Section 9

Victim compensation and criminal liability in the field of financial criminality and corruption in the public sector

I. Penalty purposes and victim compensation

A core concern in financial criminality in the public sector is the doctrinal evaluation and legislative regulation of victim compensation by the perpetrator. This issue is directly linked to the purposes of sanctions.

Criminal sanctions are known to differ from legal consequences envisaged in other fields of law, because their functional objective of imposition is mainly retributive-punitive rather than restorative of the harm or preventive of some future impairment. Therefore, the imposition of criminal sanctions is possible even when a financially quantifiable material or moral harm cannot be detected, a further preventable hazard cannot be traced, and when the offender has already ceased (perhaps voluntarily) his/her ongoing violation of the relevant legal interest.

Retributive punishment is not, however, an end in itself, but serves further purposes of an organized society. Through the imposition of sanctions against the offender, the legal order confirms the protection it generally awards to the violated legal interests. Thus, the legal system instils respect for legal interests to the society on a general preventive level (: through both positive education and negative-intimidating deterrence against similar conduct). Simultaneously, the legal order uses reprimand to create a strong disincentive for the offender in terms of engaging in similar acts in the future, hence bolstering the protection of legal interests at a special prevention level.

The abovementioned objectives served by criminal retribution might sometimes be served equally effectively by other means that may ultimately render obsolete the need for punishment. For example, this may apply when the offender's subsequent behaviour confirms an active and voluntary respect for the violated legal interest, in a way that negates the necessity of individualized preventive measures against him/her and leaves no room to the rest of society for the impression that one can maliciously disrespect a legal interest and still remain unpunished. The actively manifested respect of the legal interest by the offender through voluntary compensation can sometimes fulfil the objectives of general and special prevention usually pursued by the imposition of sanctions, thus rendering the punishment no longer a justifiable reaction of the State apparatus.

Despite victim compensation not being part of the primary objectives of sanctioning, it can sometimes contribute as an alternative to punishment to their fulfilment in a way that renders punishment redundant. Of course, the question is when and under which specific conditions victim compensation can function accordingly.

II. The current legislative framework and its drawbacks

Current legislation recognizes the perpetrator's effort to compensate the victim as a general mitigating circumstance that may lead -if accompanied by repentance- to sentence reduction for all offenses (Article 84 § 2 point d GPC). Also, since many offenses are prosecuted on complaint, the possibility exists to halt the initiation or continuation of prosecution in cases of reparation, when and insofar this suffices to sway the victim into not filing a complaint on time or resigning from it at any stage of the criminal proceedings.

Apart from that, however, and especially for crimes against property, the restoration of the victim's damages is regulated independently as a reason to activate the compulsory elimination of punishability, or at least a very significant differentiation in the offender's criminal liability. This is regulated through a complex set of provisions (Articles 384 and 406A GPC, 308B GCCP for crimes against private property, and the recent Law 4312/2014 "on the freezing or seizure of cash and pecuniary claims, and other provisions" - State Gazette 260/A/12.12.2014 on crimes against the property or the State, legal persons under public law, or equivalently treated legal persons under private law).

Current provisions -due to lack of a single systematic approach and the substantial uncertainties particularly linked to the recent Law 4312/2014- generate confusion in the field of property crimes, thus undermining the necessary legal certainty. At the same time, to the extent that they ensure widespread -explicit or de facto- impunity to anyone who restores the damage he/she caused, they seem to refute the primary objectives of criminal law and, as a consequence, substantially undermine its crime-fighting effectiveness.

III. Doctrinal foundations of victim compensation in substantive & procedural law

There are cases where property is restored after the discovery of the crime and under the pressure of prosecution, coercive measures, or conviction, i.e. without any strong indication that the offender actively and voluntarily recognizes the violation of the legal interest (whether related to property or otherwise). The doctrinal legitimacy of such cases is only possible: (a) if restoration is acknowledged as an equivalent primary objective of criminal law, thus by drawing anew the boundaries that demarcate the various bodies of law in the Greek legal order, and/or (b) if the restoration is assessed under one of the criteria that address the pragmatic need to reduce the number of criminal proceedings, thus enabling the judicial apparatus to better deal with the more serious cases it handles.

The first option would require radical interventions in the structure of the Greek legal system and its adoption should be accompanied by an adequate justification as to whether criminal law could still remain an effective tool to protect legal interests. The second can fundamentally be applied consistently to the current structure, considering that the reasonable reduction in the number of criminal proceedings may ultimately be useful for enabling a saturated criminal justice apparatus to fulfil the principal objectives of criminal law, at least in the more serious cases. Under this approach, victim restoration should not be considered an alternative to (directly) meet the primary objectives of criminal law in particular cases and thus make punishment redundant. In this perspective, reparation would only be one of several

criteria of procedural expediency that would allow the authorities to waive prosecution of a particular case in order to preserve the overall functionality of the justice system. Other such criteria of procedural expediency could include: pettiness of the violation, reduced culpability of the offender, payment of administrative fines or adoption by the perpetrator of business restructuring measures to avoid similar violations in the future, etc.

All this implies that achieving (even partially) the primary criminal law objectives differently and, hence, eliminating the need to impose criminal sanctions can only refer to cases where victim restoration is socially perceived in a unequivocal manner, as an active voluntary recognition by the perpetrator of the legally protected interests he/she infringed. Therefore, in such cases, only provisions directly referring to penalty exclusion should be doctrinally evaluated as reasons for elimination of punishability included within substantive criminal law. In all other instances, when favourable treatment reflects procedural expediency and the preservation of the overall effectiveness of the justice system, relevant provisions should remain and operate within criminal procedural law.

IV. Distinguishing between repentance as a reason to eliminate punishability and full victim compensation and criminal conciliation as procedural law institutions

According to the aforesaid considerations, and contrary to current legislation, a system of regulations is proposed that distinguishes terminogically (inter alia) between: (a) repentance, as an institution of substantive criminal law linked to the elimination of punishability and only applicable prior to any investigative activity, (b) full victim compensation as an institution of procedural law linked to a compulsory (permanent or conditional) abstention from prosecution and only applicable before the initiation of prosecution, and (c) criminal conciliation as an institution of procedural law linked to a potential abstention from sentence imposition and only applicable until the end of the formal investigation or, where appropriate, within 30 days after the service of the writ of summons or the bill of direct indictment (following a judicial chamber decision). The following criteria should apply:

(i) Reimbursement for property damages suffered by the victim (: including the State or any equivalent legal person) should be technically viewed as repentance (: i.e. as grounds for eliminating punishability) only if it refers to: (a) an offense committed by a private individual, and (b) the reparation occurs before the offender undergoes any investigation from the authorities. If these conditions are met, the elimination of punishability should apply (c) regardless if the offense is a misdemeanour or felony.

(ii) For property offenses that also infringe the public service and are committed by public officials (e.g. disloyalty or embezzlement in public service - Articles 256 and 258 GPC), when the reimbursement adheres to the aforementioned conditions, the following should apply: (a) For misdemeanours, reparation must be technically considered as a form of repentance that excludes the punishability that refers to the infringement of the public (or private) property. However, it will eventually apply to the whole criminal liability for the property offense, as the remaining sanctions associated with the violation of public service can be covered, where necessary, by reviving the (usually) subsidiary confluent provision of Article 259 GPC; (b) For

felonies, reparation should only be a mitigating circumstance that mandatorily reduces sentence (e.g. imprisonment of up to 3 years). The relevant considerations on misdemeanours cannot apply here, as the sanctions associated with (felony) violations against the public service cannot be covered by Article 259 GPC, which refers to misdemeanours. The imposed sentence, however, should be mandatorily suspended.

(iii) The victim's compensation for pecuniary damages should be treated as a full satisfaction in the technical sense of the term (: i.e. as procedural grounds for mandatory abstention from prosecution), provided that: (a) the relevant offense is a misdemeanour, (b) committed by a private individual, and (c) the compensation occurs after the authorities discovered the perpetration, but prior to any charge pressed. To prove the restoration in full, a relevant statement of the victim or their heirs is sufficient, albeit not necessary.

(iv) If all the remaining conditions of (iii) apply and the offense is a felony, restoration of damages should lead to a mandatory conditional abstention from prosecution, given that the perpetrator does not commit any similar offense in the three years following the decision for non-prosecution, which will also indefinitely suspend the statute of limitations for these crimes. In lack of an offense within three years, the abstention will become final. Otherwise, the perpetrator will be prosecuted for the original property crime once the decision on the new offense becomes irrevocable. However, in these cases it is preferable that the penalty for the initial transgression does not exceed a certain limit (e.g. no more than a 3-year imprisonment).

(v) If all the remaining conditions of (iii) apply and the offense is a misdemeanour that also infringes the public service and is committed by a public official, restoration of damages should also lead to a mandatory conditional abstention from prosecution, without excluding disciplinary and administrative legal consequences. With respect to terms, statute of limitations, and finalization of abstention, the terms under (iv) should apply proportionately.

(vi) If all the remaining conditions of (iii) apply and the offense is a felony that also infringes the public service and is committed by a public official, restoration of damages should be technically viewed as a criminal conciliation that could lead to abstention from sanctioning without excluding disciplinary and administrative legal consequences, if the victim (: i.e., the State or any other equivalent legal person) consents and the procedure described below under (vii) is followed. In this case, the perpetrator should apply for plea bargaining to the competent Prosecutor, and the latter should refer the case to the Single-Judge Court of Assizes. The Court of Assizes may abstain from penalty imposition, sentence to community service (registered in the criminal records), or impose imprisonment of up to three years.

(vii) Finally, the restoration of pecuniary damages should be technically viewed as a criminal conciliation (: procedural grounds for mandatory abstention from or reduction of punishment in proceedings to which the victim participates) when it refers to (a) a misdemeanour, (b) committed by a private individual, (c) perpetrated within 30 days after the service of the writ of summons or the notice for direct indictment (when such is decided by the judicial chamber), and (d) the offender files

a conciliation request to the competent Public Prosecutor. The victim's consent is required to initiate and conclude the procedure (: including the State or any other equivalent legal person). If these conditions apply, the case should be referred by the competent prosecutor before the Single-Judge Court of Misdemeanours, which may abstain from imposing a penalty or impose a strictly pecuniary sanction (registered in the criminal records).

(viii) If all conditions under (vii) apply, the offense is a felony and the restoration takes place before the formal conclusion of the investigation, the case should be referred by the competent prosecutor to the Single-Judge Court of Assizes, which may abstain from penalty or impose imprisonment of up to three years.

(ix) If all conditions under (vii) apply, and the offense is a misdemeanour that also infringes the public service and is committed by a public official, the Single-Judge Court of Misdemeanour may abstain from penalty or impose imprisonment of up to three years.

(x) Even if all conditions under (vii) apply, if the offense is a felony that infringes the public service and is committed by a public official, the restitution cannot activate criminal conciliation and should only considered a mitigating circumstance that mandatorily reduces sentence (e.g. custodial sentence of up to 5 years).

V. The current legislative framework on the reparation of damages in tax offenses and its drawbacks

Tax law in the broad sense (: including customs law and provisions on the collection of debts due to the State) has a long tradition of acknowledging the reparation of pecuniary damages as grounds for eliminating punishability.

All current fundamental tax criminal laws (2523/1997, 2960/2001 and 1882/1990) included until recently and/or still include a range of provisions, which gave/give the tax offender the option to enter into a "settlement" with the tax authorities, even after the discovery of the violation, and ensure impunity (: according to the so-called "fixed" provisions, e.g. Articles 18 § 3 and 24 § 2 of Law 2523/1997, 58 of Law 2960/2001, 25 § 5 of Law 1882/1990) by making specific payments (e.g. foregone customs duties and additional taxes or fines or multiple fees). These provisions were or/and are supplemented both by informal options to cancel indictment through tax law regulations combined with the occasional special procedural requirements for the prosecution of tax crimes (e.g. filing overdue statements before an investigation order is issued, and thus avoiding audit reports and tax calculations, which were -or still are- prerequisites of criminal prosecution for certain tax offenses), as well as through repeatedly adopted provisions that provide tax amnesty for past fiscal years on the condition that specific payments are made, calculated by specific ad hoc formulas (: the so-called "exceptional" regulations).

Of course, these special tax provisions are to some extent justified, as the relevant legal interests violated are the various categories of tax claims by the State, i.e. a subset (: part of the assets) of State property with significant peculiarities.

However, the peculiarities of these offenses, the need for speedy closure of unsettled cases within the ongoing legal relationship between the State and the taxpayer, the "controlled" scope of "impunity", the indirect enforcement of the ne bis in idem principle between administrative and criminal sanctions do not suffice to raise the criticisms regarding the relevant special tax provisions. As for "exceptional" regulations, even their constitutionality is uncertain, as the practical elimination of punishability for past crimes of tax offenders constitutes a sort of "legislative amnesty", which (according to Art. 47 § 3 of the Constitution) may only be envisaged for political crimes and only in a law passed with a parliamentary majority of three fifths of all MPs. Moreover, it is quite difficult to find assurance even in the pragmatistic "fiscal-budgetary" argument put forward in the context of a realistic approach. This considers such provisions as opportunities for the State to collect at least a portion of the taxes evaded through tax offenses, which, in any event and in view of the tax administration shortages in qualified auditors and modern equipment, would never be discovered. In bibliography, there is a wide consensus that such provisions enacted at regular intervals and granting direct or indirect tax amnesty are ultimately corrosive for the tax conscience of citizens and, therefore, contribute to greater financial losses in the long run when compared to the benefits accrued on a contextual short-term basis. No incentive is granted for law-abidance and timeliness in paying legitimate taxes, when citizens' are almost absolutely certain that a future "exceptional" regulation will allow them to "settle" their tax liabilities by paying only a fraction of the amount actually owed.

"Fixed" provisions also receive strong criticism. Such an example is Article 24 § 2 of Law 2523/1997: despite the advantages it ensures, it is a hazardous legal construct for the rights of taxpayers, the anti-crime effectiveness of criminal (tax) law and, ultimately, the State's financial functionality. As for taxpayers, it introduces an institutionally established means for their "blackmailing": under threat of "criminal disrepute", it is easy for tax authorities to make taxpayers agree to an unconditional surrender and confession of violations that might never have been committed to the extent and with the intensity asserted under the guise of tax law's "objective methods" and "presumptions". As for criminal policy effectiveness, it indirectly renders the State's claim to prosecute (even felonies) an object of negotiation within a purely administrative non-public procedure.

Although the recent Law 4312/2014 manages to circumvent many of the flaws of Article 24 § 2 of Law 2523/1997, it establishes a still blemished system, both regarding the handling of the cases it regulates, and in terms of evaluating accounting for and utilizing administrative sanctions imposed when assessing their criminal attributes.

VI. A proposal for damage restoration in tax offenses

A new system of provisions should be established upon a distinction between cases where the perpetrator voluntarily reveals his/her prior unlawful deeds to the tax authorities and then pays all due taxes, and cases where the taxes due are paid after the perpetrator has been discovered by the authorities (tax or other). In principle, elimination of criminality should be accepted only for the first category of cases. In

the second category of cases (which should be regulated in the field procedural law), a discrimination should apply with respect to the gravity of the offense, so that the perpetrator's discharge is not always guaranteed (: either through abstention from prosecution or by decision or decree that finds the offender non-punishable) and a possibility still exists for the imposed sentence to be served. In the same category, extending the benefit should depend not only on the full reimbursement of due taxes plus interest, but also on the payment of a pecuniary penalty scaled according to the gravity of the offense. This should sustain a minimum punitive element in the State's response; together with the possibility of a servable sentence, it will preserve the system's anti-crime effectiveness from any abuse. In respecting the principle of proportionality, the perpetrator should be granted the right to offset the above pecuniary sanction to any administrative penalties imposed by tax authorities for the same offense. Moreover, the offender should have the right to claim the benefit even when he/she pays less in tax than the amount claimed by the tax authorities, by proving before the criminal court that he/she actually paid what was required by the substantive tax provisions relevant to the case. Finally, a special provision should apply for issuing or receiving falsified taxation elements, to the extent that these infringements are not directly related to an evasion of a specific tax that might be considered a the basis for determining the harm against the State finances. Overall, the adoption of the following could satisfy these claims :

A new system of provisions should primarily be based on a distinction between stricto sensu tax evasion offenses (: i.e. including elements of deception against the State and/or appropriation of collected taxes) and simple due tax exposures (: their demerit consisting merely in the deferral to pay a particular tax). If the latter are not decriminalized (as correctly advised), the current provision of Article 25 § 5 of Law 1882/1990, which envisages the unconditional elimination of punishability once the debtor pays the balance due, should be retained. This provision, although vividly confirming the demotion of criminal law and criminal justice to tax collection devices, achieves -albeit unsuitably- to subside the complaints on criminalization of all due tax exposures, in light of the proportionality principle. Unlike due tax exposures, a different provision is necessary for tax evasion offenses, which could classify the importance of State damage restoration as follows:

(i) State damage restoration (: tax and interest) should mandatorily eliminate punishability regardless of the crime being a felony or misdemeanour, when the standard terms of repentance are met. In these cases, it becomes an alternative to achieve the primary objectives of criminal law and, therefore, averts the need for punishment. To activate the provision in question, it is time-wise decisive that the taxpayer files a complete and factual (original or amended) tax return in relation to all taxable income and taxes due, before he/she is by any means inspected by the tax authorities. The tax accrued should either be paid in full or settled in instalments before the initiation of prosecution.

(ii) For misdemeanours, State damage restoration (: tax and interest) and payment of a mark-up equal to 20% of the evaded tax should trigger mandatory abstention from either indictment (: when such has not yet been initiated) or sentencing (: after

charges have been pressed). The sum total should be paid in full prior to the issuance of a relevant decision.

(iii) State damage restoration (: tax and interest) and payment of a mark-up equal to 20% of the evaded tax should trigger mandatory abstention from either indictment (: when such has not yet been initiated) or sentencing (: after charges have been pressed), if the offender collaborates with tax authorities (after a tax inspection has begun and before the issuance of the final tax assessment) to clarify the taxable income and the taxed due, by submitting complete and factual data. The sum total should be paid in full before the issuance of a relevant decision.

(iv) For felonies, State damage restoration (: tax and interest) and payment of a mark-up equal to 50% of the evaded tax should be potential grounds for the criminal court to refrain from sanctioning. In any case, the Court may not impose a custodial sentence of more than five years. The balance due should be paid in full prior to the issuance of the decision.

(v) The above should apply mutatis mutandis to the offenses of issuing or receiving falsified taxation elements. To the extent, however, that the offenses under discussion are not directly related to an evasion of a specific tax amount, granting benefits should only be subject to the payment of the respective pecuniary sentence. Thus, in case of own repentance (: full disclosure of violations by the offender prior to any investigation), elimination of criminality should be an option without accounting for any payment whatsoever. For misdemeanors, paying a mark-up equal to 20% of the (virtual) face value of the element should trigger mandatory abstention from criminal prosecution (: if not yet initiated) or mandatory abstention from sanctioning (: if already underway). For felonies, paying a mark-up equal to 50% of the (virtual) face value of the element should trigger potential abstention from sanctioning by the criminal court. In any case, the Court may not impose a custodial sentence of more than five years.

(vi) In all the above cases, if the perpetrator holds reservations, the amount of damages incurred (: unpaid taxes plus interest) and the amount of the due pecuniary mark-up (proportionate to the amount of tax evaded or to the virtual face value of the taxation elements) should be determined individually by a judicial council or a criminal court during the deliberations on granting the benefits, and even at reduced value compared to the tax authority's findings. Also, for cases where the benefit granting depends on the (additional) payment of mark-ups, the perpetrator should be able to offset them against administrative penalties due for the same offenses. If he/she has already paid for such sanctions, these payments may be calculated to cover the thresholds of pecuniary penalties if he/she abolishes in writ his/her right to claim in trial the amounts he/she wishes to offset.