



Дудоров О. О.,
доктор юридичних наук, професор,
заслужений діяч науки і техніки України,
професор кафедри кримінального
права та правосуддя
Запорізького національного університету



Каменський Д. В.,
кандидат юридичних наук, доцент,
завідувач кафедри галузевих юридичних
дисциплін Бердянського інституту державного
та муніципального управління Класичного
приватного університету

ЩОДО НАЗВИ РОЗДІЛУ VII ОСОБЛИВОЇ ЧАСТИНИ КРИМІНАЛЬНОГО КОДЕКСУ УКРАЇНИ

Розглядаються питання, пов'язані з удосконаленням назви розділу VII Особливої частини Кримінального кодексу України «Злочини у сфері господарської діяльності». Окреслено деякі історичні передумови проблеми, наведено конституційні положення щодо правової регламентації відповідної сфери суспільних відносин. Розкриваються наукові позиції щодо тлумачення поняття «економічні злочини» та його аналогів. Наводяться аргументи на користь використання кримінально-правового поняття «злочини проти ринкової економіки».

Ключові слова: економіка, злочини у сфері господарської діяльності, економічні злочини, злочини проти ринкової економіки, кримінально-правове поняття, об'єкт злочину.

Рассматриваются вопросы, связанные с усовершенствованием названия раздела VII Особенной части Уголовного кодекса Украины «Преступления в сфере хозяйственной деятельности». Изложены некоторые исторические предпосылки проблемы, приведены конституционные положения о правовой регламентации соответствующей сферы общественных отношений. Раскрываются научные позиции по вопросу о толковании понятия «экономические преступления» и его аналогов. Аргументируется положение о целесообразности использования уголовно-правового понятия «преступления против рыночной экономики».

Ключевые слова: экономика, преступления в сфере хозяйственной деятельности, экономические преступления, преступления против рыночной экономики, уголовно-правовое понятие, объект преступления.

Analysis of legal literature on the issues of criminal liability for business (economic) crimes, demonstrates a lack of focus from local scholars on issues of adequately naming these crimes, justifying their balanced name based on position of developing quality conceptual apparatus of the Criminal Code of Ukraine. With this being said, there are many authors' interpretations of generic and specific objects of economic (commercial) offenses in criminal law treatises (of both Soviet and modern periods). Qualitatively different definitions of crimes in economic activities are proposed, more or less successful attempts to classify (organize) such punishable acts are made. It appears that listed promising directions of scientific investigations should be carried out in the future, but in order to be consistent, this should be done after conducting a study aimed at developing a balanced concept that would embrace diversity of economic crimes.

Specific nature of economic crimes, distinctly blanket method of constructing dispositions of relevant articles of the criminal law, dependence of such conducts from the level of development and protection of economic relations in the country make us think about their stable, correct name. «Commercial», «economic» (in some countries also «white collar», «corporate» and «professional»), «in business environment» – one can find many variations of concepts in the legal literature that cover similar by content punishable acts. Sometimes it is noted that the term «crimes of economic orientation» along with such definitions as «economic crimes», «crimes in the area of economy» and «crimes in the area of economic activity» have become a strong part of the conceptual framework of criminal law and other fields of knowledge, and are widely used by employees of law enforcement agencies [1, p. 8]. Attention is correctly drawn to the existence of relationship issues between the concepts of «economic crimes», «crimes in the area of economy», «crimes in the area of economic activity», «crimes of economic orientation» and «crimes of economic char-

acter» in the criminal law [2, p. 26]. And if one considers the fact that the named above phrases are involved in the circulation of not only law but also economic sciences, the task of determining correct definition of relevant offenses becomes seriously complicated. It is rather hard to disagree with P. S. Yani that in general it is very hard to define limits of the concept of economic crime in strict criminal law sense, because there will be always some level of convention behind it (the concept) [3, p. 32]. Despite its widespread nature in the scientific circulation, lack of conventional criminological concept of «economic crime» is mentioned in the literature. It is not associated with imperfect mechanisms of scientific comprehension or inefficient organization of scientific analysis, but with the nature of the problem itself. It refers to the phenomenon, the essence of which is not revealed completely; at the same time study of this issue is rightly called as a powerful incentive for continuous search for new meaning [4, p. 40].

We would like to remind that at one point the Cabinet of Ministers of Ukraine submitted a draft law «On Combating Economic Crimes» to the Parliament (registration number 2013 from July 18, 2002), that contained vague and, in our opinion, generally failed definitions of economic crime (as a socially dangerous act under the Criminal Code Ukraine that infringes on property and proprietary rights of individuals and entities in the course of their economic or official activity) and economic criminality (as combination of crimes in the course of economic, official activity and other economic crimes).

The purpose of the proposed article is to develop optimal designation of crimes, norms on liability for which are concentrated in Chapter VII of the Special Part of the Criminal Code of Ukraine, on the basis of legal analysis and critical comparison of criminal law concepts «crimes in the sphere of business activity» («business crimes») and «crimes against economic activity» («economic crimes»).

It is worth recalling in the historical and legal perspective that criminal law of the Soviet period used the concept of «business crimes». Such title was given in particular to Chapter VI of the Special Part of the Criminal Code of Ukraine of 1960 (Criminal Codes of other Soviet republics contained same titles of relevant chapters). Great Soviet Encyclopedia defined economic crimes as socially dangerous acts aimed at causing losses to socialist economy [5, p. 264]. Some Soviet scientists already questioned the specification of titles for relevant crimes in the eighties of last century [6, p. 16, 22].

Art. 4 of the USSR Constitution of 1937 stated that the economic foundation of the Ukrainian SSR is established by socialist economic system and socialist ownership of the means and ways of production that were established as a result of elimination of the capitalist economic system, abolition of private ownership of the means and ways of production and elimination of exploitation of a human by a human. Chapter 2 of the USSR Constitution of 1978 already was named «Economic system», and it was declared in its Art. 16 that Ukraine's economy is a part of a single people's economy complex that covers all levels of social production, distribution and exchange in the USSR. Based on the example of demonstrated provisions of constitutions of the Soviet Ukraine one can observe evolution of the legal regulation of economic relations, their explicit ideological content, that affected the development of criminal law.

For comparison, part 4. of Art. 13 of current Constitution of Ukraine contains provision that the state protects the rights of all subjects of ownership and business, social orientation of the economy. As one can see, the Basic Law of our country uses the terms «business» and «economy». Then it is written in Art. 42 of the Constitution of Ukraine that everyone has the right to entrepreneurial activity that is not prohibited by law. The Basic Law also declares: state protects competition in business; abuse of dominant position in the market, unlawful restriction of competition and unfair competition are not

allowed; state protects the rights of consumers, exercises control over the quality and safety of products and all kinds of services and activities, assists to activities of civil consumer organizations. These obligations of the state, as follows from the meaning of Art. 42 of the Constitution of Ukraine, refer to the domain of entrepreneurship.

By the way, Chapter 29 of the Model Criminal Code for CIS countries is entitled «Crimes Against the Order of Business and Other Economic Activities». It follows that entrepreneurship is one of the types of economic activity. To some extent this corresponds with part 2 of Art. 3 of the Business Code of Ukraine, where the concept of «entrepreneurship» covered by a broader concept of «business activity».

Under such circumstances, proposal by some researchers (G. Borzenkov, N. Kuznetsova, T. Ustinova, etc.) to legally secure notion of entrepreneurship activity in the title of the relevant chapter of the Criminal Code is viewed as questionable. The perception of this proposal will unjustifiably change content-logical characteristics of the existing system of business crimes, will lead to new approaches in the formulation of a generic object of these crimes, which is already ambiguously defined in the criminal law doctrine.

Introduction of approaches existing in the most developed countries in the world on the issues of designation and location of economic criminal prohibitions, indicates a generally low level of such bans systematization. Against this background. Singling out a separate section on crimes in economic activity in the Criminal Code of Ukraine is viewed as advantageous approach on this background. To some extent this facilitates legal analysis of criminal attacks on the economic organization of the state.

We would like to note that allocation of economic crimes into a separate section of the Special Part of the criminal law is the characteristic feature of countries that represent the «Eastern branch» of Romano-Germanic legal system, that is former and current socialist countries. And according to

frequency of criminalization in the world economic crime sets are divided into three groups: 1) acts that are somehow criminalized in all or almost all countries (including illegal action in bankruptcy, tax crimes, smuggling, counterfeiting money); 2) acts that are criminalized in most countries (such as money laundering, illegal receipt and disclosure of information that constitutes trade secrets, unlawful use of a trademark, illegal organization and breach of gambling standards, usury); 3) acts that are criminalized only in certain countries (monopolistic actions and restrictions of competition, commercial bribery, breach of accounting rules, violation of foreign exchange transactions, consumer fraud, etc.) [7, p. 226, 228–229].

Analyzing relationship between the concepts of «economic crimes» and «business crimes» V. Yehorshin and V. Kolesnikov remind that along with the concepts of economic criminality and economic crimes concept of «business crimes» was used in Russian legal literature quite widely until recently. In determining the content of the latter many discrepancies were observed. Some authors, based on the ideology of the old Criminal Code of the RSFSR, that contained a separate chapter «Business crimes», considered this type of crimes as self-sufficient and independent. Others, however, recognized business crimes as a variety of economic crimes [8, p. 47]

While proposing to call the analyzed group of socially dangerous assaults «economic crimes», I. Klepytskiy emphasizes that the economy as a set of industrial relations is identical to the national economy, which constitutes a complex system that includes relations mediated by both private and public law. Overall accepting such proposal, at the same time B. Volzhenkin indicates its inconsistency with the trends of modern Russian law to clearly reflect generic object of offenses («crimes against ...») in the title of the chapter of the Criminal Code [9, p. 78]. One can draw parallels with the structure of the Criminal Code of Ukraine, Special Section of which includes a section «Crimes in business activity». Un-

clear term «in sphere» loses to a more accurate «against».

While positively accepting the idea of the priority of economic substance over legal form in addressing issues of criminal law protection of economic relations, we would like to note that the term «people's economy» attracts some skepticism. On one hand, this term is used to denote the set of industries and areas of production, consumption and exchange (in the broader sense this is a historically conditioned set of industries of a specific country, inter-related between each other by division of labor). On the other hand, the mentioned concept became spread at the time of construction and operation of the Soviet model of command (planned) economy, which has proven to be unsustainable over time. Many experts and ordinary Ukrainians associate people's economy with the previous (socialist) system of economy construction. People's economy that presumes belonging of the entire economy of the state of its people, has long been a fiction. Actually business, if we use this term, belongs to some individuals or their associations. By the way, thinking of the refusal of the Russian legislator outdated concept of «economic crimes» B. Volzhenkin suggested that in this case we are talking about some association with the concepts of «Soviet economy» and «people's economy», the contents of which substantially graded in the process of development of market economy relations [9, p. 78].

Taking into account the fact that our government has chosen the path of building a developed model of market economy with guaranteeing freedom of entrepreneurship (as it follows, in particular, from the aforementioned Art. 42 of the Constitution of Ukraine), it makes sense to replace «people's economy» with «national economy», and even better – with «market economy», as more will be discussed below.

We have repeatedly written about the ambiguity of the title of Chapter VII of the Special Part of the Criminal Code «Crimes Against Economic Activity». Legislator can

be criticized that this title does not reflect generic object of relevant offenses as the foundation for the Special Part of the Criminal Code, does not clearly show what exactly relations are put under protection by criminal law norms, that are incorporated in the mentioned chapter of the Criminal Code. The feeling of failure of the mentioned title increases, given the fact that there may be committed offenses that are not specifically business-type (such as bribery of an official of private law entity, forgery, fraud, misappropriation or embezzlement) in the area of business activity. Following this logic, economic crimes in the broad sense of the term may include, for example, the murder on greed motives, that was aimed at preventing a group of shareholders from gaining an advantage while discussing the issue of dividend distribution at the general meeting [11, p. 32–33].

According to S. Mazur, crime against economic activity is a socially dangerous act prohibited by criminal law that directly infringes on social relations, that appear on the grounds of production, distribution, exchange and consumption of material and other goods and services and that ensure interests of normal and fair entrepreneurial and credit financial activities in the country [11, p. 24–26]. Distinction between entrepreneurial and credit financial activities should be noted, that, in our opinion, is the result of proper understanding of economic legal nature of two groups of public relations.

In criminology the concept of «economic criminality» is common and extensively developed one. The phenomenon of economic criminality was and remains the subject of numerous studies, but there is no consensus about the understanding of economic criminality neither in foreign nor on domestic criminological science [12, p. 46]. As A. Boyko mentions, there are three groups of relevant approaches: 1) economic crimes are considered as such when they directly or indirectly harm the economic system of the state and are committed with the goal to obtain economic benefits (some crimes against property, crimes against economic activity, crimes against official per-

formance); 2) economic are crimes against property that are related to business activities and crimes against activity; 3) only crimes committed by subjects of business activity or their officials in the course of business activity can be considered economic ones [13, p. 26–28].

According to O. Kalman, criminality against economy should mean the socio-economic destructive to the state's economy phenomenon that manifests itself in committing willful lucrative crimes by people in the area of legal and illegal economic activity, the main direct object of which are property relations and relations in the field of production, exchange, distribution and consumption of goods and services for profit [14, p. 46, 50].

Even with that said, it is clear that the results of criminological researches have to be used for the purposes of criminal law projects (including in the context of problem under our examination) very carefully. Moreover, we can not reckon with the position of domestic legislator.

Too broad approach, within which crimes against property are (especially without any warning) related to the economic offenses is unacceptable on criminal law point of view: it does not allow to clearly distinguish the scope of relations, which, being regulated by the state, covers production, distribution, exchange and consumption of goods and services among unspecified number of participants in the process of systematic and productive activities and requires proper criminal law protection. In this regard, M. Panov notes that social relations arising in the area of economic business activities include a wide range of relations that are closely connected between each other, stay in unbreakable unity and create a coherent whole. However, they differ from other groups of relations, including such economic relations as property, to which conducting business is not inherent (or conducting business activity). Therefore association of crimes against property and business crimes in one group sounds objectionable [15, p. 24–26].

While agreeing with the reached conclusion, as well as with the position of Ukrainian legislator that has recognized property relations as an independent object of criminal law protection at the same time we would like to point out argumentativeness of the term «against economic business activity» used by M. Panov. Simultaneous indication of both economic and business components of activity appears to interfere with the elucidation of their content and relation. Also a question arises whether there is uneconomical business activity? We have already noted above that economic activity is wider than business activity; by the way, M. Panov has no doubt in this himself [15, p. 26]. Under such circumstances, O. Radutniy is correct that under crimes in economic activity encroachment who understands attacks business relations as part of the economic system of society as crimes against business activity [16, p. 53].

With this being mentioned, neither the title of «crimes against business activity» nor the title of «crimes against economy» are able to claim absence of ambiguity so much desired for criminal law. In order to search for the optimum title of Chapter VII of the Special Part of the Criminal Code we shall try to define the role and place of the relevant criminal law prohibitions in the coordinate system of the market economy, which while being officially declared, still remains in transition mode.

The term «market economy» is defined differently in various sources. Here are just a few definitions. Market economy means a socio-economic system that is based on the principles of free entrepreneurship and choice and is developed on the basis of private property and commodity-money relations. This is the type of economy that is organized on the basis of market self-regulation, in which coordination of participants' actions is carried by the state, namely – by legislature and judiciary directly, and by executive branch – indirectly, through the introduction of various taxes, duties, privileges and more. Only decisions by buyers, suppliers of goods and services themselves

determine the structure of distribution in such economy.

Turning to the market economy model is found in the works of specialists in criminal law. For example, M. Talan mentions that the main criterion for identification of an act to economic crime is their ability to harm market relations by actors, who are included in these relationships to some extent. Crimes in the against economic activity are defined by the mentioned author as acts that cause damage or create a real possibility of causing damage to a system of social relations protected by state that develop in the economic sphere of society with a market economy [17, p. 29–30].

It is symptomatic that B. Volzhenkin has named one of the chapters of his manuscript as «Crimes against economic activity during the period of dismantling the system of socialist business and transition to market economy». Soviet criminal law was not consistent with the realities of modern society development any more because collapse of the old economic system, development of market relations have brought factors to the economy that have created conditions for the commission of socially dangerous acts unknown to socialist economy and affecting interests of owners, violating principles of free, fair and safe entrepreneurship, economic interests of the state [18, p. 45, 65]. It is difficult to disagree with scientist that drastic changes in social life, that is protected by the criminal law, require appropriate systematic changes in criminal law regulation as well.

We will try to compare concepts of «crimes against market economy» with a range of criminal law prohibitions that constitute Chapter VII of the Special Part of Criminal Code of Ukraine on hypothetical level. Depending on the group object all crimes against economic activity can (of course, with a certain degree of conditionality) be classified into: 1) crimes against the system of currency circulation, stock market and order of some documents turnover; 2) crimes against tax system and system of compulsory state social insurance; 3) crimes against

budget system; 4) crimes against the order of movement of goods across the customs border of Ukraine; 5) crimes against business activities procedure; 6) crimes against the rights of creditors; 7) crimes against the principles of fair competition; 8) crimes against the order of privatization.

«Overlaying» of «market economy» concept on the relations protected by Chapter VII of the Criminal Code of Ukraine indicates that this form of organization of national system of production, distribution, exchange and consumption of goods generally well covers areas of economic activity that are protected by criminal law. Thus, stock market, creditors' rights, fair competition – these components of Ukrainian economy are the embodiment (how well is another question) of the market economy model.

As for the protection of privatization of relations, specific Ukrainian model of transition from a planned to a market economy is implemented in this case. Assets of state may be alienated to private investors' benefit in developed countries. The question is only of acceptable social balance of economic interests under the principle «state-private», as well as of transparency level and economic feasibility of alienation of public assets to private business.

It is somewhat more difficult to determine budget system, systems of taxation and compulsory state social insurance as they relate not so much to a market economy as to finance. Turning to established concept of mixed economy may help here. It should be understood as economic system which operation depends on private

companies and businesses (mostly) and also on the government of the country. The term «mixed economy» refers to the current economy of many developed democratic countries because there is no «pure» market economy in the world today. Combination of the principles of independence and certain centralization in the management of national production and also social development are characteristic for the modern mixed economy [19].

Conducted study allows to reach a conclusion that the concept «crimes against the market economy» in the context of marking offenses that trigger liability under Chapter VII of the Special Part of the Criminal Code of Ukraine, successfully passes the conditional check of the correspondence between this structural part title and its content. We consider proposed concept as appropriate in view of the reasonable criticism of the two main «competitors» – legally fixed concept of «crimes against business activity» and the concept of «crimes against economy (option – economic activity)» that is widespread in the legal literature. We believe that in such way, among other things, it will be possible to avoid «blurring» of one of the key chapters of the Special Part of the Criminal Code Ukraine because of the implementation of idea of separation of chapter about liability for financial crimes. It is clear that the proposed clarification of title of Chapter VII of the Special Part of the Criminal Code of Ukraine does not remove the issue of making skilled and balanced legislative changes regarding liability for crimes against the market economy.

СПИСОК ВИКОРИСТАНИХ ДЖЕРЕЛ:

1. Шмонин А. В. Преступления экономической направленности: понятие и генезис уголовного законодательства: монография / отв. ред. профессор, доктор юридических наук А. В. Шмонин. – М.: Юрлитинформ, 2013. – 472 с.
2. Павлик Л. В. Диференціація кримінальної відповідальності за злочинні посягання у сфері економіки: дис. ... канд. юрид. наук: спец. 12.00.08 / Л. В. Павлик. – Львів, 2013. – 248 с.
3. Яни П. С. Экономические и служебные преступления / П. С. Яни. – М.: ЗАО «Бизнес-школа «Интел-Синтез», 1997. – 208 с.
4. Хиллота В. В. Экономические преступления: эволюция уголовно-правового регулирования / В. В. Хиллота // Криминологический журнал ОГУЭП. – 2007. – № 1–2. – С. 40–47.
5. Большая советская энциклопедия. – М.: Гос. научн. изд-во «Большая советская энциклопедия», 1957. – Т. 46. – 669 с.

6. Уголовно-правовая охрана экономической системы СССР. – М.: ВНИИ проблем укрепления законности и правопорядка, 1987. – 112 с.
7. Сравнительное уголовное право. Особенная часть: монография / под общ. и науч. ред. докт. юрид. наук, профессора, заслуженного деятеля науки РФ С. П. Щербы. – М.: Изд-во «Юрлитинформ», 2010. – 543 с.
8. Егоршин В. М. Преступность в сфере экономической деятельности: монография / В. М. Егоршин, В. В. Колесников. – СПб.: Фонд «Университет», 2000. – 273 с.
9. Волженкин Б. В. Преступления в сфере экономической деятельности по уголовному праву России / Б. В. Волженкин. – СПб.: Изд-во Р. Асланова «Юридический центр Пресс», 2007. – 765 с.
10. Яни П. С. Экономические и служебные преступления / П. С. Яни. – М.: ЗАО «Бизнес-школа «Интел-Синтез», 1997. – 208 с.
11. Мазур С. Ф. Уголовно-правовая охрана экономических отношений в сфере частного предпринимательства: дис. ... д-ра юрид. наук: спец. 12.00.08 / С. Ф. Мазур. – М., 2004–725 с.
12. Пинкевич Т. В. Криминологические и уголовно-правовые основы борьбы с экономической преступностью: дис. ... д-ра юрид. наук: спец. 12.00.08 / Т. В. Пинкевич. – М., 2002. – 417 с.
13. Бойко А. М. Детермінація економічної злочинності в Україні в умовах переходу до ринкової економіки (теоретико-кримінологічне дослідження): монографія / А. М. Бойко. – Львів: Видавничий центр ЛНУ ім. Івана Франка, 2008. – 380 с.
14. Кальман О. Г. Злочинність у сфері економіки України: теоретичні та прикладні проблеми попердження: дис. ... д-ра юрид. наук: спец. 12.00.08 / О. Г. Кальман. – Х., 2004. – 424 с.
15. Панов М. М. Кримінальна відповідальність за незаконні дії з документами на переказ, платіжними картками та іншими засобами доступу до банківських рахунків: монографія / наук. ред. д-р юрид. наук, проф., акад. АПРН України В. І. Борисов / М. М. Панов. – Х.: Право, 2009. – 184 с.
16. Радутний О. Е. Кримінальна відповідальність за незаконне збирання, використання та розголошення відомостей, що становлять комерційну або банківську таємницю: монографія / О. Е. Радутний. – Х.: Ксилон, 2008. – 202 с.
17. Энциклопедия уголовного права / Издание профессора Малинина. – СПб ГКА, 2012. – Т. 19. Преступления в сфере экономической деятельности. – 1215 с.
18. Волженкин Б. В. Преступления в сфере экономической деятельности по уголовному праву России / Б. В. Волженкин. – СПб.: Изд-во Р. Асланова «Юридический центр Пресс», 2007. – 765 с.
19. Змішана економіка: матеріал з Вікіпедії: [Електронний ресурс]. – Режим доступу до сайту: http://uk.wikipedia.org/wiki/Змішана_економіка.

Dudorov O., Kamensky D. On the name of chapter VII the Special part of the Criminal code of Ukraine.

The issues related to the improvement of names Section VII Special Section of the Criminal Code of Ukraine «Crimes in the sphere of economic activity». Outlined some of the historical background of the problem, given the constitutional provisions on the legal regulation of the respective sphere of public relations. Revealed scholarly position on the interpretation of the concept of «economic crimes» and its analogues. We present the case for the use of the criminal law concept of «crimes against the market economy.»

The term «market economy» is defined differently in various sources. Here are just a few definitions. Market economy means a socio-economic system that is based on the principles of free entrepreneurship and choice and is developed on the basis of private property and commodity-money relations. This is the type of economy that is organized on the basis of market self-regulation, in which coordination of participants' actions is carried by the state, namely – by legislature and judiciary directly, and by executive branch – indirectly, through the introduction of various taxes, duties, privileges and more. Only decisions by buyers, suppliers of goods and services themselves determine the structure of distribution in such economy.

Keywords: *economy, crimes in economic activity, economic crimes, crimes against the market economy, the concept of criminal object of the crime.*

Стаття надійшла до редакції журналу 01.11.2015 р.