

To the question of criminal responsibility and combating raider attacks in Russia

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Abstract

The article discusses some aspects of criminal liability and raider seizure counteraction concerning enterprises, companies and other facilities in Russia on the basis of existing criminal legislation analysis on criminal activities related to an illegal Seizure (raiding), the official statistics, law enforcement practice, research and author approaches. According to the basic forms of raids, the authors grouped criminal law standards and analyzed their potential of criminal liability within the separate directions of raider activities, as well as possible approaches for the further development of criminal law on the counteraction to raiding. In During the process of an article writing the research methods were used: analysis, comparison, generalization, etc. The authors conclude that the problem of counteraction to raider attacks in Russia is not only criminological and criminal one, but mostly state-political one. Therefore, in order to identify and counteract the raider seizure a public and political will, the further development of criminal legislation, a coordinated and an efficient work of all state and law enforcement authorities are necessary to prevent, detect and bring to justice the perpetrators, and the formation of an anti-raider position of citizens and civil society institutions is necessary.

Keywords: criminal liability, opposition, raider seizure, Russia, analysis, approaches.

INTRODUCTION

The reforms which took place during the 90-ies of the XX-th century in Russia within the political and socio-economic areas led to the development of new economic and market relations, to the establishment of various forms of property, to the freedom of enterprise and other economic activities. This process was not only difficult one and economically unstable, which resulted in negative consequences concerning social and economic terms [10, p. 664] and also in the significant increase of violent, selfish, and other organized and other crime, including offenses and economic crimes.

During the period of 1990-2000-ies in the field of Russian economy the market relations faced new phenomena on the level of corporate control like mergers and acquisitions, and an illegal seizure (raiding) of companies, firms and other property objects (real estate), which carried out the organized sustainable formal and informal groups of raiders. At the same time violating the rights and interests of economic actors, the raiders cause economic, image (reputation) and other types of damages by their actions.

In order to determine the possibility of perpetrator criminal prosecution and to counter the raider seizures of enterprises, companies and other facilities in Russia the authors grouped the existing penal provisions and analyzed their enforcement capabilities within the individual areas of the raider activity, and taking into account a scientific and an author approaches, the suggestions concerning the further development of criminal law were expressed about the counteraction to hostile takeovers.

METHODS

During the process of an article writing the following research methods were applied: analysis, synthesis, comparison, expert evaluation, which allowed the authors to group the criminal law and to analyze their enforcement capabilities of criminal responsibility within the individual areas of the raider activities, as well as some approaches to the development of criminal law on the counteraction to hostile takeovers, .

The empirical base of research was based on official statistics about Russian crime, law enforcement materials, the domestic scientific literature on criminal law, including the development of criminal law on the counteraction to hostile takeovers, the publications of materials in mass media (hereinafter - MM) about raider attacks.

RESULTS

It is recognized that in modern Russia the company unlawful capture (raiding) started from their privatization during the early 90-ies of the XX-th century, when through the procedures of the share capital and assets understating, bankruptcy, through public and mortgage auctions the enterprises were sold at low prices, which were thousands of times lower than their actual market value, and competitions were actually fake ones. At that the boom of hostile takeovers and the raider seizure of enterprises, companies and other facilities in Russia increased by several times at the beginning of the XXI-st century and continue to the present.

In modern times raiding is manifested not only in the form of large enterprise seizure (for example, CJSC "Vagonmash", "Sibselmash", "Togliattiazot", etc.), companies (for example, SPA "Zenith" SRI "Spetsstroy", SRI "Synthesis", etc.) and other objects (for example, the editorial office building of "New time" newspaper, etc.), but is also penetrated into the daily lives of people. The examples are known from the media and law enforcement materials when agricultural lands, plots, apartments, cottages, industrial and art workshops, etc. are captured. The initiators are the companies, the groups of persons for which raiding is a "profile" business. Thus, it becomes not a distant and an incomprehensible form of another's property seizure(real estate) for many people but

a possible and a serious problem to remain without a land, apartments, cottages and other houses where they work, live, perform creative work or perform other types of works. At that as follows from the mass media and investigative materials in many of these observed all formalities (a quasi-statutory form) concerning the transfer of real estate objects, and the very terms "raiding" and "raider attacks" acquired a clear criminal shade in the public consciousness of Russian citizens.

According to expert estimates, the profitability of raiding activity makes 200 - 1000% and 70 - 80 thousand raiding attempts are taken annually and up to 5000 raids is carried out [1]. At that, according to expert opinion the damage caused by raiding is difficult to estimate, since the raid in most cases occurs in hidden forms, not only compromises the economic policy of a state, but also undermines the prestige of Russia on the international arena, hinders innovation policy, and also entails the negative effects of socio-economic nature and raises the level of corruption in the state [1]. This certainly entails immeasurable economic losses. Businesses and companies which are constantly in a state of defense, cannot work effectively.

The authors share this scientific approach and taking into account the socially dangerous nature of raiding activity and its impact on Russian economy, a state should take an active part to combat this phenomenon through the adoption of the counter raiding National Plan, as in 2008 the National anti-corruption plan was adopted and the programs which oppose corruption are approved annually at the federal, regional and municipal levels.

The issues of responsibility for the raider seizures of enterprises, companies and other facilities in Russia during the past fifteen years are the subject of economists, politicians and lawyer debates, and their amount does not decrease, and therefore the subject of this study will be some aspects of criminal liability and raider attack counteraction in Russia.

It should also be noted that raiding in the present conditions as the form of criminal activity, inevitably leads to the merging of corruption and raiding, and in most cases it is organized, and the increase of transnational corporations and concerns number leads to the increase of international raids, involving an independent research.

There are two scientific approaches in domestic science of criminal law concerning the unlawful seizure (raiding).

Scientists who follow the first scientific approach believe the Special Part of the Russian Federation Criminal Code [2] (hereinafter - the RF CC) should provide an independent criminal law (or regulations) concerning the responsibility for raiding (such as "Misappropriation of corporate management in a legal person", "Illegal occupation of a real estate object", etc.) or add the part 1, art. 63 of the RF CC as a separate item, as an aggravating circumstance during "raiding" [3].

Scientists who hold the second approach believe that there is no need to adopt specific criminal law on the liability for raiding in the Special Part of the RF CC or a separate paragraph in part 1, art. 63 of RF CC, as the "raiding" counteraction is possible also by criminal means provided for in the current RF CC [4], including the criminal law on crimes against property (Articles 158, 159-159.6 of RF CC, etc.), economic crimes (Articles 185 and 185.1 of RF CC, etc.), the crimes against a person (Articles 105, 111, 112, 115, 116, 126, 127, 137, 138, 138.1 of the RF CC, etc.) and others.

Taking into account the proposals of scientists and law enforcers, and in order to counter raiding by federal laws (hereinafter - FL) # 241-FL issued on 30.10.2009, # 147-FL issued on 01.07.2010 and # 420-FL [5] issued on 07.12.2011 the changes were introduced into the Article 185 and 185.1 of the RF CC and others, and also new articles were introduced - 170.1, 185.2-185.5 of RF CC and others.

According to the official statistics 2388.4 thousand crimes were recorded during 2015 including 200598 crimes against property in the form of fraud according to the art. 159-159.6 of

RF CC, 112 445 of economic crimes, 6208 of economic crimes are related with real estate transactions [6]. 2628.8 thousand crimes were recorded in 2010, including 160081 crimes against property in the form of fraud under the Art. 159 of RF CC, 276, 435 of economic crimes. 9804 of these crimes are related to real estate transactions [7]. According to these data there are much less crimes in 2015 in comparison with 2010 registered in Russia, including economic crimes and the crimes related with real estate transactions, but there is a significant increase of crimes against property in the form of fraud.

As you know economic and corruption-related offenses are characterized by a high latency, as the authors noted in the publication on the corruption-related crimes in Russia [11, p. 1809], and so the official statistics according to domestic expert evaluations demonstrates only one second (third) part of this category of crimes. In the general structure of crime, taking into account the latency according to expert estimates the proportion of crimes related to raiding seizures could be about 2-3% [1].

The authors of this article, consider it is necessary to analyze the criminal law, which form the mechanism opposing to raiding concerning the forms of raids. For this, the standards are united into groups contained in the Special Part of RF CC, the violation of which is possible within the specific areas of raiding activity.

1. Illegal collection of information. Within the illegal collection of information the crimes could be committed against the constitutional rights and freedoms of a man and a citizen, provided by the Art. 137, 138, 138.1 of the RF CC. The violation of privacy, the secrecy of correspondence, telephone conversations, postal, telegraph and other communications, including the illegal use of special technical means can be used to obtain the information about an upcoming seizure object, as well as about the persons occupying the key positions in the organization for the purpose of their discredit and the impact on them during the control capture over a legal entity.

This group of actions may include the offense under the Art. 183 of RF CC - an illegal receipt and the disclosure of information constituting commercial, tax and banking secrecy. These secrets may be of interest for raiders in order to determine the organization asset structure - a potential victim, the presence of debts, the most vulnerable places in the cycles of work (production), etc.

2. Making of impact on the shareholders or the managers of a legal entity. For the illegal acquisition of property or the property rights for a legal entity, as well as the rights to manage an entity raiders often resort to crime, under the Art. 163 of the Criminal Code - extortion and coercion to a transaction performance or to the refusal of its fulfillment (Article 179 of the RF CC), for example, at the sale of shares.

Besides, under this form of raider activity the facts of kidnapping are possible (art. 126 of RF CC) and an unlawful deprivation of liberty (art. 127 of RF CC).

The criminal acts of raiders related to the falsification of the unified state register of legal entities, the register of security holders or a depository accounting system (Art. 170.1 of RF CC), the falsification of accounting documents a financial institution accounting (Art. 172.1 of RF CC), an illegal formation (establishment, reorganization) of a legal entity (Art. 173.1 of RF CC) and an illegal use of documents for the establishment (creation, reorganization) of a legal entity (Art. 173.2 of the RF CC), the violation of security rights accounting (Art. 185.2 of RF CC), the obstruction of performance or an unlawful restriction of security holder rights (Art. 185.4 of RF CC), the falsification of shareholder (participant) general meeting decisions in a business entity or the board of directors (supervisory board) decisions in a business entity (art. 185.5 of RF CC), etc.

Different manifestations of violence in respect of the mentioned persons may also take place under the Art. 105, 111, 112, 115, 116 of the RF CC.

3. The crimes committed during raider attack. First of all, it is the theft of securities, which

may be qualified under the Art. 158 of RF CC.

The analysis of law enforcement concerning raiding opposition is usually reduced to an illicit transfer of management rights in respect of a legal entity and the alienation of its property under the art. 159 of RF CC, i.e., as a fraud.

As scientists and law enforcers rightly note, at the absence of criminal law, the disposition of which would adequately reflect the criminal nature of all invader actions, the practice is performed with the proof of individual episodes or their groups as containing the content of crime in itself [8, p. 5] which are not sufficiently effective to combat raiding according to the authors' opinion.

DISCUSSION

Due to the stated above, let us analyze some scientific approaches, which provide for the adoption of a special criminal law (or rules) which determine the resistance to raiding.

L.A. Andreyeva proposes to allocate a raid in a separate composition of a criminal offense, and include the article in the chapter 22 of the RF CC and call it "Raiding". At the same time it determines the raid as an illegal seizure of business and highlights four parts in this article, namely, the capture of an enterprise as a property object, the seizure of shares, the change of management (p. 1); business capture (group of companies constituting a single technological chain or a group of companies, united by a common network or large business) (p. 2); business capture by a group of persons with the participation of officials using their official position (p. 3); the capture of large scale business, accompanied by murders or severe body harm (p. 4) [9].

V.D. Laricheva and O.Yu. Isayeva proposed to supplement the Chapter 22 of RF CC by two articles (Art. 169.1 and 169.2) [8, p. 5]. At the same time the art. 169.1 "The illegal capture of a legal person management" determines responsibility for the illegal acquisition of management power performance in relation to a legal entity (p. 1); the qualified content is the same acts committed with application of violence or with the threat of its application, with an illegal entry into premises or a legal entity repository, using his official position, by a group of persons according to a prior conspiracy, which caused a significant damage to a legal entity (p. 2); specially qualified content - the same acts committed by an organized group, resulting in serious consequences; the Art. 169.2 "The alienation of a legal entity property as the result of its control unlawful seizure" define the responsibility for the alienation of property and (or) the property rights owned by a legal entity, in favor of a perpetrator or of other persons, committed by an illegal receipt of management power performance in relation to such an entity (p. 1); qualified content - the same acts committed with violence or with the threat of violence, with an illegal entry into premises or a legal entity repository, using an official position, by a group of persons according to a prior conspiracy, causing large-scale damage (Part 2); specially qualified contents - the same acts committed by an organized group, which caused especially large damage (p. 3), and the same acts, entailing serious consequences (p. 4).

There are other research proposals in literature concerning criminal law establishing the responsibility for raiding, but because of the publication given volume it is not possible to consider them.

According to the authors, the proposed VD Larichev and O. Isayev construction of criminal law the most optimal and flexible enough, because by the laconic wording in them are not introduced specific violations of corporate order, which is produced by the capture of the legal entity. On the one hand it avoids cluttering disposition rules, as was the case with the rules of anti-raider package. On the other hand, without reference to the requirements of other branches of law in this case is not enough and norms, respectively, have a blanket in nature and involve an appeal to other laws.

CONCLUSIONS

The ongoing crisis in Russia in the economic sphere implies escalation of the conflict of interests in the sphere of production and forms of business and, consequently, leads to the formation of new types and methods of capture of enterprises, companies and other facilities to attract new actors involved in the schemes of hostile takeovers, as well as to the need to develop the legal framework to combat this socially dangerous phenomenon.

According to the authors, the adoption of the Federal Law "About struggle with raiding" is reasonable similar to the Federal Law # 273-FL "About corruption counteracts" issued on 25.12.2008, the federal law No. 35-FL "On Combating with terrorism" dated by 06.03.2006, # 112-FL "Extremist Activity countering" issued on 25.07.2002, No. 115-FL "On the counteraction to the legalization (laundering) of proceeds from crime and terrorist financing" issued on 07.08.2001. This law should define the notion of "raiding", "raider seizure" and their types, the concept of "raider attack subjects" and others. In its turn, the chapter 22 of RF CC should provide for crime contents, which determine the raider seizure of an enterprise, a company and other objects, and possibly other related criminal acts.

The authors share the scientific approach that the development of a legal framework to combat raiding requires an integrated planning of legislative activity, providing the introduction of necessary changes and the additions into the civil, administrative, criminal and other RF codes, the improvement of public policy and public control system, including the adoption of the National plan concerning counter raiding and other measures countering corruption and raiding.

SUMMARY

Thus, the problem of raider seizure counteraction in respect of enterprises, companies and other facilities in Russia is not only criminological and crimina one, but more a state-political one. Therefore, in order to identify and counter the raider attacks in Russia the state and political will is necessary, the further development of criminal legislation, the coordinated and an efficient work of all government and law enforcement authorities to prevent, detect and bring to justice the perpetrators, as well as an active anti-raider position of citizens and civil society institutions.

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