PhD DISSERTATION

THESES

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A Doctrinal and Procedural Approach to Certain Significant Economic Offences

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I. Summary of Research Objective

The primary goal of this dissertation was to offer an academic portrait of the general characteristics of and doctrinal background to a group of offences, which is squeezed into several chapters of the currently effective legislation, and which terrified the author as a student of law, especially in his third year and prior to his state exams. As per our intention, we were able to show that it is only possible to combat acts aimed at attacking certain aspects of economic interests with logically-constructed and complex statutory definitions, and that legal professionals specialising in this field must be familiar with a number of background laws if they wish to be effective practitioners.

Academic considerations are highlighted in the introductory chapters, where it is necessary to offer a definition of economic offences, a comparison with related terminology, a general description, and an international survey.

During the assessment of statutory definitions, judicial and prosecutorial practices are highlighted. As a practising prosecutor, I will supplement matters of substantive law with procedural specialties, particularly in relation to aspects of prosecutorial investigation and advocacy. Due to the internationalisation of crime, it is necessary to provide a brief introduction to international and European Union instruments, too. Finally, as an analysis of economic offences cannot forego the inclusion of background legislation (on tax, bankruptcy, accountancy, etc.), this will also be included in the dissertation.

Because of the heterogeneity of the examined legal material, naturally, an attempt at completeness could not be made. Consequently, we did not include all offences in the category, only the ones that, according to our view, bear the greatest theoretical and practical significance. As such, the offences of currency counterfeiting, budget fraud, breach of accounting regulations, misprision in liquidation proceedings, concealment of assets for avoiding a liability, and failure to comply with the obligation to supply economic data are discussed.

II. Analysis Description and Methodology

In the Premises section, we examined the history of economic criminal law, as well as the past and present of its academic literature. This is followed by a description of terms related to economic criminal law and an exploration of the relationship between these. In this vein, the terms "economy," "economic order," "economic crime," "economic activity-related offending," "economic offences," "economic criminal law," "white-collar crime," and "prioritised offences related to economic activity" were surveyed. Furthermore, based on the currently effective criminal code (Btk.), offences considered economic in a narrower sense were also defined.

This is followed by an elucidation of a criteria system developed in German criminal law, which contrasts traditional and economic offences; this is then applied to Hungarian criminal law.

The next chapter deals with the general characteristics of economic offences, criminal statistics, and the relationship of the two.

The problem posed by the protected legal interest of economic offences is weighed in a separate section, where academic conclusions on German criminal law are considered once again. Because it exhibits several types of special features, the system of obstacles to culpability in relation to economic offences was also discussed separately. Furthermore, an evaluation of the characteristics that make the discussed offences so-called "framework offences" was also contemplated, as well as the topic of prescription, which has recently proven to be of high practical relevance. In an attempt at completeness, related sanctions and procedural law are discussed in a chapter of their own. With regards to the latter, the applicable tasks of the prosecutor are highlighted. Finally, the general observations conclude with an outline of the relevant international and European agreements.

It is necessary to stress that in the general chapters we did not simply carry out the necessary analyses in relation to the offences that will be discussed later in the course of this study in more detail, but we also did so for all related criminal categories (e.g. money laundering, offences against consumers' interests, etc.).

In relation to certain prioritised economic offences, we strove not for a textbook analysis of the offence but for a detailed account of the most interesting and problematic theoretical and practical questions.

In terms of *analytical methods*, we primarily wish to highlight the most complete exploration and comparison of academic views possible, doctrinal assessment, and practical and procedural analysis. Comparative law and the exploration of legislative intent also feature in some chapters.

III. A Brief Summary of Results and Their Practical Utility

The most important results of the study are summarised below. The terms mentioned in the previous section (besides "economic offences," for example, "economic order," "economic crime," etc.) are advantageous for definitional precision and may serve as an addition to the practical vocabulary of criminal lawyers. By considering the criteria developed to contrast traditional and economic offences in German criminal law, we were able to show that, with varying weight, most fact scenarios are present in Hungarian criminal law as well. While we will, at a later stage, offer a treatment of the protected legal interest on the general and, in relation to each offence, on the special level, too, here it must be noted that *Hungarian criminal law is primarily concerned with communal interests*, although it takes an underlying interest in individual interests. When considering the characteristics of delictum proprium (special offence), the analysis offers a mixed picture, as both this and ordinary offences (delictum commune) are present. The quality of abstract endangerment identifiable in German economic criminal law is absolutely not applicable to Hungarian regulation, as the determination of the most important economic offences in their choate form, such as budget fraud and fraudulent bankruptcy, which are explicitly regulated as material offences, requires proof of outcome (e.g. financial loss). Similarly, culpability for negligence is rare, although there are examples of radical suggestions for the penalisation of preparatory acts, as in the case of currency counterfeiting.

Based on criminal statistics, it should be noted that, both in Hungary and abroad, the financial damage caused by economic offences is exceptionally high when compared to the ratio of such crimes vis-à-vis other offences.

We have highlighted that there are several special hurdles to criminal liability when dealing with economic offences. For example, we can consider the duty to initiate bankruptcy or liquidation procedures in relation to fraudulent bankruptcy, or the error in comprehending social harm in connection with several other statutory definitions. We have also demonstrated a number of specifics in relation to the problems of becoming a perpetrator of these offences. The problem of prescription was given its own detailed treatment, which, following the Btk.'s taking effect on 1 July 2013, was one of the greatest legal dilemmas of the last years (and it

will likely remain as such for the Curia and appellate courts). Understandably, it is not accidental that numerous judicial decisions have been published in this area. In this study, we have shown that in addition to the decriminalisation of certain offences and the alteration of the punitive framework, changes to the regime of the general part may also affect whether an economic offence committed before the aforementioned date will be subject to the old or new law. In questions arising in relation to procedural law, we highlight a de lege feranda proposal, according to which further offences should be assigned to the exclusive investigatory purview of the National Tax and Customs Administration (NAV). For the new criminal code to retain the group of offences belonging to the competence of the NAV unchanged is, according to the author's experience as a prosecutor and the relevant academic literature, a debatable measure. There are several offences, perhaps even in the same chapters of the Btk. as the previously mentioned crimes – and some are certainly pecuniary – the investigation of which would require the same economic perspective as budget fraud or fraudulent bankruptcy.

Concealment of assets for avoiding a liability (Btk. s. 405) is just a single section away from fraudulent bankruptcy, and it is committed during economic activity. It is therefore *objectionable that it is not investigated by the NAV.* Furthermore, *misappropriation of funds* (Btk. s. 376), which is *classically a financial offence, exhibits many similarities to economic offences*. The latter act is practically exclusively committed at the expense of companies (e.g. a limited liability company, known as Kft. in Hungarian law), and it is realised by the violation of a fiduciary duty during economic activity. Consequently, "[t]he offence of misappropriation of funds is committed by one who, as the chief executive officer of a joint stock limited liability company [Rt. in Hungarian law], instead of the direct leasing of motor vehicles, orders the completion of a hire contract featuring more disadvantageous terms with a leasing company that was founded by him, and the chief executive officer of which was the Rt.'s lawyer at the completion of the contract, and therefore causes a financial loss to the Rt."[1] Thus if the primary protected legal interest is property rights, it is not baseless to suggest that the security of both economic and business activity is violated. Academic literature also

[1] BH 2013. 57. However, in the Curia's published caselaw we may also find decisions where the aggrieved party is a kft. (BH 2016. 295.) or a cooperative (BH 2016. 165.).

highlights that misappropriation of funds occurs against a company and often at the hands of its leading officers.[2]

Additionally, this interpretation must not be too alien to lawmakers, as Act XC of 2017 on Criminal Procedure (Be.) *has included, among others, the most serious cases of misappropriation of funds amongst the previously-mentioned prioritised offences related to economic activity.* [Be. s. 10(1)(3/d)].

The opinion of Tibor Ibolya, the chief prosecutor of Budapest, must also be highlighted, as he has written a study specifically on the investigatory problems related to misappropriation. Already in his introduction, he states that "[t]hese investigations, of course, should not be conducted with increased attention simply because they attract significant interest from the media, but because their seriousness and, therefore, their threat to society are extraordinary, while *their successful prosecution is usually extremely difficult*."[3]

Consequently, the example of misappropriation of funds (though we could also mention defalcation) shows that though it is taxonomically a crime against property, in reality it exhibits many similarities to economic offences. Therefore, the professional knowledge necessary for the investigation of the latter is, in most cases, indispensable to the investigation of misappropriation. Because the police force is a general investigative body and the NAV is specialised, it is obvious that it is the latter that is likely to have detectives who are specialists, concentrated, and possess the required investigative skills. Accordingly, *de lege ferenda, it would be necessary to review crimes against property beyond the current components of the category and to delegate the investigation of those with a prominent economic feature to the NAV*. In academic literature, *Mária Juhász* highlights that the investigative organisations of the NAV (the Finance Guard from the former Customs and Finance Guard) play a definitive role in the struggle against the black market. [4]

[2] Máté Mohai: A jogi személy vezető tisztségviselői által elkövetett hűtlen kezelés egyes kérdései az új polgári törvénykönyvre is figyelemmel. Doktori Műhelytanulmányok 2014. 152-153. http://dfk-online.sze.hu/images/egyedi/doktori/doktori%20m%C5%B1helytanulm%C3%A1nyok%202014/mohai.pdf
[3] Tibor Ibolya: A hűtlen kezelés bizonyítása. Belügyi Szemle, 2010/10. p. 82.
[4] Mária Juhász: A feketegazdaság elleni büntetőjogi fellépés eredményességét befolyásoló tényezők. Ügyészek lapja, 2015/5. pp. 47-53.

The above solution could also prevent an institutional "tit for tat" between the police and the NAV. This, according to oure experience, occurs when at the end of the investigation ordered by the police – which often offers only modest successes – the detective determines that misappropriation of funds cannot be identified, although there exists a suspicion of budgetary fraud or fraudulent bankruptcy. Because the latter two fall within the investigatory ambit of the NAV, the case is transferred to the NAV. Although less common, the process can work in the opposite direction, too. The NAV can take the view that instead of fraudulent bankruptcy, a misappropriation of funds could have occurred. In practice, the "tit for tat" often takes place more than twice, and the agencies haul (often, due to the amount of corporate paperwork involved, with a forklift) the case papers back and forth. These types of competence conflicts create considerable delay, which hinders the timeliness of criminal proceedings and greatly increases the risk of disappearing – or disappeared – evidence. Besides, it undermines citizens' confidence in executive agencies.

Of the special part offences described in greater detail, without any claim to completeness, it is worthwhile to highlight the following:

In relation to the classic definition of counterfeiting currency, we have shown that the protected legal interest of the offence can be compromised even regarding so-called fake money. Thus, it should be considered whether it would be more prudent to identify the offence of currency counterfeiting instead of the currently-dominant practice of classifying such instances as fraud. Similarly, the separation between the preparation and the facilitation of currency counterfeiting is also worthy of attention.

Regarding budget fraud, our view is that it would be preferable to close the cumulative offence that the crime encompasses with a binding peremptory resolution. This would allow the unification of criminal proceedings in instances where a constituent offence arises during the trial phase.

Furthermore, it is necessary to stress the exclusion of offence continuity and the de lege ferenda criteria in connection with acts committed in the course of business. Regarding breach of accounting regulation, the recent decriminalisation and the so-called exclusionary cause for valid expectation merit attention. Regarding budget fraud, in addition to discussing the protected legal interests and the relationship between various components of the offence, we

point out that the Chief Prosecutor turned to the Constitutional Court in relation to 6/2018. BJE, in which the Curia precluded creditors from acting as substitute private prosecutors, to argue for the ruling on legal uniformity to be struck down. Although this study will most likely not be completed prior to the Constitutional Court's decision, it is probable that the success of the prosecutor's position would yield for more recognition of the aggrieved party's rights via the greenlighting of their acting as substitute private prosecutor.

Regarding concealment of assets for avoiding a liability, we highlight that this economic offence can only materialise in connection with assets affected by restraint on alienation and encumbrance, as in cases where the subject remains foreign to the perpetrator, then the applicable offence is directed against property – namely, it is embezzlement. Furthermore, if the perpetrator provably did not intend performance already at the completion of the contract, then the appropriate offence is fraud.

Perhaps the most notable feature of failure to comply with the obligation to supply economic data is that negligent commission never attracts criminal liability.

Finally, we mention that, if we simply inspect higher level courts' criminal decisions in the past years, we may notice we encounter fewer and fewer decisions of principle related to offences altered by the Btk. of 1 July 2013 or with "classic" special part offences. What is often discernible is that little-known components of offences were changed by lawmakers' alteration of the framework offence via the amendment of the background laws that constitute it. Therefore, the encouraging words said to the author by the chief prosecutor of Pest county, Ferenc Szabó are likely to be correct; his view is that while the subject of economic crime is "overdone," it is still possible to write about it, because this constantly-changing area offers a continuous task of learning and analysis to the academics and practitioners who occupy themselves with it.

Our hope is that the esteemed committee member or reader was not reminded of a practical "handbook" upon seeing the procedural suggestions at the end of certain chapters. The author was, in addition to offering an academic summary of the doctrinal background for certain significant economic offences, unable to avoid approaching the problems in question as a practising prosecutor. We hope that this attempt did not remain incomplete, and that it will

offer some considerations to academia, legal practitioners, and, through its de lege ferenda suggestions, to lawmakers.

IV. Related Bibliography

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