

Pro et Contra Criminalization of Corporate Liability in the Russian Federation

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Abstract

The article focuses on different theoretical approaches towards establishing corporate criminal liability in national legislature of the Russian Federation. The article focuses on the roots and evolution of the problem of introducing criminal corporate liability, analyses arguments pro et contra corporate criminal liability as an instrument of prevention and combat against corporate and other forms of white-collar crime. The central part of the article examines different theoretical and practical views on introduction of corporate liability in general and in the Russian Federation in particular. The author aims to shed light on different dimensions of the matter, pointing to interdependency of various aspects.

Keywords: criminal liability, Corporate liability, Civil Code, civil liability, corporate crime, administrative liability, Criminal Code



1. INTRODUCTION

One of the most disputable and controversial issues today in the legal and political society of the Russian Federation is a question of necessity of introduction of criminal liability for corporations. This issue is particularly troubling in light of the State Duma of the Russian Federation initiative on necessity of criminalization of corporate liability and the Russian Federal Chamber of Lawyers strong opposition to this idea¹.

Corporate crime is a serious phenomenon, which produces high level of social danger in many fields — economy and trade, health and safety at workplace, environmental protection, human rights and others. Introducing criminal liability of legal persons in most of contemporary legislatures has opened theoretical debates in various academic disciplines, such as criminal law, criminology, sociology and social psychology, economic science and others.

From one point of view Russian laws have different types of liability for corporations: civil and administrative². Administrative fines for certain types of administrative violations are quite high: e.g. violation of ecological and sanitary rules while collection, accumulation, use, neutralization, transportation or other operations with the industrial waste and other ozone layer depleting substances incurs from 100000 to 250000 Roubles fine for legal entities or activity hold for up to 90 days³.

From the other point of view the main distinction between criminal and administrative liability is the isolation from the society as a consequence of undue behaviour — imprisonment. How technically to isolate a legal entity?

The methodological ground of the present aarticle represents the dialectic scientific method of the socio-political, legal and organizational processes with the principles of development, integrity, consistency, etc. The consistency analysis method is used while researching the object of the analysis. The problem of the emergency of the idea of criminalization of corporate responsibility is analysed from historical point of view with application of the historical method and of the object of the analysis method. Some

1. Shashkova, A.V., Criminalization of Corporate Responsibility in Politics, the State and the Law (2015) № 8 (44) c.15. URL: <http://politika.snauka.ru/2015/08/3281>.

2. Shashkova A.V., Financial & Legal Aspects of Doing Business in Russia, in Aspect-Press (2011) P. 223.

3. The Code of the Russian Federation for Administrative Violations № 195-FZ, dated 30 December 2001. Article 8.2.



public-private research methods are also used: formally-logical method or comparative legal method are used to compare decisions of different courts on the same precedent. The aim of the present article is to find the root of the problem and, comparing positions of opponents, give recommendations for the solution of the problem.

2. EMERGING OF THE PROBLEM. THE IDEA OF CRIMINALIZATION OF CORPORATE LIABILITY

Basically interpreting the legislation and court practice in general and criminology in particular a corporate crime may be identified as a crime committed by a company or by individuals representing the company. Different types of corporate crime may be distinguished:

- Traditional Russian interpretation as white-collar crime. Crime committed by white-collar employees of the company. Such interpretation focus on subjects of crime — white-collar employees of the company.
- Organized crime where corporations are used as a vehicle for gaining profit, e.g. money laundering. Such interpretation considers subjects of crime as well — companies helping individuals to commit a crime.
- State-corporate crime basing on confrontation of corporations and the state and the relationship hereof. Such interpretation focuses on subjects of crime as well — companies interfering with the state in committing a crime.

Thus in any type of corporate crime a subject of the crime is in the main focus — a corporate individual or a corporation.

In case of undue behavior different types of liability apply: civil, administrative, criminal. Civil liability presumes monetary compensation, administrative liability means fine or winding up of a company. Criminal liability is normally associated with imprisonment.

The concept of corporation being a separate person means equality in application of liability to such separate person. The starting point for such interpretation was the decision of the US court "Santa Clara County v. Southern Pacific Railroad Co." It applied the notion "person" to a company. The American court applied Amendment Four to the US Constitution to a legal entity. It



was for the first time in history when the notion "person" was applied to a legal entity and not to a physical person.

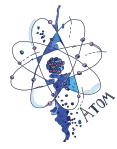
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

During 20th century corporate liability was criminalized in most UN Nation-States: countries of precedent law system (e.g., the United Kingdom, the USA, Ireland), territorial parts of different countries (e.g., Scotland) and their former colonies, Romano-German memberstates (e.g., all EU member-states), countries of muslin law family (e.g., Albania, Lebanon, Syria), countries of the former USSR (e.g., Latvia, Georgia, Kazakhstan). Still the matter of criminalization of corporate liability is under discussion in the Russian Federation.

3. PRO ET CONTRA OF INTRODUCTION OF CRIMINAL LIABILITY FOR CORPORATIONS

As stated above many countries recognized and introduced criminal liability for corporations. It is commonly recognized that facing serious type of liability corporations and their officers shall think twice before breaking the law.

What is the particularity of criminal liability? Criminal liability is one of the types of public liability. The concept of criminal liability has the same roots as concepts of other public liabilities: revelation, punishment and removal from the society. The aim of punishment is also the same: to reinstate the injured in rights and to use current legal norms. The only particularity of the criminal liability is such type of criminal punishment as imprisonment. In case of imprisonment a person is removed from the society. Here principal difference with civil liability can be seen, civil liability where the principal means of responsibility and the result of undue behaviour is fine. However, speaking about imprisonment only an individual may be taken into account: it is not possible to imprison a legal entity. So, does the society need criminal liability for corporations?



For a wide number of researches the answers is “yes”. Dr. Nagy points out that one of the reasons for prosecuting corporations is that there are no adequate civil, administrative or enforcement alternatives to ensure adequate legal compliance⁴. Some Russian researches, e.g. Alexei Fedorov, follow the same reasoning though different grounds: confronting adverse acquisition⁵.

The above-named case of the decision of the US court “Santa Clara County v. Southern Pacific Railroad Co.” and its further construction by the Supreme Court of the US⁶ provide an understanding of possibility and reasonability of criminal responsibility of corporations. There are of course certain court decisions against such construction, e.g. Connecticut General Life Insurance Company v. Johnson⁷. Notwithstanding this fact the baseline of the American courts’ construction of the problem is clear — criminalization of corporate liability.

From the other point of view the United States Securities and Exchange Commission (SEC) is very effective with its non-criminal sanctions. Using only civil and administrative methods of punishment makes corporations execute the laws properly⁸. Thus, such example shows that criminal responsibility is not the only alternative to the civil sanctions. The supporters of the idea of criminalization of corporate liability now can claim that only the element of liability and not the impact of such liability on the corporation is the reasoning and the ground for criminal liability of corporations and its officials. According to Lindsey Farmer criminal liability is idealized by the society as a panacea against further crimes in certain area⁹, though such understanding has real proof neither in the past nor in the present. The researcher offers to focus on indemnification as an alternative to the criminal liability:

4. Nagy D., Criminalization of Corporate Law: The Impact of Criminal Sanctions on Corporate Misconduct in Bus. & Tech. (2007) P. 91-95. URL: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2059&context=faculty_scholarship.

5. Fedorov A.U., Legal security of corporate relations. Current problems, confrontation with relevant means, foreign experience (2017) p. 3348. URL: <https://play.google.com/books/reader?id=GUq7AAAAQBAJ&printsec=frontcover&output=reader&hl=ru&pg=GBS.PA1888>.

6. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 496 (1909) URL: <https://supreme.justia.com/cases/federal/us/212/481/case.html>.

7. Bloch H. Ruth., Corporations and the Fourteenth Amendment in UCLA (2013) p. 31.

8. Morris M.S., The Securities Enforcement Remedies and Penny Stock Reform Act of 1990.: By Keeping Up With the Joneses, the SEC’s Enforcement Arsenal is Modernized 7 ADMIN. L.J. AM. U. 151 (1993) P. 160-166.

9. Duff R.A., Farmer L., Marshall S.E., Renzo M., Tadros V. Criminalization. The Politica; Morality of the Criminal Law in Oxford University Press (2014) P. 312.



interaction between the offender and the victim — the corporation and the state.

4. DISPUTE ON INTRODUCTION OF CRIMINAL LIABILITY FOR CORPORATIONS IN RUSSIA

In the Russian Federation the issues concerning corporate liability lay generally in the area of civil and administrative law. The Code for Corporate Governance approved by the Bank of Russia in 2014 gives recommendations on corporate conduct and corporate structure without referring to any sanctions. The discussion of the issue is intense only from time to time, and then silence comes. There's been published a number of articles on criminal liability of corporations, and a number of conferences were held with such general result as gradual introduction of criminal liability for legal entities.

From one point of view, criminalization of corporate liability is an effective mean of control over corporations on the part of the state. Introduction of corporate liability will allow withstanding of the activity of sham corporations, one-day companies, which conceal real activity of legal entities. Analysing corpus delicti we can affirm that activity of corporations may also have full corpus of crime. The concept of guilt of the legal entity also has a ground and a reasoning. The issue at question here relates to the type of liability for corporate crime and the subject of liability: officials of the corporation or corporation itself. Speaking about officials of the corporation we speak about natural persons. Of course they are officials but still natural persons and not legal entities.

Analysing criminal punishment for corporations we can affirm that the main mean of responsibility is a fine and a compensation of damages. Even when it is an unlimited fine — it is a fine. Both a fine and a compensation of damages are means of civil or administrative liability. Such types of liability are used against Russian corporations as well. E.g., in case of non-execution during the specified period of the prescription of the Anti-Monopoly body the officials of the corporation shall pay a fine from eight to twelve thousand Roubles or will be disqualified for the period up to three years; the fine for legal entities is from one hundred thousand Roubles to five thousand Roubles¹⁰. Here the subjects of the administrative liability are both

10. The Code for Administrative Violations. Article 19.5 p. 2.6.



officials of the corporation (natural persons) and the corporation itself (the legal entity). Can we see fundamental differences in the means of liability introducing corporate liability? Do we speak about the volume of the fine?

Looking through the Corporate Manslaughter and Corporate Homicide Act¹¹ adopted in the UK in 2007 we can even state a turn backwards in the responsibility system. In case of court decisions of the 19th century lifting of corporate veil was the leading idea of corporate responsibility and inevitability of responsibility of a particular guilty person. Nowadays a corporation is the only responsible person, lifting of a corporate veil is not required, thus making guilty persons hide behind the corporation. In contrast to it the Civil Code of the Russian Federation still focuses on possibility of lifting of a corporate veil. Such fact makes Russian Civil Code a much more progressive act than recent legislation adopted in European countries.

The draft law "On Introduction of Amendments to Legislative Acts of the Russian Federation in Light of Introduction of the Institute of Criminal Liability for Corporations" was submitted to the State Duma on 23 March 2015. Qualification of the gravity of crime is assessed with a volume of the fine: up to three million Roubles for minor crime, up to eight million Roubles for medium crime, up to fifteen million Roubles for grave crime, the only punishment for very grave crime — prohibition of the activity of the corporation or its involuntary liquidation. Practicability of introduction of such responsibility may be explained by obligations of the Russian Federation taken by the Russian Federation under the United Nations Convention against Transnational Organized Crime¹² and bringing the Russian legislation to conformity with the legislation of Anglo-Saxon countries which have already introduced criminal liability for corporations.

There are also other reasons on introduction of criminal liability for corporations: criminal sanctions will build an effective mechanism for resisting crimes of corporations and will allow resisting of using sham companies and other corporate structures which are not properly registered as a legal entity.

Though there are fierce adversaries of introduction of criminal liability for corporations in the Russian Federation. One of such

11. The Corporate Manslaughter and Corporate Homicide Act 2007. URL: <http://www.legislation.gov.uk/ukpga/2007/19/contents>.

12. The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000. URL: <https://www.unodc.org/unodc/treaties/CTOC/>



opponents of the idea is the Federal Chamber of Lawyers. The understanding of the issue by the Federal Chamber of Lawyers lays in the principles of criminal justice. Introduction of criminal liability for corporations is contrary to such principles¹³. As to the Federal Chamber of Lawyers the concept of criminal liability is the principle of personal culpability: a person has conducted a crime intentionally or negligently. Exculpable or collective responsibility is contrary to such principle.

The second argument lays in the purpose of criminal responsibility and criminal sanctions. The main aim of the criminal responsibility and criminal sanction is correctional rehabilitation of the guilty person as well as the correctional education. This assumes changing in the individual specifics of a person. Thus, introduction of criminal liability will result in changes to the Criminal Code of the RF providing different principles of liability for natural and legal entities. This is contrary to the constitutional principle of justice.

Nowadays the absence of criminal liability for corporations does not release officials of the corporation for criminal liability — officials which are in fact real culpable persons. Such officials are the persons that committed a crime; they signed the documents and did real deeds.

5. CONCLUDING REMARKS

Summarizing the problem of introduction of criminal liability for corporations in the Russian Federation the author comes to the following conclusions:

1. The legislation of the Russian Federation is subject to drastic changes in case of introduction of criminal liability for corporations. Thus the issue is subject to further assessment and discussion.
2. Taking into account different laws of the RF providing liability for corporation the author recognises the necessity of systematization of corporate liability in the Russian Federation.
3. The presence or absence of criminal liability in the Russian Federation at present is a topic of discussion : too many acts must be analysed to give an answer to such question. E.g., in

13. The position of the Federal Chamber of Lawyers on the draft law № 750443-6 On Introduction of Amendments to Legislative Acts of the Russian Federation in Light of Introduction of the Institute of Criminal Liability for Corporations. URL: http://www.fparf.ru/documents/legal_positions/14703/



case of bribery a natural person is liable under the Article 291 of the Criminal Code of the RF and a corporation in which interests such official acted — under Article 19.28 of the Code for Administrative Violations.

4. There is a conflict on private and public interests inside the corporation as well. In case of quorum of the Board of Directors on the decision to conduct and act, later recognized as criminal, certain directors may have been against such act. What to do with such persons ? Why should they also bear negative results of criminal liability?

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