

# Economic Turmoil and White Collar Crime – Market Crash, State Failure, or Dissolution of Social Values

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## ABSTRACT

*Capitalist society, organization and values emerge from innovation and creativity. They form the ground for success of every kind including the economic one, and can be achieved and realized legally or illegally. The regulation and control of these activities lies on the economic and political elites and highly positioned government officials as they, in the eyes of the wider public, have the power and the authority to mitigate the unpredictable and hard-to-control effects of the free market and other crisis situations. Such position allows the elites and officials to act legally or illegally, morally or immorally and provides an opportunity for committing the white collar crime. White collar crime, perceived merely as a flaw in the complex system of risk management, is not being seen as a serious form of crime with perpetrators being stigmatized by the society as a whole, although its features include misuse of trust, failed expectations, enormous loss of money as well as altering and manipulating the behavior of population in the interest of elites. In spite of the fact that lower classes' crimes are visible, create fear and severe moral judgment from the majority of population, white collar crimes affect critically the society as a whole and create a solid ground for economic disorders, namely the nation or worldwide economic crisis. The paper examines the concept of economic crisis, legal responsibilities of corporations and elites, market failures, dissolution of social values, and the role of government in turbulent times.*

**Keywords:** *white collar crime, expectations, trust, economic crises, government institutions*

## Introduction

Economic disorders can point to the failure of particular company, industry or the whole economic system as well as the existence of the white collar crime. The paper will discuss some aspects of global economic crisis in order to create more vivid illustration of individual and corporate behavior, especially in cases of moral hazard. Capitalist society, organization and values as it is already known, are based on innovation and creativity. Those two features of modern societies lay a base for a success of any kind – including the financial (economic) one and that success can be achieved legally or illegally. Regulation, control and realization of those activities in the society is the responsibility of economic and political elites as well as highly ranked government and corporate officials. However, because of the innovative skills and highly professional background of its perpetrators, white collar crime is extremely difficult to prove and prosecute.

Unlike the organized crime, which has consequences that are relatively visible and provoke immediate public outrage, there is a crime committed by elites whose effects cannot be (easily) separated from free market effects and whose consequences remain invisible. When this crime eventually reveals itself and »success« based on it becomes widely known, the authorities react mainly because of the public desire for retribution. In the eyes of the regulators, white collar crime is more seen as a flaw in complex system of risk management instead of being seen as serious crime with morally corrupt persons as perpetrators.

The need for more efficient prosecution of white collar crime led to the concept of criminal responsibility of the legal entities, creation of new secondary criminal acts, sanctions for the entities putting the corporations

in a situation where they must act as prosecutors' assistants with the obligation to prevent and reveal crimes and their perpetrators.

## Materials and Methods

This paper will analyze the white collar crime and criminal responsibility of the legal entities as well as the problem and importance of wider social context related with this crime. The main hypothesis (H1) of the paper is the following: Wider political, social and ethical context prevents efficient prosecution of white collar crime or allows its relative impunity. Auxiliary hypothesis (H2) states that even with the evolution of criminal legislation which enables relatively efficient prosecution of these crimes, political character of many institutions which do not act on the principles of reason and logic but on negotiation proves not to be suitable for prosecuting white collar crimes which are deeply socially, politically and economically interconnected and capable of neutralizing the effect of criminal legislation as one of the social subsystems. In that case, criminal legislation is under an additional pressure to prove that crime is committed and to found the individuals and corporations responsible for it.

## Discussion

### *From market failure and moral hazard to crime*

When the crime committed reveals itself, especially the large scale crime and the crime with lot of victims, that has an impact on the role and competences of politicians of various levels of government, their role and careers in the eyes of the public, and also initiates the police and judicial measures in the widest sense possible. Defining one's behavior as criminal depends on the wider social context and historical circumstances. »In some historical periods, certain acts of corruption were allowed or mildly punished or even not considered corrupt at all. Originally, the word »corruption« comes from Latin word »corrumpo« which stands for viciousness, depravity, bribery. In the second half of the 13<sup>th</sup> century, corruption was related with judge's misconduct – meaning his taking the money from clients in order to rule in their favor. More precisely, in this context, the corruption was related with judge and the client alike. During the religious war in the France (1574–1581), the corruption included the acts of all the other public officials. As a turning point in the prosecution of corruption in Europe, we can mention the French Civil Code from 1810 adopted during the Napoleon era, which implies the punishment for acts of corruption committed by public officials, including the ones in relation with performing duty. Afterwards, along with the development of the modern public administration, various forms of abuse of official power have been considered as acts of crime which violate the trust that public has for independent work of public administration. At the beginning of the 20<sup>th</sup> century, accusations for mass corruption within government representatives be-

came, for the first time, the most used instrument of political struggle and vocabulary in the United States of America«<sup>1</sup>. White collar and crime of elites, in the eyes of the politicians, legislators and media is more seen as acts based on poor judgments and poor system of risk management related with uncertain conditions. As a natural consequence, in such situation we have a case of avoiding the repression and legal prosecution<sup>2</sup>. »Because of that, the organized crime is present in the business, as they have the same goal – in the form of profit. Particular danger and problem is criminal activity of multinational companies, which owing to their economic power, are becoming a global political factor – and that can result not only in economic but also in criminal acts that violate the basic rights of population of certain region or state«<sup>3</sup>. That leads to the special form of crime which is defined as state crime – committed as a part of government, bureaucracy, military policies actions etc.<sup>4</sup>. Unlike the aforementioned form of crime which uses various forms of organization and becomes either organized or corporate, with the emergence of economic crises appears certain kind of white collar crime defined as »control management fraud«<sup>5</sup>. Insiders that control the operations inside the company, and who manage to subordinate the workers responsible for internal and external audit and review, basically steal the resources from their own company and clients through various schemes, using the government compensations to cover such behavior and accounting as a tool to achieve their goals and avoid the regulating agencies. New situation can be described as a profit thirsty beast. Levi claims that is difficult to make a distinction between white collar crime and usual business transactions. In financing industry for example there has to exist very close cooperation between loan officers, borrowers and lenders. Info about credit application has to pass numerous levels of control and verifications by different actors in order for credit to be approved in the first place. The problem was however in the widespread culture inclined towards profit maximization and financial goals along with absolute disregard for ethical values and legal procedures<sup>6</sup>. Edwin Sutherland defined the concept of white collar crime and further changes in that concept were a result of social changes and academic discussions, but always based on the fact that this form of crime was committed by well known and respected individuals with high social status during their employment. Critiques of Sutherland's concept can be summarized as follows: conceptual, empirical, methodological, legislative and political ambiguity<sup>2</sup>. Some of the research conducted in this field do not coincide with the findings of Sutherland's work since according to other findings (especially the one related with the research conducted in seven federal districts in the USA between 1976 and 1978) majority of white collar crime was committed by middle class members<sup>6</sup>. Definition of white collar crime is related with multiple concepts starting from the unethical behavior and characteristics of certain subculture, up to social harm and violation of the law in very broad sense – from the criminal and administrative to the civil. At the level of the organization, there are two

possible sources of white collar crime. One is related with individual behavior – rotten apple case and the other one is related with whole criminal structure – or rotten barrel case. The existence of either form of the white collar crime can be an indicator of organizational or even the failure of the whole industry. The term occupational crime is connected with the individual's occupation or job while white collar crime has organizational-occupational dimension which in the end tends to show that the individual is responsible<sup>7</sup>. Unlike the frauds committed by organized criminals and the outsiders, there is part of the elite whose actions cannot be differentiated from normal functioning of the capitalism and whose members keep their decency, do not provoke moral panic and whose activities remain invisible. Once the crime is revealed, often through media, and success based on such crime becomes more open to public, the moral panic starts. The authorities react mainly in order to protect themselves and to satisfy the need of public for retribution and that sometimes ends in the adoption of laws affecting the corporate elites<sup>2</sup>. However, this is a long-lasting and visible process susceptible to elections and political changes. Media and government manipulate with the damaged populations' expectations suggesting that the losses are such that no one with the reason can longer expect the compensation while police officials and prosecutors speak only in general terms how many should be arrested – just to create an impression that judiciary is doing something serious. This allows the member of the elites to surpass the control. The very control of this type of crime goes through auditing industry which requires certain economic and political preconditions and generates both types of profit for small group of high class members who control those processes using the public's fear as a guide to solve these problems. Too much of the moral panic destroys credibility of the institutions and individuals representing these institutions, and the on the other side strengthens the influence of consultant houses. According to their opinion, the response to white collar crime is not in the repression and seizure of property of the ones whose acts cannot be separated from core businesses but in risk management<sup>2</sup> and decision making process and mechanisms that control that process.

Crime or deviation is more a proof of social class subculture, marked as rotten barrel or systemic deviance – rotten orchard. In that case we are talking about systemic crime or system crime. »Systems« refers both to the formal system – the police organization, the criminal justice system and the broader socio-political context – and to the informal system of deals, inducements, collusion and understandings among deviant officers as to how the corruption is to be organized, conducted and rationalized<sup>7</sup>. Numerous theories try to make a distinction between the rotten apple and rotten barrel or orchard case. It is a complex task since the individual act of crime cannot be easily separated from general micro and macro context in which the crime was committed since they are interrelated in many ways (it is well known that the person will be less able and less likely to commit the

crime in the environment with high ethical norms). Regarding this issue it seems important to mention new phenomenological forms of corruption directly or indirectly related with white collar crime in specific context that some authors discuss. Sajo makes a distinction between corruption and clientelism. According to him, clientelism is a form of social organization (and as such always includes certain relations between 'patrons' and clients) while corruption is a special form of individual social behavior which may or may not grow to be a mass phenomenon. Sajo introduces a new term – »clientelistic corruption« and defines it as a special form of structural corruption which should be differentiated from discrete individual types of corruption<sup>8</sup>. For the time being, clientelistic structures' primary interest is to reduce any kind of insight into the existing relations of dependency and creation of new social forces which would have real and permanent interest in making the existing institutions function properly and in the way that will recognize with no delays any kind of corruptive or clientelistic behavior. Post-communist societies are characterized by interdependent but different subsystems with limited mobility, simplicity, low specialization, accentuated family and other social ties based on solidarity. At the same time, individuals and whole social groups, in a desire to survive the burden of changes but also to stabilize their position in social relations, increasingly rely on primary social ties – meaning family and local community's members etc. Finally, at least when it comes to functioning of the state and equality of the citizens in that state – as a political community, the influence of the primary groups is the highest when it comes to their demands to subordinate the principles of formal distribution of jobs, rights and goods to the primary social ties and more precisely to emerging networks of different cliques. The influence of family, friendship or some other kind of primary identification impose themselves even in job selection for key positions, especially in public administration and judiciary, making »inheriting position« and nepotism the most natural way of getting a job. In that way, the state becomes a prisoner of various social cliques, dependent of primary structure of human relations. Aware of this, Kregar implicitly warns that the sources of corruption in public administration and the inability of that administration to function as a modern administration should, should be looked for in the post-modern type of production and persistence of new social groups in the uncertain conditions of post-socialism modernization<sup>8</sup>. Reflections of the problem and crisis including the activities of network crime (systems of white collar crime, corruption and clientelism) are different in the mind of the individual and institutions. Some things are obvious even to the birds on the trees, as one proverb says, but the authorities don't do anything about it as if they are blind. This saying has its ground in scientific research. The impact of crisis on social institutions and political debate is by no means divided from crisis' impact on individual's opinion. That is related with three things<sup>9</sup>. First of all, there is an expectation that the change in thinking leads to political debate. Crisis experience has the potential to speed up

restructuring of norms, rules, principles and decision making process in solving particular problem, which in the end leads to institutional changes, everything as a consequence of overwhelming external shocks and crises as a processes of adaptation. Crisis creates the opportunities for transformation and replacement of the existing organizational structures. In reality, crisis can have adverse effects if there are gaps or obstructions in the mechanisms of coordination between social actors, especially when it comes to those parts of the structure that are oversized and subject to massive planning and routine, indirectly even to corruption, and lack flexibility when confronted with unexpected demands. Looking at the big picture – the existence of numerous subsystems like markets, politics, judiciary, media etc, it is possible to see that their reactions to crisis and its consequences especially in the form of crime will not be unified or simultaneous. That raises questions about organizational routine and practice and demands redefinition of the roles and harmonization of the activities of various social actors and segments, based on such crisis experience. Political nature of many organizations creates problems since political process in its essence requires negotiations, agreements and it is the result of organizational or political dynamics instead of application of pure logic or common sense to the past. Instead of crisis being an opportunity for learning and adaptation as it is for the individual, organization in the case of the crisis appears rigid and inflexible, reduces the information processing or channels used and perhaps what is most important concentrates the control or transfers control to the higher level in hierarchy. That leads to the rigidity in response to crisis<sup>9</sup>. Many analysts are absolutely pessimistic about decision makers' or government's capacity to realize the learning potential during the crisis. The reason for that is the political character of the institutions. The very reaction of the regulatory and other institutions to crises in long term becomes predictable for individuals and profit-oriented subjects and creates conditions for acting on the basis of moral hazard, which is similar to the white collar crime. Moral hazard is the situation where a subject tends to undertake a certain act and related risk because the consequences of such act will be borne by someone else (formally the state, but actually by the citizens). »Organizational learning is not merely the individual learning, yet organizations learn only through the experience and actions of individuals and how it's recently suggested they learn mostly by the small group and work team which replace the individual as a fundamental learning unit in complex social and technical activities. Analysts suggest that learning takes place even within inter-organizational networks through communication particularly in dynamic and competitive environment. The learning concept from the institutional perspective often focuses on the development of roles, rules, documents and routines. When individual and collective knowledge is formed as a procedure, organization evolves. In the essence that is political, social and technical process which arises and dissolves with individuals«<sup>9</sup>. One of the key factors in positioning of the person in ille-

gal activities is studying the criminal activities in interaction with others in smaller groups or directly from upper class members<sup>7</sup>. As it is well known, the individual will be less likely and less able to commit crime in the environment that has high ethical standards. One can conclude that although the individuals from the authorities understand the nature of the emerging problem, the mechanism of their actions in new situation is far more complex than the one needed for corporate frauds and rotten orchards of corrupted officials. According to Federal Bureau of Investigations (abbr. FBI), one has to pay attention to white collar crime since this type of crime creates higher social costs than everyday crime and leaves severe physical and emotional consequences on the victims which is characterized as demoralization cost with consequential mistrust towards the ones that people should trust. When perpetrators of white collar crime appear in front of the court, it can be concluded that they broke the law for the first time, have no prior convictions and show no tendency towards the life of ordinary criminals. The research conducted in Norway tried to make a distinction between the individual perpetrators of white collar crime – rotten apples and group of such perpetrators – rotten barrels. The authors of this research came to the conclusion that – based on the sample they used – a lot more perpetrators were a part of the wider crime scheme – rotten barrels than it was the case with rotten apples. When comparing the sentences given to perpetrators of each category it turns out that these sentences were milder for the members of the group than for the individual perpetrators since the first used loyalty to the firm or limited liability given to positions they occupy in hierarchy as an excuse in front of the court. On the other side, there are huge differences between maximum sentences between states. In the United States of America spectacular cases like Bernard Madoff ended with the 150 year long jail sentence or Allen Stanford with 110 years of jail, while in Norway the maximum sentence for this type of crime was 10 years of jail time and 2 years in average. Individuals were sentenced on 2.8 years in average while the group members were given 1.9 years of jail in average. Wealth of the individual perpetrators and the wealth of group members were similar, with individuals being slightly wealthier. Companies in focus were of similar size although in the cases of rotten apples the larger sums of money were at stake than in the cases of rotten barrels. Individuals dominated in corporate while groups preferred occupational crime<sup>7</sup>. Since only 1/3 of the white collar crime victims' report that crime is committed, it is very difficult to determine its scope and frequency. Legal entities also do not report this type of crime since they want to avoid bad publicity that could influence their clients. Given these facts, it is obvious that reliable or unified official statistics of this type of crime does not exist<sup>6</sup>. The evolution of white collar crime theory starts with Theory of Criminaloid of E.A. Ross from 1907 which explains the existence of perpetrator of one new unethical and dishonorable act which is not yet formally forbidden by the law. The concept of white collar crime defined by Sutherland in 1949 was mentioned before while Clinard

and Yeager developed corporate crime theory in which employees commit crimes in the company's interest and related white collar crime's subtype in the form of occupational – vocational crime. Ermann and Ludman in 1978 explained organizational deviance which entails actions against norms set outside the organization but supported by everyday working norms inside the organization. Deviance of the elites defined by Simon in 2006 includes activities of upper class members which may or may not be considered as crime. Organized crime according to Shrager and Short from 1978 involves acts of doing or omission inside a formal organization for the realization of operative goals of organization which have serious physical and economic impacts on consumers, employees and public. Green redefined the term occupational crime in 1990 saying that is the act committed within the occupation. This limited concept of white collar crime describes four variations of occupational crime: 1) crimes of organizations related with occupation, which also entail corporate crimes, 2) crimes committed within government institutions, 3) crimes related with individual profession including the crimes of upper class members, 4) crimes of individuals related with occupations of lower social class. The importance of this classification lies in the elaboration of all sorts of crime committed by employees while performing their duties<sup>6</sup>. »Besides, only few of the trials in front of the criminal courts ended in convictions, partially because of the their lawyers' talents and mild sentencing policy towards perpetrators and partially because of the powerful lobbies from all levels of government and relative immunity these individuals have because of their social prestige and power including bribery«<sup>2</sup>.

### *The responsibility of legal entities and prosecution of corporate and white collar crime*

The responsibility of legal entity is the recent institute in international conventions left to countries for implementation in the form of criminal, administrative or civil responsibility. In particular countries, the responsibility of legal entities is incompatible with the constitutional order or with the principle of guilt while in other countries this principle was easy to implement. Some of the international legal sources which relate to this matter were the following: Recommendation R(96) 8 from September 9<sup>th</sup> of 1996 about criminal policy in Europe in the times of changes, Convention about environmental change and criminal law from 1998 which in the Article 9 obliges member states to adapt necessary corresponding measures which will enable the imposition of the criminal or administrative sanctions or measures to legal entities on whose behalf some of the crimes were committed. Criminal law convention about corruption from 1999 in the Article 18 obliges states to adopt such legislation and other measures necessary which will insure that legal entities can be held responsible for crimes such as bribery, trading in influence, money laundering assumed by the Convention, done on their behalf by any physical person, acting as individual or as part of the legal entity, which

has a leading role inside that entity based on the authorization to represent, make decisions or control activities. Cyber crime convention from 2001, Second protocol of Convention on protection of European Union's financial interests, United Nations Convention against Transnational Organized Crime from 2000, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions from 1997 obliges member states to introduce criminal or non-criminal responsibility of legal entities<sup>10</sup>. Every creative businessman or employee is capable of developing new kind of fraud which technically cannot be described like one since it is not in detail defined by the law and its existence actually falls under category of legal loopholes. Otherwise, the application of the existing rule on similar cases would create an illicit legal analogy. This creates an eternal battle between legislators who try to close these loopholes by adoption of new laws and constant creation of additional law (*lex specialis*) and the ones acting dishonorably. Great deal of dishonorable acts that fall under this category are actually a part of everyday business practice and usually outside the prosecutors' reach. On the other hand, procedural legislation requires that prosecutors and agencies at his disposal with their own resources provide evidence on which they base their cases with respect to certain legal guarantees given to the suspect or defendant. Under the guarantees of the criminal procedural law one assumes the right against self-incrimination and lawyer-client privilege which should be unavailable to the prosecutor and provide efficient defense. Corporations and employees create and use documents as a part of the working process, which represent the source of information, facts and evidences in criminal procedure. Documents, dominantly in the form of business reports, whose issuance is related with defendant's job or his corporation are either in employee's personal possession or product of corporative operations and owned by corporation. This fact puts prosecutor in situation where his hands are tied and provides an explanation for further law enhancement in this area directed towards white collar and corporate crime suppression<sup>11</sup>. The evolution of criminal law went beyond the traditional concept and in a direction of: creating secondary acts of crime, proving *mens rea* or guilt as well as obtaining evidence which goes beyond classical procedural guarantees. The basic support for the development of these features lies in the responsibility of legal entities, creation of new criminal offences and sanctions for the legal entities<sup>11</sup>. The basis for liability of legal persons for crime that perpetrator committed in the name of, for the account or benefit of that person exists<sup>10</sup>: a) when the purpose of the criminal offence is arising from the conclusion, order or permission of the managerial or supervisory bodies of a legal person; or b) when the managerial or supervisory bodies of a legal person have influenced the perpetrator or enabled him to perpetrate the criminal offence; or c) when a legal person disposes of illegally acquired material gain or uses objects obtained through the criminal offence; or d) when the managerial or supervisory bodies of a legal person have failed to carry out

due supervision over the legality of work of the employees. It is necessary to differentiate between private legal entity and public legal entity like government, county. The legal entity gets its recognition by the system of registration, approval and law. When that occurs, this entity gains its legal, business and tort ability. The responsibility of the legal person is not excluded and in fact exists even when the perpetrator is not guilty for the crimes committed and vice versa. The liability of the legal person does not exclude the guilt of physical person or the persons responsible for the crimes committed. For criminal offences perpetrated out of negligence, the legal person can be liable under the conditions of law and in that case may be punished less severely. That means that the legal entity is responsible within the limits of its contribution while the perpetrator is liable within the boundaries of its negligence. Criminal code of Bosnia and Herzegovina adopted the model of derived and limited accessory or indirect responsibility of legal entity for crimes committed. Although the criminal responsibility of the legal and physical person can be related, the question is how these two can be separated<sup>11</sup>. Assuming that one of the firm's agents committed crime, one has to ask whether holding the corporation legally responsible also assumes the innocence of the managers or other shareholders in certain crimes. Under the doctrine of managerial or supervisory responsibility, the corporation will be liable for the damage perpetrator made in the line of duty. Vicarious responsibility is justified »not because the principal really participated in wrongdoing or fraud, but because the act was committed for the benefit of the principal and it is legitimate to request his responsibility for the damage individual suffered because of such behavior.« This doctrine was taken a step further in interest of the public policy allowing for corporations to be held criminally responsible even for the actions, knowledge and final purpose of acts and omission of due supervision of their agents because without these elements many acts of crime could go unpunished. Managerial structures, managers as individuals as well as corporations are used as prosecutors' and law enforcement agencies' assignees in order to suppress corporate and white collar crime. The legal entity's responsibility was expanded to all the actions of the corporation not only the actions of its employees. For example if employee »A« has in his possession a certain information about the money transfer of one of bank's clients, employee »B« knows something else about the same transfer and employee »C« also, then the bank knows everything about that transaction<sup>11</sup>. This laid foundations for legal entity's responsibility based on the assumption of collective knowledge. Decentralization and departmentalization of corporate activities divides operations and responsibilities into smaller parts and components and unites them afterwards into collective knowledge and makes corporations responsible for failure to act in accordance with that knowledge. According to that, corporations can be held responsible even when employee committed no crime. The only way the corporation can avoid this responsibility is to permanently monitor the activities of its employ-

ees which in the end enables prosecutors to cut costs of crime prevention and transfer his efforts to corporation<sup>11</sup>. In the end, that means that corporations need to have clear rules and instructions and to secure their implementation because of the assumption of collective knowledge. Prosecutors can therefore prove that unintentional acts of individuals represent corporate crime and use that, according to new legal solutions that go beyond the traditional legal guarantees and traditional criminal law. There are various models of legal entity's criminal responsibility. These models are different whether they are based on responsibility of legal entities for the acts committed by that entity or based on the responsibility of that legal entity that is derived from the behavior of the physical person as a perpetrator of the crime and additionally whether the responsibility is objective or subjective. »According to the model of derived or accessory responsibility, the responsibility of the legal person is derived from the behavior or responsibility of the physical person that acted in the name or for the benefit of the legal person. Inside this model exist two separate models – model of identification and vicarious model. According to the identification model, the legal entity is identified with the responsible physical persons – the ones in position- and the actions of these persons are considered as the actions of that legal entity. The guilt of the legal entity is derived from the guilt of its responsible persons. In a vicarious model, even the actions of the non-managerial employees are considered as actions of the corporation. The model of autonomous criminal responsibility of legal entity considers legal entity as entity separated from its members and therefore responsible for its actions. The legal entity's actions that serve as a basis for criminal responsibility are failures in organization or omission of due control that should prevent crimes from happening. If the legal entity's responsibility for crimes is based on causing the prohibited consequence, one can talk about objective responsibility. According to this model, responsibility is not based on guilt. In the model of subjective responsibility, legal entity is responsible if there is guilt present. In the model of derived responsibility of legal entity, the guilt of the physical person as a perpetrator of the crime is detached to legal person. In cases of autonomous model of legal entity's responsibility, the guilt of legal person is based on that whether legal person implemented necessary measures for preventing the illegal actions of its members«<sup>12</sup>. In fact, in cases of corporations, the prosecutor does not treat individuals as independent perpetrators of crime, but puts them into the context of their working activities – searching for documents corporations create as evidence against them. These documents are not subject to self-incrimination protection and that facilitates the process for the prosecutor to the great extent. The documents not only include the actions of the corporation and its employees but also all other information regarding other corporations, which transforms corporations into prosecutor's assistants and evidence providers. Since corporations do not have the privilege against self-incrimination as a part of determining guilt, prosecutors

have the free access to the documents that would otherwise be unavailable to them. As it is already known, legal entities' goal is to earn profit, within the legal and other boundaries but they are prone to commit crimes especially if given the right opportunity, in the country or abroad and can be a tool for committing acts of crime in the hands of the organized crime. On the other side, legal entities are not only the perpetrators of the crimes but also the victims of such crimes committed by other legal entities or their own workers. Many crimes can be related with behavior of legal entities. Criminal offences against economy, trade and security of payment systems, tax related crimes, criminal offences against work relations, crimes against people's health, environment, agriculture and other natural resources, crimes against public safety of persons and property, crimes against judiciary etc. Basically, all crimes defined in criminal code can be in this category. Primary criminal acts are the ones mentioned above while money laundering and other forms of obstruction of investigation and justice – defined in Criminal Code of Federation of Bosnia and Herzegovina like »tampering with evidence, giving false statements, failure to report a criminal offence or perpetrator« can be classified as secondary acts of crime. The perpetrators of these crimes are responsible and official physical persons, as well as the legal entities whose guilt is derived from the actions of the physical persons. Furthermore, acts of crime can be perpetrated, attempted and directed towards preparation of criminal offences and for each is given an appropriate sentence. Giving false statement and obstruction of justice can be used to prove the existence of primary crime. For obtaining the conviction for obstruction of justice, the state has to prove that at least one person in the company tried to persuade others to destroy documents that may be related with investigation, which is considerably easier to prove beyond reasonable doubt than that the knowing person participated in the fraudulent scheme to make commissions higher than usual<sup>11</sup>. »The Recommendation of Ministerial Committee of Council of Europe R(88) 18 in the part related with sanctions, after pointing out that the goal of the sanctions against corporations should be: 1. prevention of future crimes, 2. remuneration of victims, entails the introduction of many sanctions – suitable for corporations – ranging from warnings to dissolution of corporation. According to this document, sanctions and measures can be applied solely or in combination with others, with or without delays, as major or supplementary. The Recommendation especially points out the growing number of corporate crimes, which cause considerable damage to individuals and community but also generate profit for some as well as the difficulties caused by complexity of corporate managerial structures which prevent identification of individuals responsible for crimes committed«<sup>12</sup>. Sanctions for legal entities<sup>10</sup> are fines, seizure of property and dissolution of legal entity. The general reasons for less severe punishment of legal person or release from punishment is the behavior of its managerial and supervisory bodies who willingly report the perpetrator after the crime is committed (the case for less severe

punishment) or decide to return the illegally acquired material gain or to remove the caused harmful effects or to communicate the information concerning the grounds for holding other legal persons liable (the reasons for release from punishment). In order to release the legal person from paying the fine, the legal person has to prove: that it has implemented the system or program of precise behavior recording, that the criminal offence is recognized as the act of its employees, that it has reported the offence and that it has gathered all the evidence for government agencies – which could then serve as a basis for indictment against corporation and its employees. The question is whether all of this is a step in right direction in case that corporation wants to clear itself from criminal charges. In order to reduce sentence or get the release from punishment based on cooperation, corporation first has to willingly and on time reveal and report the illicit behavior, provide full cooperation to government agencies during their investigation and clearly accept the responsibility for such behavior. Revealing the criminal offence on time means that the offence has been reported before the act was actually committed or that the act was reported before the official investigation started and in reasonable time after the corporation became aware of such offence. Full cooperation requires that the corporation accepts the investigation, provides the government agencies with all information that are known and needed for identifying the nature of criminal offence and determining the individuals responsible for criminal conduct. If organization fails to do so, the government agencies need to bear the burden of proof during the trial – while the corporation is left to negate the important factual elements of crime and guilt<sup>11</sup>. It is needless to say that these provisions create a strong disincentive for organization to organize defense from criminal charges. Determining whether the organization cooperated sufficiently in order for sentence to be reduced is a task for the prosecutor. Since the court will not grant the reduction of sentence without recommendation from the prosecutor, corporation must be willing to give up its attorney-client privilege, to refrain from paying its employees' legal fees and to refuse to enter into joint defense agreement with its employees. The prosecutor will assess the willingness of corporation for cooperation from its readiness for disclosure of information including the waiver of the attorney-client privilege and work product protections with respect to internal investigation and communication between officers, directors, employees and counsel. The quality of cooperation is measured by timely and complete information and refraining from demanding immunity agreements. Such measures allow the prosecutor to obtain statements of possible witnesses, subjects and targets without having to negotiate with individuals and corporation<sup>11</sup>. This disables corporation to pay legal fees and defense for its employees and agents, and prevents joint defense efforts for two and more corporations in front of the court. Managerial bodies of the company are obliged to collect all the facts and pass them to the prosecutor – using in that way the results of the internal investigation against its own em-

ployees. If the company fails to do so, it could face charges for obstruction of justice. Organizations therefore don't have the right to remain silent, they cannot use the right against self-incrimination and presumption of innocence in their case is virtually non-existent. The only documentation protected from the official investigation is the one that corporation uses during the court trial<sup>11</sup>. Since the corporation assists the prosecutor during the investigation, at the same time it disables or aggravates the defense of the individual and puts pressure on them to plead guilty. In order to operate efficiently as well as to prevent criminal offences from happening, communication in corporation is necessary. That entails certain level of secrecy (confidentiality) and trust which has to exist on both sides. The employees will not be willing to reveal the information if they could bear the consequences especially in cases of criminal prosecution and when internal information, previously considered as secret, are publicly disclosed by the prosecutor. On the other hand, law requires that company has efficient surveillance system over its business activities – and because of that companies try to secure the alternative ways of information gathering where they can to certain level but not absolutely grant secrecy. The example is the possibility of anonymous reporting or open telephone line for complaints. Each and every document that is created on a daily basis creates new evidence that could be used against corporation. Formal lines of communication in corporation very often do not serve as corridor for the most important information since there is an intentional diverting or non-sharing of information from the company's parts and employees because they want to manipulate or reward certain behavior, escape the self-incrimination or they have fear of leaving any written trace of communication. The fact that corporation has the overall knowledge on which the responsibility of that corporation is based (because of the omission of due diligence) will put it in situation where it will must choose between conducting the internal evaluation and making an accusation against itself and refraining from the investigation and official claiming that it has no knowledge about what is taking place in corporation. The company agrees to conduct the investigation only if the criminal offence becomes known to the authorities and only then agrees to cooperate – because in that case has nothing to lose<sup>11</sup>.

### *The white collar crime and economic crises*

White collar crime and its manifestations are especially visible during great economic disorders in the form of national and international economic crises. Although it is difficult to determine with certainty whether the crisis are results of corporate and elite crime or the unethical and in the end criminal behavior is a consequence of poor economic conditions, it is absolutely clear that crises and white collar crime are connected with bonds that cannot be broken – as confirmed by theory and practice. Before the World War I, crises were caused (among other things) by lies and frauds and after the Great Depression (1929–1933) crises based on speculations were one of the

prominent types of economic crises. Criminal of high officials and corporations can always be, to certain extent, interpreted or justified by the market failure, failure of state regulation and prevalence of profit as the measure of success and that at the same time creates a basis for covering up, diminishing and subsequent revival of this negative phenomenon. The experiences from the two different economic crises speak in favor of these findings – the Savings and Loan Crisis (S&L) from the 1980'es and the latest Global Economic Crisis 2008–2010 – both originally from the United States of America. S&L Crisis from the 1980'es started with the state deregulation measures in financial sector – mainly with Depository Institutions Deregulation and Monetary Control Act from 1980 and Garn-St. Germain Act from 1982<sup>5</sup>. These changes included: a phasing out of limits on deposit interest rates, elimination of the 5 percent limit on brokered deposits, permitting thrifts to make commercial real estate and other loans and direct investments in their own properties as well as to issue credit cards, allowing a single entrepreneur to operate a federally insured thrift instead of requirement according to which thrifts need to have at least 400 stockholders with no individual owning more than 25 percent of stock, the thrift could be founded by non-cash assets like land or real estate. All these changes were introduced with rising at the same time federal deposit insurance per savings account. These measures draw get-rich-quick entrepreneurs to this previously successful industry. They would then run down the thrifts' resources and then pass them – bankrupt as they were – to the government for rescue. The role of government agencies was then to reimburse the depositors with taxpayer's money but drying up of those resources led eventually to their bankruptcy as well. The fact that draws special attention is that deregulation itself was more a result of the lobbying efforts of powerful people with interest in S&L industry than anything else. The list of transactions related with fraudulent behavior begins with land flips (piece of property is sold back and forth between two or more partners inflating in that way the sales price and refinancing the property with loan until the value increases several times over), continues with reciprocal lending (situation where the thrift officers and directors made loans to the officers and directors from other thrift), linked financing (where the loan would be approved under the condition that the deposition of money into the financial institution is made), nominee loans (financing of borrowers indirectly connected with the thrift) and continues with illegal trading (where usually honest bankers and thrift's directors fight for deposits which they later use for speculative investments hoping that this practice would save the thrift from bankruptcy), looting (where thrift corporations were used as a means for achieving personal gain) and covering up (whose goal was covering up or hiding the thrift's insolvency and the fraud that contributed to that insolvency with the use of accounting as a tool – usually preferred by white collar criminals). Besides insiders and management personnel, many outsiders like professional accounting companies, real estate appraisers, lawyers,

and politicians participated in these criminal schemes and formed entire criminal networks. Although at first, the assessed losses in S&L industry due to frauds and crime in general were only 3 percent of the total losses, later they were assessed as taking as much as 70 to 80 percent of the total losses amounting to 100 billion dollars. 91 percent of those charged for white collar crime were formally convicted and mainly received prison sentences, but large proportion of perpetrators remained undetected<sup>5</sup>. The late Global Economic Crisis (2008–2010) originated in the USA was caused by, among other things by, loose monetary policy and politics of low interest rates, problems in mortgage market, deregulation of the certain institutions in financial sector, speculative activities of great number of financial institutions (private and state sponsored) as well as a illicit practice of regulatory agencies. Deregulation was related with legal and business changes in American banking system, changes in potential and activities of two state sponsored enterprises devoted to mortgage lending »Fannie Mae« and »Freddie Mac«. Introduction of Gramm-Leach-Bliley Act in 1999 permitted the mergers of commercial and investment banks which previously was not the case. Furthermore, the deregulation in this field brought about further changes like widening the distance between lender and borrower, easing the conditions necessary for obtaining loans, introduction of new financial derivatives by the banks and other financial institutions like Collateralized Debt Obligations (abbr. CDO's) and Mortgage Based Securities (abbr. MBS's) which allowed mortgages and other types of debt to be packaged and re-sold again and again. Changes also included new accounting standards like mark-to-market rule according to which the price of the mortgage loan is recorded by the market instead of historical price and off balance sheet investing (mainly in Structured Investment Vehicles – abbr. SIV's). All of this reduced the need of lender (bank) to practice much needed oversight because if a loan went bad it would no longer belong to them<sup>13</sup>, and they would have the money for new mortgage loan. The requirements that a bank needs to fulfill were diminishing while the mortgage sales' provision was getting bigger and bigger. Along with the other favorable conditions (low interest rates, rise in rate of borrowing and expected housing price run-up), this increased the number of those who bought the packages of mortgage loans. The first in that chain were investment banks, which bought the mortgages from the commercial banks, and securitized them and with provision sold them to the another financial institutions like state sponsored enterprises, hedge funds, pension funds, and finally to the domestic and foreign investors. In that process, hundreds and even thousands of mortgage debts would be transformed into one package of bonds, which would then be divided into numerous parts and sold at the financial market. The buyers of these bonds could not (even if they wanted) assess the riskiness of such investments – mainly because certain MBS's contained various mortgage loans and investors relied mostly on credit rating agencies (like Moody's, Standard & Poor's, Fitch's) for risk evaluation of such investments. These

agencies however, as a profit making businesses, tried to keep or attract new clients (mainly investment banks) with grading their mortgage securities (regardless of their quality) as highly profitable<sup>14</sup>. The special role in the formation of housing bubble, besides other state companies, had two government chartered agencies – the Federal National Mortgage Association (abbr. Fannie Mae) and the Federal Home Loan Mortgage Corporation (abbr. Freddie Mac). Primary function of these two enterprises (especially the Fannie Mae) was to stimulate commercial banks in providing the loans for building houses for whose repayment they guaranteed while their role expanded to securitization and buy-out of mortgage loans<sup>15</sup>. In 1999, under the pressure from Clinton's administration, these two companies began with the pilot program of guaranteeing the payment of mortgage loans for persons lacking the proper credit histories – mainly the poor population and later with subprime mortgage market activities which led them (and the state) 10 years after into the situation where they must repay in full the main part of these mortgages in the market and cause the breakdown of American financial system. Also, serious mistakes and failures of private companies and institutions in every phase of the originate-and-sell model of mortgage loans – its issuance, securitization, rating and risk management – contributed to the great extent to the complexity and depth of the crisis and the emergence of white collar crime. Mortgage originators (issuers and sales agents) were oriented mainly towards the sales' commissions which depended mainly on the number of mortgages issued. Securitizers (financial institutions) made investors' risk assessment impossible by the process of securitization of mortgage loans. Credit rating agencies rated highly the MBS's and CDO's, but soon after the crisis began they downgraded them abruptly – which further undermined the investor confidence in these securities. Investors, mainly individuals didn't bother much to check on the riskiness of securities but relied solely on the opinion of the rating agencies. Financial institutions failed to manage risk and protect themselves from the investing in MBS's and CDO's keeping them often off-balance sheet (in the form of SIV's). When a demand for these financial products decreased, some of these financial institutions were forced to put SIV's back onto their balance sheets which created funding pressures, decreased the capital ratios and tighten the credit. Changes in financial industry un/intentionally worsened the situation on the real estate market, especially the one related with implementation of the later much criticized mark-to-market rule<sup>15</sup> which obliged financial institutions to value their MBS's and CDO's at current market prices which was positive as long the prices on the mortgage market were running up but after the prices went the other way – the value of companies' assets went down as well. The abolishment of the so called »uptick rule« according to which the investor who expects the decline in stock price can sell those stock only after the price starts to rise back again, because of the decision of the American Security and Exchange Commission, led to disappearing of the protection against sharp fall of stock

prices, and indirectly to the extreme instability in financial markets. Constant use and introduction of new financial derivatives (like for example specific instruments like Credit Default Swaps – abbr. CDS's – based on the transfer of the default risk)<sup>15</sup> additionally decreased the visibility of risk and made the situation on the market even worse. In order to achieve more easily some of their goals, the corporations directly bribed the state officials. Countrywide Financial (the biggest issuer of common and subprime mortgages in the United States before the housing market crash and the biggest client of Fannie Mae) tried to influence the state officials with offering affordable (VIP) loans for houses and apartments. Amongst them were the members of the US Congress, the members of Department of Housing and Urban Development and the executives of the Fannie Mae and Freddy Mac. Also, some of the former chief executive officers from the Countrywide occupied prominent positions in Fannie Mae and Freddie Mac, all which finally led to the lawsuits related with mortgages and other offences. Along with profit motivated frauds and frauds motivated with acquiring ownership, the emergence of moral hazard related with antirecession programs of US government proved to be extremely serious problem. Programs like 700 billions of dollars' worth Troubled Asset Relief Program (abbr. TARP)<sup>16</sup> were directed towards the rescue of the corporations responsible for the crisis and explained solely by the slogans like »to big, to global, to involved to fail«<sup>17</sup> instead of applying proper sanctions and slogans like »to guilty to remain free«. Legal sanctions for the ones contributing greatly to the crisis or causing the most damage did not take place and the same applies to the reaction of judiciary and investigative agencies. These authorities were, accidentally or not, more directed towards the individuals applying for the loans. In 2007 the FBI announced partnership with the Mortgage Bankers Association – abbr. MBA and trivialized to the great extent the mortgage frauds committed by the mortgage providers and went the opposite way to accuse the borrowers for such frauds. The FBI together with the MBA even went that far to create posters warning customers that if they cheated the mortgage lenders, the FBI would investigate them as borrowers<sup>5</sup>. The experiences from the periods of crisis provide further proof for considering the white collar crime as a crime whose emergence is closely related with state deregulation, whose upraise follows the market's expansion and whose termination and new cycle begins with the state antirecession – rescue programs.

## Conclusion

Economic activities can be a good cover for unethical, harmful and criminal acts of individuals and groups in the line of their duties and professions defined previously as occupational or corporate crime perpetrated in the name, for the account or benefit of corporations. The evolution of criminal law towards the definition of new criminal offences in the field of economy and regulatory

norms from certain industrial branches along with the possible use of secondary criminal offences (committed by the persons not related with the principal criminal offence but who failed to report it, cover up such acts or impede the investigation) in the indictment and liability of legal entities for crimes committed, should help the prevention and prosecution of white collar crimes. The specificity of collecting evidence, and non-existent presumption of innocence of legal persons should persuade the legal person to provide help and cooperate with the prosecutor if it wants to avoid penalties. The responsibility of the legal entity is based on the assumption of collective knowledge which can be very adequately used in the context of proving the criminal viability of corporation. It can therefore be concluded that the legal entity has no or very little chance to escape from punishment if the efficient judiciary exists. However, the judiciary system is just one of the social subsystems which has influence on the white collar crime. The other important subsystems are media, politics and legislative processes aimed at adoption of new laws. In fact, the white collar crime reveals itself first through the scandals in media. Information and facts that appear during such scandals point towards the biggest and the most obvious crises but they cannot be considered as totally reliable. Once this crime is revealed and »success« based on it becomes widely known, the authorities react mainly because of the public desire for retribution. Even here, the political nature of many organizations creates problems since political processes require negotiations, agreements and they are a result of organizational or political dynamics instead of application of pure logic or common sense to the past. In that way, basic logic is twisted because instead of crisis being seen an opportunity for learning and adaptation, as it is often in the case of individuals, the social subsystems responsible for the control appear rigid and inflexible in their response to crisis. Because of high influence the corporations and stakeholders have and the pressure they put on the media, the crisis is presented as a consequence of market fluctuations and risk management failures instead of being portrayed as a consequence of immoral conduct of individuals or corporations. Only few of the trials in front of the criminal courts ended in convictions, partially because of the perpetrators' lawyers' talents, mild sentencing policy towards perpetrators, difficulties in proving the white collar crime and partially because of the powerful lobbies from all levels of government and relative immunity these individuals have because of their social prestige and power. Even if the conviction for crime finally occurs, some studies have shown that the individual perpetrators or rotten apples receive more severe sentences than the members of the group or rotten orchard because the later use loyalty to the firm or limited liability as an excuse in front of the court. In the former socialist states, although the anticorruption laws have been adopted, the nature of systemic corruption (previously defined as »clientelistic corruption« which serves as a means for maintaining certain groups in the political positions and controlling the new generations of managers, companies and state officials and implemen-

ted through the creation of close relations and nepotism, typical for earlier epochs – not the modern state), dis-

ables their implementation and conceals the existing ownership and business processes and relations.

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## EKONOMSKA PREVIRANJA I KRIMINAL BIJELOG OVRATNIKA-TRŽIŠNI KRAH, DRŽAVNI NEUSPJEH ILI PAD DRUŠTVENIH VRIJEDNOSTI

### S A Ž E T A K

Kapitalističko društvo, organizacija i vrijednosti proizlaze iz inovacija i kreativnosti. Oni čine temelj za uspjeh svake vrste, uključujući gospodarske, a može se postići legalno ili ilegalno. Regulacija i kontrola tih aktivnosti leži na gospodarskim i političkim elitama i visoko pozicioniranim državnim dužnosnicima koji u očima šire javnosti, imaju moć i autoritet kako bi se umanjili nepredvidivi i teško kontrolirani učinci i druge krizne situacije. Takav položaj omogućuje eliti i dužnosnicima da djeluju legalno ili nelegalno, moralno ili nemoralno te se pruža mogućnost za počinjenje kriminala bijelog ovratnika. Ovakav kriminal doživljava se samo kao mana u složenom sustavu upravljanja rizicima, a ne gleda se kao ozbiljan oblik kriminala s počiniteljima stigmatiziranih od strane društva u cjelini, iako njegove karakteristike uključuju zlouporabu povjerenja te ogroman gubitak novca. Unatoč činjenici da su vidljivi, zločini niže klase stvaraju strah i tešku moralnu osudu od većine populacije, dok zločini bijelih ovratnika utječu na društvo u cjelini, te stvaraju čvrste temelje za ekonomski poremećaj i Svjetsku gospodarsku krizu. U radu se razmatra koncept ekonomske krize, pravne odgovornosti korporacija i elita, tržišnih neuspjeha, raspada društvenih vrijednosti te uloge vlada u turbulentnim vremenima.

