

## **ECONOMIC CRIMINAL LAW: COMPARATIVE OVERVIEW**

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**Abstract.** *The criminal liability of legal entities has been in the focus of the criminal law reforms over the last century, especially in the modern globalization era. The theoretical debate and the creative judicial practice in cases of serious illegal behavior of corporations have provided the necessary vehicle for change from the traditional conception that legal persons cannot be liable under criminal law ('societas delinquere non potest') to the newly embraced doctrine of 'respondeat superior' (with some modification). The first part of the article presents an overview of the major concepts and theories of the criminal liability of legal entities. The next part deals with a comparative overview of relevant legislation in the prominent criminal law systems of the United States of America, Germany and the European Union. The article ends with a general overview of the Serbian legislation on this matter.*

**Key words:** *crime, liability, legal entity, economic criminal law.*

### INTRODUCTION

Although an imminent part of human society for centuries, economic crime has gained attention and prominence in the period of Industrial Revolution and, even more so, in the era of globalization, especially in the last several decades.

Unlike criminal law in general, economic criminal law has a specific subject of protection: it is aimed at protecting the public or collective legal goods and the economic policies of the sovereign, rather than personal legal rights.

The incidence of economic crimes is much lower than of other crimes, but the amount of ensuing damage, which is sometimes measured in billions of dollars, is in inverse proportion, especially in cases of financial crimes, bribery and antitrust offences. Corporate crimes attract public attention and can arouse public outrage at the audacity of high-ranking managers. Economic crime is also closely related to corporate environmental crime and crime against public health, workers' safety, obstruction of justice, etc.

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There is an intricate correlation between economic crime and corporate crime, on the one hand, and between economic crime and the so-called 'white-collar' crime, on the other hand. Economic offences can be perpetrated by individuals (natural persons) as well as by corporations. In case the offence is committed by corporations, their liability result from the acts or omissions of individuals in the high-ranking managerial positions in the corporation ('white-collar' crime), but also from the acts or omissions of other individuals acting in their line of duty as agents or employees, or even persons hired to do some work for the company.

This paper focuses on the criminal liability of companies for economic crime. After explaining the main concepts and theories of economic criminal law, the author provides a comparative overview of relevant legislation on corporate liability in the most prominent legal systems and a general overview of the Serbian legislation on this matter.

## 1. THE CONCEPTS AND THEORIES OF ECONOMIC CRIMINAL LAW

### 1.1. Corporate liability and its underlying concepts and theories

In the realm of general criminal law, the offender is not essential to the concept of the crime itself, as in most cases any person can perpetrate any criminal offence. Hence, crime is defined in terms of two essential elements: 1) the act (or omission) – *actus reus*, and 2) the guilty mind – *mens rea*. These concepts are clearly distinguished in the Latin maxim: *Actus reus non facit reum nisi mens sit rea*”- The act itself does not make a person guilty of a crime unless the mind is guilty (Oxford Dictionary of Law, 2003:10).

The notion of the 'guilty mind' (*mens rea*) varies from crime to crime; it is either defined in the statute creating the crime or established by precedent; common examples of *mens rea* are: intention to bring about a particular consequence, recklessness as to whether such consequences may come about, and (for a few crimes) negligence; some crimes require no *mens rea* – these are known as crimes of strict liability (Oxford Dictionary of Law, 2003:321).

Clearly, the concept of *mens rea* cannot be applied to legal entities in its traditional sense, as entities 'have no souls'; this wording was cited to be the dictum of the England's *Case of Sutton's Hospital* in 1612, stating that corporations cannot “*commit treason, nor be outlawed nor excommunicated, for they have no souls*” (Dubber, 2012: 11).

Having this in mind, legal scholars – especially before the Industrial Revolution and the occurrence of high-profile cases of company fraud and other malfeasances – thought that “*societas delinquere non potest*”. In other words, since the corporation (legal entity in general) does not have a mind of its own, it cannot be criminally liable even in case of severe consequences caused by its acts or omissions to act.

This school of thought still survives in a few countries whose legal systems do not recognize criminal liability of legal entities. Instead, corporations are liable under civil and administrative law and can be legally obligated to pay civil damages to victims of their acts (under tort law) as well as administrative fines, or sustain other administrative measures (under statute and regulatory law).

However, modern criminal law encompasses criminal liability of legal entities, in general, and liability of corporations for economic crimes, in particular. The underlying theory is based on the classic principle of vicarious liability – *respondeat superior* ('let the principle answer'). At the turn of the 20th century, the judicial decision in the seminal case (*New York Central & Hudson River Railroad Co. v. U.S.*, 1909) before the federal criminal

court of the United States of America created the test for the *respondeat superior* principle to be applied in practice. The court established that, in order to make a company criminally liable, “prosecutors need only establish that a corporate agent committed an illegal act while acting within the scope of his employment and intending to benefit the corporation” (Diskant, 2008: 139).

The need to abandon the strict legal formalism and logic syllogism, in order to adapt the law to societal changes, paved the way to judicial creativity that based corporate criminal liability on the same standard as civil tort liability, without any separate analysis of *mens rea*, as in the aforementioned case of *New York Central*. One of the pioneers in this line of legal thought was the U.S. Judge Oliver Wendell Holmes (Beale, 2013: 7). In his written opinions and papers dating as far back as 1881, Judge Holmes urged that criminal law should abandon its traditional focus on mental culpability, reasoning that the life of the law has not been the logic, but the experience, guided by “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, ...” (Holmes, 1881: 5).

The prominent feature of modern economic crimes is that no willful act is required, but gross negligence or even negligence (Engelhart, 2014: 700).

However, the ensuing scholarly criticism of the *respondeat superior* principle as being overbroad, led to newly established theories of corporate culpability which, however, have not been accepted by the courts (Beale, 2013: 13).

One of these theories is the *corporate ethos* standard, based on the assumption that entities have their distinct and identifiable personality, different from the personality of their managers and employees. According to that theory, the government could convict a corporation only if it proved that the corporate ethos encouraged agents of the corporation to commit the criminal act (Bucy, 1992: 1114).

The second is the theory of *constitutive corporate fault*, where the key question is whether the act of the agent was 'authored by' the corporation in a meaningful sense, so that it could be deduced to be the act of the corporation itself, due to objective organizational factors such as the size, complexity, formality, functionality, decision making process, and structure of the corporate organization – that all make it possible for the agents “... to cooperate and collaborate in legally problematic ways” (Laufer, 2000: 1285).

The third is the *aggregation theory*, according to which the legal entity can be criminally liable even if no individual employee or agent has committed an offence but the individual acts or omissions, taken together, form the body of an offence which the corporation should have prevented by installing the proper internal standards and procedures. The aggregation principle was applied in the case *United States v. Bank of New England* (1987), over the bank's failure to file U.S. Treasury reports on multiple transactions over \$10,000 (Beale, 2013: 9).

The fourth theory is more restrictive than the previous one, and is instituted by the American Law Institute's *Model Penal Code* (MPC).<sup>1</sup> The MPC has not been adopted by the Congress, but a number of states have implemented it, restricting the criminal liability of corporations to cases when “the commission of the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment” (MPC, § 2.07(1)(c)). The MPC further allows the defense to exculpate the

<sup>1</sup> American Law Institute's *Model Penal Code* (MPC), developed in 1962, updated in 1981;

corporation and the high managerial agent from liability if the agent proves that he/she, in performing his/her supervisory power, employed due diligence to prevent the commission of the offence (MPC, § 2.07(5)).

Finally, out of the previous theories came two constructive proposals for restrictive application of the *respondeat superior* principle.

The first one suggests that the said principle be supplemented with the defence of good faith or due diligence, but leaves as unresolved the question of whether the burden of proof (that the company had reasonable policies and procedures to prevent employee misconduct) should rest upon the company or the government (Beale, 2013: 17).

The second proposes that the corporation should be held criminally liable only when it can be proved that the agent acted primarily with intent to benefit the corporation (Buell, 2006: 526). This proposal is the median between the theories of the corporate ethos and constructive corporate fault (as unworkable in practice), and the MPC's focus on the management fault (unwary of the fact that the lower level employees can cause serious harm because of institutional norms).

The above considerations on the main concepts and theories of the corporate criminal liability being discussed, we should further examine the two essential *objective* conditions for establishing such liability: 1) the entity, and 2) the crime.

## 1.2. The entity

Although the above concepts are not uniform in all legal systems, the common trait is that the criminal liability is restricted to *private* entities with commercial and non-commercial scope of activity (Pop, 2006: 18). The state and its agencies are immune from criminal liability, subject to certain exceptions.

In the United States of America, the 'entity' is covered by the broad definition of the terms 'person' or 'whoever', used in the U.S. Code to denote the subjects of the applicable law. The opening article of the U.S. Code states that "*unless the context indicates otherwise ... the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals*".<sup>2</sup> Furthermore, the definition and the list of organizations which are subject to criminal law are elaborated in the U.S. Federal Sentencing Guidelines (2005). Under its express terms, the 'organization' means a 'person other than the individual', and it includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, government and political subdivisions thereof, and nonprofit organizations.<sup>3</sup>

In *United Mine Workers v. Coronado Coal Co.* (1922), the U.S. Supreme Court decided that unions can be held criminally liable, as opposed to the criminal immunity conferred to syndicates by the English Parliament's enactment of 1906. Even today, the English syndicates are the only private entities in England that may not be held criminally liable (Pop, 2006: 19).

On the other hand, criminal liability is extended to non-legal-status entities, i.e. the unregistered or unincorporated entities (associations, partnerships, etc.), which is for example the case in legislations of the U.S., England and France (Pop, 2006: 19).

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<sup>2</sup>1 U.S.Code § 1 (cited after Beale, 2013: 8)

<sup>3</sup> U.S. Sentencing Guidelines Manual, 18 U.S.C.S. Appx. § 8A1.1 (2005).

Finally, the process of dissolution, transformation or succession of the legal entity through merger or acquisition does not extinguish the criminal liability of the corporation. In case of merger or acquisition, it is the successor that assumes the criminal liability of the participating member.

In regard to economic criminal law, the legal entities as potential perpetrators are profit organizations that operate under the scope of registered economic activities, although non-profit organizations and other entities can be regarded as criminal offenders when their acts are *ultra vires*, or related to the legally registered economic operations of other entities.

### 1.3. The crime

The determination of crimes which legal entities are capable of committing varies from country to country. However, there are some common features which help us discern three major systems: 1) 'general' or 'plenary' liability; 2) crime-specific liability, and 3) a detailed list of crimes for establishing the liability of collective entities (Pop, 2006: 23).

Under the system of general (plenary) liability, the entities are treated on the same terms as individuals, so that they are presumably capable of committing any crime under the statute. This legislative approach has been adopted in England, Canada, Australia (Pop, 2006: 23). It was also adopted by the newly enacted Serbian legislation in 2008.<sup>4</sup>

The system of crime-specific liability has been used in France, where the juristic persons are criminally liable only when it is expressly prescribed by the law or regulation.

Under the third system, which is used in the U.S., the collective entities can be held liable only for crimes which are listed in a formal document, namely, the U.S. Sentencing Guidelines. The list is so broad that corporate criminal liability virtually includes all the crimes that can be perpetrated by individuals, which is the feature of the general system. Thus, corporations can be held liable for crimes such as theft, bribery, forgery, and even manslaughter and negligent homicide (Pop, 2006: 24).

Economic or economy-related crimes are a distinctive feature of economic criminal law. Some of them can be perpetrated both by the companies and individual persons, while others can be committed only by the companies and, even more specifically, by the companies in certain economic circumstances or lines of business.

The German Criminal Code (*Strafgesetzbuches* 1998, 2013– amend.) is specific in this regard. Although it explicitly proscribes crimes which are economic in nature, including the crimes against the freedom of competition on the market, it does not make legal entities criminally liable for those acts; instead, it envisages the liability of individuals acting on behalf of the entities. On the other hand, corporations are liable for the consequences of those acts under the civil and administrative (regulatory) law. In the German Criminal Code, the economic or economy-related crimes are grouped into the following chapters: Chapter 22: Fraud and Embezzlement; Chapter 24: Offences in the State of Insolvency; Chapter 26: Restrictive Practices Offences; and Chapter 29: Offences Against the Environment.<sup>5</sup>

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<sup>4</sup> Article 2, Act on Responsibility of Legal Entities for Criminal Offences, Official Gazette RS, 97/2008.

<sup>5</sup> *Strafgesetzbuches* (english translation), accessed on the Internet address: [https://www.gesetze-im-internet.de/englisch\\_stgb/index.html#gl\\_p0007](https://www.gesetze-im-internet.de/englisch_stgb/index.html#gl_p0007), retrieved on September 11, 2016.

## 2. COMPARATIVE OVERVIEW

### 2.1. The United States of America

The history of the American modern economic criminal law began in 1887, with the adoption of the Interstate Commerce Commission Act, amended in 1903 by the 'Elkins Act', as the first federal law to regulate private industry. The Act regulated railroad rates and explicitly extended criminal liability to corporations in breach of the statute's mandates (Diskant, 2008: 135).

The constitutionality of the Act was upheld in the seminal 1909 U.S. Supreme Court's case *New York Central & Hudson River Railroad v. U.S.*, in which the court unwaivered before the corporation's contentions that it could not, as an entity, commit a criminal crime, nor possess the criminal intent. The Court, instead, applied the civil law principle of *respondet superior*, holding that the corporation could be criminally liable, if one of its agents committed a criminal act: 1) within the scope of his or her employment, and 2) for the benefit of the corporation (Diskant, 2008: 135).

The Elkins Act was regulatory in nature, and sought to curb the economic and political power of the railroad trusts, preventing their exertion of railroad transportation rebates from the railroad companies (Wells, 2002: 27).

Along with the Elkins Act, the advent of the antitrust criminal liability of corporations was marked by the adoption of the Sherman Act in 1890. It banned 'restraint of trade', declaring that “(e)very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal”; it also proclaimed unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations”.

The Sherman Act thus criminalized the infringement of its antitrust provisions, declaring such acts to be felonies (Dabbah, 2010: 238). It was followed by the enactment of other antitrust laws in the first part of the 20<sup>th</sup> century.

The antitrust law has become the essential part of the economic criminal law for several reasons: first, the antitrust criminal law was introduced in order to combat illegal practices of the 'big businesses', with the aim to preserve or restore the 'fair market competition', as one of the pillars of the democratic society in liberal economies; second, it can be defined as criminality *ad personam*, which means that the antitrust criminal acts could only be perpetrated by companies, as market players (i.e. market participants), with the accompanying liability of their representatives in the high-ranking managerial positions; third, the mental element of the crime was interpreted by the courts, which narrowed it down to an element of *knowledge* of the probable consequences of the act, dispensing with a further requirement of intent on the actual anticompetitive results; forth, the antitrust sentencing policy is reflective of the gravity of the crimes, the immensity of criminal profits made by the companies, as well as the need for a well-designed system of deterrence – which account for the penalties that are among the most severe in the area of the economic criminal law, ranging from US\$ 1 million (for individuals) to US\$ 100 million (for legal entities), along with the sentence of imprisonment (for individuals) of up to ten years for each offence.<sup>6</sup>

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<sup>6</sup> Antitrust Criminal Penalty Enforcement and Reform Act 2004.

The *respondereat superior* principle, applied to criminal liability of legal entities through judicial precedent, has been in the limelight of the scholarly critic, as presented under subheading 1.1. in this article.

Judges still hold fast to that principle but its outreach and effects have been significantly moderated by the prosecutorial practices, framed by the Principles of Federal Prosecution of Business Organization in the United States. This moderation is accomplished by employing some renowned and distinguishable instruments of the U.S. prosecutorial powers: 1) the prosecutorial discretion; 2) the use of plea bargaining (for minor offences); and 3) the authorization to negotiate with the management in order to obtain the waiver of the attorney-client privilege and to conclude the Deferred Prosecution Agreement ('DPA').

Under the principle of prosecutorial discretion, the prosecutors are allowed to refrain from criminal charges, even in evidentiary well-substantiated cases (established on the *respondereat superior* principle), if they find that other factors are conducive to that decision, e.g. the seriousness of the harm done, the pervasiveness of wrongdoing within the corporation (including the role of management), the history of similar misconduct, and the existence and effectiveness of any pre-existing compliance program (Beale, 2006: 19).

The economic crimes sentencing is not a matter of judicial discretion, as is the case in Germany and other countries of the European-continental legal system. Instead, sentences are strictly defined by the U.S. Sentencing Guidelines and, as such, they can be easily predicted by companies that perceive them as the imminent threat and the wielding power of public prosecutors.

In those circumstances, corporations accept to cooperate with the prosecutors, facilitating the investigation of the individual employees who are accused of a crime (Diskant, 2008: 166). The resulting outcome of these prosecutorial policies is that very few companies are convicted of a crime in the court of law, which is in inverse proportion to the number of convicted individual employees of the same companies. The DPA serves as an incentive for the companies to cooperate and gain protection from the prosecution in the form of deferral or even absolution from the charges altogether.

## 2.2. Germany

The ancient principle *societas delinquere non potest* still pervades the legal thought in Germany. Today, German criminal law does not recognize the criminal responsibility of legal entities, although (as previously noted) the German Criminal Code (*Strafgesetzbuches*) envisages a number of economic and economy-related crimes.

Under the express terms of Section 14(1) of the Code, if a person acts: 1) in his capacity as an organ authorized to represent the legal entity or as a member of such an organ; 2) as a partner authorized to represent a partnership with independent legal capacity, or 3) as a statutory representative of another, any law according to which special personal attributes, relationships or circumstances (special personal characteristics) form the basis of criminal liability shall apply to the representative, if these characteristics do not exist in his person but in the entity, partnership or person represented.<sup>7</sup>

Also, according to provisions of Section 14(2), if a person, whether by the owner of a business or somebody delegated by him, has been: 1) commissioned to manage the business,

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<sup>7</sup> Strafgesetzbuches (english translation), accessed on the Internet address: [https://www.gesetze-im-internet.de/englisch\\_stgb/index.html#gl\\_p0007](https://www.gesetze-im-internet.de/englisch_stgb/index.html#gl_p0007), retrieved on September 11, 2016.

in whole or in part; or 2) expressly commissioned to perform autonomous duties which are incumbent upon the owner of the business – and the person acts on the basis of this commission – any law, according to which special personal characteristics give rise to criminal liability shall apply to the person commissioned, if these characteristics do not exist in his but in the person of the owner of the business.

It can be deduced from the cited provisions that, even in case of commission of crimes which require *ad personam* qualification of a legal entity, the German law does not recognize the entity itself as a perpetrator, but only the individual person acting on behalf of the entity as its organ, authorized agent or statutory representative, as well as the person commissioned to act on behalf of the owner or somebody delegated by the owner of the business.

In regard to intent, Section 15 prescribes that, unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall be the ground for establishing criminal liability. Additionally, Section 11(2) of the German Criminal Code provides that an act is also deemed intentional for the purposes of this law, if it fulfils the statutory elements of an offence, which requires intent in relation to the offender's conduct but lets negligence suffice as to a specific result caused thereby.

There is, however, no ground to conclude that legal entities can eschew responsibility for unlawful acts. But, instead of having to bear a stigma of crime attached to them, legal entities can be held liable and punished under the provisions of administrative and regulatory law, and held accountable for compensation of damage under the civil law remedies.

The bulk of statutory provisions on the regulatory liability of legal entities is found in the German Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*, OWiG). Pursuant to Section 30 para. 1 OWiG, regulatory fines may be imposed on a corporate entity when someone representing the entity has committed a criminal or regulatory offence in violation of duties imposed on the company by law, or when the company has been enriched or was intended for the company to be enriched (Nowak, 2016: 26). The fines imposed can be up to €10 million for intentional criminal offences and up to €5 million for negligent criminal offences. In case of regulatory offences, the possible fines depend on the offence in question (Nowak, 2016: 26).

It can be concluded that such enormous fines are 'quasi-criminal' in nature. They are also accompanied by other penalties, like asset forfeiture and forced repayment of illegally obtained gains (Diskant, 2008: 143).

The absence of criminal liability of legal entities in German law is at odds with the vast majority of the European Union member states, as well as Switzerland and Norway, which have corporate criminal laws (Nowak, 2016: 26). However, there are proposals for the accommodation of the German law to the principles of modern economic criminal law, spurred by the recent publicly denounced Volkswagen emission scandal and Porche's failed attempt to take over Volkswagen in 2008 (Nowak, 2016: 26). The first draft of a corporate criminal code (*Verbandsstrafgesetzbuch*) was presented in 2013 by the Minister of Justice of the North Rhine Westphalia, but it has not been discussed extensively; thus, the corporate criminal law has not been enacted to date (Nowak, 2016: 26).

On the other hand, the initiatives for reform of German law nowadays stem from the supranational level, due to the international influence and monitoring system of the OECD Convention on combating bribery (1998), as well as the regional influence of the EU legislation (in the area of insider trading and market manipulation, falsification of balance sheets, subsidy fraud and corporate criminal liability) (Engelhart, 2014: 698).



### 2.3. The European Union

EU criminal law covers the competences and procedures in criminal matters with cross-border effects, as part of the Area of Freedom, Security, and Justice (AFSJ) which is now found in Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU). It falls within the scope of shared competence, referred in Article 2(2) TFEU, which stipulates that the Member States shall exercise their competence only to the extent that the Union has not exercised or has decided to cease exercising its competence within any such area (Craig, De Burca, 2011: 933).

According to Article 67(3) TFEU, the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

The EU's competence to enact criminal law rules and measures is specified in Article 83 TFEU, which provides that the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension; these areas are as follows: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime (Craig, et al., 2011: 941).

The EU competence in the area of criminal procedure is defined in Article 82(2) TFEU, empowering the European Parliament and the Council to adopt directives, in accordance with ordinary legislative procedure, establishing minimum rules necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The coordination and cooperation between national investigating and prosecuting authorities is supported by the following newly instituted EU authorities and instruments: Eurojust (in the area of criminal investigations and prosecutions), the European Public Prosecutor's Office (having autonomous power to prosecute the perpetrators of certain offences against the Union's financial interests), the European Arrest Warrant (EAW), and the European Evidence Warrant (EEW) (Craig, et al., 2011: 943).

In the area of substantive criminal law, the EU has enacted a plethora of detailed measures relating to matters listed in Article 83(1) TFEU as well as the measures that would be legitimated under Article 83(2) TFEU, both including economic crimes such as: organized crime, corruption, money laundering, financial crime, environmental crime, etc (Craig, et al., 2011: 954).

### 3. CORPORATE LIABILITY UNDER SERBIAN LAW

Liability of legal entities has been part of the modern Serbian legislation for decades. It was first enacted in 1977 Act on Economic Misdemeanors, with subsequent amendments and supplements, last adopted in 2005. This Act regulates the conditions for establishing the liability of legal entities and individuals for minor offences (misdemeanors) which are regulatory in nature and specified as offences against established statutory economic and financial rights and obligations. The Act also stipulates the procedure against offenders and institutes the system of sentences, along with the sentencing principles and rules.

According to Article 6(1) of the Act on Economic Misdemeanors (2005), the commission of an economic misdemeanor could lead to liability of a legal entity and an individual acting on behalf of a legal entity. A legal entity is liable if the misdemeanor is established to have been the result of its management's act or omission to act with due diligence and supervision, but also if such an act or omission can be attributed to any other person acting within the scope of his employment or otherwise authorized to perform duties on behalf of the legal entity.<sup>8</sup> An individual will be held liable if the act or omission were the result of his intent or negligence, except where the law expressly determines that the offence can be perpetrated only with intent.

The above system of corporate liability is similar to the regulatory framework in Germany, as presented earlier in this article. However, unlike Germany, Serbia has adopted the Act on Criminal Liability of Legal Entities in 2008.<sup>9</sup> The Act regulates the conditions governing the liability of legal entities for criminal offences, the criminal sanctions that may be imposed on legal entities, the rules of procedure for deciding on liability of legal entities, imposing criminal sanctions, awarding decisions on rehabilitation, termination of a safety measure or a legal consequence of conviction, as well as the enforcement of judicial decisions (Article 1). According to Article 2 of this Act, a legal entity may be prosecuted for the commission of criminal offences specified in the special part of the Criminal Code and other laws if the conditions for criminal liability specified in this Act have been fulfilled.

A legal entity shall be held liable for a criminal offence committed by the responsible person acting in line of duty and/or authority vested by the legal entity with intent to acquire illegal benefit for the legal entity (Article 6, par. 1). The liability referred to in paragraph 1 of this Article shall also exist where the lack of supervision or control by the responsible person has enabled a natural person acting under supervision and control of the responsible person to commit a criminal offence for the benefit of the legal entity (Article 6, par. 2). Within the meaning of this Act, a responsible person is any natural person who has been entrusted, either *de facto* or *de jure*, with a specific set of duties within the legal entity, as well as a person who has been authorized, or may be reasonably considered to have been authorized, to act on behalf of the legal entity (Article 5, par. 2). The liability of a legal entity shall be based upon the culpability of the responsible person (Article 7, par. 1).

The Act has been in force since 4 November 2008, but the policymakers have not yet commissioned an analysis of its effects. The data input, retrieved from the public prosecutors' offices and courts, on the number of instigated criminal prosecutions, case trials against legal entities and their outcomes would be an essential part of the awaited analysis.

A considerable part of the Serbian substantive criminal law has sustained dynamic reforms in the past decade and is still subject to ongoing systemic and organizational changes, which are embodied in a number of recently enacted legislative acts: the 2016 Act Amending and Supplementing the Criminal Code (including a completely revised Chapter 22 on economic crimes [Articles 223-245] and envisaging a number of new criminal offences in that area)<sup>10</sup>, and the 2016 Act on the Organization and Competences of State Authorities in Prevention of Organized Crime, Terrorism and Corruption (introducing special organizational units and task forces).<sup>11</sup>

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<sup>8</sup> Article 9, Act on Economic Misdemeanors, Official Gazette RS, 101/2005.

<sup>9</sup> Act on Responsibility of Legal Entities for Criminal Offences, Official Gazette RS, 97/2008.

<sup>10</sup> Act Amending and Supplementing the Criminal Code, Official Gazette RS, 94/2016;

<sup>11</sup> Act on the Organization and Competences of State Authorities in Prevention of Organized Crime, Terrorism and Corruption, Official Gazette RS, 94/2016.

## CONCLUSION

The doctrine of criminal liability of legal entities has evolved over the past century, from the governing principle of *societas delinquere non potest* to the almost ubiquitous civil law principle of *respondeat superior*, which has been moderated by the rectifying doctrines of due diligence and good faith. However, there are still considerable differences in both substantive and procedural national criminal laws with regard to liability of legal entities. Those differences persist despite the ongoing harmonization incentives, stemming from the supranational level and from the public outcry at the financial, economic and societal harm caused by illegal behaviour of companies wielding unprecedented power.

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## **PRIVREDNO KRIVIČNO PRAVO: UPOREDNI PREGLED**

*Krivična odgovornost pravnih lica je u proteklom veku bila u središtu krivičnopravne reforme, a naročito poslednjih decenija, u jeku globalizacije. Teorijske rasprave i kreativna sudska praksa u slučajevima protivzakonitog ponašanja korporacija omogućili su neophodnu promenu tradicionalnog shvatanja da pravna lica ne mogu biti krivično odgovorna ('societas delinquere non potest'), uvažavanjem doktrine 'respondeat superior' (uz određene korekcije).*

*Članak daje prikaz najvažnijih pojmova i teorija o krivičnoj odgovornosti pravnih lica, a potom i uporedni pregled prava Sjedinjenih Američkih Država, Nemačke, Evropske unije, kao i presek pozitivnopravnih osnova odgovornosti pravnih lica za krivična dela i privredne prestupe u pravu Republike Srbije.*

*Ključne reči: krivično delo, odgovornost, pravno lice, privredno krivično pravo*

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