Justifiable Economic Risk

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Summary: The following work has the aim to mark the basic elements of the institute of acquitted economic risk, to make some terminological distinctions and comparisons in order to understand better the nature, scope and significance of the acquitted economic risk as a ground of exoneration of liability.

Key words: acquitted economic risk, law institute, exoneration, liability.

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This paper attempts to examine an interesting, but unfortunately with insignificant practical application so far, penal law institute, such as the justified economic risk. With a view to more complete clarification of the justified economic risk, some other law institutes, such as the normal production-economic risk and the exceptional need are indicated comparatively and in short, also a connection with the administrative and penal liability is made. The judicial practice on the specified problem is extremely inadequate which, on its part, provides a good opportunity for the doctrine to state its opinion in this connection.

The concept of justified economic risk is regulated in the criminal law of the Republic of Bulgaria, which does not mean that it has only narrow penal law meaning. The implementation of the corpus of the justified economic risk entails not only legal but also economic consequences.

I. The institute justified economic risk is settled in the regulation of art. 13a of the Penal Code (PC)[1]. It is from the category of reasons (along with the unavoidable defense; causing of damages to person, who has committed a crime and the exceptional need), excluding the social danger of the act.

According to art. 9, para. 1 of the PC, a crime is such a socially dangerous act (action or inaction) which has been committed by delinquency and declared by the law as punishable. From the same definition it is evident that a compulsory element of the crime is the social danger. I.e. when there is no social danger of the specific act, it does not constitute a crime, which in its respect means that penal liability may not be sought for it. But the question is not exhausted with this.

The concept of socially dangerous act itself is defined in the regulation of art. 10 of the PC, according to which socially dangerous is the act which threatens or harms the personality, the rights of the citizens, the property, the legal order in the Republic of Bulgaria established by the Constitution or other interests defended by the law. From here is derived the division of crimes into threatening and harmful, depending on whether they only threaten or harm to a specific benefit[2].

[1] Concerning the justified production risk (before the establishment of art. 13a PC with State Gazette, issue 28 of 1982) see Nenov, I., Criminal law of the Republic of Bulgaria, General part, book 2, 1992, page 82 and 83.
See Guneva, M., On some issues of the qualification of the justified risk, magazine Socialist Law, 1980, book 11.
[2] For example, a threatening crime is the discredit (art. 136-141 PC) and harming is the murder (art. 114-125 PC).

Particularly the concept of social danger is derived through the definition of the character and rate of the social danger. The character of the social danger is a qualitative characteristic of the concept, which indicates in general what and how is negatively affected and the rate of social danger is a quantitative characteristic of the concept, indicating how much is affected. Therefore, when determining the specific social danger it shall be judged what relations are affected, what are the specific consequences, to what extent the object is affected, what is the significance of the object, the methods and resources used, time, place and setting, characteristics of the subject and the subjective party.

Crimes differ from other types of negatively human behavior as civil delicti, administrative violations and disciplinary offences by the rate of social danger as well. The last show lower rate of social danger which determines their different sanction. Acts which are illegal and punishable are also socially dangerous and if the act is not socially dangerous, it is not illegal and punishable as well[3]. In lack of illegality civil or other liability should not be borne.

According to art. 13a, para. 1 of the PC, the act committed with justified economic risk in order to achieve a substantial socially useful result or to avoid considerable damages is not socially dangerous, if it does not contradict to an explicit prohibition, established by a normative act, corresponds to the modern scientific and technical achievements and experience, does not place in danger the life and the health of somebody else and the perpetrator has done everything depending on him for the prevention of the occurred harmful consequences.

Here is one extended factual corpus. The law has in mind economic risk, i.e. risk which is undertaken only in the field of the economic activity. The behavior here is an element of the implementation of some type of economic activity, as a result of which the economic social relations may be harmed, as well as it is possible to achieve a significant socially useful economic result. Both cases concern consequences which are of economic character, affect specific property or economic interests.

The objectives that are pursued in this case are two possible alternatives – achievement of a significant socially useful result or avoidance of significant damages. In both hypothesizes, harmful consequences occurred, but in the first a significant socially useful result is achieved, which compensates these damages, and in the second more serious possible negative consequences than the occurred consequences are prevented. A significant socially useful result means that the result at the moment of its achievement has large social significance, provides something new and useful for the society in the relevant field. The concept of significant damages in view of the entire conception of the justified economic risk should be understood as significant property damages, expressed both in suffered loss and in missed benefit. Moreover, the act should not put in danger the life and health of any person, which means that there is no place for caused pains and suffering and other similar disorders.

On the other hand, the act should not contradict to an explicit normative prohibition, laid down in any normative act (legal or subordinate). Here belong the Constitution of the Republic of Bulgaria, codes, laws, decrees of the Government, rules, regulations and instructions[4]. The prohibition should be so formulated that in the interpretation of the relevant normative act it is derived in undoubted and firm way.

[3] See Stoynov, A., Criminal law, General part, 1999, page 203 in fine.
[4] See art. 2 to art. 8 of the Law on normative acts.

The act should correspond to the modern scientific and technical achievements and experience, which means that it should cover the requirements of all innovations achieved so far in the relevant field of science and technology from the view point both of the theory and of the practice, i.e. to be in full conformity with the scientific and technical innovations in the given field. Whether such compliance in every specific case and in view of the need of special knowledge exists, should be established through assignment of the relevant expertise[5].

In no case should the behavior put in danger the life and health of any person. These are absolute, non-expropriatable and irrevocable fundamental rights of the citizens, regulated by the Constitution of the Republic of Bulgaria[6]. They also have penalty-law protection, regulated in the individual corpi of murders, body injuries and others. Not to put in danger the life and health of a person means that there are no such prerequisites, in the presence of which there is a possibity the person to be killed, respectively its health to be negatively affected as a result of the act. The idea of the legislator in these most valuable human benefits is to put the state protection in action in foreground before reaching their damage – still at the early stage of their placement in danger, of their threatening.

Another prerequisite in the justified economic risk is the perpetrator to have made everything depending on him to avoid the occurred harmful consequences. This is when according to the circumstances of the case he has done his best to avoid in personal as well as with the support of third parties the occurrence of harmful consequences. Yet, such harmful consequences[7], however, despite the efforts made by the perpetrator, occur. As mentioned above, these harmful consequences have property nature and are expressed in suffered loss or missed benefit. The suffered loss (damnum emergens) is a real damage which leads to decrease of the already available property. The missed benefit (lucrum cessans), on its part, is expressed in the impossibility to increase this property in the future, i.e. one natural and reliable opportunity for its increase is missed.

For that reason this economic risk is justified, because in the indicated parameters it could bring a socially desired and significant result in the relevant field in comparison with the occurred harmful consequences. That is why the law determines as a criterion in the assessment of whether the risk is justified, to take into account both the above stated prerequisites and the correlation between the expected positive result and the possible negative consequences, and the possibility of their occurrence (see art. 13a, par. 2 of the PC). The expected positive result should be more significant than the possible harmful consequences. The risk is also justified when the possibility of occurrence of expected positive result is bigger than the possibility of occurrence of the relevant negative consequences.

5 See in this sense art. 144 Penal Procedure Code (also art. 195 Civil Procedure Code).

6 Also according to art. 28 of the Constitution everyone is entitled to live and the offence on it shall be punished as the most grave crime.

Art. 29, par. 1 provides that no one shall be subjected to torture or to cruel, inhuman or humiliating treatment as well as forcible assimilation and according to par. 2 no one shall be subjected to medical, scientific or other experiments without his voluntary written consent.

Art. 48, par. 5 provides that workers and employees are be entitled to healthy and safe labour conditions. In the same sense is art. 55 of the Constitution, according to which the citizens have the right of a healthy and favourable environment corresponding to the established standards and norms.

7 See Stoynov, A., Criminal law, General part, 1999, page 236 – damages caused in justified economic risk should be ratable in money. They are shown as negative change in the economic relations where specific property or economic interests are affected.

In the first hypothesis (art. 13a, para. 1, rule 1 of the PC) the expected positive result would be achievement of a significant socially useful result, and in the second (art. 13a, para. 1, rule 2 of the PC) – avoidance of significant damages[8]. The assessment whether the economic risk is justified should be made for every particular case (ad hoc), as considering all elements of the factual corpus[9]. The point of the existence of the institute justified economic risk is the stimulation of the development and innovation in the filed of the economic relations. This is an encouraging norm.

The institute justified economic risk, in view of its essence, should find application in the field of economic activity when the issue for conformity with the corpus of one act in view of the specific committed offence against the economy is examined. The social relations, subject to protection against similar offences, are referred to in chapter VI of the Penal Code, entitled "crimes against the economy". More particularly, section I of the same chapter, entitled "general economy crimes" contains texts where the reviewed institute would find application. For example, such is the case with the crime abandonment, referred to in art. 219 PC. The particular specificity from the view point of subject, subjective party, object and objective party of acts in the economic field should be taken into account.

II. With a view to the proper clarification of the justified economic risk it is necessary to indicate in short some comparisons and juxtapositions.

The justified economic risk differs from the normal production-economic risk[10]. The latter is settled in art. 204 of the Labour code (LC) and regulates specific aspect of the property liability of the worker or the employee before the employer. According to this text, the worker or the employee is not property liable for the damage, which is a result of a normal production-economic risk.

First, it is necessary that the relevant person has the quality of a worker or employee. LC does not provide legal definition of the concepts worker and employee. The legislator has allowed himself only to explain the term employer. In § 1, item 1 of the additional regulations of LC, entitled Explanations of some words, the term employer is defined. According to it, an employer is every natural entity, legal entity or its unit, as well as any other organizationally and economically identified formation (enterprise, institution, organization, cooperation, industry, establishment, household, company or other similar), which hires independently workers or employees on labour relationship[11]. Therefore, from here, the conclusion that as per the meaning of LC workers or employees are the natural entities working on labour relationship could be made.

Next, during the performance of his duties under the labour relationship the worker or the employee causes damages to the employer. Those damages, obvious from the wording of the regulation, also have a property nature. These are damages, occurred as a result of a normal production-economic risk. That is to say, these

[8] On the shown reasons the opinion expressed in the doctrine that the correlation between the expected positive result and the possible negative consequences should be taken into account only when the risk is undertaken in order to achieve significant socially useful result could not be accepted – see Stoynov, A., quoted work, page 238. Such narrow interpretation does not correspond to the spirit and letter of the law.
[9] See also Guneva, M., Criteria specifying the justified economic risk under art. 13a of the Penal code, see magazine Legal Thought, 1982, book 5.
[10] For details concerning the main point of the normal production-economic risk see Vasilev, At., Labour Law, 1997, pp. 355-359.
[11] In the same sense the term employer is defined in § 2, par. 2 of the additional and final regulations of the Collective Labour Ddisputes Settlement Act.

are damages logically accompanying the relevant production-economic activity. They would occur always and regardless whether the particular job is performed by one or another worker or employee. This at the same time characterizes the normal production-economic risk. The actual job carried out should have production nature.

In presence of the so indicated prerequisites, the worker or the employee shall not have property liability, which means that he does not bear any civil liability. This is so, in contrast to the justified economic risk, in the presence of which the perpetrator shall not have any punitive liability, and as the action is not against the law – no civil liability as well. In the last case, the issue for the civil liability should be specifically considered, in view of the silence of the law in this direction and in view of the presence or the lack of the respective civil and legal prerequisites (illegal behavior, fault, damage and causal relation). Art.204 of the Labor Code is a ground, excluding the property liability of the worker or the employee before the employer.

A legal institute, similar to the justified economic risk, is the excessive necessity. Its regulations also have motivational nature in view of implementation of specific socially-useful behavior. According to art.13, para. 1 of the Penal Code, the activity of somebody in case of excessive necessity – to save state or public interest, as well as his own or somebody else's personal or property goods from immediate danger is not e socially dangerous activity if caused by the action damages are less considerable than the prevented one.

It is necessary the interests and goods indicated above to be endangered by an immediate danger as it must be real and forthcoming and no abstract. Also, no other legal way for its avoidance should have existed and the occurred damages shall be less important in comparison to the avoided damages, that is to say that there is a real benefit from the actions taken. Here, also caused damages are present – property and/or non-property. But in view of the regulation of art. 13, par. 2 of the Penal Code there is no excessive necessity when the actual avoidance of the danger is a criminal act. The behavior should not be in conformity with the corpus.

In excessive necessity, object of protection are state or public interests, personal or property goods of the perpetrator or somebody else, while in the justified economic risk some kind of economic activity is always concerned.

According to art. 46, para. 2 of the Contracts and Obligations Act, in case of excessive necessity, remedy of the damages caused is due. As the law does not answer to the question who should remedy the damages and in view of possible complications due to the compassion of more than one person to the excessive necessity state, the judicial practice[12] is the one giving the permission. It is accepted that a compensation for damages, caused in excessive necessity is due by the author of this state or by the owner of the good, if has arisen from it, respectively from the person, under which supervision it is, and not by the person acting in this state. In the way the indicated persons owe this compensation for more considerable damages and in their prevention by the perpetrator they should remedy less considerable damages. In the rest of the cases the remedy of the damages shall be assigned to those whose more valuable goods are saved during the implementation of the action.

This conclusion comes from the regulation of art. 13, para. 1 of the Penal Code – if the perpetrator have not prevented the destruction or damage of the goods, the suffered damage for

[12] See in details Enactment No 4 from 30.10.1975 of PlCC.

their owner would have been more considerable. That is way he shall suffer the smaller damages, caused by the acting in excessive necessity. If the acting in this state person is also a carrier of the saved goods, he on this ground shall be obliged to remedy the damages caused to somebody else. Although the legal practice in regards to the justified economic risk is meager, I think that the stated above principal positions for the assigning of the obligation for remedy of the damages in excessive necessity could find the respective application as per analogy in here.

In excessive necessity actually there is no matter of real exclusion of the civil liability because, after all, the remedy of the damages is due by the indicated above circle of individuals and is actually concerning the fair assignment of the damages occurred. In here, the direct author of the damages would have been responsible in very rare occasions and namely, from this point of view, the responsibility for him would be excluded.

Both the justified economic risk and the excessive necessity are grounds excluding the social danger of the action, which means that in these cases penal liability could not be sought. The issue for implementation of civil liability under order of claim in connection with the caused damages remains open. In excessive necessity remedy of the damagesis owed. In justified economic risk in lack of illegality in the particular behavior, civil liability should not be borne.

The justified economic risk has relation to the administrative-punitive liability[13] as well and more specifically in relation with the norms of the Law on administrative breaches and punishments. According to art. 6 from this Act, administrative breach is this deed (action or inaction) violating the established order of state governing, it is caused guiltily and is declared as punishable with administrative punishment, imposed under the administrative rules. Of big importance in the case is the blanket norm of art. 11 of the same Act. Taking it into account on the issues of fault, soundness of mind, circumstances excluding the responsibility, the forms of coparticipation, preparation and experience, the regulations of the general part of the Penal Code are applicable as long as not otherwise provided. This means that on the ground of art. 11 of the Law on administrative breaches and punishments in connection with art. 13a of the Penal Code, the institute justified economic risk will find application with the administrative- punitive liability as well, as it may serve as a ground for releasing from responsibility in here as well. It should be marked that according to art. 24, para. 2 of Law on administrative breaches and punishments, for administrative offences accomplished during the implementation of the activity of enterprises, establishments and organizations, responsible are the workers and employees, who have accomplished themt, as well as the managers who have ordered or admitted their accomplishment. The same is referred to the issue who shall be responsible, respectively who shall not be responsible in case of administrative offences in regards with any kind of economic activity. In regards with the diversification between the individual responsibilities it should be indicated that in the hypothesis when for an action punitive prosecution of the public prosecutor has started, there is no administrative punitive proceeding formed. In the contrary hypothesis – when it is established that the deed for which an administrative-punitive proceeding is formed, composes a criminal offence, the proceeding shall be ceased and the materials send to the respective prosecutor. According to art.

[13] Details on the administrative and penal responsibility see. Dermendzhiev I., Kostov, D., Hrusanov E. – Administrative Law of the Republic of Bulgaria, General part, 1999, pp. 284-336.

34, para.1, b "v" an administrative punitive proceeding is not formed and the formed one is ceased when stipulated by law or a decree. There is no obstacle such ground, in view of the above stated, to be the justified economic risk as well.

III. Judicial practice in regards with the justified economic risk is very limited. According to Resolution No 59 from 13.09.1986 on p. c. No 57/1985 of OSNK of the Court of Supreme there is no justified commercial risk in presence by virtue of art. 13a from the Penal Code when the officers in order to restore the damages caused to the enterprise (refund of not retained income tax), intentionally allow private persons to sell goods at prices, higher than the set by enactment prices, to receive part of it, in order to cover their damages. Even the activity accomplished by the accused was allowed by some officers, the accused still were obliged to control the prices of the goods produced by private craftsmen, as these goods may not be sold in second-hand shops. In the interpretation of the stated resolution, the moment when it was enacted and the existing toward this moment public relations should be taken into consideration.

De lege lata is socially justified existence of multiple norms, similar to the justified economic risk, to motivate the human behavior toward achievement of a specific useful for the society outcome, regardless whether they are objectified in the punitive law (for instance art. 12 of the Penal Code regarding the unavoidable defense, art. 12a of the Penal Code regarding harming an individual, who have accomplished criminal deed during his retention, art.13 of the Penal Code regarding the excessive necessity) or in the civil law (for instance art. 46 of the Obligations and Contracts Act according to which during the unavoidable defense there is no liability for damages). ИА