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HERITAGE OF FINANCIAL CRIMES – LAW BALANCE BETWEEN FINANCIAL LOSSES AND STATE FORCE: THE UK EXPERIENCE

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SUMMARY

The article examines approaches to the definition of financial crimes in order to determine which act should be a crime, and which should not. The legal regulation of financial crimes in a free market, justifies the feasibility of considering the characteristics of the types of committing financial crimes, the reasons for their commission and aspects of state prevention in the UK are also examined.

Key words: financial crime, physical and legal persons, fraud, criminal acts, tax, financial crisis, European Union, financial system, money laundering.

ПОСЛЕДСТВИЯ СОВЕРШЕНИЯ ФИНАНСОВЫХ ПРЕСТУПЛЕНИЙ: ЗАКОНОДАТЕЛЬНЫЙ БАЛАНС МЕЖДУ ФИНАНСОВЫМИ ПОТЕРЯМИ И ГОСУДАРСТВЕННЫМ ПРИНУЖДЕНИЕМ: ОПЫТ ВЕЛИКОБРИТАНИИ

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АННОТАЦИЯ

В статье изучаются подходы в определении понятия финансовых преступлений, чтобы определить, какой поступок должен быть преступлением, а какой нет. Также рассматривается нормативно-правовое регулирование финансовых преступлений в условиях свободного рынка, обосновывается целесообразность рассмотрения вопросов характеристики видов совершения финансовых преступлений, причин их совершения и аспекты государственной превенции в Великобритании.

Ключевые слова: финансовое преступление, физические и юридические лица, мошенничество, преступные действия, налог, финансовый кризис, Европейский Союз, финансовая система, отмывание денег.

Introduction. Activities which can be found referenced as 'financial crimes' in key discourses are widely regarded as among the most difficult crimes for the legal system to deal with, let alone control. Therefore, unsurprisingly, a decade on from the global financial crisis, so-called 'transformative understandings' of these activities have been unable to deliver greater effectiveness in enforcement, or even provide greater clarity on whether these activities are properly regarded as crimes'. Why is financial crime important? How important is it, what are its consequences for state, business and individual? Those are the questions that need to be answered before any legal changes are initiated, since the answers will inevitably impact whole system, from the height of philosophy and law to the bottom of personal daily life.

The relevance of the research topic. Financial crime is a very unique sort of crime: it does not involve violence and is not manifested by physical deeds. Moreover, it is closely connected to something as ancient and vital for humanity as trade. Given that finance represents trade, actual or potential (including taxes), financial crime may be characterised as trade operations criminalised by the legislative body. At the same time, crime as a whole falls into the scope of activities that infringe on the interests of either an individual or a state. Some would add here, that it is also against "the interest of society", but this category is extremely vague and hard to measure. The clearest ways in which society's interests visibly manifest themselves are ideologies, which, in turn, are effectively operating as political agendas. Thus, it might be said that a particular action infringes the interest of society if it is contrary to the leading ideology (and agenda). Such statement indicates the danger in referring to society while discussing crime: it is never about society, only about a certain part of it, the group sharing a particular set of ideas and values. Interests of the state are a reasonable alternative. Those are never free from political agenda (in this way state interacts with society), but also measured by more objective categories, such as economical wealth, scientific/technological development, international status, ability to maintain order and protect itself etc. State also changes much slower than society; it enforces rule of law that protects an individual from pressure of ideological groups. So, financial crimes are trade operations contrary to interests of state and/or individual, criminalised by the legislative body. It is important to note that deeds which are not legally criminalised cannot be considered crimes, no matter how unpopular those are in public opinion.

Status of research. In the criminological aspect the works of E. Saterland, D. Harko, V. Bilous, V.V. Luneyeva, O. Kalman, V. Glushchenko, O. Dudorov, A. Klimenko, O. Gorban, I. Karpets, Y. Muravska, O. Turchinov, V. Lysenko. I. Rusakova, A. Tolkushkina, M. Padeiskiy were devoted to the study of financial crimes. D.M. Harko includes the presence of the duality − both physical and legal persons to the characteristic features of economic crime from its subjects. For an individual, it is important to pay attention to the characteristic motivation of the offender's behavior: he does not feel himself as an offender, he believes that criminal activity he commits for the sake of business or state interests, because his actions are not directed against specific citizens or entrepreneurs [23, p. 598].

Issues of financial investigations in the countries of the European Union are presented in the works of J. Manning, G. Pasco P. Baker, R. L. Dernberg, J. Pepper, H. Lukoti, Kr. Janni, A. Filip, K. Sicker, V. Gasner, K. Vogel and others.

The European Union manages huge financial resources that become the subject of criminal acts. According to Y. Muravsky, the purpose of a large number of criminal acts is to generate profits by individuals and the processing of these criminal proceeds to conceal their illegal origin. According to the author, the Financial Crime Investigation Service (FCIS) was established in the context of the effective construction and maintenance of the Lithuanian economic security system. The mission of the Financial Crime Investigation Service is to protect the state financial system by detecting criminal acts and other violations of the law [21, p. 161].

The Object and Purpose of the Article is a study of normative legal regulation of financial crimes in the conditions of a free market, the rationale for the consideration of the specifics of the types of financial crimes committed, the reasons for their commission and aspects of government prevention in the UK.

Presentation of the main material. There is no single definition of financial crime: they vary between jurisdictions and academics. International Monetary Fund provides in its Background Paper several possible variants. The broadest is "any type of illegal activity that result in a pecuniary loss" [11], but it is too broad to properly reflect its nature and distinguish it from other crimes that involve property, such as, for example, robbery. Narrower definitions include "non-violent crime resulting in a pecuniary loss [that] also involves a financial institution" [11]. But not only financial institutions can be perpetrators, so this definition is too narrow.

Lepsky S.I. determines that financial crimes are understood as a generalized concept that extends to a variety of types of illegal activities related to the receipt, use and distribution of financial resources, namely: counterfeiting of securities and money, money laundering, fraud with credit cards, violation of tax laws, etc. [20, p. 190].

Looking at crime through such context allows developing a better understanding of how to decide, which deed should be crime, and which should not. Trade nature of financial crimes makes it harder, since there is a smaller, sometimes purely artificial difference between lawful and unlawful acts. It is obvious for people that murder, theft or rape are illegal. It is not that obvious how trade using inside information is different from trade in common conditions, except for a better chance of favourable outcome. Loss and gain are both natural results of financial operations; there is always risk of failure, as well as a chance of profit. Still, some actions bring harm that on a larger scale outweighs all potential advantages. And those are actions that should be (and in most jurisdictions already are) financial crimes.

Next important question is: what are those potential advantages against which harm should be measured? Those are not of a harmful act itself, but of free market which allows it to happen while also allowing business to enjoy a great number of options for development. It offers fewer restraints, less bureaucratic encumbrance – and less control. There should be, of course some reasonable regulations, such as legislation against fraud, misrepresentation and tax evasion, but strict criminal punishment should be the last

remedy. Firstly, it is hard for prosecutors to make their case in court, particularly because of mens rea element (as it should be, for high standard of proof is there to ensure that individual is protected against the powers of state), and enforcement consumes giant amount of time and resources on behalf of the state. Secondly, large amount of criminalised deeds does not make sense from economical point of view: state should prioritise closing the financial gap over inflicting punishment, since existence of such financial gap is the essence of the problem, and criminal justice is not the most effective way to solve it. Civil or administrative proceedings are better suited for recovering the loss. Also, other methods are worth considering, especially those aiming at making individuals and businesses interested in lawful behaviour. For example, business that pays the full amount of due tax, and an additional fee, may be granted certain attractive benefits. If tax is reasonably low, business would then see more advantages in paying it.

On the other hand, it may be argued that criminalisation and enforcement are supposed to prevent initial harm inflicted by unlawful behaviour. There are people who are convinced that changes in legislation are not absolutely necessary; they are arguing that the more enforcement there is, the more weight would it have in the eyes of the public, and as a result, financial crime will decrease. Such was the view of Professor Sutherland: in his book "White collar crime" he wrote that "laws, to a considerable extent, are crystallizations of the mores, and each act of enforcement of the laws tends to reinforce the mores" [18].

Understanding that crimes have unavoidable consequences and fear of imprisonment are likely to reduce the number of people willing to take the risk. Enhanced enforcement would influence their perception of crime and make it less acceptable. It might well be true; legislator is thus facing a choice, whether it is better to act through deterrence and compulsion, or through encouragement and support. Healthy balance between these two sides is necessary, and it is best determined by evaluation of outcome. Still more challenging is such evaluation in cases of financial crime that does not, in fact, cause any direct (and, arguably, indirect) loss. For example, money laundering, which is not aimed at gain, rather at retaining valuables already acquired: it makes process of investigation harder for the law enforcement, but of itself does not cause any financial loss.

Some would support the claim that recent financial crisis happened as the result of large-scale financial crime. Others specify that not only illegal actions were the cause of it, but also actions that should have been illegal. Such statements reveal their authors' belief that market can be controlled without losing its efficiency. But the very principle that enables enrichment is uncertainty. Uncertainty demands decisions that are based on ability to analyse, understand, gamble and accept the potential of failure; it is a contest of talents and capabilities which are never equal. This is why losses are inevitable, but one man's loss is another man's gain. There are always those who make mistakes and those who benefit from that. Financial crisis was hardly caused by this phenomenon as such, rather by its multiple simultaneous occurrences that together produced too large an effect for economy to deal with. It was not the first time when rapid growth was followed by downfall.

Crisis started in mortgage sector. Mortgage lending was considerably democratised at that point: higher-risk clients (such as low-income families) were able to obtain loans. A number of such mortgages combined formed bundles baked by CDS insurance which were then sold as low-risk. State-sponsored agencies (namely FNMA and FHLMC known respectively as Fannie May and Freddie Mac) guaranteed those loans and contributed to even more high-risk lending. This resulted in initial boost in real property market. But then, predictably, mortgages remained unpaid, banks put real property back on the market, prices dropped, and banks faced a liquidity crisis.

Poor risk management and predatory lending are commonly perceived as main causes of collapse. Dr. Nicholas Ryder and Kerry Broomfield point out that "it is [their] contention that predatory lending practices are one of the important factors that contributed towards the financial crisis" [16]. John Lancaster in his article "Dicing with disaster" states that "[i]f our laws are not extended to control the new kinds of super-powerful, super-complex, and potentially super-risky investment vehicles, they will one day cause a financial disaster of global-systemic proportions" [12].

But this view leaves out of spotlight natural expansion of mortgage sector, role of the Community Reinvestment Act (the CRA) and failure of borrowers to fulfil their obligations. The CRA is, of course, far from being the sole reason behind the pattern of high-risk low-interest (and some high-interest sub-prime) mortgages, and its influence was limited, but it is a good representation of regulations and general mindset that enabled and facilitated this pattern [1]. Its goal was to make mortgage available to the low-income persons, but this could never be done without lowering lending standards and encouraging banks to provide low-interest rates (that included offering them lax regulation). Poor people are a high-risk category, and their failure to pay back their loans is predictable [13]. Which does not mean that they are somehow free from their responsibility to do so; we must not forget that it was their own choice to enter into risky agreements. Their responsibility (and responsibility of supporters of political agenda behind the CRA) for financial crisis of 2008 is no smaller, and perhaps even larger than that of banks and business. The latter are supposed to create profit, it is the primary goal of their existence. Misrepresentation occurred on their part with regard to classifying high-risk bundles as low-risk, and this crime contributed to the swing of collapse, extending it to the whole financial system. But the reason of collapse is simultaneous existence of critical mass of high-risk mortgages. If bankers are guilty of failures in risk management, so are those who have backed implementing of mass affordable loans politics, and so are those who have misjudged their own ability to pay their debts.

Modern scientific research, as well as analytical materials prepared by the European Information and Research Center, points out that financial crimes violate the relations related to financial and economic activity, and thus have a destructive character for the economy of the states, inflict a negative investment image for legal entities. For example, according to the Information Guide prepared by the European Information Center at the request of the Verkhovna Rada of Ukraine's Committee dated November 07, 2017, the states (USA, Canada,

Poland, Estonia, Italy) are actively modernizing their own security sectors for the protection of e-commerce, security of electronic transactions and payment tools in response to cyber threats.

According to official statements, such units were created in the United States (U.S. Cyber Command), UK (Government Cyber Security Operations Center), Germany (Internet Crime Unit, and The Federal Cyber Security Operations Center). A leading position in the fight against cyber threats is taken by the leading international security organization (NATO), Cooperative Cyber Defense Center of Excellence. Thus, states are increasingly focusing on the development and protection of their own information resources. Indeed, the perpetrators commit illegal actions related to money laundering, are engaged in the sale of information on the number of bank cards [19].

In addition, the fight against financial crime of the EU is actively being developed. Thus, the provisions of Directive 2015/849 "On the prevention of the use of the financial system for money laundering or terrorist financing" apply to credit and financial institutions, physical and legal persons (auditors, auditors, tax advisers, notaries) [4]. The Directive contains provisions on: simplification of procedures for cooperation and exchange of information between member states of EU in identifying and monitoring suspicious transaction of money transfer for the purpose of preventing criminal activity, establishing clear disclosure requirements for beneficiaries of companies for the development of a coherent policy for non-EU countries and do not have a policy to combat money laundering and terrorist financing [22].

Now, ten years later, we still refuse to recognise the responsibility of a common borrower. Partly it is explained by self-defence strategy of political agenda that promotes social benefits, but also by shared fear of uncertainty. There are only two options: to accept the fact that the next global financial crisis will inevitably happen, or try and predict what would cause it in an attempt to prevent market's collapse. It appears to be very hard, if possible, to control judgement of every person taking a loan; imposing more regulations on business seems to be a simpler and more popular solution. The EU calls for criminalisation of insider dealing, market manipulation and for stricter punishments, including longer prison sentences [5]. Still, this is called "minimum rules", and "Member States are free to adopt or maintain more stringent criminal law rules for market abuse [5]". The EU is convinced that mild regulation of some Member States may cause significant negative consequences for the whole European market, and this is supposed to justify a demand to change criminal law of a sovereign state.

Given that the UK is leaving the EU, these particular provisions may no longer be relevant, but British legislation also offers a considerable amount of criminal deeds. Fraud Act 2006 determines that a person is guilty of fraud if their act (or failure to act) falls within the scope of false representation with intent to make a gain or cause a loss, failing to disclose information, or abuse of position (if a person "occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person" and "dishonestly abuses that position" with intent to make a gain or cause a loss) [10]. Companies Act 2006 recognises the offence of fraudulent trading (with a quite broad definition of "fraudulent trading": "any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose") [2] and provides a maximum custodial sentence of 10 years [8].

Fraud Act seems to fulfil its deterrence role, since the Act received praises for being straightforward and increasing the number of defendants willing to plead guilty [15]. Additional regulation is provided by Financial Services and Markets Act 2000 and Financial Services Act 2012, allowing disciplinary measures to be taken by the appropriate regulator with regard to regulated activities. The latter are defined as activities "of a specified kind which is carried on by way of business" and "relates to an investment of a specified kind" or "in relation to property of any kind" [9]. And, of course, there is Criminal Finances Act 2017 that regulates a number of questions relevant to financial crime, including money laundering, tax evasion, enforcement, and civil recovery etc., a countermeasure against risk management, terrorist funding and unlawful enrichment [3]. So, response of the UK legislation to the problem of financial crime is, at the very least, adequate.

British politicians are calling for greater enforcement. George Osborne in his Mansion House speech stated that "it must be right that we focus on accountability of individuals" and that "individuals who fraudulently manipulate markets and commit financial crime should be treated like the criminals they are – and they will be" [14]. Gordon Brown formulated his thoughts in no less decisive way, saying that "if bankers who act fraudulently are not put in jail with their bonuses returned, assets confiscated and banned from future practice, we will only have a green light to similar risk-laden behaviour in new forms" [6]. The latter statement is a particularly curious reflection of a left-wing political agenda. It most probably will not have any real legal consequences though, at least not until the majority in the Parliament would be ready to share such radical views. But it gives us an understanding that concerns about absence of popular disapproval of financial crime are not well-grounded.

The UK government generously finances institutions aimed at preventing and punishing financial crime. Director of Public Prosecutions indicated in his 2013 speech that "as part of the 2010 Spending Review settlement, HMRC was allocated additional resources (£900 million over 4 years) to tackle the problems of tax evasion and avoidance" [17]. Initiatives such as "Fighting Fraud Together" unite efforts of all essential organisations, from the Government and police to professional associations [7]. It cannot be said that financial crime does not receive enough attention from the state as well.

Still the question remains: if deterrence is important, are there any methods that offer more efficiency? In fact, there are, and those methods include concentration on ordinary people rather than on the rich or on the big business. This is already being done in the UK with regard to taxes [17], and this policy should be extended. Firstly, ordinary perpetrators are responsible for a large share of financial crime. Secondly, their crimes are easier detected and easier proved in court, so it makes more economical sense to prosecute them. Thirdly, it sends a powerful message that their crimes shall not be tolerated. If reckless banking should be a crime punishable by prison sentence, maybe it is time we reintroduce

debt prisons as well? This might help to emphasise seriousness of the high-risk loans problem and encourage people to make choices responsibly. But then, such decision would be extremely unpopular despite its consistency with "deterrence through enforcement" policy, probable effectiveness and justice of treating both sides of a loan agreement equally.

Legislation drafting is another issue. It is best to have legislation worded as narrowly as possible, or, in other words, as widely as absolutely necessary to ensure protection of vital interests of state and individual. It may be harder for prosecutors to make a case, but it is would be easier for lawyers advising business to determine whether a particular action is legal or not, and warn their clients against illegal strategies. It would bring clarity and certainty into regulation, providing business with a firm ground to stand on, which is extremely important given the amount of uncertainty they have to face and work with on a daily basis.

Conclusion. Overall, each particular understanding of financial crime relies heavily on system of values and political beliefs that, in turn, determine priorities. This explains why it is so hard to find a common ground: there are numerous arguments on both sides regarding market regulation, enforcement is facing ideological, legal and financial obstacles, and popular perceptions remain indefinite. A lot of attention is devoted to influencing public opinion, and there is a reason why it is so. No decisive effort may be undertaken until consensus is reached, which is unlikely to happen in the nearest future, if ever. But perhaps it is for the best: unsettled situation provides greater flexibility and faster reaction to various changes of circumstances. It is doubtful that financial crime would ever disappear, or that global financial crisis would never happen again. It will, probably sooner than later as markets grow and new sectors develop. Amount and areas of regulation would be in a constant process of change as well. EU directives will not have power in the UK once Brexit is complete, and whether or not the UK will choose to implement similar legislation remains yet unknown. There is always a possibility that alternative, more effective ways of reducing harm caused by financial crime will be found in future.

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ПРАВОВАЯ ОСНОВА ДЕЯТЕЛЬНОСТИ ОРГАНОВ ПОЛИЦИИ ГОСУДАРСТВ-ЧЛЕНОВ ЕС В ПРОТИВОДЕЙСТВИИ ТРАНСНАЦИОНАЛЬНЫМ ПРЕСТУПЛЕНИЯМ

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АННОТАЦИЯ

В статье проанализированы положения учредительных договоров ЕС, акты вторичного законодательства, регламентирующие сотрудничество органов полиции государств-членов ЕС в противодействии транснациональной преступности. Изложен перечень актов Союза, определяющих виды транснациональных преступлений, среди которых: организованная преступность, торговля людьми, детская порнография, наркобизнес, киберпреступность, терроризм и др. Определены направления деятельности Союза в целом и его институтов в этой сфере, а также задачи полицейских органов. Сделаны соответствующие выводы и рекомендации, направленные на усовершенствование сотрудничества в сфере противодействия транснациональной преступности.

Ключевые слова: законодательство, органы полиции, правовая помощь, сотрудничество, институты, транснациональные преступления.

LEGAL FRAMEWORK FOR COUNTERING TRANSNATIONAL CRIME BY THE POLICE AGENCIES OF THE EU MEMBER-STATES

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SUMMARY

The article analyzes the provisions of the EU founding treaties, legal acts of secondary legislation governing the cooperation of police agencies of the EU member-states in countering transnational crime. The author presented the list of EU legal acts defining the types of transnational crime, including: organized crime, human trafficking, child pornography, illicit trafficking in drugs, cyber-crime, terrorism, etc. The directions of activity of the Union as a whole and its institutions in this area, as well as the tasks of the police agencies are defined. Relevant conclusions and recommendations are made aimed at improving cooperation in the area of countering transnational crime.

Key words: legislation, police agencies, legal assistance, cooperation, institutions, transnational crime.

Постановка проблемы. Глобализация и растущая мобильность людей в Европейском Союзе создают новые возможности для трансграничной преступности. Среди определенных видов угроз, требующих высокого уровня скоординированных действий полицейских органов и других правоохранительных структур ЕС в 2009 г. в Сообщении Комиссии Европейскому Парламенту и Совету – Область свободы, безопасности и правосудия, служащая гражданину, указаны международная организованная преступность, торговля людьми, детская порнография в интернете, киберпреступность, экономическая преступность (отмывание грязных денег, фальшивомонетничество), наркотические вещества, терроризм [1].