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Critical Approach to (Un)Justified Overcriminalization in the Economic Field

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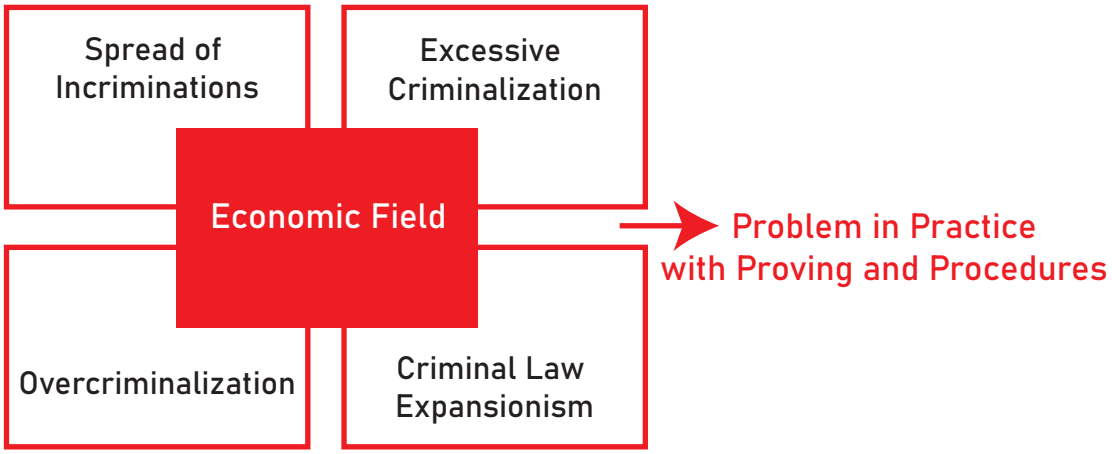
Abstract: In recent decades, the spread of incriminations in the economic field has been very present. One of the reasons for this is the harmonization of national legislation with acquis communautaire. Bearing in mind the views of other authors, in this paper we started from the assumptions that a large number of economic crimes are unnecessary, because their legal description could be subsumed under the already existing crimes, that excessive criminalization can contribute to problems in practice and that procedural legislation often does not follow the changes in substantive criminal legislation when they are carried out by non-criminal laws, as well as when changing and reforming criminal legislation, crimes prescribed by secondary criminal legislation are generally ignored.

Starting from the mentioned assumptions, we try to make recommendations for the further direction of the development of substantive criminal legislation, which, in our opinion, should follow the narrowing of criminal law interventionism in the economic area. In this paper we have analyzed the provisions of secondary criminal legislation, which precisely contain the shortcomings pointed out by the authors when analyzing the need to reform substantive criminal legislation. Therefore, in this paper the dogmatic-legal method is dominant, and special attention is paid to the analysis of the provisions of the Law on Tax Procedure and Tax Administration and the Law on the Capital Market.

Keywords: economic crimes, substantive criminal legislation, secondary criminal legislation, unjustified, overcriminalization.

Graphical abstract



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INTRODUCTION

Many years ago, the authors stated that the development of criminal legislation is such that the circle of criminal behaviour is constantly expanding. This was influenced by the abandonment of the ideologies of liberalism, the intensification of state intervention in economic life, and especially the spread of the idea of the welfare state and need to act in the direction of redistribution of national income (Giunta, 1986; Ignjatović, 2000).

In recent decades, increasing criminal law expansionism in the field of economy has been present in Serbia. Although certain socially harmful behaviours could be effectively suppressed by prescribing misdemeanour sanctions, the legislator decided to prescribe criminal sanctions for them as well. The legal description of misdemeanours and criminal acts that protect economic relations it often very similar and the only difference is reflected in the amount of damage caused by taking the enforcement action or in the amount of obtained illegal property benefits. This is why in practice it happens that certain behaviour that constitutes a criminal offence is qualified as a misdemeanour because the competent authorities (e.g., in the case of tax crimes) due to the similarity of the legal description, first submit a report to the misdemeanour court, which, based on them, conducts a procedure within which is made judgment. Due to the application on the ne bis in idem principle, criminal proceedings cannot be conducted against a person who has already been legally convicted in criminal proceedings (Matić Bošković & Kostić, 2020).

When it comes to economic crimes, there is a wide distribution of incriminations to a large extent through secondary criminal legislation, and some of these crimes are impossible to prove due to procedural barriers. In addition, secondary criminal legislation prescribes certain behaviours that can fit into the legal description of some other criminal acts. This gives prosecutors the ability to make discretionary decisions regarding the qualification of the same behaviour in different cases as different criminal acts, for which different sanctions may be prescribed. Reasons for this may be easier proof or the fact that a lighter sanction is prescribed for a specific criminal offence (Stuntz, 2001).

Overcriminalization is also connected with the phenomenon of increased repression, which according to some authors is almost certainly connected with harmonization with European standards (Kolarić, 2018). Likewise, the authors state that the reasons for changes in criminal legislation and changes in the forms of criminality sometimes necessitate the reaction of the criminal legislator (Stojanović, 2013). However, instead of prescribing redundant incriminations, the existing criminal law solutions should first be reviewed, as well as the competence of employees in competent authorities to react in an adequate manner and achieve effective cooperation in order to suppress modern forms of crime.

Although they are prescribed by the criminal legislation, some criminal acts, especially those foreseen by secondary criminal legislation, almost do not exist in judicial statistics. Some of them are difficult to prove, because changes in the area of substantive criminal legislation are not accompanied by changes in the area of procedural legislation, and the existing procedural solutions cannot be applied. Therefore, the authors rightly believe that procedural solutions should be adapted to substantive law, because they should enable their application (Stojanović, 2013).

In this paper, we start from the assumptions that a significant number of crimes in economic area, which are prescribed both by secondary and basic criminal legislation, are

unnecessary, because the legal description of criminal offences could be subsumed under the already existing criminal offences, that excessive criminalization can contribute to problems in practice and that procedural solutions do not follow the changes in the substantive criminal legislation, as well as that during the changes and reform of the criminal legislation, criminal acts that are prescribed by non-criminal legislation are generally ignored. In order to provide recommendations for overcoming problems that may arise in practice and narrowing criminal law interventionism in the economic field, in this paper the dogmatic-legal method is dominant. We first look at the views of other authors based on their research. Next, we analyse the provisions of substantive criminal legislation.

(UN)JUSTIFICATION OF CRIMINAL LAW EXPANSIONISM

One of the goals of prescribing criminal sanctions is general prevention. However, in science certainty is preferred over the severity of punishment. Thus, Cessare Becaria believed that even a mild punishment has a preventive effect if its application is certain. In his paper the Preventive Function of Criminal Law, Stojanović (2011) points out, referring to the previously conducted research, that it has been proven that there is a correlation between the probability of detection and punishment and the general preventive effect, but not the correlation between the severity of the punishment and general prevention. Therefore, the greater degree of deterrence from committing criminal acts has the probability that someone will be discovered and convicted, than the severity of the prescribed punishment (Stojanović, 2011). This is also indicated by the results of the application of the American Sarbanes Oxley Act (2002), which prescribed a large number of economic crimes, but the planned results had no effect in practice, i.e., its adoption did not affect the reduction of economic crime (Dervan, 2013).[2]

Criminal acts are prescribed in order to prevent certain behaviours of physical and legal persons that are contrary to the functioning of the state and that must be prevented not only in order to ensure the basic conditions for life, but also the conditions that are necessary for the improvement of its development (Anolisei, 2008). Although it is true that the goal of prescribing them is to enable and improve the functioning of the national economy, compensation of justice deficit by excessive punishment has its downsides and cannot achieve true justice (Stojanović, 2013).

The idea of adopting the Criminal Code of the Republic of Serbia from 2006 was to codify the substantive criminal law. However, this was not implemented in the following period (Bodrožić, 2020). Instead, there is an increasing number of criminal offences.

When making amendments, the limit of expansion of the criminal zone should be re-examined by increasing incriminations and the state's need to react effectively to new forms of crime (Kolarić & Stojanović, 2015). New incriminations are present not only in areas where criminal law is ineffective, but also in areas where the already existing incriminations are not applied. The authors also include corruption and organized crime in these areas (Kolarić & Stojanović, 2015), which also includes economic crimes, the incriminations of which are subject of analysis in this paper.

2 The mentioned law was passed in order to protect investors by improving the accuracy and liability of corporate disclosures made pursuant to the securities laws and for other purposes.

As one of the main reasons for excessive criminalization in the field of economics, the authors state the fact that economic criminality is more difficult to investigate and prove, and as a result, it is more difficult to deter potential perpetrators of those crimes (Haugh, 2015). However, the excessive discretion of prosecutors due to the overlapping of certain criminal acts contributes to the misapplication of resources in the fight against crime (Haugh, 2015).

Overcriminalization diminishes the value of the exiting criminal legislation. It is impossible for laymen to understand what a crime is and what is not. In addition, it increases the power of prosecutors, who can decide on a criminal offence according to their choice, especially if the legal description of certain offences overlaps. If the law prescribes too many crimes, punishment can lose its deterrent and even retributive purpose (Stuntz, 2001; Podgor, 2012).

The prescription of significant numbers of crimes increases legal uncertainty. A significant number of prosecutors and judges probably do not even know about a large number of these criminal acts. Economic crimes are crimes from the mala in prohibita category. Due to their large number, it is possible for their perpetrators to have a legal error, while it is different in relation to criminal acts that are mala per se. This legal uncertainty is further increased by the prescription of crimes in both basic and secondary criminal legislations. So, for example tax crimes are prescribed by the Law on Tax Procedure and Tax Administration and the Criminal Code (Law on Tax Procedure and Tax Administration and Criminal Code of the Republic of Serbia). If all criminal acts were prescribed exclusively by the basic criminal legislation, the possibility of legal error would be very small or completely impossible (Šuput, 2015). However, the subject of this paper's analysis are only some criminal acts, which in our opinion represent the true examples of unnecessary and redundant criminal law expansionism.

TAX CRIMINAL OFFENCES

Criminal law expansionism is particularly present in tax matters. Instead of reviewing the justification for the existence of some already prescribed criminal acts, the legislator continued with the expansion of incriminations. During 2020, the Law on Amendments to the Law on Tax Procedure and Tax Administration introduced a new crime of fraud related to value added tax (Article 173a of the Law on Amendments to the Law on Tax Procedure and Tax Administration from 2020). The prescription of the mentioned crime in our opinion was completely unjustified, given that the behaviours that can be brought under the legal description of criminal offences had already been prescribed by the Criminal Code.

The first form of the criminal offence of fraud related to value added tax exists if a person with the intention that he/she or another person in the previous twelve months get the right to an unfounded refund of value added tax or a tax credit for value added tax prepares one or more tax returns for value added tax with untrue content, and the amount of the refund or tax credit exceeds one million dinars. Behaviours that can be classified under the legal description of the above-mentioned criminal offence could be classified under the description of the criminal offence of fraud, which is prescribed by Article 208

of the Criminal Code and which exists if a person with the intention to obtain an illegal financial benefit for himself/herself or another, by presenting or concealing facts, misleads a person or keeps him/her in a delusion and in this way induces him/her to do something to the detriment of his/her own or someone else's property. In the specific case, it would be about misleading an authorized person of the Ministry of Finance, which would cause damage to the budget based on incorrect or incomplete facts. Even for the perpetrator of the criminal offence of fraud related to the value added tax, the same criminal sanction is prescribed, as for the perpetrator of the criminal offence of fraud. Therefore, it seems that prescribing a new incrimination was unnecessary. The same applies to another form of tax fraud related to value added tax.

Another form of the offence exists if a person with the intention of avoiding paying value added tax completely or partially in the previous twelve months, fails to submit one or more tax returns for value added tax, submits one or more tax returns for tax on added value of untrue content or if, with the same intention, he avoids payment of value added tax in another way, and the amount of tax whose payment is avoided exceeds one million dinars. The legal description of this offence coincides with the legal description of the criminal offence of tax evasion, which is prescribed by Article 225 of the Criminal Code.[3] In addition, for the perpetrator of the criminal offence of tax fraud related to the value added tax, the same punishment is prescribed as for the perpetrator of the criminal offence of tax evasion.[4]

We assume that the amendment of the Law on Tax Procedure and Tax Administration in the part in which the crime of fraud related to value added tax was introduced is a consequence of the harmonization of national legislation with the law of the European Union with the aim of later more effective protection of its financial interests, and in accordance with Article 3, paragraph 3, items c and d of the Directives on combating fraud against the financial interests of the European Union by means of criminal law (Directive 2017/1371).[5] However, if this was done under the aforementioned assumption, the approach of the Republic of Croatia could have been applied instead of that approach, in whose Criminal Code, instead of prescribing a new criminal offence, the existing incrimination, which prescribed the crime of tax or customs evasion, was only expanded, and in which it was added in only one paragraph that the existing incriminations also refer to crimes committed to the detriment of the financial interests of the European Union (Article 256, paragraph 1, item 4) of the Criminal Code of Croatia). It seems that it is a little too early for the harmonization of the national legislation of the Republic of Serbia with the Directive of the European Union regarding the protection of its revenues, because the Republic of Serbia is still not a

3 The crime of tax evasion exists if a person, with the intention that he/she or another person completely or partially avoid paying taxes, contributions or other prescribed duties, provides false information about the acquired income, items or otherwise conceals information related to the determination of the aforementioned obligations, and the amount of the obligation the payment of which is avoided exeeds one million dinars.

4 For the basic forms of both crimes, a prison sentence of one to five years and a fine are prescribed.

5 According to this provision, the member states are obliged to prevent criminal acts to the detriment of the revenues of the European Union, and under which are considered criminal acts committed with intent in relation to the income derived from their own resources based on value added tax, any act or omission that carried out in cross-border fraud systems and related to the use or presentation of false, inaccurate or incomplete documents related to value added tax which violates a certain obligation with the same effect or presenting correct statements regarding value added tax for the purposes of concealing non-payment or illegally exercising the right to a refund of value added tax.

member of the Union, and therefore neither is part of the revenue from the value added tax that is collected at the national level, it does not belong to its budget (Kostić, 201 6). Bearing in mind all of the above, we believe that it was unnecessary to prescribe a new criminal offence within the Law on Tax Procedure and Tax Administration. It is this example that illustrates the claim of other authors that criminal law expansionism is also conditioned by the need to harmonize national legislation with the regulations of the European Union. However, it seems that it is not being approached quite rationally, and the example of overlapping legal descriptions of criminal offences in national criminal legislation does not end here. And during the following years, the spread of incriminations in the tax area continued. Namely, in 2022, the Law on Amendments to the Law on Tax Procedure and Tax Administration prescribes two new criminal offences: unauthorized circulation of equipment for fiscalisation (Article 175a) and unauthorized circulation of accounting and other software (Article 175b). In the explanation of the Proposal for the Law on Amendments to the Law on Tax Procedure and Tax Administration from 2022 (page 4) it is stated that the aim of introducing new criminal offences is to harmonize the aforementioned Law with the provisions of the Law on Fiscalisation (Proposal, 2022). The crime of unauthorized circulation of equipment for fiscalisation exists if a person contrary to the regulations governing fiscalisation, unauthorizedly produces, processes, sells or acquires for sale, holds or transfers or mediates the sale or purchase or otherwise illegally places electronic devices, equipment and software that are not registered in the register of manufacturers of fiscal devices, and which serve to avoid the recording of retail transactions in the manner regulated by the regulations governing fiscalisation. However, it seems that when prescribing this criminal offence, the fact was ignored that the crime of illegal production (Article 234) as well as the crime of illegal trade (Article 235) were already prescribed by the Criminal Code. Under the legal description of these crimes, actions of committing crimes of unauthorized circulation of equipment for fiscalisation as well as unauthorized circulation of accounting and other software could also be subsumed. The acts of committing crimes prescribed by the Law on Tax Procedure and Tax Administration overlap with the acts of committing crimes prescribed by the Criminal Code. A special problem is the fact that Article 175a of the Law on Tax Procedure and Tax Administration prescribe a stricter punishment for the same actions than for the criminal acts of illegal production and illegal trade, which are prescribed by the Criminal Code. Precisely this approach leaves the possibility of choosing the criminal offence, that is, the possibility of discretionary decision by the prosecutor in which case the same behaviour will be brought under the legal description of the crime prescribed by the tax legislation, and in which case under the legal description of the criminal offences of illegal production and illegal trade. The same objection can be made in connection with the provision of the Law on Tax Procedure and Tax Administration which prescribes the criminal offence of unauthorized circulation of accounting and other software. Instead of prescribing new criminal acts, it should first be examined whether certain socially dangerous behaviour can be brought under the legal description of a criminal act already prescribed by the criminal legislation or maybe the possibility of amending and supplementing the already existing incrimination.

As already stated in the paper, the criminalization of certain behaviours within two laws, as is the case in the tax area, further contributes to legal uncertainty. In Italy and Germany, tax crimes are not prescribed by the basic criminal legislation. In Italy, they are prescribed by a special law, while in Germany they are part of secondary criminal legislation (Kostić,

2016; Kostić & Pavlović, 2020). Such a solution can have certain advantages, but only if the incriminations are rational and aligned with the basic principles of criminal legislation.

CRIMINAL OFFENCES AGAINST CAPITAL MARKET INTEGRITY

The prescription of crimes in order to protect the integrity of the capital market was to some extent conditioned by the harmonization of national legislation with Directive 2014/57 on criminal sanctions for market abuse (market abuse Directive) (Directive 2014/57). Secondary criminal legislation prescribes a large number of these criminal acts. However, they are not provided for by a single law that regulates the functioning of the capital market, but are fragmented into several regulations: the Law on Capital Market, the Law on Takeover of Joint Stock Companies, the Law on Alternative Investment Funds and the Law on Open Investment Funds with Public Offering.

In this paper, we analysed only the provisions that we considered to represent unnecessary and excessive criminal law reactionism, as well as those for which we believe that there are no adequate procedural mechanisms in terms of proving them.

The Law on Capital Market prescribes the criminal offence of using, revealing and recommending insider information (Article 403). The basic form of the offence exists if a person, with the intention of obtaining a material benefit for himself/herself or another person or causing damage to another person, uses insider information directly or indirectly when acquiring, alienating or attempting to acquire or alienate, for his/her own account or for the account of another person, financial instruments to which that information relates, as well as when it is used to reveal or make available to any other person or to recommend or induce another person to acquire or alienate the financial information to which this information relates based on such information. A fine or a prison sentence of up to one year is prescribed for the perpetrator of that act. In this case, it seems to us that a criminal law reaction is unnecessary. In our opinion, it was sufficient to prescribe a sanction for a misdemeanour for the aforementioned activities. The basic form of the criminal offence is the use, disclosure and recommendation of insider information and does not represent the fulfilment of the obligation to comply with the provisions of Directive 2014/57. According to its provisions, member states are obliged to prescribe as a crime by their national legislation behaviour that matches the legal description of the act of committing the basic form of a criminal offence, the use, disclosure or recommendation of insider information, but only on the condition that the action was undertaken with the intention and in more serious situations (Article 3, paragraph 1). In the case of the basic form of the mentioned offence for sanctioning the perpetrator, the Law on Capital Market does not prescribe as a necessary condition the existence of intent, nor that illegal property benefit was obtained by its execution or that serious damage was caused to a person or property. The prescription of more serious form of criminal offence, the use, disclosure and recommendation of insider information, is in line with the provisions of Directive 2014/57, bearing in mind that it exists, through the act of execution, an illegal property benefit was obtained or property damage was caused to other persons in the amount of more than a million and five hundred thousand dinars.

When it comes to a special form of the criminal offence of using, revealing and recommending insider information, another objection can be made there. This form exists if the criminal offence was committed by a person who possesses insider information through membership in the administrative and supervisory bodies of the issuer or a public company, a person who has a share in the capital of the issuer or a public company, or a person who has access to information obtained by performing work at the workplace. However, this form of work did not need to be additionally prescribed. It could be brought under the legal description of the criminal offence of abuse of the position of a responsible person, which is prescribed by Article 227 of the Criminal Code of the Republic of Serbia.[6] The existence of a more serious form of both crimes is conditioned by the consequence, which consists in obtaining illegal property benefits in the amount of one million and five hundred thousand dinars. For the perpetrator of the more serious crime of abuse of the position of a responsible person, a prison sentence of two to ten years is prescribed (Article 227, paragraph 3), while for the perpetrator of the more serious crime of using, revealing and recommending insider information, a prison sentence of six months to five years and a fine are prescribed (Article 403, paragraph 4). Such a solution violates legal certainty, because it gives the possibility to competent authorities, and above all to the prosecution, to choose between two criminal acts, which can later be reflected in different sanctions for the perpetrators.

The crime of using, revealing and recommending insider information is difficult to prove in practice. In judicial statistics, criminal offences from secondary legislation are shown collectively as "criminal offences prescribed by other laws", so it is not possible to monitor their representation in practice in an adequate way. According to national legislation, indirect (indirect) evidence cannot be used in court proceedings. In order to raise an indictment, the existence of reasonable suspicion is necessary, which means the totality of facts that directly support it (Article 331, paragraph 1, Article 341, paragraph 1 in conjunction with Article 338, paragraph 1, item 3 of the Criminal Procedure Code and Article 2, items 1 and 2 of the Criminal Procedure Code). Therefore, it seems that the criminal offence of using, revealing and recommending insider information can be proven only through the use of special evidentiary actions. However, the problem is the fact that evidentiary actions can be applied exclusively to criminal offences listed in Article 162 of the Code of Criminal Procedure or to criminal offences to which the Law on the Organization and Competence of State Authorities in Suppression of Organized Crime, Terrorism and Corruption applies (Article 2 of the Law on Organization and Competences of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, but not to crimes prescribed by secondary criminal legislation (Kostić & Jelisavac Trošić, 2020).

Certainty of the sanction, i.e., the probability of detection and punishment of the perpetrator is precisely what acts as a deterrent. The impossibility of proving a criminal offence points to the need to reconsider the justification of the spread of incriminations without a prior analysis of the adequacy of procedural mechanisms for proving them. The existence of a sanction, without the possibility of its application, means nothing from a general preventive aspect.

6 According to Article 112 of the Criminal Code, a responsible person in a legal entity is a person who, on the basis of laws, regulations or authorization, performs certain tasks of management, supervision or other tasks from the activity of a legal entity, as well as a person who is actually entrusted with the performance of those tasks.

CONCLUSION

Criminal law expansionism in the economic area is largely present in the national legislation of the Republic of Serbia. A significant number of crimes are prescribed by non-criminal legislation without any prior analysis of the existing criminal justice mechanisms. It seems that a large number of these crimes can be subsumed under the law of other crimes that are already prescribed in the Criminal Code.

Although most of the new acts in the economic field are intended to harmonize national legislation with acquis communautaire, sometimes criminal law expansionism exceeds even such needs, as shown by the way of defining the act of committing the basic form of the crime, the use, disclosure and recommendation of insider information. In addition to the above, when prescribing new crimes, the possibility of specifying or supplementing the already existing incriminations is not taken into account if this is necessary for the purpose of harmonizing with European standards or overcoming certain problems that have been observed in practice.

Prescribing criminal acts with non-criminal regulations negatively affects legal certainty, and excessive criminal law expansionism weakens the general preventive function of criminal law. It is sure that the certainty of the application of the prescribed sanction will contribute to the reduction of criminality in a certain area more than the tightening of sanctions and the prescription of redundant criminal acts. A special problem is the overlapping of legal descriptions of certain criminal acts for which different sanctions are prescribed, which gives the possibility for discretionary decision-making by competent authorities.

Amendments to the substantive criminal legislation, and especially the prescription of new criminal offences by non-criminal legislation, are often not accompanied by amendments to the procedural legislation. This is why there are problems with proving certain crimes. This is the case with the crime of using, revealing and recommending insider information. Bearing in mind the above mentioned, we believe that a more effective solution would be to codify the criminal legislation, but in such a way that the criminal acts prescribed by secondary criminal legislation are also taken into account. In our opinion, a better solution that would reduce legal uncertainty would be for all criminal acts to be prescribed exclusively by the Criminal Code. The lack of proven crimes does not mean that new criminal offences should be prescribed that will have a similar legal description.

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