A cohesive model to counteract financial crime and corruption in public sector in Greece: challenges in counter crime policy and the limits of equitability

PART A
Theoretical Foundations

SECTION 1

Tackling financial crime and corruption in the public sector: institutional limits

I. The fundamental principle of applying criminal law as ultima ratio and the need to delineate the current criminal policy deficits

The effective and fair tackling of financial crime and corruption in the public sector is an undeniable priority in any state governed by the rule of law. The challenge obviously lies in the type and extent of addressing similar malaises.
It is not only equitability that calls for the application of criminal law as a last resort, the latter being the most forceful mechanism of social control available to legal orders. It is above all imposed *institutionally*, through regulations of increased validity. As a first essential constituent, the constitutionally acknowledged (Art. 25 § 1) *principle of proportionality* requires the legislature to carefully weigh its options and assume the most distressing means available only when other alternatives to control a social problem do not work.

However, in reality things are completely different, especially in the criminality fields discussed herein. Particularly in areas of intense political interest (such as the State's financial interests and the politicians' eagerness to show "incorruptibility") and not only in Greece, criminal law is often used excessively, and even symbolically.

Before articulating individual observations on developing a credible strategy against inflictions of public property and acts of corruption in the following chapters, a central estimate of the State's lagging behind is generally required. Deficits in Greek law enforcement –however small or big– do not owe so much to the lack of strictness of criminal provisions, but more to the chronic failure of repressive mechanisms in identifying and justly countering relevant behaviors.

Therefore, if one accepts that Greece's key-problem in addressing these phenomena is the application of law and not its lack of strictness, the ultima ratio principle already suggests that in restoring the whole system, one should not intensify the admittedly inefficient harshness of criminal enforcement: a typical example of such a flawed practice, that opposes strikingly the principle of ultima ratio, is the recent drastic escalation of sanctions for tax evasion crimes.

Traces of the same distortion can also be found in the money laundering legislation and its application: of a rather limited function in the criminal policy of many continental European states, in Greece it provides law enforcement mechanisms with a chance to escape their chronic insufficiency to identify and timely document

the individual "predicate" offenses. The same holds for the recent novel provisions on the "continuous" character of some tax crimes, also intending to bypass chronic problems of the anticrime mechanism through an irrational intensification of criminal enforcement.

In all these cases, the ultima ratio violation is clear: instead of focusing specifically on organizational measures to improve the system so that it responds to the application of substantive criminal law, the latter becomes the system's main device of "improvement".

II. Putting the fundamental principles of criminal law first

Whenever introducing criminal liability –and especially in the fields discussed here, which favor the political management of criminal law– the Greek legislature is called upon to firstly reevaluate the existing institutional framework for countering financial crime and corruption in the public sector in relation to their compliance with constitutionally guaranteed fundamental principles that should govern law enforcement.

These include first and foremost the principle of proportionality, the guilt principle, as well as core procedural principles related to the respect of human dignity, such as the prohibition of self-incrimination. As to financial criminality and corruption in the public sector in particular, the Greek legislator must assess not only the range of punishability with respect to the ultima ratio principle, but also all sanctions threatened by law. The latter are very often disproportionate, as felonies become a norm in harmful conducts surpassing a high quantitative threshold. On the other hand, provisions exist that fall substantially short in respecting the guilt principle, such as those on the liability of company directors for corporate public debts (Art. 25 §§ 2 & 3 of Law 1882/1990).

Financial criminality also puts crucial and constitutionally vested procedural principles to the test. Besides questioning the principle of proportionality, coexisting administrative and criminal sanctions for the same conduct raise the issue of adherence to the ne bis in idem principle, in view of the European courts' case-law. Moreover, the investigated citizen's obligation to assist authorities in relevant administrative inspections intensely reveals a possible breach in the self-incrimination principle, in terms of criminally punishing the same conduct. This is why proposals to improve the existing institutional framework for countering financial crime and corruption in the public sector must initiate from the self-evident constitutional limits imposed on the application of criminal repression measures.

III. Integration of international and EU legislation and institutional limits

Institutional limits exist for the Greek legislature in adopting the noted dynamic (though not always equitable) activation of the international community towards the criminal repression of financial crime and corruption in public sector. To the extent that Greece has signed and ratified almost all relevant international conventions and

is an EU Member State, criminal legislation on financial offenses and corruption in the public sector (among others) is now part of the national legal order that carries the strongest international impacts.

In producing national criminal legislation of international or/and EU origin, two issues concern the national legislature: *compliance with the relevant commitments* and *abidance by the essential limits relevant to these commitments*, the latter arising from international and European law, as well as the Greek Constitution. In this context, the importance of possible deviation prospects for the Greek legislature or law enforcing agencies is highlighted.

Commitments in importing criminal law through *international conventions* arise from the content of the provisions thereof, but are valid when they conform to the Constitution. The unambiguous supremacy of the latter (Art. 28 § 1) establishes a vital framework for the correlation between national and international legislation in this respect, making it imperative to utilize reservations possibly included in the relevant conventions, in order to safeguard constitutional requirements on criminal repression whenever international statutes contradict them.

On the other hand, such commitments differ when *EU law* is evoked, being obligations of the broader legal order of EU as a supranational organization in which Greece participates and to whom it has delegated powers to co-formulate penal law (intel alia), according to union primary law. The constitutional provision regulating Greece's accession to the EU (Art. 28 § 3) is widely regarded as promoting an interpretation of the Constitution in harmony with EU law, inasmuch as the latter acknowledges the principles deriving from the constitutional traditions of its Member States (Art. 6 § 3 TEU), and furthermore from its institutional guarantees over fundamental rights and its accession to the ECHR. Practically, this means that the search for the limits of commitments on EU-imposed criminal repression measures should combine EU-law provisions and their specific co-existence with the Greek Constitution.

Insofar as Greek commitments for criminal repression of specific conducts spring from both *international and EU legal instruments* (that being the rule in financial criminality and corruption in the public sector), EU choices override international ones and have a practically different enforcement capacity under national law. Consequently, the Greek legislature is obliged to respect this priority; compared to the relevant international conventions ratified, if the EU calls for wider punishability or special procedural measures, Greece must abide by these requirements. On the other hand, possible violations against the rule of law or fundamental rights *by these very EU provisions* should be examined in the compound framework of coexistence between EU legislation and the Greek Constitution. As generally evident, the fundamental principles and rights associated with criminal law have solid foundation in EU-law itself. In this sense, very few regulations introducing punishability actually infringe, e.g., the guilt or proportionality principles (both fundamental to EU-law by Arts. 5 § 1 TEU & 48 § 1 EUCFR), and therefore do not bind the national legislature. The latter is asked to transpose EU provision into national law *in accordance* with the

fundamental principle or right of EU (and national) law challenged in any relevant case. If not, and according to ECJ case-law and by directly applying the fundamental rights and principles of EU-law, the court must enforce the conforming national provision or -when this is not possible- abstain from enforcement.

In transposing international and EU obligations into national law and apart from safeguarding the fundamental principles and rights related to criminal repression, the Greek legislature is expected to wisely process the relevant regulations and avoid a mere "blind" replication, ensure their harmonious integration throughout national law and not disturb the endo-systematic cohesion (wherever it stands), and understand that successfully transferring an international or EU requirement might simply mean *not adding a new provision* when the national legal system meets or even exceeds the relevant commitments, unlike the common practice of enacting special criminal laws.