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Tightening of penalty in the penal law of the Republic of Serbia

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Abstract:

The subject of the authors' attention is the issue of tightening a penalty in Penal Law of the Republic of Serbia. To tighten the penalty means to impose it higher than its maximum length for a particular punishable act. The authors observe current criminal legislation by analysing regulations and laws concerning the tightening of penalty. The subjects of analysis are Criminal Code, Law on the Criminal Responsibility of Legal Entities for Criminal Offences, Law on Misdemeanours, and Economic Offences Act.

Keywords*: penalty, criminal offence, economic offence, misdemeanours, tightening.*

Introduction

Criminal offences, misdemeanours, and economic offences are the part of the Penal Law of the Republic of Serbia. Differences between these three types of criminal acts are generally significant. However, in some situations the line between them is thin. These three groups of punishable acts are regulated by different documents, with the exception of cases where there is analogous application of another regulation.

It is rightfully pointed out that the process of measuring the penalty is the most important phase in criminal proceedings in general, when the commitment of a criminal offence is already determined, as well as its perpetrator and the existence of prerequisites for criminal responsibility. Then the court faces the most challenging task – to determine the type and extent of penalty which would be justified given the gravity of the committed offence and the level of criminal responsibility on one side, and on the other, the most suitable criminal measure for achieving the purpose of punishing.[1]

One of the ways of individualisation of penalty is its tightening. In the Criminal Code, as well as in other laws that regulate this field of Criminal law, various possibilities for tightening of punishment are stipulated. Therefore, for some criminal offences, it not possible to tight penalty under requirements set under relevant law, while for others it is possible to act in that manner.

This article is divided in the several systematized sections. The first section refers to the tightening of penalty for natural persons under the Criminal Code, followed by tightening under Law on the Criminal Responsibility of Legal Entities for Criminal Offences. The central section of the article relates to the tightening of penalty for perpetrators of misdemeanours, which is regulated by the Law on Misdemeanours.

[1] Ljubiša Lazarević, *Commentary on the Criminal Code*, 2006, p. 185.

Finally, the subject matter of the last section is the issue of the tightening of penalty in accordance with the Economic Offences Act.

Tightening of penalty under the criminal code of the Republic of Serbia

Tightening is imposition of more severe penalty than the one envisaged for a particular criminal offence, in the situations stipulated in the relevant law.[2] In the current Criminal Code[3] the possibility of tightening the sentence is not envisaged. Thus, according to current Criminal Code, it is not possible to tighten the sentence under any conditions.

Prior criminal legislation had envisaged the possibility of tightening the penalty. Admittedly, in article 46 of the Penal Code[4], which was entitled "**Determination of penalty in the case of multi-recidivism", it was defined that:**

(1) For a criminal act committed with premeditation for which the law provides the penalty of imprisonment, the court may impose a more severe penalty than the one prescribed by statute in the following cases:

1) if the offender has been sentenced to imprisonment for a term exceeding one year at least twice before, and if he still demonstrates a propensity toward continuing to commit criminal acts;

2) if a period of five years has not expired between the day when the offender was released after serving his previous sentence and the day when he committed the most recent criminal act.

(2) The more severe penalty must not exceed double the amount of the prescribed penalty of imprisonment, and must not exceed a period of fifteen years.

(3) In considering whether to impose the more severe penalty the court shall take special account of the similarity among the criminal acts committed, the motives from which they were committed, as well as the need that such a penalty be imposed for the sake of attaining the aim of penalty.

In light of the mentioned provision it is obvious that in the case of multi-recidivism, it was possible to tighten the penalty, where there were defined requirements for multi-recidivism. The tightening of penalty has been facultative. By passing the Criminal Code in 2005, such a possibility has been reversed. However, by the Law on Amendments and Additions to the Criminal Code in 2009[5], it was possible to tighten the penalty for continuous criminal offence. On the other hand, in regard to committed criminal offence, this possibility was finally reversed by the Law on Amendments and Additions to the Criminal Code in 2012[6].

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[2] Emir Ćorović, *System of sanctions for criminal offences of the Republic of Serbia*, 2015, p. 159.

[3] Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.

[4] Official Gazette of SFRY Nos. 44/76, 36/77 - corr., 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 - corr. and 54/90 and Official Gazette FRY, Nos. 35/92, 16/93, 31/93, 37/93, 41/93, 50/93, 24/94, 61/2001 and Official Gazette of RS, No. 39/2003.

[5] Official Gazette of RS, no. 72/2009.

[6] Official Gazette of RS, no. 121/2012.

Tightening of penalty to legal entities because of committed criminal offences

In the Republic of Serbia, the Law on the Criminal Responsibility of Legal Entities for Criminal Offences was passed in 2008[7], which regulates conditions governing the liability of legal entities for criminal offences, penal sanctions that may be imposed on legal entities as well as procedural rules when ruling on the liability of legal entities, on imposing penal sanctions, passing a decision on rehabilitation, termination of security measures or legal consequences of the conviction, and on enforcement of court decisions.[8]

According to the mentioned Law, it is possible to tighten the penalty for criminal offence committed by a legal person. **A legal person is responsible for a continuous criminal offence** if, in compliance with Article 6 of this Law, it is accountable for several criminal offences committed by two or several responsible persons, provided that the criminal offences constitute a joinder as mentioned in Article 61, paragraph 1 of the Criminal Code. The sanction imposed against the liable legal person for the continuance of a criminal offence may be aggravated to the extent of a double amount stipulated in Article 14 of this Law.[9] Under article 14 of the mentioned Law, a fine can be imposed against a legal person in particular amount within range between the lowest and the highest envisaged extent of a fine. The fine cannot be lower than 100 000 dinars and higher than 500 million dinars. Fines shall be imposed in the following amounts: 1) from a hundred thousand to a million dinars for criminal offences punishable by imprisonment up to one year or by fines; 2) from a million to two million dinars for criminal offences punishable by imprisonment up to three years; 3) from two million to five million dinars for criminal offences punishable by imprisonment up to five years; 4) from five to ten million dinars for criminal offences punishable by imprisonment up to eight years; 5) from ten to twenty million dinars for criminal offences punishable by imprisonment up to ten years; 6) minimum twenty million dinars for criminal offences punishable by imprisonment for more than ten years of duration.[10]

Tightening of sentence under the law on misdemeanours

Law on Misdemeanours[11] regulates the definition of a misdemeanour, the conditions for misdemeanour liability, the conditions for prescribing and enforcing sanctions for misdemeanours, the system of sanctions, the misdemeanour proceedings and the judgment enforcement procedure.[12] Therefore, the main source of law in the field of misdemeanours is the Law on Misdemeanours[13], which does not define any of

[7] Law on the Liability of Legal Entities for Criminal Offences, *Official Gazette of RS, no.* 97/2008.

[8] See Article 1 of the *Law on the Liability of Legal Entities for Criminal Offences.*

[9] *Law on the Liability of Legal Entities for Criminal Offences*, Article 11.

[10] *Law on the Criminal Responsibility of Legal Entities for Criminal Offences*, Art. 14.

[11] *Law on Misdemeanor*, Official Gazette of RS, Nos. 65/2013 and 13/2016 .

[12] *Law on Misdemeanor*, Article 1.

[13] See more Ivan Milić, *The new Law on Misdemeanor and Old Issues with Security Measures Ordering Compulsory Alcohol and Drug Addiction Treatment*, Collected Papers of the Faculty of Law of the University of Novi Sad, No. 1/2014, pp. 363-271.

the misdemeanours. Instead of that, particular misdemeanours are defined in other laws and acts of a lower legal power. For the purpose of this paper, the focus is put on provisions which regulate the issue of punishing for misdemeanour, particularly those regulating tightening of penalty.

As previously stated, the Criminal Code of Serbia does entitle courts to tighten the penalty, which is not the case with the Law on Misdemeanours. Thus, under the Law on Misdemeanours, it is possible to tighten a sentence against the perpetrator of such punishable act. It is envisaged in the situations of concurrence of misdemeanours and continuous misdemeanour as well.

Tightening the penalty for concurrence of misdemeanours

Law on Misdemeanours contains special rules for measuring penalty in a case of concurrence of misdemeanours[14]. In Article 45 it is provided that if a person has committed, with one or more actions, a number of misdemeanours for which they will be tried simultaneously, first the penalty shall be determined for each of the misdemeanours, and then a consolidated penalty shall be pronounced for all those misdemeanours.

A consolidated penalty shall be pronounced according to the following rules:

1. If a penalty of imprisonment has been determined for all consolidated misdemeanours, a consolidated imprisonment penalty shall be pronounced, which cannot exceed 90 days;
2. If a fine has been determined for all consolidated misdemeanours, a consolidated fine shall be pronounced which will be the total amount of the determined fines, but the consolidated fine cannot be greater than twice the amount of the highest fine prescribed by this Law;
3. If a penalty of community service has been determined for all consolidated misdemeanours, a consolidated penalty of community service shall be pronounced, which cannot exceed 360 hours in duration.
4. If a penalty of imprisonment has been determined for the consolidated misdemeanours, and a fine for all other misdemeanours, a penalty of imprisonment and a fine shall be pronounced in accordance with Points 1 and 2 of this Paragraph.

The solution provided in the current Law on Misdemeanours clearly states that penalties can be tightened, with different treatment of particular penalties. If a penalty of imprisonment has been determined for all consolidated misdemeanours, a consolidated imprisonment penalty shall be pronounced, which cannot exceed 90 days. Bearing in mind previously mentioned fact, it is evident that the perpetrator can be imposed to imprisonment in total duration higher than its prescribed general maximum. Namely, under the Law on Misdemeanours, the perpetrator cannot be sentenced to the less than one day or longer than 60 days of imprisonment.[15] To conclude, in case of the concurrence of misdemeanours, penalty of imprisonment can be tightened for 1/2 of its prescribed general maximum.

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[14] See more in Zoran Stojanović, *Criminal Law – General Part*, Belgrade, 2009, p. 207.
[15] *Law on Misdemeanor*, Article 37(1).

If penalty for concurrence of misdemeanour is imprisonment, a fine can be tightened, but a sentence of imprisonment cannot be higher than the double amount of maximum sentence which is prescribed by the Law on Misdemeanour. As a conclusion, in case of determining the fine as a penalty for concurrence of misdemeanour, the penalty can be tightened by doubling, while in case of jail sentence, it can be tightened higher than the general maximum, but no more than half.

If a perpetrator is sentenced to community service, the penalty can be tightened, but it is not allowed to be higher than the maximum 360 hours of work. Therefore, community service penalty can be tightened up to maximum general duration.

Tightening of penalties for continuous misdemeanours

Current Law on Misdemeanours governs continuous misdemeanour, which had not been governed in the last version of the Law on Misdemeanour.[16] Article 46 of the Law on Misdemeanours stipulates that Misdemeanour in continuous duration exists if the perpetrator with unique intent commits several of the same time-related misdemeanours, which represent the same entirety due to at least two of the following circumstances: the same identity of the aggrieved party, the same object of misdemeanour, usage of the same situation or permanent relationship, and unity of place or space of the execution of the misdemeanours. First provision of this Article can be applied only on misdemeanours whose nature allows unification in one unity. Misdemeanour that causes damage to immaterial legal property of natural person or legal entity can be caused in continuous validity only if it has been committed against same aggrieved party. Misdemeanour which has not been included in continuous misdemeanour in legally binding court decisions represents specific misdemeanour, respectively becoming part of a specific continuous misdemeanour. For misdemeanours stipulated in the first provision of this Article a penalty may be imposed that is more severe than the prescribed one, but it must not be severe more than double in comparison to the prescribed one nor higher than the highest sentence envisaged in the second Provision of Article 45 of the Law on misdemeanour, which regulates measurement of penalty for misdemeanour committed as concurrence of misdemeanour. To conclude, sentences for continuous misdemeanour can be tightened as in the case of sentences for concurrence of misdemeanour.

Tightening of penalty for economic offence

The third kind of criminal acts are economic offences. As per legal definition: "An economic offence is a socially harmful violation of regulations on economic or financial operations which has caused or may have caused graver consequences and which is defined as an economic offence under the competent authority's relevant regulation."[17] Field of economic offences is regulated with Economic Offences Act which has been adopted back in 1977. As stipulated in the first article of the Economic Offences Act: „To

[16] *Law on Misdemeanor*, Official Gazette of RS, Nos. 65/2013 and 13/2016.

[17] *Economic Offences Act*, Official Gazette of SFRY, Nos. 4/77, 36/77 (corrected version), 14/85, 10/86 (revised text), 74/87, 57/89 and 3/90, Official Gazette of FRY, Nos. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96 and 64/2001 and Official Gazette of RS, No. 101/2005 (other law), Article 2(1).

protect the legality in the sphere of economic and financial operations, the present Act shall define the general terms and principles governing the imposition of sanctions for economic offences, the sanctions system and the proceedings for establishing the liability of and imposing sanctions on economic offenders."[18] Economic Offences Act does not stipulate particular offence, though they are stipulated by other laws and regulations.

As it was indicated for our subject of interest, it is important to determine whether the penalty could be tightened or not. However, before we provide an answer to that issue, it is necessary to explain which penalties could be imposed for committed economic offence. For economic offence, only a fine can be imposed.[19] This specific legal solution arises from the nature of this responsibility, due to the fact that for this kind of penalty, the responsibility lies in the legal entity and responsible person from the executive board.

According to regulations of Economic Offences Act (Article 18):

(1) The minimum fine which may be prescribed for a legal entity is 10,000 dinars, while the maximum fine is 3,000,000 dinars.

(2) Fine levels may be prescribed for a legal entity in proportion to the damage done, the unfulfilled obligation or the value of a commodity or other item which is the subject of an economic offence, in which case the maximum fine may be up to twenty times the amount of the damage done/unfulfilled obligation or the value of a commodity or other item which is the subject of the economic offence.

(3) The minimum fine which may be prescribed for the responsible person is 2,000 dinars, while the maximum fine is 200,000 dinars.

On the other side, the Law on Economic Offences envisages that a fine **can be higher**. Therefore, the Article 22 stipulates:

(1) The court may aggravate a penalty against a legal entity or the responsible person for the economic offence committed to up to twice the maximum penalty set, if the perpetrator is a multiple re-offender.

(2) A legal entity shall be considered a multiple re-offender if it has already been convicted of related economic offences to penalties of over 20,000 dinars at least twice, and if the time elapsed since the last validly imposed penalty does not exceed five years.

(3) The responsible person shall be considered a multiple re-offender if they have already been convicted to imprisonment or fined for over 4,000 dinars at least twice, if the time elapsed since the last prison sentence completed/validly imposed fine does not exceed five years and if the offender is inclined to commit such criminal acts/economic offences.

(4) When deciding whether to aggravate a penalty, the court shall in particular take into account the circumstances under which an economic offence was committed and the gravity of its consequences.

(5) The penalty set in Article 18, paragraph 2 of the present Act cannot be aggravated.

It can be realized that **in the case of multi-recidivism**, the court can tighten the fine for legal entities and responsible persons from the executive board. The Law does not envisage the same treatment for first-time offenders and for recidivists, which is

[18] *Economic Offences Act*, Article 1.

[19] *Economic Offences Act*, Article 17.

understandable. The sole existence of multi-recidivism is defined in the Law itself, although separate criteria refer to legal entities and responsible persons from the executive board. It can be noticed that when it comes to legal entity, all criteria are objective, while in the case of responsible persons from the executive board, one subjective criterion is stipulated as well. Under subjective criterion it is envisaged that the perpetrator had propensity for committing criminal offences, i.e. economic offences.

We consider that certain issues shall appear in legal practice. If the rules for recidivism are to be applicable, the court must be aware of that fact. Therefore, based on previous records, the judge has to realize that a legal entity or a responsible person from the executive board had been sentenced for economic offence in the past. In accordance with the above mentioned, the Economic Offences Act stipulates keeping the record of verdicts for economic offences as well, which is applied through the courts of first instance.[20] The fact that the legal entity or responsible person from the executive board is in record of criminal offences, should not imply that the record shall be permanent. In accordance with that, the Economic Offences Act stipulates that sentences to a fine against a legal entity or responsible person from the executive board shall be removed from the record after a period of three years, with the condition that as of the moment of the legally binding verdict, the legal entity does not commit another economic offence, i.e. that the responsible person from the executive board does not commit criminal offence that contains characteristics of economic offence. Further, a legal entity or mentioned responsible person that had been **repeatedly sentenced** for economic offences will have their record deleted after three years, under the condition that as of the moment of the last legally binding verdict, the legal entity does not commit another economic offence, i.e. that the responsible person from the executive board does not commit a criminal offence that contains characteristics of economic offence. In the case that, beside a fine, legal entities or responsible persons have been sentenced to protective measurements as well, the **verdict cannot be removed** from the record before prescribed measurements are executed.[21] To conclude, for the whole time while a person is registered in official records, *i.e.* until the verdict is deleted from therein, we can consider this person (legal entity or responsible person from the executive board) to be recidivist. Therefore, if rehabilitation occurs, recidivism cannot be taken into consideration.

On the other hand, the Economic Offences Act envisages that if **conviction for economic offence had been deleted**, information about the conviction is not to be given to any subject, **except** the court, public prosecution, organs of internal affairs and organs of inspection which is in relation to process for economic offence which is conducted against persons whose conviction had been deleted.[22] Although the conviction against legal entity or responsible person from executive board had been deleted from official record, it can still be provided and used by specific organs, which authors find unjustified. Authors question how that certain information is to be deleted, but still kept available for certain organs which govern the process.

A fine can be tightened for perpetrators of economic offence, but in the same time it cannot be greater than twice the amount of the highest fine prescribed by this law. Even though it seems that this way of legal solution completely solves the issue of fine

[20] *Economic Offences Act*, Article 41(1).
[21] *Economic Offences Act*, Article 43(1-3).
[22] *Economic Offences Act*, 44(4).

amount, authors still consider that certain concerns are still possible to happen in practice. Authors pose the question whether a fine can be doubled in accordance with maximal fine which is prescribed for that particular economic offence, or it can be doubled in accordance with general maximal fee which is prescribed for economic offences, *i.e.* prescribed by the Economic Offences Act. Having that in mind, authors consider that a particular legal solution needs to be modified and defined precisely so that it stipulates that a fine cannot be higher than twice the amount of the fee for particular economic offence nor more than the fine for economic offences in general.

Debatable issue from the legal practice

As per the opinion of authors, the tightening of presented offences is not debatable. In fact, it is the matter of the judge`s subjective opinion whether he will or will not tighten the penalty. Of course, this process shall be in accordance with the fulfilment of legal conditions. However, an issue that may be encountered in practice is the purposefulness of penalty tightening.

Is it suitable to apply the institute of penalty tightening in accordance with the Article 22 of the Law on economic offences in case of multi-recidivism, when at the same time it is obvious that previous measurement did not meet their basic purpose? (having the posed question in mind, the following explanation has been provided: Legal entity – trading company appears as the perpetrator of several economic offences prescribed in the Law on health correctness of sustaining food and consumer goods. In official records there is information that it has committed the same economic offence seven times, while responsible natural persons were different – managers in particular shops. In regard to legal entity, it is social enterprise, which bank account is blocked, and workers receive the minimum of salary. It is also important to note that the most of economic offences are related to the expiration date of consumer goods, and the fact is that tightening of penalty would put this enterprise in an even more difficult position.

The institute of **multi recidivism**, as a foundation for **penalty tightening**, has been prescribed by provision of Article 22 of the **Economic Offences Act**, and it was introduced for the first time in economic-criminal process with the adoption of the Economic Offences Act in 1977. The first provision of Article 22 of the Economic Offences Act stipulates that the court has the right to tighten the penalty for committed economic offence for legal entities or responsible persons from the executive board up to **double the amount** of the maximum penalty, in case of recidivism. The second provision of this Article stipulates that same conditions apply if a legal entity has been sentenced at least two times for related economic offences to fines which are higher than 20,000.00 RSD, and if no more than 5 years has passed from the moment of the last legally binding fee sentence. The third provision of the Article stipulates that the condition of recidivism applies to a responsible person from the executive board in the case that the responsible person had been sentenced at least two times for related economic offences to prison sentence or to a fine which is higher than 4,000.00 RSD, if no more than 5 years has passed from the moment of the last legally binding fee sentence, and if the perpetrator shows a **tendency** to commit related criminal offences, i.e. economic offences. According to the fourth provision of this Article, in order to make a decision on penalty tightening, the court shall take in particular consideration circumstances under which the offence was committed, as well as the severity of its

consequences. According to the fifth provision of the same Article, the penalty prescribed in the second provision of Article 2 of this Law cannot be tightened.

The contents of specified provisions clearly indicates the fact that penalty tightening due to existence of multi-recidivism in committing economic offences is always optional, and the conditions stipulated in provisions 2, 3, and 4 of the Article must be fulfilled in order that the court could impose tightened fine for an economic offences rather than the prescribed one. However, whether the court will make such a decision should be decided on a case-by-case basis in light of its specifics, as well as in accordance with evaluation of the situation previously described in the posed question.[23]

Conclusion

The authors' intention is to emphasize provisions of three laws governing the field of punishable acts, i.e. the Criminal Code, the Law on Misdemeanours and the Economic Offences Act, particularly regarding tightening the penalty. The answer to the question whether it is possible to tighten the penalty for punishable act in the legal system of Serbia is clear –the penalty can be tightened. The penalty can be tightened for perpetrators of misdemeanours and economic offences. Therefore, for the so called light punishable acts, the penalty can be tightened, while it is not envisaged for the gravest punishable acts – criminal offences. Bearing in mind that in practice, imposed penalties are close to their minimum, or even below the envisaged minimum, we find that this possibility will take effect only as prevention for potential perpetrators of misdemeanours and economic offences.

[23] The answer was stipulated on the session of the Department for Economic Offences and Legal Counting Litigations of the District Commercial Court held on 20th September 2006.