THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Issue of Competition between Penal Norms and Nonpenal Norms in the Process of Defending the Order of Right Against the Illegality Related to the Crediting Process

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Abstract: The author tackles the issue of competition between penal norms and nonpenal norms in the process of defending the order of right against the illegality related to the crediting process. The interference of penal right spheres and the ones of other branches of law (firstly the civil right) is specific for the process of defending against the economic offences. Or, to obtain and grant a credit firstly constitute the settlement object of the civil law. The author analyzes different situations and underlines that the civic responsibility doesn't automatically exclude the possibility of applying the penal responsibility. Also, the „banking" responsibility that is specific to the banking law is analyzed and its relation with the other responsibilities is revealed. The author comes to the conclusion that it is not necessary to unincriminate the deeds stipulated in art.238 and 239 of the Criminal Code of Republic of Moldova. An evident social necessity for juridical-penal defence of the rights and interests of honest participants at crediting relations exists. The existence and application of these norms constitus a guarantee of preventing and combating the illegalities related to crediting, characterized by a high prejudicial level, that are commited by the dishonest participants. The prejudicial level is the criterion that permits the application by itself either of the „banking" responsibility or penal responsibility. In the same time, each of the specified juridical responsibility forms may be accomapnied by the civic responsibility.

Keywords: child abuse; sexual abuse; prophylaxis

In a civil society, guided by the principles of the rule of law, where there persists the separation of powers and full respect of the fundamental rights and freedoms, the law is called to contribute to making full use of all physical and spiritual features of a human being. Society no longer stands at one pole of a contradiction and the individual is not thrown to the other pole. After V. Dzodiev, the civil society incorporates in itself a lot of relationships that are not mediated by the state between the free an equal individuals, acting in the market economy. We believe that this definition covers not the civil society as a whole, but only its "social linchpin", consisting of a relationship of a private nature. In reality, within the movement of the individual towards the society and the society to the individual, the state cannot be left aside.

The amplification and the increased protection of the rights of members of the Moldovan society is a way to ensure, by law, the improvement of the actual contents of the relationship individual - state - society. There is an increasing demand for solving cases of competition between rules belonging to different branches of law that protect the same rights of the members of the society. In the context of this study, a problem of particular interest is the investigation of criminal procedures and rules of competition in the defense of non-criminal legal order against illegalities related to crediting.

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In this respect, it is necessary to mention the view point of the criminal doctrine, according to which the rules providing for liability for offenses committed in the banking sphere should be decriminalized, this would in no way jeopardize the interests of any person, society and state, as the facts mentioned are liable to legal and other influence (e.g. legal and civil nature). Is the decriminalization of rules, providing for accountability for crimes related to crediting, more positive than negative?

In trying to find an answer to this question, we seek the opinion of M. Eliescu, referring to the rules governing the competition between criminal and civil liability rules establishment: "But the border between the two responsibilities is not on the whole flat. The current law, today, considers the idea of compensation belonging to the criminal law, by repairing a social damage caused by crime, through appropriate measures, safety measures... The liability imposed by criminal law and the liability dealt with in civil law interfere. Most of the offences are also crimes or civil cvasioffences, which compel for compensation or repair".

It is therefore possible to have a criminal liability and extra-criminal liability aggregation (the latter form of liability is determined by the rules of civil law, banking law, financial law, commercial law, tax law etc..). From this perspective, of particularly relevance is the view point of G. Vrabie and S. Popescu, who among the general principles of liability, nominate "Principles of a single violation, where a legal norm corresponds to a single imputation of liability, which does not exclude the possibility of overlapping the forms of legal liability, where one and the same act violates two or more legal rules "(the emphasis belongs to us - N).

For the defense against economic offenses (including offenses related to credit) the interference of criminal law and other branches of law is very common (above all - of civil law). However, obtaining and providing a credit is primarily subject to regulatory civil law. The appropriate civil legal rules are incorporated in Section 3 of "bank credit" in Chapter XXIV "contracts and bank operations" and, to some extent in Chapter VII "loans" of Title III of Book Three "obligations" of Civil Code of the Republic of Moldova. Hence, getting a credit or a loan is the subjected to legal and contractual and failure to respect the contractual obligations entails contractual liability.

However, if the application of civil liability does not exclude the application of criminal liability, then what should be the criteria for a crime to be susceptible not only to civil legal influence, but also criminal legal influence? Referring specifically to crimes related to crediting - "Obtaining a credit by fraud" (art.238 CC RM) and "Breaking the crediting rules" (Article 239 CC RM) - can provide the following answer: criminality of the offense, provided for in CC RM art.238, is determined by deceiving the victim by the offender, not any disclosure - in order to obtain a loan or increase its share or obtaining a loan in favorable terms – requires criminal law intervention, only in the case when the information given is knowingly false, this intervention is justified. As for the criminality of the offense referred to in Article 239 CC RM, it is determined by the presence of intentional violation of the rules of credit, seconded by causing damage to a large financial institution, not any credit granting determines intervention of criminal law, only if the loan was accompanied by violation of credit, and in addition, significant damages have been caused to the institutions, criminal law intervention is justified.

In other words, if the breach of civil law rule is accompanied by fraud or breach of trust, there are grounds for application of criminal liability. Tackling the competition rules of criminal and civil law in the determination of liability for acts of getting credit by deception, V. Stati states: "This action cannot be regarded as a breach of contractual obligation. The Criminal Law delineates the moment of its consummation before signing the credit agreement, at the stage of verification by the financial institution of the loan documents. If the fraud is not detected at this stage, since the contractual relations between the borrower and financial institution have been established, it is not possible to consider the situation breach of contractual obligation. However, precision forces us to recognize that the detection of fraud after having concluded the credit agreement, by application of criminal liability may not exclude civil liability. This is because the presences of signs of crime, under art.238 CP RM, do not exclude the presence of a default under the credit agreement.

However, it is more important to establish that the application of civil liability does not automatically exclude the possibility of applying criminal liability. Honesty, reliability, compliance with the requirements constitute the exigencies that a civilized market cannot do without. Flagrant disregard of these requirements may be the reason for applying legal and criminal measures. In this respect, we comply with the views of I. Deleanu "citizens ... must exercise their constitutional rights and liberties in good faith, without infringing the rights and freedoms of others. The idea involved the penalization for "abuse of rights" or, otherwise the "abusive exercise" of law. Indeed, while exercising his rights, the holder must act in that socio-economic or political purpose for which the law has recognized and guaranteed those rights. Deviation from the right ratio legis means the abnormal exercise of the right and therefore is reprehensible".

We believe that both acquiring a credit by deception (art.238 CP RM) and by violating the crediting norms (Article 239 hp MR), deflection of the right ratio legis of the underlying objective is obvious. Moreover, this deviation is so serious that it requires criminal law intervention.

In the specific literature on the subject, it is widely recognized that social danger (prejudice), a the material point of a fact, is the criterion that allows delineation of different types of illegalities. That the level of prejudice constitutes the indices that conditions the intensity of the legal measures. The deception and abuse of trust offenses under art.238 and 239 CC RM, is a sufficient basis to apply to such offenses legal and criminal measures.

Non application of these measures would mean to adhere to „vigilantibus, et non dormientibus, jura subveniunt; servat lex, succurunt jura subveniunt" ("laws serve only those who are watching them, not sleep, laws are written only for those who care about their interests "). In the market economy, it would be totally inappropriate to qualify facts by the degree of their prejudice, based on the criteria of the perpetrator's ability to deceive, alongside with the credibility and lack of experience of the victim.

The concept, based on such criteria would impact negatively not only the process of implementation of art.238 and 239 CC RM, but also the development of economic relations. This is because the economic cycle is based on trust. Lack of it hampers and slows significantly the circuit, and thus producing a negative impact on every member of the society. Therefore, providing solid legal and criminal market economic relations is a crucial goal of the present moment. What should be the legal and criminal influence degree so as not to undermine the ability of self -regulation in the market economy? Throughout history this degree was established empirically, in expressing the relation between public law and private law. However, such involvement of the criminal law is necessary in order to provide effective protection within the market economy against the achievement of the principles of operation and development. However, this should not mean unconstitutional measures, specific or planned economy, to substitute the legal and civil norms by legal and criminal rules. Application of the latter, has reason only in the case when the freedom of the market economic relations and property rights are abused. However, criminal enforcement is not the abolition of market economy relations or liquidation of ownership.

Delimitation of the offenses related to credit and infringements of civil law is based on qualitative criteria, meaning the existence (or absence) of fraud or breach of trust. In the case when these indications of fraud exist the criminal law response is required. The existence or absence of quantitative criteria - the amount of the damage caused to the victim or the perpetrator income size - is the subsequent existence or lack of quality criteria specified above. The reparation of the damage caused to the victim and collection of income received by the perpetrator should be subject to civil law, in the case when the quantitative criteria mentioned above lack.

So, the main distinction between legal and civil influence and the criminal influence consists in that the former the subjective violated right is restored and the damage is repaired. On the other side, under the hypothesis of legal and criminal influence, the offender is punished. So in the first case the subject property is subject to influence, and in the second case even the subject person

is subject to influence.

In the literature sometimes the division of the functions between the two forms of legal influence is perceived incorrectly. Thus, N.I. Pikurov does not support the view that the role of criminal law is only in determining penalties for violations of subjective rights. According to this author, the possible connection of criminal rules to regulating the relations, arising from a contract, on strengthening the criminal liability for actions that show a real risk of violation of legal and civil bonds is not excluded As an example, is the rule establishing criminal liability for illegal obtaining of a credit (art. 176 Criminal Code of Russian Federation): "At the first glance, in this case, criminal law enters the sphere of exclusively legal and civil regulation, due to the conditions for concluding a contract. Thus, the criminal law persists until the actual cause of injury happens... The illegal act of obtaining a loan is closer to the regulatory method of criminal law than that of civil law. This is because the manner in which the offender is creating a situation likely to cause damage to heritage, creates the illusion that they could rely on being able to restoring the subjective violated rights when the given the damage is caused.

The allegation of criminal law to regulating the relations, arising from a contract (in case of a bank credit agreement), on strengthening the criminal liability for failure to respect the legal and civil liabilities is considered unfounded. The criminal law is not, by definition, regulating some specific social relations. The function of criminal law is to protect social values and social relations associated with them, in accordance with paragraph (1) Article 2 CC RM. Connecting the criminal law to regulating social relations would be possible if the rules of criminal law would give new rights or would incumbent new bonds to the parties to the contract. However, this hypothesis is unattainable. The bond commits an offense related to crediting as subject to state coercion as criminal responsibility. This obligation, however, is fully consistent with the defense function of criminal law, not being specific to regulatory function of the civil law and other non-criminal law branches.

Studying the role of criminal law in the system of law branches, V.V. Malţev stated: "In defense of the social relationships, governed by civil law, the nature of these relationships cannot be left without consideration (subject to legal and criminal defense), thus, the character of the rules of civil law... . Therefore, under the circumstances, civil law is given priority over criminal law. But this priority does not turn into a vertical relationship of "subordination", since the legal force of these branches of law is equal".

In the same rut, A.E. Jalinski believes that cutting processes of collisions between criminal and civil law should be based on the priority of civil law as far as the juridical evaluation of the action concerns, which appears as a legal fact, and accordingly on the accessory nature of criminal law."

A.G. Bezverhov, although he does not use the term "priority" specifies: "The essence of the patrimonial crime is determined above all, by the nature of those relations which they affect ... Any thesis, stated in the sphere of criminal law must be correlated with the fundamental principles that govern the patrimonial relations".

In his turn, A.M. Yakovlev expressed the following point of view: "Today, when after the economic crisis in 1998, there re-appeared calls of amplification of state regulation of the economic relations, we should emphasize that, under the successful development of economy, the power state regulation of the economy consists in the assuring of the effective application in practice of the norms of the Civil Code. Trying to influence upon the economic relations by threatening with punishment restriction, means to contribute to the market restriction, of the civil circuit".

Thus, the cited authors choose the primacy of the juridical - civil regulation of the economic activity.

In contrast, other authors propose the combining of the juridical –penal with the juridical-civil one for the defense of the economic relations. Thus, P. Iani says: "It causes objections the vision on the criminal law as law incidental, adjacent, as a law that can be applied only if the civil law does not contradict". Sharing a similar view, A.V. Naumov considers: "There is no branch of law the norms of which would not be be embedded organically within the norms of criminal law. In these cases the conditions of criminal liability for the committing of prejudicial acts are contained not only in the criminal norms, but in the norms of other branches of law as well". We consider it more acceptable the

position expressed by P.Iani and A.V.Naumov because, as S. Poleakov affirms, it does not contradicts Article 6 of the Convention for the defense of Human Rights and fundamental freedoms. We mention that within the according norm it is established the principle in accordance with which everyone has the right to a fair hearing. In this regard S.Poleakov records: "The intervention of the state in cases involving private rights may violate this principle. In civil legal relations, the state interests should not prevail over the interests of the sides. Therefore, the special position of the state fro the defense of its interests in civil cases do not correspond to the request of equality of parties and can not be considered fair".

In response to those specified, it must be said that indeed, the unreasonable interference of the judicial authorities in civil law employment relationships often occurs consciously.

The persons who are not sure of the correctness of their arguments and of the success in resolving the civil trial sometimes apply to illegal methods in order to attract the local authority to their side. However, this does not mean that when, in addition to evidence of a breach of the rules of civil law, were discovered when an element of an economic crime, the state should not interfere. In this situation there are two hypostases that should not be confused: in the first stance, specific to the civil trial, the two parties - the plaintiff and defendant – are equal in their procedural rights, under Article 26 of the Code of Civil Procedure of the Republic of Moldova on 30.05.2003; in the second stance, specific to the penal trial, the two parties - the accused and the victim - can not be considered equal. The principle of equality requires that equal situations are treated equally and unequal situations – differently. The offender and the victim are placed in unequal positions. The first person affected some social relations and values protected by criminal law, and the second person suffered a physical injury, patrimonial or moral. That is why, in the presence of some sufficient reasons one the same person may be subject to both civil and criminal liability.

Regarding the question about the corresponding or non-corresponding of the parallel application of the criminal and civil liability with the stipulations of the Convention for the Protection of the fundamental human rights and freedoms, it is necessary to specify the following: The European Court of Human Rights claims in the solving of the problems, the legal principle of security in the juridical reports (the decision of 25/07/2002, Sovtransavto Holding v. Ukraine), and another cardinal principle in criminal matters, according to which the State, as guarantor of public order, is free to adopt criminal necessary measures (the decision of 06/09/1998, Incal v. Turkey). Moreover, there were cases when states were convicted because they did not adopt a criminal law effective enough to protect the rights guaranteed by the Convention (judgment of 03/26/1985 X and Y v. Netherlands).

In this respect, we believe that art.238 and 239 PC of RM are rules effective enough to protect the rights guaranteed by the Convention on Human Rights and fundamental freedoms. Mainly, it is intended to protect the right of property: according to the First Protocol to the Convention on Human Rights and fundamental freedoms, any physical or legal person has the right to respect his own goods; no one can be deprived of his property except in the public interest and as provided by law and general principles of international law (Article 1). Also, we believe that RM art.238 and 239 PC correspond to the security principle within juridical reports and to the principle of freedom of the state to adopt necessary penal measures. Yet, the honest and good faith participants to the economic relations should be provided security against dishonest participants' acts and those of bad faith to the same relationships. The legal and penal measures to ensure this security, expressed in the application of the art.238 and 239 PC of RM, derives from the freedom of the Moldovan legislator that is harmonized with the respect to the international obligations of the Republic of Moldova.

Developing this idea, we are convinced that the that freedom of Moldovan legislator, manifested in the adoption of CP art.238 RM - "Obtaining credit by fraud" - is fully consistent with Article 1 of the additional Protocol No. 4 to the Convention of fundamental Human Rights and freedoms: "No one shall be deprived of his liberty because it is not able to fulfill a contractual obligation".

In this respect, we agree with the view according to which that disposition is not applied to the fraudulent or intentional un-execution of an obligation, because in the art.238 PC of RM is meant

namely such a breach of the contractual obligation. About this it is spoken in the phrase "knowingly presenting false information» from the relevant article.

A similar phrase, which would indicate to the manifestation of intent and fraud by the executor, was not in art.155 ³ "Disposal or non- giving of the credit" of the Criminal Code of 1961, regarding some ways of the appropriate act. Or, according to this article it was provided criminal liability for the use of the credit means contrary to the indicated destination, either the loan of the credit and of the rates in the terms and conditions stipulated in the credit agreement if by these actions to the financial institution there have been caused large-scale damage.

The direct meaning of the phrase "or forgiveness of the loan and interest in the terms and conditions stipulated in the credit agreement" shows that it relates to a dispute arising from contractual obligations and therefore follows to be punished according to the stipulations of the Civil Code. There is no any indication that would print criminal illicitly to the modality described in the phrase cited above. Foreseeing as punishment for such an act the deprivation of liberty for three to seven years, the Moldovan legislature ignored its international acts to which Moldova is party.

From these reasons, on 02/04/2002, the Constitutional Court of the Republic of Moldova adopted the decision on No.17 for the review of the constitutionality of some stipulations of ³ art.155 of the Criminal Code, revised by Law nr.1436-XIII from 24.12.1997 "For the modification and the supplementation of the Criminal Code.» Thus, the Constitutional Court found that the sentence "or loan forgiveness and interest in the terms and conditions stipulated in the credit agreement" in art.155 of the Criminal RM ³ of 1961 contravenes to the Article 1 of the additional Protocol No. 4 to the Convention of fundamental Human Rights and freedoms. Consequently, the Constitutional Court declared this phrase unconstitutional.

Considering this, courts that have examined the causes of criminal offense referred in art.155 ³ PC RM from 1961, disposed of the acquittal of the defendants. However, there are cases where the judgment was made according to art.155 ³PC RM 1961, although the materials do not cause that person would be convicted and executed or intentionally fraudulent loan repayment obligations.

Thus, we can conclude: if the relations between participants – equal economically and legally in law – to the economic activity covered by the legal regulation, when the interest of the free producers boost the entire economy, the will exercised by these participants is conducted and regulated by civil law. At the same time if economic activity appears as an effective economic interest not individually, but the state's interest (in an indication that supplies the contract), then the state's will realization is provided by the specter of criminal liability.

The corresponding execution of the contract conditions is the foundation of normal economic activity in the context of the market economy relations. Under paragraph (2) CC art.572 RM the obligation must be must be executed properly, with good faith, at the place and in the time set. According to paragraph (1) and (2) CC art.602 RM defaults include any breach of obligations, including poor or late performance, if not executing the obligation, the debtor is bound to compensate the creditor for damage if not prove that the failure is not attributable obligation.

Despite the variety of cases of non-contractual obligations (violation of economic rights, causing damage, etc..), the state involvement in the development of civil law relations between subjects independent and equal legal rights is justified only if - in addition to the restoring of the right violated, damage etc.. – is justified also the punishment of the perpetrator. In these circumstances, is it correct to speak of the existence of competition of rules in the criminal and civil rules of safeguarding law against illegal acts related to credit?

In order to answer this question it is necessary to identify the legal significance of the concept of competition. In this context, T.G. Chernenko believes that for competition, one of the competing standards and should be given priority.

Also, L.D. Gauhmansees the essence of competition in choosing one of two competing standards.

It is necessary to mention that N.S. Taganţev said: "If illegality requires both punishable violation of the norm, as well as causing as causing damage patrimony, then the illegality is complex, incorporating criminal illegality and civil legality ..." Thus, the legitimacy of applying liability along with criminal liability - subject to specific forms of legal liability function first mentioned - also exclude such a relation between the civil rules and criminal rules like competition. Or, the function of liability is a restorative compensational one. It is this specific function is given under exclusion of liability legal form that among those whose co-report is characterized by the principle "non bis in idem" ("not be punished twice for the same offense"). The lability function is not to punish, but to restore to the injured party the rights.

The lack of theinter-branch competition of those rules of civil law and rules of criminal law, which establish liability, excluding the need to develop procedures and rules to resolve the competition. When committing an act, which contains both signs of a breach of civil law rules, as well as economic elements of an offense, is correct to speak not about the competition rules and regulations civil criminal, but about the complex application of both.

But in the case of a problem related to illegalities to credit it appears not only the application of criminal liability but of civil liability too. It can be applied also the "bank" responsibility "bank", specific to the branch banking law. Especially in the context of crime, under Article 239 hp RM (partially - the offense referred to in art.238 CP RM, while gaining credit by fraud is done by a commercial bank from another commercial bank or National Bank of Moldova), is relevant to disclose the nature of criminal liability and the proportion between the "bank". Can the rules - under criminal law and banking law belonging - to be applied in parallel? Or should there be a choice between two types of rules for determining the legal liability of different shapes?

The rules, which establish liability under "bank", including credit-related illegalities are b) paragraph. (1) Article 10 and Article 38 of the Financial Institutions Act, adopted by the Moldovan Parliament on 21.07.1995.

Specifically, under the item b) par.(1) Article 10 of Law the nominated National Bank of Moldova bank may withdraw approval if the violations were listed in Article 38 of the same law.

In the article 38 of the Law on Financial institutions there are listed the following liability likely illegal "bank" actions: the violation of the Financial Institutions Law, the legal acts of National Bank of Moldova; breach of permit conditions or fiduciary obligations; engaging in risky or suspicious transactions; reporting omission, delay reporting or erroneous reporting of the prudential indicators and other requirements provided in regulations of the National Bank; Failure to remedy established by the National Bank.

Among the remedial measures and sanctions imposed by the National Bank in the responsibility "bank" from the financial institution, its owners or administrators of Article 38 of Law financial institutions lists: the issuing of a warning; b) the completion of a financial institution providing remedial agreement; c) issuing of the order to terminate violations, carrying out remedial measures and sanctions; d) the application and imposition of the fine to indisputable financial institution to 0.3% of its capital; e) the restriction or suspension of financial institution; f) the withdrawal of ETV.

In the same time, we emphasize that, in accordance with par. (4) Article 38 of the above-named law, the measures and penalties provided for in this Article shall not exclude other measures and sanctions under the law.

We consider the formulation of this paragraph imprecise and generating abuses. Compared to the same person - or entity - can not be applied in parallel liability "bank" and criminal liability. At the same time, compared to the same person can be applied simultaneously responsible "bank" or civil liability. Or, both liability position "bank" as well as as criminal liability is a repressive function of punishment. So it is a totally different function such as liability, often having a restorative-compensational character. Therefore, the design competition of the rules governing the criminal liability and liability rules governing the "bank" is valid in the same natural or legal persons of the

same: one and the same individual (owner or manager of financial institution) and the same person legal (financial institution) can not be simultaneously subject to remedial measures or sanctions provided in Article 38 of Law on Financial Institutions and criminal liability under art.238or 239 PC of RM. Or, the description of remedial measures and sanctions mentioned are obvious repressive character of punishment, but not the restorative, compensatory character. The application of parallel liability "bank" and criminal liability to the same person would be a breach of the principle "non bis indem".

At the same time, it would not be not violation of this rule the application only to responsibility "bank" individual in parallel with the application to the legal person of criminal responsibility. Or vice versa.

It should be noted, that in the section "Ensuring legality, there are guaranteed the rights and freedoms. The continuous improvement of national framework "of the work program of the Government of Moldova for 2005-2009" Country Modernization - Welfare of People 'focus, among others, the "evaluation of the national legislation for the purposes of reformulation of ambiguous stipulations, which allow their double improper interpretation and application."

From the above considerations, we have the option for the completion of the paragraphs. (4)Article 38 of the Financial Institutions Act, as follows: "Compared to the same person - or entity - can be used alongside the measures or penalties provided for in this article, and criminal liability or other legal liability assuming coercion".

Conclusion

In conclusion, we consider it is not necessary the discrimination of the facts underart.238 and 239 PC RM. There is a clear social need in the criminal defense of the legal rights and interests of participants of good faith within the credit relations. The existence and application of these rules is a guarantee to prevent and combat irregularities related to credit, characterized by a high degree of prejudiciability that are committed by the participants of bad faith in the named relations. The degree of "guiltiness" is the criterion that permits the independent application, for illegally related to credit, either of the "bank" responsibility or criminal liability. At the same time, each of the specified forms of legal liability may be accompanied civil liability.

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