

Sustainability Issues of Business Security in Ukraine: Risk Factors of the Corporate Criminal Liability

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The article deals with recent changes in the Ukrainian criminal legislation, which concerns the activities of the criminal-legal character introduction against legal persons (quasi-corporate criminal liability) in the context of risk factors for sustainable business development.

Keywords: business security, corporate criminal liability, corporate social responsibility, crime, risk factors, sustainability of business.

Verslo saugumo tvarios plėtros Ukrainoje klausimai: juridinių asmenų baudžiamosios atsakomybės rizikos veiksniai

Straipsnyje aptariami naujausi Ukrainos baudžiamosios teisės pokyčiai, susiję su baudžiamosios teisės priemonių (*kvazi baudžiamosios atsakomybės*) įvedimu juridiniams asmenims, atsižvelgiant į rizikos darniai verslo plėtrai veiksnius.

Pagrindiniai žodžiai: verslo saugumas, juridinių asmenų baudžiamoji atsakomybė, juridinių asmenų socialinė atsakomybė, nusikaltimas, rizikos veiksniai, verslo tvarumas.

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Introduction

Since the cardinal review of approaches to the substance and corporations illegal actions in the criminal legal sense (and this revision occurred on the verge of the 19th–20th centuries), more and more scholars believe that criminal laws can and should be applied to corporations to ensure their responsibility to society. However, the corporate criminal liability (or the criminal liability of legal entities) faces many questions, problems and mistakes, so criminal legal norms, that originally are designed to apply to individuals, now must include legal fictions. At the same time, the false or knowingly unlawful bringing of a legal person to criminal liability are the factors of increased risk for the sustainable development of business and business security.

As the Ukrainian lawyer in criminal cases M. Khahula rightly notes, legal entities, as organizations, unite the will and interests of different individuals, from the founders (participants) of this legal entity to its with ordinary employees. Each of them, within the limits of his authority, can act on behalf of the legal entity, but very often they commit such actions in their own interests, but not in the interests of a legal entity. In addition, the need to punish the legal entity for the actions of its representative is at least questionable (Khakhula, 2003). Moreover, the application of corporate criminal responsibility should be considered in the context of obstruction of sustainable business development and possible negative consequences in relation to:

- 1) the minority shareholders who are not able to influence the actions of the authorized persons of the corporation, but as a result of unlawful actions, the latter will lose their income in the form of dividends (in case of imposing property sanctions on the corporation – a fine or confiscation of property) or shares in general,
- 2) the hired workers who can generally remain unemployed (due to the state reduction that are associated with significant financial losses of the corporation, related to the imposition of property sanctions, or in the case of a legal entity liquidation).

At the same time, it should be emphasized that corporate criminal liability is provided by the legislation of only certain states and, importantly, they have not achieved, due to this fact, any real positive results in crime counteraction. At the same time, the practice of corporate criminal responsibility norms applying in those states where criminal liability is provided, is insignificant (Paseka, 2010), and local enforcement authorities are faced with material and procedural difficulties in implementing criminal law for legal entities (Dudorov, Kamensky, 2015, p. 103–146). An example is the United States, where the criminal liability of legal entities has been used for over a century. However, in American legal literature, the discussions on the feasibility of criminal legal impact on legal entities in the context of the high degree of possible mistakes and abuses probability are continuing. These circumstances raise the objective need to investigate the grounds of corporate criminal liability and the feasibility of this institute functioning in Ukrainian criminal legislation in the context of European integration and ensure sustainable business development.

Literature Review. In Ukrainian criminal legal science, the problem of corporate criminal liability has been discussed over the last few decades. The scholars have expressed various arguments in favor and against the criminal liability of legal entities establishment. Until recently (until 2013) the argumentation against its introduction prevailed. The arguments of the majority of Ukrainian scientists (M. Bazhanov, L. Yermakova, P. Ivantsov, T. Kondrashova, N. Kuznietsova, O. Malynovskyi, V. Popovych, L. Saviuk, R. Mikhieiev, A. Korchahin, A. Shevchenko etc.) seem quite clear and reasonable: because the recognition of a legal entity by the subject of a crime contravenes the fundamental principles of criminal law (in particular, the principles of personal and guilty liability), it does not correspond to the purpose of punishment. It will lead to the negative consequences that will be felt first of all by

the ordinary employees of a legal entity who have no relation to the committed assault (first of all in case of a legal entity liquidation). Instead, it is possible to stop harmful activities of a legal entity by means of other branches of legislation, in particular, civil, economic, administrative, tax, financial, etc. (Gutorova, 2002, p. 157–162; Kharchenko, 2011; Shablysty, 2016). At the same time, the opponents of corporate criminal liability do not exclude the criminal liability of authorized persons of such a legal entity, which are directly guilty of committing criminal acts on its behalf (that seems quite logical).

On the other side, there are many supporters of corporate criminal liability in the post-Soviet area (Antonova E., Samylov I., Grischuk V., Paseka O., Komosko A. etc.), who try to substantiate not only its expediency, but also to prove that legal entities can and should be brought to criminal liability. At the same time, other types of legal liability are supposedly ineffective in the harmful activity of large corporations' termination that are solely guided by business interests and are prepared to involve the lawyers' army, and also to use some corruption schemes for protection against any administrative or civilian means of influence (Antonova, 2011; Samylov, 2008; Grischuk, Paseka, 2017). However, a logical question arises in this context: can corporate criminal liability be considered a panacea from such problems? Therefore, the analysis of the arguments that are expressed in the special literature leads us to think about the weakness of the arguments of corporate criminal liability' supporters.

In particular, as the Ukrainian researcher V. Popovich notes, the supporters of legal entities criminal liability and developers of relevant proposals to criminal legislation do not offer anything, but simply ignore the traditional categorical apparatus and methodological foundations of the criminal liability institute; they do not take into account the category of "intention," "guilt," and a number of other categories that, etymologically, may be inherent only to individuals (Popovych, 2009).

The critical attitude to the corporate criminal liability is present in American legal literature. In particular, in the publications of American scholars, we found specific remarks regarding the violation of the theoretical foundations of American criminal law (Hasnas, 2009, p. 1329); the ineffectiveness of corporate criminal liability, the absence of a preventive component in it (Simpson, 2002); the possibility of corporate criminal liability applying for political reasons (Thornburgh, 2009). Such remarks are important in the context of further analysis of methodological problems and risks of corporate criminal liability.

The purpose of the article is to consider the problems of introducing corporate criminal liability in Ukraine and to identify the risks associated with its application in the context of sustainability issues of business security.

1. Methodological Problems of the Grounds of Corporate Criminal Liability

In Ukraine, until 2013, the issue of criminal liability of legal entities was considered only within the theory of criminal law. In the lawmaking process, this idea was discussed in the 1990s, when developing one of the two Criminal Code draft. But it was severely criticized and rejected because of the impossibility of recognizing a legal entity as the subject of a crime. As a result, the Verkhovna Rada of Ukraine in 2001 endorsed and finally approved the draft of Criminal Code of Ukraine, where this institute was absent. However, some time later, the Ukrainian legislators radically changed their position by adopting the Law of Ukraine No. 314-VII of May 23, 2013 "On Amendments to Certain Legislative Acts (Regarding the Implementation of the Action Plan on the Liberalization by the European Union of the Visa Regime for Ukraine as Regards the Liability of Legal Entities)". This law revived the idea of corporate criminal liability in Ukraine as the criminal legal measures in relation to legal entities. Thus, the Ukrainian legislator tried to bypass the abovementioned discussions by establishing a so-called quasi-criminal liability, when

a legal entity is not formally recognized as a subject of a crime, but it is recognized as an entity to which criminal legal measures may be applied.

The first researchers of this legislative novelty (Orlovskaya, 2014, p. 127–130; Yaremko, 2014, p. 89–96.; Yashenko, 2013, p. 123–127) assert that these measures should be considered not in the context of criminal liability of legal entities, but in the context of measures of criminal legal influence, since no refinement in the normative definition of the crime subject (Article 18 of the Criminal Code of Ukraine) was not introduced by the legislator. At the same time, measures of criminal legal influence are a broader concept than criminal liability (the latter is considered as one of the forms of criminal legal influence).

The problem is that, using the notion of “measures of criminal legal character” instead of the “criminal liability” of legal entities, the legislator did not change the essence of such measures in comparison with the punishment, and did not propose new approaches that would indicate the appropriateness of recognizing the legal entity as the subject of criminal legal relations. At the same time, the Ukrainian legislator does not even consider the question of a legal entity guilt existence and the causal link between its activity and the criminal actions of an authorized person (the direct subject of a crime): its guilt (and in essence, the guilt of the whole collective that it forms) is simply foretold and according to the logic of the legislator does not need to be proved. Therefore, one can not but agree that this formulation of the question of legal entity’s liability can lead to negative consequences for enterprises in the form of the growth of production lowering or its complete suspension due to the impossibility of an operational appeal in court of raider competitors unlawful interference to their activities. Thus, first of all, criminality, corrupt bureaucracy, shadow economic relations, that is the crime-causing factors, which directly impede business security and sustainable development of business as a whole, prevails (Popovych, 2009).

USA is one of the few countries where corporate criminal liability was introduced more than one hundred years ago. In 1909, the Supreme Court held in a railroad regulation case (*New York Central & Hudson River R.R. Co. v. United States*) that a corporation could be held criminally liable for the acts of its agents under a theory of what is known as “respondent superior,” or, in non-legalese, “the superior must answer,” or an employer is responsible for the actions of employees performed within the course of their employment.

Despite a centenary experience of holding corporations to criminal liability (or maybe because of it), there are heated debates in American legal literature about expediency of this type of liability. Sally S. Simpson considers the problem of efficiency of corporate criminal responsibility in her monograph *Criminal Law, Crime and Social Control*. As she thinks, criminal law is an ineffective and inefficient deterrent for corporate criminals, because the threat of criminal processing will not produce deterrent effects. At the same time, alternatives to criminal law – specifically “tort” law – can prevent and deter corporate offending (Simpson, 2002).

John Hasnas (Georgetown University) (Hasnas, 2009) used the most critical approach to this problem. The scientist thinks that there is no theoretical justification for corporate criminal liability and argues that the assignment of criminal responsibility to corporate entities is a direct violation of the theoretical structure of Anglo-American criminal law. The case is that in Anglo-American criminal law a crime requires the combination of an *actus reus* – the performance of a legally prohibited act – with a *mens rea* – a particular state of mind with respect to that act. Nevertheless, corporations have no bodies or limbs with which to perform actions and no brains in which mental states can reside. So how then can corporations commit crimes? The Supreme Court answered that question in *New York Central* by importing the tort doctrine of *respondeat superior* into the criminal sphere. Thus, since 1909, the law has been that a corporation commits a crime whenever an employee acting within the scope of his or

her employment for the benefit of the corporation commits a crime. As John Hasnas notes, the only problem with definition of corporate criminal liability is that it violates all of necessary conditions for criminal responsibility. In addition, the problem is that corporate criminal punishment is a form of collective punishment in which the innocent are intentionally targeted for punishment along with, and sometimes in place of, the guilty in order to discourage wrongdoing by individuals.

Therefore, as we see, criticism of corporate criminal liability in the USA has sufficient theoretical and methodological ground. That is why we think that Ukraine should not repeat the same mistakes.

2. Corporate Criminal Liability and International Law

If we analyze the reasons for the introduction of the institute of quasi-criminal liability of legal entities in Ukraine, the main and perhaps the only argument of the Ukrainian legislator was the reference to the international legal obligations of Ukraine provided for by the Council of Europe Convention on the Prevention of Terrorism, the Criminal Law Convention on Anti-corruption, the International Convention on Combating the Terrorism Financing. There may be a false impression that the listed international legal documents consider criminal liability of legal entities as an effective means of eliminating the risks of using a business for unlawful (criminal) purposes. Consequently, corporate criminal liability is perhaps the only proper way for every state that seeks to comply with international standards.

However, this is not true. In fact, the mentioned conventions contain not only provisions that would indicate the need to introduce criminal liability of legal entities. On the contrary, they are about liability that the form of which should be determined by each state independently, based on the peculiarities of its own legal system:

- **Criminal Law Convention on Corruption**, Art.18: “Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person”;
- **Council of Europe Convention on the Prevention of Terrorism**, Art.10: “Each Party shall adopt *such measures as may be necessary, in accordance with its legal principles*, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention. Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences”;
- **International Convention for the Suppression of the Financing of Terrorism**, Art. 5: “Each State Party, *in accordance with its domestic legal principles, shall take the necessary measures* to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.”

Also the reference is made to the Action Plan for the liberalization of the European Union visa regime for Ukraine in the title of Law No. 314-VII. But this document also does not contain any direct indications on the need of criminal liability of legal entities applying. There are, however, the points about the need to prevent and combat corruption, money laundering, organized criminality, terrorist financing, trafficking and drug trafficking. However, the prevention of corruption can occur if the

possibility of criminal liability to legal entities applying is an additional factor of authority abusing by law enforcement officers (by opening of criminal proceedings in relation to legal entities without due reasons) and by judges (by issuing unlawful sentences). In the given circumstances, on the contrary, it will contribute to the growth of corruption, raiding and criminal potential in the sphere of economic relations, deterioration of the investment climate of the state as a whole (Popovych, 2009; Datsiuk, 2015).

3. Risks of Corporate Criminal Liability for the Sustainability of Business

The relevant risks of negative consequences because of insufficiently substantiated or knowingly unreasonable of criminal law norms to legal entities application are even recognized by adherents of corporate criminal liability in American legal literature. In particular, the American researcher L. Derwan, in an article devoted to rethinking of the corporate liability' fundamentals of corporate in the US, notes the following: "In extending criminal liability to corporations, however, it is important to remember that though they are fictitious, corporations are merely collections of people who suffer real and significant consequences when corporate criminal laws are applied. As such, every effort must be made to ensure corporate criminal liability is applied to organizations in a fair and consistent manner, as if the corporations were the very people who fill their ranks" (Dervan, 2011, p. 7–20). Another researcher of corporate criminal liability Anca Iulia Pop also admits that the American system's most important disadvantages are the significant spill-over effects on innocent employees and shareholders, the possible over-detering effect, and the high costs of implementing corporate criminal liability (Pop, 2006). In this regard, the American researchers recognize corporate criminal liability as a powerful law enforcement weapon that can cause catastrophic consequences, and at the same time, it is necessary to adopt rigorous directives for prosecutors and judges in order to ensure a responsible and the proper use of this weapon before applying it. It should be used to punish and deter corporate offences, but not for extortion.

There is hardly any doubt that today the guaranteed assurance of proper and responsible use of this "weapon" in Ukraine is unlikely. So, as O. O. Dudorov and D. V. Kamensky emphasize, "the relevant legislative matter, that is even written out from the theoretical point of view as high as possible qualitatively and well-balanced, is able to turn into a convenient means of redistribution of property and conduct of unfair competition, another corruption-causing factor" (Dudorov, Kamensky, 2015, p. 103–146).

The detailed criminological forecast of negative consequences in the case of criminal liability of legal entities applying cites V.M. Popovich. In his studies, step by step, at the level of causation, it has been shown that such a novel violates the entire categorical system, the entire methodology of the institute of criminal liability, and also provokes the involvement of the operative and investigative apparatus in raiding, corruption process, the reproduction of deviant motivations and criminogenic potential not only in one or another sphere of entrepreneurial activity, but also in the operational investigating apparatus themselves, as it often happens with judges who make decisions that contribute to raider attacks (Popovych, 2009).

Dick Thornburg (former Attorney General of the USA) views the possibility of application of corporate criminal liability for political reasons in his report before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of US House of Representatives (Thornburg, 2009). As an example, he cites a case of Arthur Andersen, one of five largest auditing companies in the world (founded in 1913). In 2002, this company was found guilty of criminal charges relating to the firm's handling of the auditing of Enron, an energy corporation based in Texas, which had filed for bankruptcy in 2001 and later failed. Since the U.S. Securities and Exchange Commission cannot accept audits from convicted

felons, the firm agreed to surrender its CPA licenses and its right to practice before the SEC on August 31, 2002 – effectively putting the firm out of business. Later the Supreme Court overturned the verdict, but it did not put back to work the tens of thousands of partners and employees of that Firm. So this is a case in which a business entity received effectively a “death sentence” based on the acts of isolated employees over a limited period. Herewith, Dick Thornburg sarcastically notes, “[a]s this case illustrates, this is not a partisan issue – Arthur Andersen was prosecuted under a Republican administration.”

4. Corporate Social Responsibility (CSR) and Business Sustainability

Amid criticism of corporate criminal liability in the United States (Hong, Liskovich, 2015; Slaper, Hall, 2011, p. 4–8) and many European countries (Gallardo-Vazques, Sanchez-Hernandez, 2012, p. 103–115; Horobet, Belascu, 2012, p. 24–44; Wolska, 2013, p. 45–53), the idea of corporate social responsibility is quite popular nowadays; it received its justification in accordance with the concept of 3P (people, profit, planet). The essence of corporate social responsibility is the conscious business interest in sustainable development in the social, economic and environmental spheres, that manifests itself in fulfilling the respective responsibilities to the state and society (timely payment of taxes and wages, organization of new jobs and life quality improvement of company employees, participation in charitable activities, environmentally safe production and disposal of hazardous waste, etc.). The realization of such tasks takes place through the social dialogue between the state, public organizations and business representatives in order to implement the relevant principles and rules of corporate governance, adequate response of corporations to the trade unions’ demands, public organizations and local authorities. At the same time, the state should not interfere in the companies’ operational activities, should not impede the implementation of appropriate business security measures, but exercise due control in keeping with the legality of the latter.

Among the main consequences of non-compliance with the principles of corporate social responsibility are public condemnation, boycott, the dissemination of negative information about the company, its activities and media production, and, consequently, as a result, demand decreasing, reduction of production volumes, profit decreasing, etc. (Joseph, 2010, p. 30–35). Therefore, within the framework of corporate social responsibility, the companies bear the risk of reputational losses that have a greater restraining effect than the artificial criminal law impact on corporations. Instead, the subjects that should be attracted to criminal liability (officials, officers, employees) are those who directly commit unlawful acts on behalf of the company.

Conclusions

According to our deep conviction, any criminal legal influence on the corporation is an additional factor of the criminogenic risks that are associated with their activities (including through unlawful pressure on business structures by corrupt enforcers, judges, officials of other state structures that are involved in raider schemes or corporate blackmail schemes, etc.). So the existence of corporate criminal liability provokes a rise in corruption, raiding and criminogenic potential in economic relations and thus impedes the security and sustainable development of business.

Of course, we do not deny that the liability of legal entities needs to be strengthened, but it is quite realistic to realize within the framework of civil, administrative, financial and tax legislation. In contrast, contrary to the generally accepted tendencies for deregulation, in the civilized world, corporate criminal liability actually turns into another form of compulsory state control over their activities.

Therefore, in our opinion, from the standpoint of sustainable business development, a more urgent issue rests within the ideas of corporate social responsibility borrowing, the implementation of which should be carried out in combination with measures of organizational and legal infrastructure for preventing criminal manifestations in the field of corporate relations. At the same time, the solution of social, economic and environmental problems (the 3P doctrine) that are important and painful for the society and the state will bring much more benefits than the artificial and not inherent in criminal law institute of corporate legal liability.

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S u m m a r y

The article discusses the latest changes in Ukrainian criminal law regarding the introduction of criminal law measures against legal entities (quasi-corporate criminal liability) in the context of risk factors for sustainable business development.

The authors analyze the research results of Ukrainian and American scientists and the US experience in the application of corporate criminal liability. In particular, attention is focused on the fact that discussions on the appropriateness of criminal law influence legal entities in the context of a high degree of probability of possible errors, and abuses are still ongoing in American legal literature, given the following: 1) the violation of the theoretical foundations of American criminal law; 2) the inefficiency of corporate criminal responsibility, the lack of a preventive component; 3) the possibility of applying corporate criminal liability for political reasons. Based on an analysis of the provisions of international legal documents and the Action Plan for the liberalization of the visa regime for Ukraine by the European Union, the common thesis that introducing corporate criminal liability is a requirement of international law is refuted.

The position that corporate criminal liability is a factor of increased risk for security and sustainable business development is consistently maintained, because this measure provokes the growth of corruption, raiding and the growth of criminogenic potential in the field of economic relations (including through unlawful pressure on business structures with parties to corrupt law enforcement officials, judges, officials of other government agencies involved in raider schemes or schemes to rporativnogo intimidation and the like). As an alternative, the authors propose to turn to the experience of those EU and US countries where effective measures of corporate social responsibility are introduced today – measures that promote business security and increase the level of business responsibility to society and the state through social dialogue and other non-punitive measures.

Verslo saugumo tvarios plėtros Ukrainoje klausimai: juridinių asmenų baudžiamosios atsakomybės rizikos veiksniai

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S a n t r a u k a

Straipsnyje aptariami naujausi Ukrainos baudžiamosios teisės pokyčiai, susiję su baudžiamosios teisės priemonių (kvazi-korporatyvinės baudžiamosios atsakomybės) įvedimu juridiniams asmenims, atsižvelgiant į rizikos darniai verslo plėtrai veiksnius.

Autoriai analizuoja Ukrainos ir JAV mokslininkų tyrimų rezultatus, JAV patirtį taikant juridinių asmenų baudžiamąją atsakomybę. Visų pirma atkreipiamas dėmesys į tai, kad Amerikos teisės literatūroje tebevyksta diskusijos dėl baudžiamosios teisės įtakos juridiniams asmenims, dėl didelės galimų klaidų ir piktnaudžiavimų tikimybės, atsižvelgiant į šiuos dalykus: 1) Amerikos baudžiamosios teisės teorinių pagrindų pažeidimus; 2) juridinių asmenų baudžiamosios atsakomybės neefektyvumą, prevencinio komponento nebuvimą; 3) galimybę taikyti juridinių asmenų baudžiamąją atsakomybę dėl politinių priežasčių. Remiantis tarptautinių teisinių dokumentų nuostatų ir Ukrainos Europos Sąjungos vizų režimo liberalizavimo veiksmų plano analize, paneigiama bendra tezė, kad įmonių baudžiamosios atsakomybės įvedimas yra tarptautinės teisės reikalavimas.

Nuosekliai laikomasi pozicijos, kad juridinių asmenų baudžiamoji atsakomybė yra padidėjusios saugumo ir tvarios verslo plėtros rizikos veiksnys, nes ši priemonė provokuoja korupcijos, reidų ir kriminogeninio potencialo augimą ekonominių santykių srityje (įskaitant neteisėtą korumpuotų teisėsaugos pareigūnų, teisėjų, kitų vyriausybinių agentūrų, dalyvaujančių reidų schemose ar bauginimo schemose ir pan., spaudimą verslo struktūroms). Kaip alternatyvą autoriai siūlo atsižvelgti į tų ES šalių ir JAV, kuriose šiandien diegiamos veiksmingos įmonių socialinės atsakomybės priemonės, patirtį – priemones, skatinančias verslo saugumą ir didinančias verslo atsakomybę visuomenei ir valstybei per socialinį dialogą ir kitas nebaudžiamąsias priemones.