

# The Impact of European Union Law on the Distinction Between Tax Evasion and Fraud in the Criminal Code of the Republic of Lithuania

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**Keywords:** crimes against the financial system, composition of the criminal offence, *nullum crimen sine lege*.

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Article 2(1) of the Criminal Code of the Republic of Lithuania (hereinafter, CC) defines the principal of *nullum crimen sine lege* as an imperative that prohibits the prosecution of a person if his or her actions do not correspond to the composition of the criminal offence or misdemeanour provided for in the criminal law. One of the requirements of criminal law arising from this principle is that the elements of the offence and the formal elements of it should be expressed in the criminal law as clearly as possible, with the aim of properly assessing person's actions in classifying criminal offences (the principle of *nullum crimen, sine lege certa*) (Švedas, 2006, p. 81).

Such an interpretation of this principle is also enshrined in the case law of the Constitutional Court of the Republic of Lithuania. As stated in the ruling of the Constitutional Court of the Republic of Lithuania no. 7/03-41/03-40/04-46/04-5/05-7/05-17/05, legal regulation established in legal acts must be clear, understandable, non-contradictory, wording of legal acts must be accurate, the internal coherence of the legal system must be ensured, the legal acts must not contain provisions that simultaneously regulate the same public relations in a different way; the law cannot require the impossible; infringements for which liability is established by law must be clearly defined. However, with the ever-increasing amount of criminalised socially unacceptable behaviours that

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leads to almost casuistic creation of a specific criminal law norm for each of the undesirable behaviours in question, a difficulty of delimiting certain criminal offences in practice arises. One of the main reasons for such an intensive criminalisation could also be linked to the transposition of European Union law into national law.

At present, as many as 33 pieces of the European Union legislation (Framework decisions and Directives) have been transposed into national law through the CC and a handful still awaits transposition. In this context, it should be noted that the European Union legislation harmonised by all 27 countries often uses specific legal techniques to construct criminal offences, which often leads to compatibility problems that are not addressed by a systematic assessment of the criminal law system but by *ad hoc* creation of new criminal offences. This creates preconditions for enshrining in the criminal law legal norms that are similar in nature, which establish different limits of criminal liability for acts of a substantially similar nature.

One of such problems, in the author's opinion, is the problem of delimitation of property and tax offences (in this case – fraud (swindling) established in Article 182<sup>2</sup> of the CC and provision of inaccurate data on income, profit or assets established in Article 220<sup>3</sup> of the CC), which still remains relevant to both criminal law science and for practitioners of qualification of criminal acts (lawyers, prosecutors, pre-trial investigation institutions).

Taking this into account, the aim of this research is to distinguish the features of the delimitation of fraud (swindling) established in Article 182 of the CC from the provision of inaccurate data on income, profit or assets offence

<sup>2</sup> Article 182. Swindling

1. A person who, by deceit, acquires another's property for own benefit or for the benefit of other persons or acquires a property right, avoids a property obligation or annuls it shall be punished by community service or by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to three years. <...>

<sup>3</sup> Article 220. Provision of Inaccurate Data on Income, Profit or Assets

1. A person who, seeking to evade the payment of taxes the amount whereof exceeds 100 MSLs, provides data on the person's income, profit, assets or the use thereof that are known to be inaccurate in a tax return or in a report approved in accordance with 76 the specified procedure or in another document and submits such data to an institution authorised by the State shall be punished by a fine or by a custodial sentence for a term of up to four years. <...>

established in Article 220 of the CC and to assess their validity in the context of the Lithuanian and European Union legislation. To achieve this goal, the article analyses the features of criminal offences enshrined in Articles 182 and 220 of the CC, the constructions of criminal offences and their influence on the qualification of these criminal offences, compares the features of the composition of the offences in question with those set out in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (hereinafter - Directive (EU) 2017/1371).

The following scientific research methods were mainly used in the work: 1) linguistic (in interpreting the meaning of the terms used in the composition of criminal offences established in Articles 182 and 220 of the CC); 2) systemic (in assessing the place of the criminal offences in question in the CC system); 3) comparative (identification of similarities and differences in the features of the composition of the criminal offences in question); 5. Document analysis (assessment of the most relevant case law of the Constitutional Court of the Republic of Lithuania).

The object of a criminal act embedded in Article 220 of the CC is the state financial system, the object of the crime provided for in Article 182 of the CC is property and property rights, which is to be considered an integral part of the state financial system. Although O. Fedosiukas notes that in criminal law, there is no fundamental distinction between financial and property crimes, they are set out in different sections of the CC. An encroachment on the public finance system is in no way contrary to the concept of property crime, so in criminal law, the application of property and financial crime rules under the rule of ideal coincidence is commonplace (Fedosiukas, 2010, p. 173). Having that in mind, it is acceptable that the assessed objects of criminal offences are not contradictory to each other but they should not be harmonised, as property is only one of the components of the public financial system. It should be noted that one criminal offence may encroach on both property and public finances (e.g. by falsifying a VAT return, which unreasonably reduces the amount of VAT payable to a person), in the presence of conditional competition for goods protected by criminal law, the public finance system should dominate.

It must therefore be concluded that one of the main characteristics which distinguishes the offences in question is the subject - matter. If it is established that a person's actions have directly encroached on the public financial system,

it should be qualified as a relevant crime against the public financial system. Property and property rights are only an integral part of public finances, therefore it is considered that this object is wider and violation of it affects a significantly larger number of persons.

Analysis of the objective side shows that the objective features of deceit essentially include the features of a criminal offence enshrined in Article 220 of the CC. There are no reasonable criteria to distinguish deceit from incorrect submission of data to a public authority, as the purpose of such submission is to ultimately mislead/deceive the public authority responsible for tax administration. Furthermore, it is important to note that in the case of crimes against the financial system, criminal offences are deemed to have been completed from the moment the acts are committed or abstained, and fraud (swindling) requires the consequences provided for in criminal law. In such a case, it must be considered that the application of Article 220 of the CC should be simpler and more effective, as it is not necessary to establish a complex causal link between the offence and the risen consequences, but in practice, a false report in order to avoid taxes is, in principle, always established only after the fact of tax evasion has been established. In the view of this, the method of committing the criminal offences in question and the formal construction of these norms do not in themselves allow them to be effectively delimited. The only way to delimit the offences in question is to assess the nature of the property to which the offence was directed, bearing in mind whether there is a fundamental difference between public and private finances. Therefore, it should be noted that there could be compliance issues of the constituent elements of the said criminal offences with regards to the principle of *nullum crimen, sine lege certa*, whereas these different criminal offences often criminalise identical misconduct.

It should be noted that the composition of the criminal offence set out in Article 3 (d)<sup>4</sup> of Directive (EU) 2017/1371 does not bring any greater clarity in

- 4 (d) in respect of revenue arising from VAT own resources, any act or omission committed in cross-border fraudulent schemes in relation to:
- (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget;
  - (ii) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or
  - (iii) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

order to distinguish property fraud from criminal offences to the state financial system, because the article in question regards different acts, namely tax evasion, tax avoidance and embezzlement, as simply fraud. In that context, the question arises as to why the (EU) 2017/1371 did not make a clear distinction between tax evasion and tax embezzlement, since, in the author's view, the unlawful conduct in question is not identical in nature and consequences. There is no doubt that in the case of tax evasion, a person seeks to avoid a specific tax liability, even though he or she has the opportunity to actually enforce it, and in the case of tax embezzlement, a person encroaches on public finances (the whole of the European Union) without any legal basis, which is essentially similar in nature to the elementary theft of another's property. Taking into account such established regulation, in the Republic of Lithuania, a person would currently be subject to criminal liability under Article 220 of the CC for the features provided for in Article 3 (d) (i) and (ii) and criminal liability for simple fraud (Article 182 of the CC) for features provided for in Article 3 (d) (ii). Thus, the current legal framework of the European Union still does not allow to draw a specific line in distinguishing tax-related criminal offences from criminal offences to private property. However, the evaluation of the implementation of the said Directive (EU) 2017/1371 into national law by the Commission could provide further answers, whether criminal offences related to VAT evasion and embezzlement fall within the scope of fraudulent crime, or specific criminal offences enshrined in Chapter XXXII of the CC - crimes against the public finance system – should be established.

Given that national VAT also accounts for the bulk of the European Union's budget, it is not clear why such an important tool for harmonising the European Union law is chosen to criminalise only VAT embezzlement of an international nature. Although it is understood that the Directives lay down only minimum requirements for the Member States and that Directive (EU) 2017/1371 created the preconditions for the functioning of the European Public Prosecutor's Office, in the author's opinion, the regulation in question could have been more extensive, clearly establishing the core definitions of tax avoidance, optimization, embezzlement, while not emphasising the necessary cross-border element, as the vast majority of VAT is appropriated within the inner system of the states. Paragraph 1 of Article 83 of the Treaty on the Functioning of the European Union clearly states that the European Parliament and the Council may, by means

of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. In this context, there is no doubt that the fight against both national and supranational (European Union level) VAT fraud is of particular need to be tackled on a common basis.

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