ECONOMIC CRIMINALITY IN THE EUROPEAN UNION

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Abstract

Paradoxically, economic criminality is based both on fulminant technological developments and centuries-old human traits: greed, desire for power, attachment to material values, luxury. According to Europol reports, there are over 3600 economic organizations in the European Union with a high level of expertise supported by great mobility and connectivity. The magnitude of this phenomenon and the risks it entails in relation to the rule of law, with national and EU budgets have led states to work together to create a complex and effective form of cooperation for the prevention, combating and sanctioning of economic criminality. A large number of Member States of the European Union already have some form of administrative synergy, even if it is not so named.

Key words: Criminality, Fraud, European Union, evasion, taxes.

Criminality is a social phenomenon. Once criminality exists and develops in society, it results that it is also a product of it. Criminality itself is not conditioned by the biological nature of man, although it can manifest a critical criminogenic influence in the genesis of criminal behavior. Being a dangerous product of society, criminality causes considerable damage. For these reasons, the fight against this phenomenon requires to the greatest extent the elaboration and application of social measures, which give obvious results in controlling it.

The social origin of crime is based on researches carried out in different countries of the world. Resolutions, guiding principles, analyzes, and other materials of UN conferences focusing on explaining, preventing, and controlling the criminal phenomenon stem from the social nature of crime.

UN Member States have agreed since 1994 that they need to establish a common definition of organized criminality in order to make national measures as homogeneous as possible and to ensure the effectiveness of international cooperation. Thus, a first definition of "organized crime" is found in the World Plan of Action against Transnational Organized Crime. The UN General Assembly has thus tried to make a first definition in relation to the illegal activities committed, ranging from international vehicle theft to the sale of nuclear products, illegal immigration, environmental crime, cybercrime, trafficking in women and children and getting to corruption.

Subsequently, international institutions have not defined the concepts of "organized crime" or "organized criminality", but have understood to relate to this phenomenon by the concept of "criminal organization". In general, both Interpol and Europol define the "criminal organization" as a company or group of people engaged in permanent illegal activities, hired beyond national borders and whose main purpose is to obtain profit.

In 1998, the Council of the European Union - Justice and Home Affairs also defined the concept of "criminal organization" as "a structured association of more than two persons, established over time, acting concertedly to commit offenses punishable by a custodial sentence or the deprivation of liberty for a maximum of four years or a more severe punishment, whether these offenses are a purpose in itself or a means of obtaining material advantage and, where appropriate, to unlawfully influence the functioning of public authorities."

The United Nations Convention against Transnational Organized Criminality, adopted in New York on 15th of November 2000 (hereinafter referred to as the "Palermo Convention") replaces the phrase "criminal organization" with "organized criminal group". Thus, according to Art. 2 letter a) "organized crime group" is a "structured group composed of three or more

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persons who have existed for a certain period of time and are acting in arrangement for the purpose of committing one or more of the serious offenses or offenses provided for in this Convention, in order to obtain, directly or indirectly, a financial advantage or other material advantage". It may be considered relevant in defining the concept and the fifth United Nations Conference, which drafted the Resolution "Crime as a Form of Business". The resolution highlights four criteria considered to be defining for organized criminality, namely:

- the purpose, respectively, obtaining substantial gains;
- the connections, respectively, the existence of well-structured and hierarchically defined relationships within the group;
- the specifics, respectively, the valorization of the attributions and the work relations of the participants in the group;
- the level, respectively, occupation by the group's participants of higher positions in economy and society.

The Council of Justice and Home Affairs (JHA), through the Framework Decision No. 2008/841/JHA on the fight against organized crime, repealed Joint Action No. 98/733/JHA and redefined the criminal organization as follows: "a structured association, established in time by more than two persons, acting concertedly to commit offenses punishable by deprivation of liberty or the enforcement of a measure of deprivation of liberty of at least four years' duration or a more severe punishment in order to obtain, directly or indirectly, a financial or other financial benefit". (https://eur-lex.europa.eu/legal-content/ro/TXT/?uri=CELEX%3A32008F0841)

Tax evasion

The notion of fraud comes from the Latin word *fraus, fraudis*, which means deception, prejudice, misdemeanor.

Tax evasion is defined by the European Commission (https://ec.europa.eu/taxation_customs/business/company-tax) as a situation that occurs when some companies use aggressive tax planning to minimize the tax burden. This often involves companies that exploit the legal loopholes of tax systems and the inconsistencies between national rules to artificially change profits to jurisdictions with low or zero tax systems.

The issue of taxation is a matter of immediate importance for any state or governmental structure, representing the main means available for fundraising. The state apparatus then uses them to provide the basic services that constitute the essential obligations and the consideration for the "social contract".

Value Added Tax was introduced into the European Community in 1970 through a series of Directives. It was intended to replace some of the former taxes on production and consumption and to allocate a percentage of VAT revenue (calculated on an integrated basis) to finance the Community budget, thereby facilitating the harmonization of VAT rules between Member States. The Sixth VAT Directive (77/388/EEC) provided a common basis for Community financing by applying the same transaction tax in all Member States and, at the same time, introducing an integrated calculation basis. The Sixth Directive contains definitions and principles of value added tax relating to the application of a general and non-cumulative consumer tax levied at all stages of production and distribution. Thus, VAT rules imply equal treatment of domestic and imported goods and services and a neutral tax-pricing ratio.

Legislation is made up of the following EU Regulations and Directives:

- Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation;
- Council Directive 77/1070/EEC;
- Council Directive 89/130/EEC on the approximation of the composition of GDP at market prices;

- Council Directive 89/1553/EEC on integrated rules for the collection of own funds resulting from VAT;

- Council Directive 93/454/EEC on the definition of taxes on production and imports;

- Council Directive 94/168/EEC on implementing measures;

- Council Regulation 218/92/EEC on administrative cooperation in the field of indirect taxation (VAT);

- Commission Decision no. 98/527/EC on the treatment of VAT fraud for national accounting purposes (discrepancies between theoretical and actual VAT invoices);

- Regulation of the European Parliament and of the Council 2516/2000/EC of 7 November 2000;

- Council Resolution of 10 February 1975 on measures to be taken by the Community to combat tax evasion and avoidance (OJC 035 14.02.1975 p.1);

- Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 13 November 1991 on the protection of the Community's financial interests (OJC 328 17.12.1991 p.1) (https://eur-lex.europa.eu/collection/eu-law/eu-case-law/reports.html).

Fiscal sovereignty is one of the fundamental rights of the EU Member States which, in this area, have given the EU only limited powers. Since the process of tax rules is geared to the unimpeded functioning of the single market, the harmonization of indirect taxation rules began at an earlier stage and, unlike the rules on direct taxation, required a more in-depth review of regulations in force. In parallel to these efforts, the EU is stepping up its fight against evasion and tax evasion, which is a threat to fair competition and is the cause of a major budget deficit.

Under the Treaty, fiscal measures should be adopted by the Member States unanimously. Tax policy is largely influenced by the case-law of the European Court of Justice, and the European Parliament has the right to be consulted in this respect, except for budgetary matters, for which Parliament, in its capacity as budgetary authority, decision-making powers with the Council.

Combating tax evasion and aggressive tax planning is a key challenge. Improving cooperation and coordination and increasing transparency in EU tax policy relations among Member States would allow Member States to avoid significant revenue losses and help to ensure a higher level of equity across the Union.

The recent European and international measures also place good fiscal governance among the means of combating tax evasion and tax evasion, considering that this scourge occurs within a state's borders but crosses more states both within the European Union and beyond its borders, the efforts of a single state are not enough to fight effectively.

In this regard, at European and international level, the concept of good fiscal governance is increasingly being debated in European and international institutions, minimum standards of good fiscal governance are being developed and there are also concerns for finding the best legal means to combat the scourge of fraud and tax evasion. Thus, new structures such as Eurofisc and the Platform for Good Tax Governance, Aggressive Tax Planning and Double Taxation were created in 2013.

Promoting good governance in the tax area requires action both at the European Union level and at Member State level. So, if good governance in the tax area improves within the European Union, Member States will benefit from it.

At the beginning of 2016, as part of its actions to promote good tax governance, the European Union has developed a package of anti-tax evasion measures that are part of the Commission's ambitious program for a more balanced, simpler and more effective company taxation within the Union.

The package includes concrete measures to combat aggressive fiscal planning, improve tax transparency and establish fair tax competition for all companies in the European Union. The Union has appreciated that this package of measures will help Member States to take firm and coordinated action against tax evasion. These include the Proposal for a Council Directive laying down rules against tax evasion abolition practices that directly affect the functioning of the internal market, based on the conclusions of the European Council of 18 December 2014 which underlined the "urgent need to step up efforts to combat tax evasion and aggressive tax planning, both at global and Union level." (http://www.nos.iem.ro/bitstream/handle/123456789/1143/10-Dragodan%20Arina.pdf?sequence=1&isAllowed=y)

This Directive establishes common minimum rules for combating tax evasion practices directly affecting the functioning of the internal market, namely rules to combat erosion of the tax base and transfer of profits agreed within the Organization for Economic Cooperation and Development (OECD). This is part of the Commission's anti-tax avoidance package, which addresses a number of important new business developments and important political priorities in the field of company taxation, which require a rapid response at EU level.

However, inconsistencies and gaps in implementation by Member States need to disappear. On 12 July 2016, was adopted the Directive (EU) 2016/116430 laying down rules against tax evasion practices which have a direct impact on the functioning of the internal market and which applies to all taxpayers who are subject to corporation tax in one or more Member States, including permanent establishments in one or more Member States of entities resident in a third country.

The directive proposes six strict anti-abuse measures that all Member States will have to transpose into national law and implement them in order to combat common forms of aggressive tax planning, namely: interest deductibility, exit taxation, the clause "Switch-over" (the transition from the tax exemption to the granting of credits), the general anti-abuse rule, rules on foreign controlled companies (FCC) and a framework for combating non-uniform treatment of hybrids.

As regards the transposition and applicability of the new European provisions, the Directive requires Member States to adopt and publish by 31 December 2018 the laws, regulations and administrative provisions necessary to comply with the Directive and the application of the provisions of the new Directive by the Member States will be made as of 1 January 2019. The new rules sought to establish rules to strengthen the average level of protection against aggressive fiscal planning in the internal market.

Since these rules should fall under 28 different national corporate tax systems, the Directive provides that they should be limited to general provisions and allowed to be implemented by the Member States as they are more well placed to define the specific elements of the rules in the most appropriate way for their corporate tax systems.

This objective has been achieved by creating a minimum level of protection for national systems of company taxation against tax evasion practices throughout the Union. As judged in the doctrine, "the transposition of a directive into national law does not require the adoption of specific rules of expression, with a general legal framework favorable to achieving that outcome." Also, the general rules for combating abuse in tax systems have the role of combating an abusive practice in this area, which has not yet been regulated by specific provisions.

In addition, the Directive has been developed considering it is important to ensure that general rules for enforcement are applied nationally, within the Union and in relation to third countries in a uniform manner, so that their scope and outcomes in internal situations and cross-border should not differ. Member States should not be prevented from applying sanctions in cases where the general anti-fraud rule is applicable.

In the fight against fraud and tax evasion, an important role is played by the Organization for Co-operation and Economic Development within which were elaborated conventions containing provisions on international standards on the transparency and exchange of information in the tax field, providing all possible forms of tax cooperation to combat fraud and tax evasion, a priority for all states.

Money laundering

Money laundering is the de facto financial part of all the crimes that make a profit. It is the process by which offenders attempt to hide the origin and real possession of income from their criminal activities. If successful, this activity will allow control of these revenues and, ultimately, provide legitimate cover for the source of their income.

The purpose of a large number of criminal activities is to generate profit for the individual or group that is committing the offense. Money laundering is the processing of these crime outcomes in order to hide their illegal origin. This process is of critical importance because it offers the offender the opportunity to enjoy the proceeds of crime without revealing their provenance. Money laundering is a process by which an illegitimate gain is obtained by criminals who, without being compromised, benefit subsequently from the amounts obtained.

There is no single money laundering method. The methods can range from buying and selling a luxury item (e.g. a car or jewelry) to money through a complex international network, legal business, and ghost companies (companies that exist only as legal persons without having business or doing business).

Initially, in the case of drug trafficking or other offenses such as smuggling, theft, blackmail, etc., the resulting funds usually take the form of liquid money that must be introduced by any method into the financial system. Traditional bank deposits, money transfer and lending systems provide a vital money-laundering mechanism, especially in the initial phase of introducing cash into the financial system.

Despite the variety of methods used, the money laundering process is carried out in three stages that can include many transactions made by money laundering, transactions that are likely to alert financial institutions to criminal activities, namely:

1. Placement: Represents the “escape”, in its own right, of cash obtained from illegal activity, to separate funds from illicit sources that could be supervised by law enforcement. In the initial stage or of placement in money laundering, the offender introduces his or her illegal profit into the financial system. This can be done by dividing large amounts of cash into smaller and less suspicious amounts that are then deposited directly into a bank account or by buying a number of financial instruments (checks, promissory notes, etc.) that are then collected and stored in accounts from another location.

2. Stratification: After the funds are entered into the financial system, there is a second stage - stratification. It is the process of moving money between different accounts to hide their origin. At this stage, the money laundering undertakes a series of changes or movements of funds to remove them from their source. Funds can be directed to buying and selling investment instruments, or the launcher can simply send funds through electronic transfer to a series of accounts from various banks across the globe. The use of several geographically remote accounts for money laundering is mainly used in those jurisdictions that do not cooperate in anti-money laundering investigations. In some situations, money laundering may disguise transfers as payments for goods and services, thereby giving them a legitimate appearance. The separation of illicit revenue from their sources by creating complex layers of financial transactions designed to mislead control bodies and ensure anonymity.

3. Integration: Once the crime’s processes successfully went through the first two steps of the money laundering process, the money laundering goes to the third stage in which the funds re-enter the legal economic circuit. The launderer can then choose to invest the

funds on the real estate market, luxury goods or business. If the stratification process is successful, integration schemes will once again send the laundry results to the economic circuit, so they will re-enter the financial system by appearing as normal and "clean" funds from commercial activities.

The three basic steps can be in separate and distinct phases. They may appear simultaneously or, more commonly, may overlap. The way in which the basic steps are used depends on the available scouring mechanisms and the requirements of criminal organizations.

In the money laundering process, some vulnerabilities were identified, which were difficult to avoid by the money laundering unit and therefore easily recognizable, namely:

- placement of cash in the financial system;
- passing cash across borders;
- transferring cash to and from the financial system.

Conclusions

Direct tax harmonization in the European Union usually had a slow pace and limited scope. For decades, Member States have ensured their fiscal sovereignty, showing a strong reluctance to agree on common solutions in this sensitive area. Some proposals that have stood for many years on an EU political agenda have progressed now.

However, this dynamic seems to have changed dramatically in response to the recent priorities of establishing rules against tax evasion and tax transparency practices. Progress made so far towards their implementation seems unprecedented.

This has happened because, as is well known, the collection of taxes and duties and the fight against tax fraud and evasion are the competences of the Member States of the European Union. However, in a world where globalization is progressing, the European Union and the Member States need to work together both within the Union and internationally with other third countries to combat this scourge. In the fight against tax evasion, international cooperation through good fiscal governance plays a key role, sharing information between the tax administrations of states being fundamental.

As a result, the new means of combating tax evasion and avoidance adopted within the European Union and at international level provide the Member States with a legal framework and the necessary tools to effectively address cross-border tax issues and to exchange best practices.

In the tax area, the European Union accepts the existence of different Member States' legislation as a consequence of fiscal sovereignty. In turn, national fiscal policies differ from one Member State to another, international cooperation remaining the only way for Member States to fight effectively against international tax evasion and tax evasion. Given that one of the main objectives of Council Directive (EU) 2016/1164 is to improve the resilience of the internal market as a whole, to cross-border tax avoidance practices, this cannot be done satisfactorily by the Member States through individual actions.

National company taxation systems are different and Member States' independent actions would only duplicate the current fragmentation of the internal market in the field of direct taxation. Thus, they would perpetuate the inefficiency and distortions that arise in the interaction between a series of distinct national measures. There would be a lack of coordination. Instead, as most cases of inefficiency in the internal market give rise, first of all, to cross-border issues, remedial measures have been taken at Union level. It was therefore essential to adopt solutions that work for the internal market as a whole, and this could not be better achieved than at Union level, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

In accordance with the principle of proportionality, as set out in that Article, the Directive does not go beyond what is necessary in order to achieve that objective. By establishing a minimum level of protection for the internal market, this Directive aims only at achieving the minimum essential coordination degree within the Union in order to achieve its objectives.

In this respect, it has been appreciated that the harmonization measure at EU level in this area creates stronger protection from the perspective of the internal market; however, it also presents some risks. While non-EU countries are still analyzing whether, how and when to implement relevant measures to combat tax evasion and transfer of profits (BEPS), the EU as a whole becomes an entity that adopts early G20-OECD recommendations. Agreement between Member States on designing anti-evasion measures is based on an unanimously voted requirement: an unanimous agreement of all Member States must be ensured before anything, even if after its conclusion small adjustments to minimum standards can be made.

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