosti nisu izrečene[11].

Što se sankcija tiče, za krivična dela protiv privrede, ukupno je izrečeno 842 sankcije, i to 142 kazne zatvora, od čega je kazna preko preko pet godina zatvora izrečena u 3 presude, u trajanju od dve do pet godina u 24 presude, preko 6 meseci nije izrečena ni u jednoj presudi, do 2 godine u 78 presuda, a u trajanju do 6 meseci u 36 presuda. Novčane kazne su izrečene u 57 presuda, a uslovna osuda u 515 presuda. Izvršioci su proglašeni krivim, a oslobođeni kazne u 2 presude, rad u javnom interesu izrečen je u 2 slučaja, dok sudske opomene i vaspitne mere nisu izricane.[12]

Kada govorimo o geografskoj rasprostranjenosti izvršenja krivičnih dela protiv privrede, uočava se da se krivična dela protiv privrede više izvršavaju na teritoriji Vojvodine, a najmanje na jugu zemlje[13], dok podacima za AP Kosovo i Metohiju, Republički zavod za statistiku od 1999. godine ne raspolaže. Kada govorimo o krivičnom delu poreske utaje, u 2018.godini u Beogradu i okolini izvršeno je 164 krivično delo, u Vojvodini 739, u Šumadiji 613 krivičnih dela, dok je na jugu Srbije ovo krivično delo izvršeno 292 puta[14]. Tokom 2018. godine

[8] https://publikacije.stat.gov.rs/G2021/pdf/G20212054.pdf [16.10.2021.].

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] https://publikacije.stat.gov.rs/G2019/Pdf/G20191192.pdf , str. 11 [16.10.2021.].

osuđena su punoletna lica za krivična dela protiv privrede u 1144 slučaja, a od čega za utaju poreza ukupno 266 lica. Od toga je izvršiocima izrečeno 50 kazni zatvora, 14 novčanih kazni, 185 uslovnih osuda,17 kazni kućnog zatvora, dok rad u javnom interesu nije izrečen nijednom izvršiocu krivičnog dela poreska utaja u okviru posmatranog perioda.[15]

3. NEUPLAĆIVANJE POREZA PO ODBITKU

Neuplaćivanje poreza po odbitku izvršava odgovorno lice u pravnom licu-poreski platilac, koji u nameri da ne plati porez, ne uplati na propisani račun javnih prihoda iznos koji je obračunat na ime poreza po odbitku. Kod ovog poreskog krivičnog dela, objekt zaštite je budžet Republike, a objekt napada je posebna vrsta poreza, koji predstavlja poseban izvor javnih prihoda Republike Srbije. Sama radnja se odnosi na neuplaćivanje poreza u celosti ili delimično, a što prestavlja radnju nečinjenja, tj. propuštanja da se u zakonskom roku uplate obračunata sredstva.

Za postojanje ovog dela, neophodno je da budu kumulativno ispunjena dva uslova: da je radnja izvršenja preduzeta od strane određenog lica-preduzetnika ili odgovornog lica u pravnom licu, kao i da je radnja preduzeta u određenoj nameri, tj. da se na ovaj način ne uplati obračunati porez po odbitku. U tom slučaju za učinioca dela propisana jekazna zatvora od jedne do deset godina i novčana kazna. Zanimljivo je da, prema Republičkim statističkim podacima iz 2018. godine, za ovo krivično delo ukupno izrečeno samo 6 kazni i to 4 uslovne osude i 2 kućna zatvora.[16]

4. EVROPSKO ZAKONODAVSTVO I UPOREDNOPRAVNA REŠENJA

Na nivou Evropske unije tokom 2017. godine usvojena je Direktiva (EU) 2017/1371[17]o borbi protiv prevara za na štetu finansijskih interesa Evropske unijeputem krivičnopravnih mera (od sada Direktiva o PFI) koja nameće obavezu za zemlje članice da kao krivična dela propišu najteđe oblike prevare u vezi sa porezom na dodatu vrednost (PDV-om).

Prema odredbama Direktive zemlje članice imaju sledeće obaveze:[18]

[15] *Ibid.*

[16] https://publikacije.stat.gov.rs/G2019/Pdf/G20191192.pdfstr. 11 [16.10.2021.].

[17] https://eur--lex-europa-eu.translate.goog/legal-content/EN/TXT/?uri=CELEX:32017L1371&_x_tr_sl=en&_x_tr_tl=sr&_x_tr_hl=sr&_x_tr_pto=nui,sc [17.10.2021.].

[18] *Ibid.*

- da obezbede odgovarajuća istražna ovlašćenja nadležnih organa za gonjenje krivičnih dela definisanih Direktivom;
- da obezbede efikasna ovlašćenja za oduzimanje prihoda stečenih od izvršenja krivičnih dela propisanih odredbama Direktive;
- da nadležnosti relevantnih nacionalnih organa precizno definišu;
- obezbede adekvatne i efikasne mehanizme za otkrivanje poreskih delikata;
- omoguće sprovođenje adekvatnesaradnje između nadležnih tela i institucija;
- obezbede efikasnu međunarodnu saradnju.

Direktivom (EU) 2018/843[19] izmenjena je Direktiva (EU) 2015/849[20]. Među njenim odredbama kao veoma značajna ističe se odredbe kojom se propisuju rokovi zastarelosti krivičnog gonjenja za krivična dela na štetu finansijskih interesa Evropske unije. Prema članu 12. navedene Direktive:[21]

1. Države članice imaju obavezu da preduzmu neophodne mere kako bi obezbedile da rok zastarelosti omogućava istragu, krivično gonjenje, suđenje i donošenje sudske odluke o krivičnim delima na štetu finansijskih interesa Evropske unije u vremenskom periodu nakon izvršenja tih krivičnih dela, kako bi se ona efikasno suzbila;
2. Države članice imaju obavezu da preduzmuneophodne mere kako bi omogućile istragu, krivično gonjenje, suđenje i donošenje sudskih odluka za krivična dela na štetu finansijskih interesa Evropske unije za koja je propisana maksimalna kazna od najmanje četiri godine zatvora. To podrazumeva propisivanje roka zastarelosti u trajanju od od najmanje pet godina nakon izvršenja krivičnog dela;
3. Osim navedenog, države članice mogu da odrede rok zastarelosti krivičnog gonjenja kraći od pet godina, ali ne kraći od tri godine.

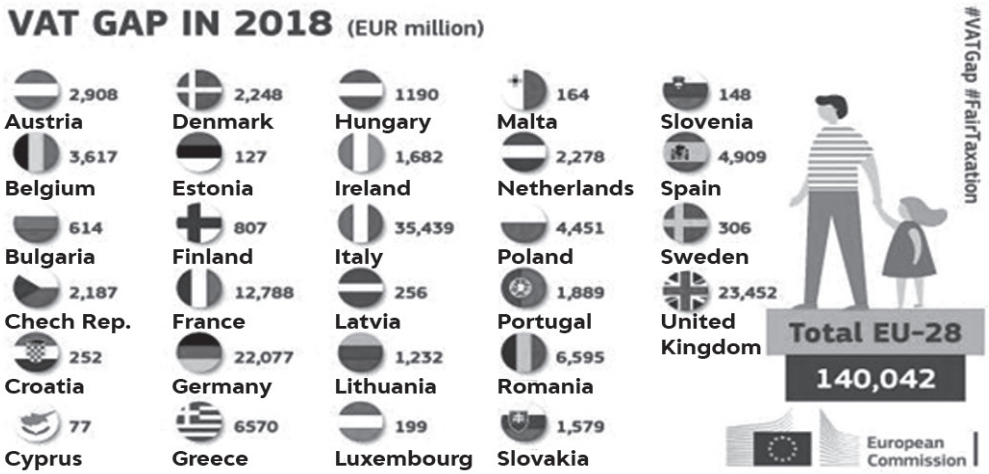
Neposrednu odgovornost učinioca, većina zakonodavstava uređuje kao posledicu njegovog činjenja ili nečinjenja. Samo mali broj zemalja (npr. SAD i Francuska) inkriminiše i samo pomaganje ili podstrekavanje učinioca na izbegavanje poreske obaveze. To bi praktično značilo, da se saučesništvo izjednačava sa radnjom izvršenja. Zakon tako ne predviđa da je pod uticajem saučesničkih radnji u konkretnom slučaju došlo do preduzimanja radnje neposrednog učinioca, već je dovoljna činjenica pomaganja i podstrekavanja. Pregledom različitih rešenja se vidi da je objekt napada u najvećem broju krivičnih zakona porez, drugi doprinosi ili propisane obaveze. Zakon okvirno govori o zakonskim obavezama, ne precizirajući

[19] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2018.156.01.0043.01.ENG [18.10.2021.].

[20] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0849&rid=2 [18.10.2021.].

[21] *Ibid.*

ih jer suštinu obaveza uređuju drugi propisi iz drugih oblasti prava. U okviru politike kažnjavanja najčešće se viđaju različita rešenja ali se, u velikom broju zakona, predviđa kumulativno izricanje kazne zatvora i novčane kazne (Albanija, BIH, Bugarska, Francuska, Makedonija, RepublikaSrpska). Raspon kazne zatvora, za osnovno delo, kreće se od prilično blagihkazni (Mađarska, BIH, Bugarska, Republika Srpska, Slovenija) do težih (Francuska, Hrvatska, Makedonija, Nemačka, a u kojima je propisana kazna do pet godina zatvora). Kada je teži oblik krivičnog dela u pitanju maksimalne kazne koje su propisane iznose od pet godina do čak petnaest godina zatvora (npr. u Republici Srpskoj se kazna izričekada je visina dažbina prešla zakonom određeni limit ili je delo izvršenona posebno prikriven, prevaran i opasan način koji zahteva pooštreno kažnjavanje). Nedavni Izveštaj koji je objavila Evropska Komisija sadržizaključak da je borba protiv poreskog kriminala zahtevna i iziskuje interakciju različitih stranaka, te istovremeno i saradnju i koordinaciju na nivou članica, kao i proširenje jurisdikcija. Izveštaj upoređuje podatke i sadrži preporuke i ukazuje na razlike i sličnosti identifikovane u svakoj jurisdikciji. Na taj način Komisija je nastojala da istakne najbolja iskustva i prakse u oblasti suzbijanja poreskog kriminaliteta.



Glavni nalazi Izvještaja[22] za 2020. o jazu u PDV-u jesu da se ukupna razlika u PDV-u na nivou Evropske unije blago smanjila za skoro milijardu evra na 140,04 milijarde evra u 2018. godini. Očekivalo se da će se ovaj trend pada nastaviti još godinu dana, iako je došlo do pandemije koronavirusa.

[22] https://www.google.com/search?q=vat-gat-report-figure-2020 [16.10.2021.].
https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/vat-gap_en [16.10.2021.].

ZAKLJUČAK

Za uspešno vođenje postupaka protiv izvršilaca poreskih krivičnih dela neophodno je dokazati postojanje umišljaja i jasne i nedvosmislene namere da se kroz učinjene radnje potpuno ili delimično izbegne plaćanje javnih prihoda. Međutim, dokazivanje tog subjektivnog elementa predstavlja problem u praksi prilikom donošenja presude. Izbegavanjem plaćanja poreza, direktno se ugrožava funkcionisanje države, dok to indirektno utiče na sve građane s obzirom na to da se iz javnih prihoda finansira rad institucija čija je delatnost od javnog interesa, pa se deficit poreskih prihoda može negativno odraziti na obim i kvalitet njihovih usluga.

Uspešnost u sprečavanju poreskih krivičnih dela u velikoj meri zavisi od spremnosti institucija na nacionalnom nivou, kao i od adekvatnosti i blagovremenosti saradnje između različitih država. Razmena informacija i prekogranična saradnja ključni su za uspešno sprečavanje poreskih krivičnih dela.

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CRIMINAL OFFENSES OF TAX EVASION-CRIMINAL LAW AND CRIMINOLOGICAL ASPECT

One of the most serious crimes against the economy, and directly directed against the tax and financial system of the state, is tax evasion. This crime is almost usually committed in the field of economic crime. The first part of the paper analyzes the basic elements of this crime, the conceptual definition and the manner of execution. Data presented by the EC are presented, showing that in 2017 Member States lost an estimated EUR 137.5 billion in value added tax revenue due to tax fraud, as well as shortcomings in tax collection systems. This assessment is related to one type of tax crime (ie VAT) and does not include losses from other types of tax fraud, such as inheritance taxes. However, this shows the scale and seriousness of tax crimes across the EU. In the second part, we point out that despite the tightening of penal policy, the percentage of committing this crime is still high and its characteristics are presented in the national legislation of the Republic of Serbia.

KEYWORDS: criminal offense; tax evasion; criminal code; criminal sanction.