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OBSTACLES TO AND CONDITIONS OF CRIMINAL RESPONSIBILITY IN HUNGARIAN ECONOMIC OFFENCES

A court may only impose a penalty in relation to an act that is hazardous to society and contravenes criminal law.[2] Therefore, our starting point is that an act must be an identifiable offence under substantive criminal law. A condition for this is that the offence must be choate, and there must be no factors present which may exempt from illegality or criminal responsibility. In academic literature, the latter category is also called *primary grounds for exemption from criminal responsibility*.

Nonetheless, criminal responsibility also has a further – similarly substantive – condition. This is the absence of grounds for total exemption from criminal responsibility[3] and other obstacles to criminal prosecution.[4] These two are called *secondary grounds for exemption from criminal responsibility* by Ferenc Nagy. This moniker, in contrast with primary grounds, intends to

[2] Criminal *measures* – *warning* and *probation with supervision* – may be imposed by a prosecutor. s. 64(2) of Act C of 2012 on the Criminal Code (Btk.); s. 418(2) of Act XIX of 1998 on Criminal Procedure (Be.).

[3] Btk. s. 25: Criminal responsibility shall be excluded: a) upon the death of the perpetrator; b) by statutory limitation; c) by clemency; d) upon voluntary restitution; e) under other grounds defined by law."

[4] Btk. s. 30: "Criminal prosecution shall be precluded lacking: a) a private motion; b) an official complaint."

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highlight that when these factors are at play, the offence is completed under the standards of substantive law, but a determination of liability is nonetheless barred.[5] Furthermore, a determination of criminal responsibility may be excluded due to procedural causes with respect to a covert investigator[6] and a cooperating perpetrator.[7] My position is that this category includes instances when the prosecutor halts an investigation due to the favourable completion of a period of conditional prosecutorial deferral.[8] The reason for this is that a conditional prosecutorial deferral is the "prosecutorial equivalent" of a court's power to place on probation, and because the favourable outcome of a period of probation qualifies as legal ground for terminating criminal responsibility,[9] there can be no other conclusion in relation to a conditional prosecutorial deferral either, though the legal basis is distinct.

It is worthy of mention that criminal law does not only feature elements that exempt completely from criminal responsibility, but it also includes provisions for the reduction – and even the indefinite reduction – of punishment. A simple commutation[10] allows the court to impose a sentence below the minimum sentencing requirement or to seek an alternative to punishment if significant mitigating circumstances are present. Unlimited reduction effectively overwrites the minimum sentencing requirement and allows the use of any

[5] Ferenc Nagy: A magyar büntetőjog általános része. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2010, p. 176.
[6] Be. s. 224(1)(a): "An covert investigator shall not be liable for any criminal offence, misdemeanor, or infraction during the course of his deployment, if that is necessary for his deployment, effectiveness, and the law enforcement aim to be accomplished by the deployment, and if the law enforcement aim to be accomplished by the deployment is of a higher importance than the prosecution of the investigator."
[7] Be. s. 382(2): "The prosecutor can refuse a complaint if a person reasonably suspected of committing an offence contributes to the investigation of the offence or another criminal offence to a degree where the national security or law enforcement interest of cooperation is greater than the interest of the prosecution of the aforementioned person reasonably suspected of committing an offence."
[8] Be. s. 420(1).
[9] Btk. s. 66(2).
[10] Btk. s. 82.

alternative penalties or the mildest disposal. A substantial difference between obstacles to liability and mitigating provisions is that in the former there are no charges raised, because the prosecutor (or, depending on the nature of the relevant hurdle, the investigating authority) terminates proceedings.[11] When considering the reducibility of punishment, raising charges generally cannot be avoided, because the court must be put in a position through indictment to adjudge the circumstances of reduction. An exemption to this is the previously-mentioned conditional prosecutorial deferral, if, of course, the legal requirements for this are present.

According to the correct interpretation, instances where the wording suggests that the law approaches a provision not from the negative side (i.e. "it is not punishable…") but through positive language (i.e. "it is punishable if…") cannot be considered as obstacles to responsibility. An example of this is a provision on *fraudulent bankruptcy* [s. 404 of the 2012 criminal code (Btk.)], which states that this offence is punishable if

a) bankruptcy proceedings have been opened;

b) liquidation proceedings, involuntary de-registration or compulsory winding-up proceedings have been ordered; or

c) liquidation proceedings had not been opened by derogation from the relevant statutory provisions.

[11] According to Be. s. 398(1), this power primarily belongs to the investigating authority, and, as per paragraph (2), the Prosecution Service may be entitled to the exercise this power in exceptional circumstances. For example, in an instance of voluntary resititution, only a prosecutor can terminate proceedings and not an investigating authority. If an action does not constitute a criminal offence, both are entitled to terminate.

In these cases, we do not speak of obstacles to responsibility but its very conditions.[12]

In this study, I will provide a detailed examination of one aspect of this topic, which is concerned with the theoretical, investigation supervisory, and prosecutorial dimensions of economic crime. Through an examination of the academic literature of general and economic criminal law and a review of effective legislation, I will discuss the various types of obstacles to criminal responsibility in the field of economic crime, and what criteria were developed in jurisprudence and through judicial practice to identify or ignore them.

My analysis will start with a short discussion of the rules relating to obstacles to responsibility contained in the general part of the criminal code (Btk.), touching on both instances where illegality and culpability are excluded and where obstacles to prosecution continue to allow for the classification of an act as criminal. Then, we will move on to the special part grounds in relation to the previously-discussed economic offences.

Grounds Precluding Illegality

The Btk.'s general part grounds for precluding illegality (or, in the words of some writers, *threat to society*)[13] are, due to the nature of the subject, rarely relevant to economic crimes. As such, we cannot speak of *justifiable defence*, and even the issue of *means of last resort* arises only on a very theoretical basis.[14] However, s. 24 of the Btk., according to which "an act that is authorised

[12] Ferenc Nagy: ibid. p. 175.
[13] In Ferenc Nagy's interpretation, these are written or unwritten legal concepts that contradict the illegality of an identifiable offence. Ferenc Nagy: ibid. p. 135.
[14] Theoretically speaking, a situation similar to *means of last resort* may arise in the instance of a nearly-bankrupt entrepreneur, who is only able to feed his family through illegal acts committed via his company. However, if one is in a position where he is able to commit an economic offence, it would

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by law or that is exempted from punishment by law shall not be criminalised," is noteworthy. This provision creates the possibility for the direct application of non-criminal law provisions in criminal law. Regarding the application of this rule, the relevant economic offences are those that are framework dispositions, i.e. their content comes from norms in other areas of law. One example for this could be s. 11(1)(a) of Act CXXVII of 2003 on Excise Taxes and Special Rules for Distributing Excise Goods (*Jöt.*), according to which excise goods can be shipped with duty suspension to a bonded warehouse and from a tax exempt user to a bonded warehouse. Consequently, shipping under such circumstances precludes the possibility of *conspiracy to commit excise violation* (Btk. s. 398). The debate surrounding such provisions mostly concerns whether, based on the wording of the statutory definition of the offence, the presence of legal authorisation remedies only the issue of illegality, or if the act ceases to be characterizable as an identifiable offence altogether. Accordingly, the offence of *unauthorised foreign trade activities* (Btk. s. 405) explicitly includes the element of importing and exporting goods without a permit. In this case, not only illegality, but categorisation as an offence, too, is excluded. The same is true for the crime of *unauthorised financial activities* (Btk. 408).

Additionally, in the field of economic crime, the permissible undertaking of risk may be an element that precludes the illegality of an act. This may arise in relation to acts carried out in the course of business, where company leaders' discretion includes the weighing of engagement in risky economic activity. In these instances, an economically advantageous outcome is possible, but, should

seem nearly impossible to determine that he is facing an imminent threat. Though it belongs to the category of *offences against property*, a comparable old Hungarian case is cited by Ádám Zoltán Mészáros, where the Curia "acquitted a parent who stole firewood in the interests of his children, because without heating material his children would have gotten sick and their lives would have been endangered." According to the author, too, the flaw of the decision was that there was no imminent threat. Ádám Zoltán Mészáros: A végszükség szabályozásának alakulása, tekintettel az új Btk.-ra. Jogelméleti Szemle, 2012/4., p. 3.

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the process yield unexpected results, the threat of a legally relevant *adverse result* is present.[15]

Though on a theoretical level it is possible that a criminal court must correctly decide on an instance of permissible risk, on the practical significance of the topic since the democratic transition I agree with Ervin Belovics, who states that,

> "*for most economic actors and decisionmakers, the field of possible action is limited firstly by concrete laws […] and, second, by other legal norms. A decision that is harmonious with these norms – as there is no transgression – does not attract liability under criminal law. A transgression of the norms, however, would, as long as other factors – e.g. financial loss – are also present. Nonetheless, in this case the basis for responsibility is not the undertaking of outsized risk, but the materialisation of the specific statutory elements of an offence. Simultaneously, if the relevant economic activity is not illegal, the criminal responsibility of the person expressing or conducting it cannot be considered, because one of the main characteristics of economic life – virtually its natural corollary – is that participants can sometimes make economically advantageous decisions, and sometimes they make economically disadvantageous – i.e. unprofitable – choices. But this is a problem to be evaluated in the field of the economy, and under the rule of law it cannot pertain to criminal law.*"[16]

[15] The most detailed coverage of this topic was in Emil Erdősy: A megengedett kockázat a büntetőjogban. Akadémiai Kiadó, Budapest, 1988.
[16] Ervin Belovics: Az érték-érdek összeütközések mint a büntetendőséget kizáró okok. Budapest, 2008, p. 198.

Finally, the victim's agreement is a cause for exemption from illegality under customary law. In economic crime, this may arise in a so-called *sham contract*, which nonetheless does not rule out the possibility of illegality. This is because the victim's acquiescence may not preclude illegality if the act causes harm to society.[17] According to the decision of the Supreme Court, such may be the case with *sham contracts* entered into with the purpose of tax evasion, which is clearly *budget fraud* (Btk. s. 396).[18]

Causes for Preclusion of Culpability

Being under the age of criminal responsibility is only minimally relevant among the causes for the avoidance of culpability[19] in economic crime. In relation to minors, we may simply highlight that while the new criminal code lowered the age of responsibility for some crimes from fourteen to twelve,[20] this did not affect economic offences.

Of practical relevance is the defence of insanity,[21] especially as it may arise not only as a factor hindering culpability, but it can also allow for the unlimited mitigation of punishment.[22] In the former case, insanity exists to a degree that prevents the perpetrator from understanding the outcome of his conduct or acting in accordance with this understanding. In the latter, understanding and accordingly appropriate behaviour are simply limited but not non-existent. To keep matters "running smoothly," it is not uncommon in the circles of organised crime to appoint a barely or not at all educated, often homeless and/or mentally impaired individual – frequently referred to as a strawman – as manager to a

[17] Ferenc Nagy: ibid. p. 153.
[18] Legf. Bír. Kfv. 35317/2002.
[19] Culpability is the attributable mental relationship between the perpetrator, his act, and the act's socially dangerous consequences. Ferenc Nagy: ibid. p. 162.
[20] Btk. s. 16.
[21] Btk. s. 17.
[22] Btk. s. 17(2).

company in exchange for a few thousand forints.[23] He is made to sign all documents for the company and, naturally, he then appears on the radar of the National Tax and Customs Administration's (NAV) investigators.[24] When interviewed by detectives, he states that he has no idea about the company's affairs. Investigations are usually halted at this point not due to the presence of grounds for excluding culpability, but because the determination that a crime has been committed cannot be made, and the continuation of proceedings is not expected to produce results (*termination due to lack of evidence*).[25] However, if criminal responsibility can be established [usually in connection with *breach of accounting regulations* (Btk. s. 403)], the psychiatric evaluation of the perpetrator is often waived, even though a competent action or dismissal necessitates expert opinion. If the perpetrator is mentally impaired in his conduct or his ability to assess it, the prosecutor must submit a competent motion pertaining to the possibility of the unlimited mitigation of penalty according to the relevant legal requirements. If the impairment is complete, the investigation must be halted. Motions for compulsory treatment and acquittal are statutorily not competent in economic crimes, because the category does not include violent interpersonal offences or acts that endanger the public.[26]

Furthermore, duress or threat might be grounds for precluding culpability.[27] The law prescribes a requirement of writing (sometimes fulfilled through electronic means) for forming companies and amending articles of association, so compelling someone through pressure or intimidation to criminal conduct can have practical relevance. For example, such would be the case if a perpetrator

[23] Ágota Kozma: Zsebszerződések veszélyei. Magyar Jog, 2012/6, pp. 350-360.
[24] Be. s. 34(2); ss. 4(3) and 14 of Act CXXII on the National Tax and Customs Administration.
[25] Be. s. 398(1)(c).
[26] Btk. s. 78(1).
[27] Btk. s. 19.

submits doctored data to the tax authorities due to threats that he and his family will be murdered.

Mistake may also have great practical significance, whether it is factual or regarding the degree of societal harm an act will achieve.[28] An example of a factual mistake would be a scenario of *money laundering* (Btk. s. 399), where the accused is unaware that the funds are of illegal origin. The Supreme Court itself pointed out the significance of errors relating to the estimation of societal damage in economic crime. Citing court decisions, Csilla Hati states that

> "*in offences where the legal framework changes frequently, there appears to be greater probability for the perpetrator's underestimation of societal harm. This is underpinned by the fact that various courts often differ in their opinions on these cases. In such instances, it cannot necessarily be expected of the perpetrator to be aware of applicable regulations, expectations, and duties*."[29]

Considering this, it may be argued successfully in a *budget fraud* case that the offence was committed solely because the accused was unaware of the measure of budgetary contribution required due to changes in the details of tax law. Finally, a case carefully examined by Balázs Elek also belongs to this field, in which the mistake in estimating the degree of societal harm is due to misinformation by the authorities.[30]

[28] Btk. s. 20.
[29] Csilla Háti: A társadalomra veszélyességben való tévedés. Büntetőjogi szeme, 2012/3., p. 14.
[30] Balázs Elek: Juris ignorantia non excusat? A jogi tévedés megítélése a gazdasági büntetőperekbe. Rendészeti Szemle, vol. 2009/7-8, pp 100-102.

While causes precluding *expectability* are contained not in the general but the special part of the Btk., the reason why they must be discussed here is that they exclude culpability and therefore the formation of an offence. This academically accepted view[31] was recognised by the Supreme Court's 2/2002 ruling on the uniformity of criminal law:

"*Without culpability there is no responsibility under criminal law; this follows from*

s. 10 of the criminal code. The expectability of behaviour corresponding to the norm is an element of culpability. All must refrain from criminal acts; the law expects that citizens' behaviour be influenced by the «communal motif». There are however instances where this cannot be expected under the burden of criminal responsibility. Expectability is the evaluative /normative/ element of culpability, and it always manifests itself to the benefit of the perpetrator."

In economic crime, we may find an example for the exclusion of *expectability* in the offence of *failure to report violation of international economic restrictions,* in relation to which, as per s. 328(2) of the Btk., a perpetrator's relative is not culpable. This is because the law cannot expect the perpetrator's relative to report him to the authorities.

Special Part Obstacles to Criminal Responsibility

According to the Btk. s. 400(3), one is not responsible for money laundering if he makes a voluntary report to the authorities and discloses the

[31] Ferenc Nagy: ibid. pp. 174-175.

circumstances of commission – granted that the crime has not been discovered, either completely or in part. Gábor Miklós Molnár suggests that,

"*[t]his provision is based on a policy principle. Society has a greater interest in*

uncovering money laundering than in punishing the perpetrator. Via the collateral, uncovering money laundering may lead to uncovering and prosecuting the principal act, because the legalisation of criminal moneys is often intended to ensure funding for new criminal activities."[32]

This general idea also appeared in the works of Miklós Kádár and György Kálmán:

"*The protection of a legal interest and the retroactive remedy of the damage caused are more important to society than general and special prevention through punishment.*"[33]

According to Btk. s. 405(4), a person who conceals assets to avoid liability "shall not be punishable for concealment of assets if the debt is settled before the indictment is filed." In addition to protecting the lender, this regulation, too, responds to a policy consideration. Lenders generally tend to value recovering outstanding sums over lengthy criminal and civil litigation. In contrast with the criminal code effective until 30 June 2013, the number of available grounds for the exclusion of responsibility with respect to this offence has shrunk: The

[32] Gábor Miklós Molnár: ibid. p. 524.
[33] Miklós Kádár - György Kálmán: A büntetőjog általános tanai. KJK, Budapest, 1966, p. 498.

previous legislation allowed payment until indictment,[34] while the current rule requires payment specifically from the perpetrator himself.[35]

The problem is not remedied by the ministerial justification for the Btk., which states that,

> "*[t]he law retains the ground precluding responsibility contained in the effective Btk's s. 297(2), but it extends this to the currently extant offence of concealment of assets as well. The guiding rule continues to be that the settlement of debt is competent until indictment. This defence cannot terminate court proceedings. Should settlement occur during proceedings, this should be considered during sentencing."*

It is true that the new rules combined the offences of *concealment of assets* and *concealment of assets for avoiding a liability*,[36] but the justification does not discuss why it abolished the possibility of a defence if a well-wisher makes payment and restricted this solution solely to payment by the perpetrator. From the perspective of lender protection, it is completely irrelevant whether the debtor or someone else offers payment. A suggestion that the previous, more liberal text be restored may be made, with the additional concession that this defence be available not simply up to the point of indictment but until the court of first instance makes its decision. If the accused is able to settle by that time, there is no need for punishment.

[34] S. 297(2), Act IV of 1978.
[35] Previously correctly stated in Mihály Tóth: ibid., p. 153.
[36] László Fázsi: Egy „helytelen" törvényi tényállás az új Büntető törvénykönyv rendszerében. Büntetőjogi szemle, 2012/3., pp. 6-10.

Furthermore, it is suggested that this exemption from responsibility could be made to apply to other economic offences involving the withholding of capital or other instruments. An example of this could be the offence of *impairment of own capital* (Btk. s. 407), because even in the case of a limited liability corporation (kft.), with a view to securing the flow of business, it is not justifiable to hold its executive accountable if he can later replace the misappropriated own capital.[37] In my view, *de lege ferenda* there would be a need for a defence for the charge of *fraudulent bankruptcy* for those who are able to repay lenders until the ruling of the court of first instance is issued.

S. 415(5) of the Btk. includes a defence to the *marketing of substandard products*.[38] According to this, the accused may not be held responsible if "he makes every effort, upon gaining knowledge of the substandard quality of the product, to regain possession of the substandard products." According to the justification,

> "*[i]n this instance, the law shows its appreciation by ensuring impunity for the active mitigating behaviour undertaken to prevent loss."*

A critique of this provision may suggest that, with a view to achieving a relatively more lenient degree of culpability and the mitigation of damage, it offers total impunity for the perpetrator. It seems to pay no attention to whether we are faced with a more severe and conscious negligence or to the value of the goods. In my view, this ground for exemption from responsibility could be amended to allow for the punishment's unlimited commutation for the

[37] László Horváth: A társasági tőke védelmének büntetőjogi eszköze: a saját tőke csorbításának bűntette. Büntetőjogi Szemle, 2015/1-2., pp. 54-57.
[38] Krisztina Karsai: Fogyasztóvédelem és büntetőjog. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2009, pp. 81-102.

mitigation of loss and its omission if particularly commendable efforts were shown.

S. 420(4)-(6) of the Btk. includes both special grounds for exemption from responsibility and the possibility of the penalty's indefinite commutation or dismissal in relation to *agreement in restraint of competition in public procurement and concession*

procedures. These provisions are intended to offer an effective criminal law response to cartels.[39]

Summary

In this study, we intended to stress via a review of academic literature that the examination of the grounds for exemption from criminal responsibility in the field of economic offences requires careful consideration from the field's practitioners. From amongst the factors precluding culpability, it is worth highlighting certain cases where a mistake is made in relation to the appreciation of an act's harmful societal effect, which may have practical relevance in situations where the legal framework changes rapidly or when the authorities offer erroneous information.

The causes for the exclusion of responsibility in the special part of the criminal code were found to be mostly agreeable, though in some cases arguments for additional grounds were advanced, while in others more stringency was desired.

[39] Ágnes Roxán Kéryné Kaszás: Korlátok és lehetőségek, avagy a kartelltilalom büntetőjogi szabályozásának helye a magyar jogrendszerben. Pécs, 2013.