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# White-Collar Crime: Ukrainian Experience of Searching for Optimal Model of Criminal Liability

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## Abstract

Author analyses quite a sensitive issue for society – white-collar crime in Ukraine, defining the optimally probable model of criminal liability. The white-collar shadow economy level is rather high in Ukraine – 45.96 % of the GDP and correlates with the respective data of Nigeria. The author's approach can be related to two aspects: first, prevent excessive criminalization activities; second, effectively punish white-collar criminals.

*Keywords:* criminal liability, punishment, white-collar crime, restriction of liberty, confiscation of proceeds.

## Introduction

The purpose of criminal law is to protect individuals and the entire society from socially dangerous acts. The method of such protection is recognition of acts like crimes, and establishment of criminal liability of persons who have committed them.

This liability is realised through state conviction, as well as criminal punishment and (or) other criminal legal measures that apply to the guilty persons. The main goal of criminal liability in a democratic society is to prevent new crimes that could be committed by both a person to whom this liability was applied and by other members of society.

Criminal law cannot and should not be the main means of resolving social conflicts, since its application is always connected with a significant restriction of the rights and freedoms of a perpetrator, as well as with collateral negative consequences for other persons and entire society. At the same time, the use of criminal law to regulate social relations, especially in the economic sphere, is often not effective. Therefore, in the science

of criminal law, there is no doubt that criminal legal regulation of social relations is permissible only as an extreme, the last possible means, the ultimo ratio.

This conclusion is especially relevant in relation to white-collar crimes – corruption and other crimes committed by public officials, as well as economic and professional crimes. Usually, these crimes are committed by corruption, fraud, abuse of trust and negligent performance of official duties. These crimes cause significant harm, such as substantial property damage, harm to authority of public power, and in some cases, harm to life or human health.

Based on this, in determining the criminal liability for white-collar crimes, it is necessary to consider the significant harm they cause and the specifics of the personality of the white-collar offender. In contrast to the so-called common criminals, who commit, for example, thefts, robberies, bandit attacks, rape, etc., white-collar criminals in society have a positive reputation, care about their families, do not abuse alcohol or drugs. These personal characteristics of white-collar criminals should be taken into account when establishing criminal liability for the crimes they commit.

However, traditionally the criminal law is trying to use a unified approach to the application of criminal liability measures to both "common" criminals and white-collar criminals. However, traditionally, the criminal legislation tries to use a unified approach when applying criminal liability measures to both "ordinary" criminals and "servants". We can observe obvious shortcomings of this approach in the post-Soviet space, including Ukraine. The law provides for a strict punishment for white-collar crimes, mainly in the form of long-term imprisonment. Courts often disagree with such a decision of the legislator, and will use many opportunities of the Ukrainian criminal law to mitigate punishment or use probation.

This difference between the criminal law and the practice of its application also increases the level of corruption risks in this area. As a result, criminal responsibility does not reach the goal of preventing white-collar crime, and sometimes even contributes to its growth.

Therefore, it is important to research the problems of optimisation of criminal responsibility for white-collar crimes.

## Aim

The aim of this article is to research, using the experience of Ukraine, the possibility of developing an optimal model for criminal liability of persons who have committed white-collar crimes, and, in case of a positive result, the determination of its main components. This model should take into account personal characteristics of the subjects of these crimes, as well as provide for a complex of measures of criminal legal effect that will provide for the least possible restriction on the rights and freedoms of the guilty person and will be necessary and sufficient to achieve the goals of criminal responsibility.

## Materials and Methods

This study is based on regulation acts, criminal legislation, Criminal Law Convention Council of Europe on Corruption (1999), Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning prison overcrowding and prison population inflation (Adopted by the Committee of Ministers on September 30, 1999 at the 681st meeting of the Ministers' Deputies), the data of Corruption Perceptions Index 2017 from International Organisation Transparency International, the study of the Association of Chartered Certified Accountants "Emerging from the shadows. The shadow economy to 2025", the information of the Word Bank, the analysis of 450 criminal cases of white-collar crimes, according to which the courts of Ukraine had sentences (2009–2017), research works and opinions of progressive people in this field. Article is grounded on dialectical, comparative, analytic, synthetic and comprehensive research methods.

## Results and Discussion

For the first time the theory of "white-collar crime" was formulated by the American criminologist Edwin Sutherland and represented in 1939 in a speech to the American Sociological Society. In his later article in 1940, the author substantiated the existence of white-collar criminality, which is a criminality of "upper or white-collar class, composed of respectable or at least respected business and professional men". This criminality is different from "crime in lower of persons of low socioeconomic status" [12, *1*].

Sutherland proved that white-collar crime is a real crime, and it is very dangerous for society. He wrote: "The financial cost of white-collar crime is probably several times as great as the financial cost of all the crimes, which are customarily regarded as the 'crime problem'." The danger with this type of crime is not limited to causing financial damage.

The author states:

> "The financial loss from white-collar crime, great as it is, is less important than damage to social relations. White-collar crimes violate trust and therefore, create distrust, which lowers social morale and produces social disorganisation on a large scale. Other crimes produce a relatively little effect on social institutions or social organisation." [12, *4, 5*]

Based on this, he believes that "a white-collar criminality in general terms will be also a description of the lower class. The respects in which the crimes of the two classes differ are the incidentals rather than the essentials of criminality. They differ principally in the implementation of the criminal laws which apply to them" [12, *7*]. The author comes to a conclusion that "the white-collar criminals are segregated administratively from others criminals, and largely as a consequence of this are not regarded as real criminals by themselves, the general public, or criminologists" [12, *8*].

The term "white-collar crime" is criminological and in criminal law has no precise definition. Dervan and Podgor in their article *"White-collar Crime": Still Hazy After All These Years* stated that there is no clear list of "white-collar crimes", although more than 75 years have passed since the appearance of this term. This is explained by the following: "Yet the term 'white-collar crime' was used initially as a sociological term and has been used more recently as a legal term tied to specific criminal offenses" [10, *766*]. Ukrainian researchers Kamensky [8, *341–343*] and Melnychuk [9, *197*], based on the analysis of scientific literature, also note the lack of clarity in the criminal law definition of "white-collar crime".

According to the U.S. Department of Justice, Dictionary of Criminal Justice Data Terminology, it is

> "non-violent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional, and utilising their special occupational skills and opportunities; also, non-violent crime for financial gain utilising deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation" [16, *215*].

In a generalised form, white-collar crimes include crimes such as corrupt and other crimes, committed by public officials, as well as economic and professional crimes. This definition will be used for the purposes of this study. It should be noted that a more detailed analysis of the definition and types of white-collar crimes is not the aim of this article.

In modern criminal law, there is no doubt that white-collar crimes are real crimes for which criminal responsibility is applied. At the same time, there is a discussion on the theory of criminal law about what measure of such responsibility and punishment should be applied to white-collar criminals.

When solving this problem, it **is necessary to consider the characteristics of white-collar criminality**:

1) these crimes cause significant harm to public relations, which entails extremely negative consequences for society and the state as a whole;
2) usually, the society does not perceive these crimes as dangerous, treats them as loyal, which is explained by their non-violent nature and, as a rule, by the absence of harm to the property of individuals;
3) persons guilty of committing these crimes are characterised positively, do not pose a physical danger to society, which is significantly different from those committing ordinary crimes.

Further are discussed the characteristics of Ukrainian white-collar criminality.

**Causing significant harm to public relations.** As to the extent of the harm that leads to white-collar crimes in Ukraine, indicators such as corruption and the shadow economy can be concluded. It is known that these negative social phenomena arise from the commission of white-collar crimes, and, therefore, these phenomena are in a directly proportional relationship.

To determine the level of corruption in Ukraine, data of Corruption Perceptions Index 2017 from International Organisation Transparency International will be used. This index ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. In 2017, Ukraine ranked 130th in this rating with 30 scores. To compare, Latvia has the 40th rank (30 scores), Poland – 36th (60 scores), Germany – 12th (81 scores). From this rating, we can see that Ukraine is one of the most corrupted countries within the Europe and Central Asia group. In this group a higher index was observed only in Russia (135th place), Kyrgyzstan (135th place), Uzbekistan (157th place), Tajikistan (161st place) and Turkmenistan (167th place) [15].

The next negative social phenomenon, derived from white-collar criminality, is the shadow economy. The study of the Association of Chartered Certified Accountants "Emerging from the shadows. The shadow economy to 2025", which was published in June 2017, the size of shadow economies of Ukraine in 2016 consisted of 45.96 % of Gross Domestic Product (GDP). Among the 28 countries, the information on the shadow economy of which is presented to the study, the situation is worse only in Nigeria (48.37 % GDP) and Azerbaijan (67.04 % GDP). In Latvia, this indicator makes 24.17 % GDP, in Poland – 23.68 %, in the USA – 7.78 % [13].

A high level of corruption and shadow economy has an extremely negative impact on economic and social development of Ukraine. Despite the presence of significant natural resources, developed industry and agriculture, GDP per capita in Ukraine is extremely low. According to the information of the Word Bank, in 2016 Ukraine had GDP per capita $ 2,185.7. To compare, GDP per capita in Latvia was $ 14,071.0, Poland – $ 12,414.1, Germany – $ 42,161.3, the USA – $ 57,638.2 [14]. Due to non-payment of taxes and other illegal economic activities, the state does not have sufficient resources to fulfill social functions; a high level of corruption leads to a significant stratification of society, the bulk of which goes into the category of low-income people. This gives grounds for the conclusion that white-collar criminality causes significant damage to public relations.

**Loyal attitude of society to white-collar criminals.** For individuals who have committed corruption and economic crimes, society is much more loyal than towards traditional criminals, especially those who commit violent crimes and crimes against property of individuals.

Kamensky explains this situation as follows, "because of the corruption and the absence of perception of justice, fairness and accountability, both in politics and business, many white-collar crimes, such as smuggling, counterfeiting and tax evasion, are viewed as morally neutral, or even acceptable. It causes frustration and even hatred against the corrupt government engaged in self-dealing, and that does not operate for the benefit of the common folk is one of the major reasons for passive approval of such non-violent crimes with economic substance. This deviant ideology within economically oppressed society can be formulated this way: "The government cheats against you, so cheat it back". On the other hand, the vast majority of Ukrainian white-collar criminals

also believe that cheating or embezzling is insignificant, at least with respect to moral barometers." [8, *344*].

This attitude to the white-collar crimes contributes to its further spread. It has been observed that this affects the attitude of judges towards such persons. In many cases, the punishment imposed for the white-collar crimes is not strict; often such persons are generally exempted from serving their sentence.

*Positive characteristics of white-collar criminals.* When speaking about the characteristics of people committing white-collar crimes, it is necessary to take into account that they differ significantly from other criminals. To describe white-collar criminals, Sutherland used the words of Judge Woodward, which he had pronounced in 1933 upon imposing a sentence on the officials of H. O. Stone and the company: "You are men of affairs, of experience, of refinement and culture, of excellent reputation and standing in the business and social world." [12, *8*]. This characteristic is typical for this category of criminals, and, therefore, should be considered when establishing certain types of criminal penalties in the law and in applying the courts. If this is not done, then there is a high probability that the courts will be based only on a positive characterisation of a criminal's identity when assigning punishment. Such a situation will lead to the fact that a real criminal penalty will not be imposed.

Given the personality of white-collar criminals, it is not advisable to establish in the law a penalty in the form of a deprivation of liberty for crimes that are not serious. Such an assumption is based on the absence of physical danger for the society of such persons, as well as the large number of negative side effects of the punishment in the form of the deprivation of liberty.

The criminal law must solve a very difficult task, to create a system of criminal penalties for white-collar crimes that will be adequate to the damage caused by these crimes, capable of achieving the goals of preventing these crimes and, at the same time, adequate to the identity of white-collar criminals and society's attitude to their deeds.

Historical analysis of the criminal legislation of Ukraine and the practice of its application shows that over the past 50 years, the system of counteraction to these crimes has undergone significant changes several times. In many cases, the search for an optimal model of such counteraction was carried out by trial and error. At present, there is no reason to speak of an optimal solution to this problem.

Thus, during the period of Ukraine's membership in the USSR, the number of white-collar crimes that could be committed was extremely limited. This was due to the existence in the Soviet republics of the command and administrative system of management and the absence of a market economy.

At the same time, the Criminal Code of the Ukrainian Soviet Socialist Republic of 1960 established very strict penalties for such white-collar crimes as embezzlement, bribery and other crimes in the sphere of official activity. It was established in the criminal law that for such crimes long periods of deprivation of liberty with confiscation of property and deprivation of the right to hold certain positions or engage in certain activities

should be applied. For example, Article 84 for the embezzlement of state or collective property by abuse of official position established a punishment from three to fifteen years of imprisonment with confiscation of property and with deprivation of the right to hold certain positions or engage in certain activities for up to five years; if such embezzlement was committed in especially large amounts, then in accordance with Article 86-1 the punishment was from ten to fifteen years of imprisonment with confiscation of property.

Article 168 established a punishment for a bribe from five to fifteen years of imprisonment with deprivation of the right to hold certain positions or engage in certain activities for a period of five years and confiscation of property. It was possible even to apply death penalty for some types of embezzlement and bribes. Courts in most cases did not have the opportunity to release the guilty from serving the sentence or to impose to him a milder punishment related to deprivation of liberty. Due to complete control of the state, as well as specifics of the economic system, the white-collar crimes were not widespread in the Soviet period. However, despite such serious criminal sanctions, the commission of these crimes was not a rarity.

After Ukraine had become independent in 1991, the liberalisation of economic system and development of a market economy began. At the same time, the number of white-collar crimes increased significantly, and new types of economic crimes appeared. So, along with corruption crimes and embezzlement, criminal responsibility was established for tax evasion, fraud with financial resources, fictitious entrepreneurship and other economic crimes.

In 2001, the new Criminal Code (CCU) was adopted in Ukraine. As in the Criminal Code of 1960, the main type of punishment for white-collar crime was deprivation of liberty; the fine was imposed as punishment only for a small number of economic crimes.

It should be noted that criminal legislation liberalised criminal liability for these crimes. Thus, terms of deprivation of liberty were significantly reduced, and Article 75 of the Criminal Code gave the opportunity to apply probation to persons who were sentenced to imprisonment for up to five years. However, in the criminal law the specificity of white-collar crime was not considered. In fact, a single approach to both white-collar and other criminals were used.

This situation very quickly changed the practice of applying criminal punishment for these crimes. Courts, like society as a whole, began to treat white-collar criminals very loyally. The fines imposed for these crimes were scanty, often significantly smaller than the damage caused by the crime.

In cases where the CCU only imposed a sentence of imprisonment for a particular white-collar crime (such us embezzlement, bribery, qualified types of tax evasion, fictitious entrepreneurship, etc.) the courts used probation almost in all cases on the basis of Article 75 CCU. This meant that if during a court-appointed probation period from one to three years such a person did not commit a new crime, did not systematically violate the public order, and did also perform the duties assigned to him by court, the punishment in the form of deprivation of liberty would not be enforced. Obligations that were imposed

on the perpetrator were very simple and, as a rule, amounted to the following: 1) periodically appear for registration with the penitentiary offices; 2) inform these offices about the change in the place of residence. In fact, white-collar criminals remained unpunished.

For example, in the period from 2001 to 2011, for tax evasion in an especially large amount, Part 3 of Article 212 CCU provided for punishment in the form of deprivation of liberty for five to ten years with confiscation of property and with the deprivation of the right to hold certain positions or engage in certain activities for up to three years. Analysis of the practice of courts of Ukraine for the period between 2008 and 2011 showed that more than 90 % of the cases were sentenced to imprisonment for a period of five years, from serving of which the person was released with probation. Thus, the court had very broad opportunities for imposing punishment for these crimes; either to impose a penalty of imprisonment from five to ten years in real terms, or to release from serving a sentence with probation, which would mean actual impunity of the crime.

Impunity of white-collar crimes contributed to their widespread distribution, and also significantly increased corruption risks in this area.

On November 15, 2011, changes were introduced in CCU, which were aimed at changing the system of punishment of economic crimes. A penalty was imposed on the form with a fine for most of these crimes, instead of a non-alternative imprisonment. The size of the fine has increased significantly. It was also introduced as the rule that for more serious crimes the amount of the fine cannot be less than the amount of damage caused by the crime or the benefit obtained from the crime. For the first time in the Ukrainian legislation, it was provided for the replacement of an unpaid fine with imprisonment for a term from one to twelve years.

A significant shortcoming of these legislative changes was the fact that a high fine should be paid in a very short time, as the criminal law, as before, provides against the possibility of an installment payment of a fine not more than one year. Therefore, proceeding from the minimum in 2018 sums of taxes, evasion from payment of which is qualified in accordance with Part 3 of Art. 212 CCU, the minimum fine is UAH 4,405,000 (about EUR 136,377). If this amount is to be paid within a year, the monthly payment will be EUR 11,365. At the same time, the minimum wage in Ukraine at the beginning of 2018 was about EUR 115, almost 100 times lower than the monthly payment of the convict to a fine. If the fine is not paid on time, according to the criminal legislation (Article 53 of the CCU), the convicted person will have to serve a sentence of imprisonment for ten years.

It can be assumed that the legislator thus tried to encourage white-collar criminals with hidden incomes (for example, assets of offshore companies, deposits on foreign currency accounts in foreign countries, property issued for other persons), to refund money to the state budget. However, analysis of judicial practice shows that this law is often used by people who have no income but have agreed to perform the functions of "fictitious directors". For such persons, there is no other way out of this situation, as serve a sentence to ten years of imprisonment in a year after the verdict of the court.

The next innovation of the Ukrainian legislation in establishing the limits of criminal liability for white-collar crimes was a significant increase in repressiveness in relation to corruption offenses. By the law of February 12, 2015, changes were made to the CCU, which prohibited the use of incentive criminal law norms for corruption offenses.

Under this law, for example, if an investigator or a prosecutor received a bribe, then in accordance with Part 3 of Art. 368 of the CCU, they must be sentenced to imprisonment for a term of five to ten years with the deprivation of the right to hold certain positions or engage in certain activities for up to three years and with confiscation of property. In this case, court has no right to mitigate the punishment on the basis of Article 69 CCU, for example, to appoint a term of deprivation of liberty that is less than five years, or to apply a softer punishment. The court is deprived of the opportunity to apply probation on the basis of Article 75 CCU, or even to release from punishment a pregnant woman on the basis of Article 79 CCU.

The adoption of such harsh measures against white-collar criminals who committed corruption offenses, in my opinion, is currently justified. As already noted, the high level of corruption, which affects judicial system, requires strict and clear laws, leaving little room for judicial discretion. Simultaneously, such strict laws with respect to white-collar criminals are only permissible for a short time, as a "shock therapy".

Since the entry into force of this law has passed less than three years, analysis of judicial practice shows that the number of sentences to corrupt officials passed under this law fell sharply compared to the previous period. Yet, the time for consideration of criminal proceedings in courts increased. It can be concluded that the defense side, realising the inevitability of strict punishment, in every possible way delays trials in order to maximally delay the appointment of punishment in the form of over long periods of imprisonment.

Thus, the experience of Ukraine in the establishment and application of criminal responsibility for white-collar crimes can be defined as a "trial and error method". Lack of a well-thought-out, scientifically sound methodology for counteracting these crimes resulted in a drastic change in strategy in this matter. Initially, there were unreasonably cruel punishments for white-collar crimes in the Soviet period. Further, in the first 20 years of Ukraine's independence, the situation was characterised by almost total impunity due to extensive application of probation for these crimes. At present, there is an insufficiently thoughtful serious increase in criminal liability for corruption and some economic crimes.

As a result of this application of the criminal law, corruption and shadow economy have become widespread in Ukraine, which negatively affects economic and social development of the state.

The question remains what should be the optimal model of criminal ability for white-collar crimes. It should be noted that science of criminal law has not presented the indisputable and the only correct answer to this question. The Ukrainian criminalist Khavronuk states that over the course of its existence, earthlings have made more than three hundred scientific discoveries, which without a doubt can be considered a significant contribution; from writing and determining the duration of the year before

the discovery of the boson to landing on Mars a 900-kilogramme rover with a full-scale research laboratory. Nevertheless, since the creation of the Bible until today lawyers have bothered to conclude that the punishment for a crime must be fair and adequate. The mystery remains how to make it real [5, *284–285*].

It is obvious that bringing to criminal responsibility and imposing punishment on the person guilty of committing a crime in all cases, without exception, has to deal with negative consequences. It is not only a significant restriction of the rights and freedoms of the offender with possible negative consequences for his physical and mental health, but also negative consequences for his family and other persons connected with him, as well as the significant expenses of taxpayers' funds related to implementation of justice and execution of punishment.

This applies to all white-collar criminals. Moreover, taking into account their personal characteristics, the number of people whose rights and interests can be limited by the exposure of these negative side effects becomes significantly larger. To begin with, they are children, spouses, parents, and other people who receive substantial material support. In many cases, among white-collar criminals there are entrepreneurs who employ workers. Criminal liability and punishment in many cases lead to the cessation of the activity of such a business entity and, as a consequence, to the dismissal of workers.

Therefore, the construction of an optimal model of criminal responsibility for white-collar crimes should begin with a thorough justification for the need for criminalisation of the offense. Such criminalisation is not expedient in cases when white-collar offenses do not cause significant damage to society, and also if it is possible to effectively counteract them by civil-law or administrative measures.

Failure to respect the principle of proportionality in solving this problem leads to a violation of fair balance between the restriction of fundamental rights and significant advantages for society as a whole. This gives rise to such a negative phenomenon as over-criminalisation. Summarising the views expressed by American scientists on this issue, Kamensky concludes that "over-criminalisation may suggest that a phenomenon where the government establishes too many new crimes, punishes wrongdoing too severely, or generally imposes too much into the common citizens behavior" [8, *345*].

This phenomenon is researched in criminal law as applied to criminalisation of offences in general [7; *1*] as well as to criminalisation of white-collar crimes [4; *11*].

Husak in his study *Over-criminalisation. The limits of the Criminal Law* defends a theory of the limits of penal sanction to combat the problem of over-criminalisation. This author is sure that

> "it is important to recognise that this theory has an even broader application. A theory of criminalisation is needed to justify criminal laws we should retain, as well as to provide the criteria by which we should decide whether to enact even more penal legislation. Because I am more interested in retarding over criminalisation than in achieving these latter objectives; however, the theory I present consists in a number of constraints to limit the criminal sanction rather than a set of reasons to extend it" [7, *V*].

Strader, based on the analysis of criminal cases of such white-collar crimes as financial fraud, concludes that the application of criminal law to such offenses is justified only in cases when civil and / or administrative remedies are insufficient and the harm is identifiable and substantial. In the financial fraud arena, the "harm is usually financial harm that is relatively simple to define, if not to quantify" [11, *50*].

Such conclusions regarding the establishment of limits on criminalisation of white-collar crime are justified. In general, a scientific study of the problems of criminalisation of white-collar offenses should be continued.

Another unsolved problem is punishment, which needs to be applied to white-collar criminals to achieve the goals of criminal liability. At the same time, it is necessary to consider internal inconsistency of these crimes: the enormous damage they cause to society and the positive attitude of society towards white-collar criminals, and also the positive characterisation of their personality. Finding a reasonable balance is very difficult.

Solution of this problem should be carried out by deciding the question of what goals of criminal punishment we want to achieve, and by what means we can do this. The main purpose of criminal punishment is to prevent commission of new crimes, which includes two components: special prevention or prevention of commission of new crimes by the convicted, and general prevention or prevention of commission of crime by other persons.

Achievement of special prevention in relation to white-collar criminals, as a rule, does not present a great deal of complexity. To do this, it is sufficient to apply punishment in the form of deprivation of the right to hold certain positions or engage in certain activities. If the occupation of a position becomes impossible, such a person will not be able to commit a new crime using this post. As for corruption crimes, the entry of the guilty person into the register of persons who have committed such crimes makes it impossible for the person to occupy a public position during his lifetime, which practically excludes commission of a repeated corruption offense.

It is much more difficult to achieve the second goal – to implement general prevention. In science of criminal law, it is proved that the attainment of this goal is possible in two ways: severity of criminal punishment and inevitability of its application. These two methods are in correlation dependence; the higher the level of inevitability of punishment, the less severe punishment can be and vice versa [6].

A serious negative side effect of conventional criminal penalties, in particular, deprivation of liberty, is the high cost of public funds for their implementation. Nobel Laureate-economist Becker in his work *Crime and Punishment: The Economic Approach* first applied the economic approach to crime problems. The author, based on his mathematical calculations, concludes that in counteracting crime, "optimal decisions are interpreted to mean decisions that minimise social loss in income from offenses" [3, *207*].

It is interesting that Becker mathematically proved the correctness of the conclusions made back in 1764 by an outstanding Italian lawyer and economist di Beccaria in *An Essay on Crimes and Punishments*. More than 250 years ago, the scientist wrote,

> "The certainty of a small punishment will make a stronger impression, than the fear of one more severe, if attended with the hopes of escaping; for it is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater; especially if supported by examples of impunity, which weakness or avarice too frequently afforded. … That a punishment may produce the effect required, it is sufficient that the evil it occasions should exceed the good expected from the crime; including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore, tyrannical." [2, *94, 95*]

Becker also concludes that the reduction in the number of crimes is significantly affected by the increase in the "probability that an offense is discovered and the offender apprehended and convicted". This is justified by the fact that "illegal activities "would not pay" (at the margin) in the sense that the real income received would be less than what could be received in fewer risky legal activities." If there is no high level of probability of criminal prosecution, then increasing the severity of punishments will not lead to the desired result, but at the same time significantly increase public spending on combating crime [3, *207–209*].

This also applies to white-collar crime in a full measure. An effective model of counteraction to these crimes should include measures that can make their commission, on the one hand, the riskiest in terms of the probability of identifying and bringing to criminal responsibility, on the other – economically unprofitable.

As a rule, such punishments as deprivation of liberty and fine are imposed for white-collar crimes. As additional punishments can be confiscation of property and deprivation of the right to occupy certain positions or engage in certain activities.

Deprivation of liberty has long been a traditional form of punishment for criminal law. The ability of this type of punishment to perform a punitive function is obvious. In countries where there is no penalty in the form of the capital punishment, deprivation of liberty is the most severe form of punishment. Such punishment, as already noted, has significant negative side effects, and therefore, its application for white-collar crimes should be limited. The punishment should be imposed only for serious crimes with the aim of achieving the goal of general prevention, i.e. prevention of commission of crime by other persons. Such crimes include serious corruption crimes.

Thus, according to Paragraph 1 of Art. 19 of Criminal Law Convention Council of Europe on Corruption (1999) having regard to the serious nature of criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

If white-collar crimes are not serious, then in such cases, the punishment in the form of deprivation of liberty should not be applied. Recommendation No. R (99)

22 of the Committee of Ministers to Member States concerning prison overcrowding and prison population inflation (Adopted by the Committee of Ministers on September 30, 1999 at the 681st meeting of the Ministers' Deputies) established that deprivation of liberty should be regarded as a sanction or measure of last resort and should, therefore, be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate. Member states should consider the possibility of decriminalising certain types of offence or reclassifying them so that they do not attract penalties entailing deprivation of liberty.

A real alternative to the deprivation of liberty is a restriction of liberty, for example, such as was introduced in Poland as a result of the reform of February 20, 2015. Describing this reform, Wiak writes,

> "After the changes implemented with the act of February 20, 2015, a penalty of restriction of liberty still consists in the obligation to perform unpaid supervised work for community purposes; however, its content may be supplemented with subsequent elements, such as the obligation to stay in the permanent place of residence or another designated place with the use of an electronic surveillance system, plus numerous obligations, which are probations in nature and, which have been imposed so far on a convict in the event of an imposed penalty of imprisonment with a conditional suspension of its execution. The period for which restriction of liberty may be imposed was extended to two years. A major decision of the legislator is also abolishment of the possibility of conditional suspension of this penalty." [17, *188–189*]

This type of punishment in Poland has been applied for a brief period, so it is too early to draw conclusions about its effectiveness. However, it is obvious that it can be considered as an effective measure to combat white-collar crime. Advantages of this decision are that 1) this punishment is an alternative deprivation of liberty, which allows to minimise negative side effects for society and individuals; 2) it includes separate elements of probation, but it has a real punitive effect and does not lead to actual impunity for the offender.

Obviously, considering the personality characteristics of white-collar criminals in the aspect of their positioning as a higher class, the elite of society, the punishment in the form of supervised work (community service), without remuneration and for community purposes, for example, cleaning streets, can have a significant preventive effect. In combination with prohibition to change the permanent place of residence without permission, with the use of an electronic surveillance system, such measures will make it possible to achieve the goals of criminal punishment no less effectively than deprivation of liberty.

Another type of punishment, which is effective against white-collar criminals is a fine. This punishment can be used as the basic or as an additional one. In the latter case, it can be applied in addition to deprivation or restriction of liberty.

As noted by Becker, "fines have several advantages over other punishments: for example, they conserve resources, compensate society as well as punish offenders" [3, *208*].

To ensure the effectiveness of the fine as a form of criminal punishment for white-collar criminals, the following is necessary:

- a significant amount that will be a serious restriction of property rights of the offender, and will also depend on the damage or income caused by the crime as a result of such a crime;
- existence of a real possibility to pay the required penalty, which in many cases requires the possibility of an installment plan for a long period;
- replacement of the fine for imprisonment in case of evasion from payment.

Non-compliance with at least one of these conditions denies the possibility of this punishment in counteracting the white-collar crime.

Thus, the following system of criminal penalties can be proposed as an optimal model of sanctions for white-collar crime:

- basic punishment is a restriction of liberty (for certain serious crimes, there can be deprivation of liberty);
- additional punishments – fine and deprivation of the right to occupy certain positions or engage in certain activities;
- other measures of a criminally-legal nature – confiscation of proceeds from crimes or property obtained by criminal means.

The term of deprivation of liberty and the size of the fine must depend on the degree of public danger of crimes.

Of course, the problem of optimising criminal liability for white-collar crimes requires further scientific research. However, I strongly believe that this model will avoid, on the one hand, the groundless application of deprivation of liberty, on the other hand, impunity for these crimes due to the extensive application of probation.

## Conclusions

White-collar crimes include crimes such as corruption and other crimes, committed by public officials, as well as economic and professional crimes. Characteristic features of this type of crime are: 1) it causes significant harm to public relations, which entails extremely negative consequences for society and the state as a whole; 2) usually, the society does not perceive these crimes as dangerous, treats them as loyal, which is explained by their non-violent nature and, as a rule, by the absence of harm to the property of individuals; 3) persons guilty of committing these crimes are characterised positively, do not pose a physical danger to the society, which is significantly different from those committing ordinary crimes.

To effectively combat white-collar crimes, the criminal law must solve a very difficult task: to create a system of criminal penalties for white-collar crimes that will be adequate to the damage caused by these crimes, capable of achieving the goals of preventing these crimes and, at the same time, adequate to the identity of white-collar criminals and the society's attitude to their deeds.

The experience of Ukraine in the establishment and application of criminal liability for white-collar crimes can be defined as a "trial-and-error method". Lack of a well-thought-out, scientifically sound methodology for counteracting these crimes resulted in a drastic change in strategy in this matter. Initially, there were unreasonably cruel punishments for white-collar crimes in the Soviet period. Further, in the first 20 years of Ukraine's independence, the situation in this sphere was characterised by almost total impunity due to extensive application of probation for these crimes. At present, there is an insufficiently thoughtful serious increase in criminal liability for corruption and some economic crimes. As a result, corruption and shadow economy have become widespread in Ukraine, which negatively affects the economic and social development of the state.

The construction of an optimal model of criminal responsibility for white-collar crimes should begin with a thorough justification for the need for criminalisation of the offense. Such criminalisation is not expedient in cases when white-collar offenses do not cause significant damage to society, and also if it is possible to effectively counteract them by civil-law or administrative measures.

Another problem that needs to be solved, is punishment, which is advisable to be applied to white-collar criminals to achieve the goals of criminal liability. The main purpose of criminal punishment is to prevent commission of new crimes, which includes two components: special prevention or prevention of commission of new crimes by the convicted; general prevention, i.e. prevention of commission of crime by other persons. Special prevention of white-collar crimes, as a rule, is achieved through the use of punishment in the form of deprivation of the right to hold certain positions or engage in certain activities; this task is not very hard. The attainment of general prevention is possible in two ways: the severity of criminal punishment; inevitability of its application. These two methods are in correlation dependence – the higher the level of inevitability of punishment, the less severe punishment can be and vice versa.

Based on the studies of di Beccaria and Baker, it should be concluded that preference is given not too severe punishment, but to its inevitability. This approach will minimise the negative side effects of criminal punishment, as well as reduce the expenditure of public funds. An effective model of counteraction to white-collar crimes should include measures that can make their commission, on the one hand, the riskiest in terms of probability of identifying and bringing to criminal responsibility, on the other – economically unprofitable.

As a result, the following model of sanctions for white-collar crimes is proposed:

- basic punishment is restriction of liberty, which includes community service and prohibition to change the permanent place of residence without permission, with the use of an electronic surveillance system (for certain serious crimes there can be deprivation of liberty);
- additional punishments – fine and deprivation of the right to occupy certain positions or engage in certain activities; it is necessary to ensure the effectiveness

of the fine as follows: 1) significant amount that will be a serious restriction of the property rights of the offender, and will also depend on the damage or income caused by the crime as a result of such a crime; 2) existence of a real possibility to pay the required penalty, which in many cases requires the possibility of an installment plan for a long period; 3) replacement of the fine for imprisonment in case of evasion from payment;

- other measures of a criminally-legal nature – confiscation of proceeds from crimes or property obtained by criminal means.

The term of deprivation of liberty and the size of the fine must depend on the degree of public danger of crimes.

## Balto apkaklīšu noziedzība: Ukrainas pieredze, meklējot krimināLatbildības optimālo modeli

### Kopsavilkums

Raksts veltīts problēmām, kas saistītas ar krimināLatbildības optimizēšanu saistībā ar t. s. balto apkaklīšu noziegumiem. Balstoties uz krimināLtiesisko normu analīzi un to piemērošanas praksi Ukrainā pēdējo 25 gadu laikā, ir veikti pētījumi krimināLtiesību un ekonomikas jomā, kā arī analizēta citu valstu pieredze krimināLatbildības piemērošanā par šādiem noziegumiem, lai izstrādātu optimālu sankciju modeli. Šī modeļa mērķis ir likvidēt noziedzību: novērst balto apkaklīšu darbības kriminalizāciju un efektīvi sodīt tās par noziegumiem.

Optimālā sankciju modelī attiecībā uz šiem noziegumiem būtu jāiekļauj: 1) pamatsods – brīvības ierobežošana, kas ietver sabiedrisko darbu un aizliegumu mainīt pastāvīgo dzīvesvietu bez atļaujas, izmantojot elektronisko uzraudzības sistēmu (par dažiem smagiem noziegumiem var piemērot brīvības atņemšanu); 2) papildu sodi – naudas sods un aizliegums ieņemt noteiktu amatu vai veikt noteiktas darbības.

Savukārt naudas soda efektivitāti var panākt šādi: 1) piemērojot tik lielu naudas sodu, kas kļūs par nopietnu pārkāpuma izdarītāja īpašuma tiesību ierobežojumu un būs atkarīgs no noziedzīgā nodarījuma radīto zaudējumu vai no tajā gūto ienākumu apjoma; 2) lai nodrošinātu reālu iespēju samaksāt nepieciešamo soda naudu, daudzos gadījumos nepieciešams noteikt ilgtermiņa maksājuma plānu; 3) sodanauda jāaizstāj ar brīvības atņemšanu, ja notiek izvairīšanās no maksājuma; jāveic citi krimināLtiesiska rakstura pasākumi – mantas un noziedzīgi iegūto līdzekļu konfiskācija.

Brīvības atņemšanas termiņam un naudas soda lielumam jābūt atkarīgam no tā, cik liels kaitējums nozieguma dēļ sabiedrībai radīts.

*Atslēgvārdi:* krimināLatbildība, sods, noziegumu novēršana, balto apkaklīšu noziegumi, naudas sods, brīvības ierobežojumi, brīvības atņemšana.

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