

INTRODUCING CORPORATE CRIMINAL LIABILITY IN UKRAINE: TERRA INCOGNITA

Dmitriy Kamensky*

I. INTRODUCTION

Modern political developments, a globalized economy, and the further synchronization of legal systems around the world provide a unique forum for expanding existing national-law frameworks and establishing new principles and doctrines of law. In light of new global threats, such as terrorism, economic criminality, and public corruption, both national and international criminal law systems require thorough reconsideration. This Article examines the advantages and disadvantages of corporate criminal liability implementation in one European country in particular—Ukraine. The American corporate liability model will serve as a virtual “sparring partner” for the purposes of evaluating both the progress and potential pitfalls of Ukraine’s attempt to establish an effective legal framework to combat corporate crime.

The Criminal Code of Ukraine (CCU) has recently been amended by introducing quasi-criminal liability for organizations in the form of specific measures.¹ This undoubtedly historic legislative step highlights a few significant points. First, liability may now be imposed on artificial legal entities, not solely on natural persons. Second, Ukraine is serious about its commitment to becoming a member of the European Union. Finally, at this stage in the national criminal law developments—which strive towards democracy, rule of law, and free-market economy—

* © 2016, Dmitriy Kamensky. All rights reserved. Fulbright Faculty Development Fellow, Stetson University College of Law, and Professor of Law, Berdyansk State Pedagogical University (Ukraine). PhD, Ukrainian Bar Academy, 2010; LL.M., Georgetown University Law Center, 2009. This Article was made possible by the Fulbright Program research grant. I want to thank Professor Ellen Podgor for her valuable research advice and *Stetson Law Review*’s 2015–2016 Executive Editor Viktoriya Johnson for her editing assistance. I am grateful to my family for their love and support during the writing process.

1. CRIM. CODE OF UKR. art. 96³–96¹¹ (2001), available at <http://zakon5.rada.gov.ua/laws/show/2341-14/page3>.

neither the judiciary, law enforcement, nor the legal community in general have accepted corporate liability statutes due to their novelty and lack of meaningful and comprehensive doctrinal explanation. Meanwhile, Ukrainian scholars remain quite skeptical about the current model of corporate liability and argue that the traditional approach to individual criminal liability should remain the only available remedy.

This Article is organized in four parts. Part II examines the current sociopolitical climate in Ukraine to provide context for the introduction of corporate criminal regulation. Part III discusses the history, principles, and recent development in the area of American corporate criminal liability and uses the American experience as a comparator to the evolution of corporate criminal liability in Ukraine. Part IV then analyzes the key features of a recently enacted framework of quasi-criminal measures against organizations in Ukraine and explores professional commentary on corporate liability amendments. Finally, the Article concludes with some observations on meaningful connections between corporate criminal liability regimes in Ukraine and the United States and emphasizes the potential for further research in this area of comparative criminal law.

II. CHALLENGES TO THE UKRAINIAN CRIMINAL JUSTICE SYSTEM AND THE NEED FOR CORPORATE CRIMINAL REGULATIONS

Legal details aside, the need for criminal liability of organizations, particularly business corporations, has manifested. Under the current sociopolitical framework in Ukraine, the two fundamental reasons to introduce corporate criminal liability are corruption and oligarchy.² Indeed, the country has been struggling with its own “public enemy number one”—widespread corruption³—for more than two decades

2. Merriam-Webster Dictionary defines “oligarch” as “a person who belongs to a small group of people who govern or control a country, business, etc.” Merriam-Webster, *Oligarch*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/oligarch> (last visited Oct. 25, 2016).

3. The massive amounts of Ukrainian reports and materials on corruption are beyond the scope of this Article. Top American officials have, on numerous occasions, pointed at corruption as the major threat for Ukrainian democracy, its civil society developments, and its economic well-being. See, e.g., Joe Biden, Vice President of the United States, *Remarks by Vice President Joe Biden to the Ukrainian Rada*, USEMBASSY.GOV (Dec. 8, 2015, 11:58 AM), <http://ukraine.usembassy.gov/statements/biden-rada-12082015.html> (explaining the historical battle against corruption in Ukraine); Jacob J. Lew, United States Treasury Secretary, *Readout from a Treasury Spokesperson on Secretary Jacob J. Lew's Meetings Today in Ukraine*, USEMBASSY.GOV (Nov. 13, 2015), <http://ukraine.usembassy.gov/statements/lew-press-11132015.html> (stating that United States loan guarantee is conditioned, among other factors, on Ukraine's progress on anti-corruption measures); Geoffrey

now. Since the early 1990s, future oligarchs have often employed organized crime methods, vast fraud schemes, and political bribery⁴--while concurrently eliminating business competitors, honest lawmakers, and upstanding law enforcement officials--to pursue their business ambitions. Because of their corrupt connections in the nation's political circles, these moguls' past and present shady dealings⁵ largely remain beyond the reach of criminal law.⁶ Despite the recent revolutionary and war conflicts within Ukraine, owners of the largest business conglomerates continue to aggressively employ corrupt means⁷ to preserve or expand their commercial empires, which has caused enormous losses--sometimes even bankruptcy--to legitimate business competitors.⁸ The late Edwin Sutherland would probably be surprised to see that his theory of white-collar criminality perfectly matches empirical material under Ukrainian realities.⁹

R. Pyatt, United States Ambassador to Ukraine, *Remarks by Ambassador Pyatt to the American Chamber of Commerce*, USEMBASSY.GOV (Dec. 10, 2015), <http://ukraine.usembassy.gov/statements/pyatt-12102015.html> (calling upon the newly appointed Anti-Corruption Prosecutor to put an end to corruption within the ranks of the Ukrainian Prosecutor General's Office itself). The 2008 United States-Ukraine Charter on Strategic Partnership also recognizes the importance of combating corruption and promotes collaboration of two countries against it. U.S. Dep't of State, *United States-Ukraine Charter on Strategic Partnership*, STATE.GOV (Dec. 19, 2008), <http://www.state.gov/p/eur/rls/or/142231.htm>.

4. See *Business Corruption in Ukraine*, BUSINESS-ANTI-CORRUPTION.COM (June 2015), <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/ukraine/snapshot.aspx> (providing an analytical overview of major corruption-related risks for foreign businesses that plan to invest in Ukraine).

5. See Andrew Cockburn, *Undelivered Goods*, HARPER'S (Aug. 13, 2015, 11:32 AM), <http://harpers.org/blog/2015/08/undelivered-goods/> (describing some questionable business practices by Ukrainian oligarch Igor Kolomoisky and his successful scheme of pocketing \$1.8 billion of International Monetary Fund financial rescue package for Ukraine).

6. See David M. Herszenhorn, *In Ukraine, Corruption Concerns Linger a Year After a Revolution*, N.Y. TIMES (May 17, 2015), http://www.nytimes.com/2015/05/18/world/europe/in-ukraine-corruption-concerns-linger-a-year-after-a-revolution.html?_r=0 (discussing the failed anti-corruption measures a year since the Ukrainian revolution and noting that the so-called deligarchization campaign remains among the top priorities for the Ukrainian President Petro Poroshenko).

7. See Taras Fedirko, *Corruption and "Rules of the Game" in Ukrainian Economy*, PECOB.EU (May 2013), <http://www.pecob.eu/corruption-ukraine> (stating that with the internalization of Ukrainian economy, the problem of corruption repels foreign investments into the country, while local businesses secure market advantages by corruptly conspiring with bureaucrats).

8. See, e.g., *В Україні є Проблема і з Олігархами* [There Is also a Problem with Oligarchs in Ukraine], NAT'L ANTICORRUPTION PORTAL "ANTICOR" (Apr. 14, 2015, 8:09 PM), http://antikor.com.ua/articles/36855-v_ukrajini_je_problema_i_z_oligarhami (stating that today major sectors of national economy are still run by oligarchs); *Марія Заславська, Рай для Олігархів: В Україні Панують Ідеальні Можливості для Процвітання Монополії* [Maria Zaslavska, Paradise for Oligarchs: Ideal Opportunities for Prosperity of Monopolies Dominate in Ukraine], TYZHDEN.UA (Aug. 20, 2012), <http://tyzhden.ua/Economics/57500> (discussing connections between some business monopolies and the oligarchs who control them).

9. See Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1 (1940), reprinted in CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY 89, 90 (Leonard Orland ed., 1995) (discussing the "present day white-collar criminals, who are more suave and deceptive than the 'robber

With this large scale business corruption in mind, many commentators, including myself, believe that corporate criminal law reform¹⁰ will serve as an invaluable tool for eliminating economic misconduct and the existing oligarchy.¹¹ Obviously, no business owner wishes to lose profits or his or her business altogether. This concern is heightened in Ukraine, where the majority of businesses, organized as closely held corporations, operate in a largely undeveloped stock market.¹²

Employing this strategy will cause significant financial and reputational harm to these entities, even if the individuals themselves are not prosecuted. A “tough on corporate crime” approach will inject confidence in the government’s effective, impartial regulation of the market economy by legitimate business persons, potential investors, and lay Ukrainians.

III. CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES: ORIGINS AND MODERN ENFORCEMENT PRIORITIES

Historically, the prevailing criminal law theory was that corporations could not be held criminally liable because of their artificial personality (a legal fiction approach) and lack of moral blameworthiness.¹³ However, over the past hundred years, American

barons,” and who engage in illegal conduct while exerting influence on politicians, courts, and law enforcement agencies to avoid criminal penalties).

10. ВОЛОДИМИР СТЕПАНОВИЧ СОТНІЧЕНКО, ЮРИДИЧНА ОСОБА ЯК СУБ’ЄКТ КРИМІНАЛЬНОЇ ВІДПОВІДАЛЬНОСТІ [VOLODIMIR STEPANOVICH SOTNICHENKO, LEGAL ENTITY AS SUBJECT TO CRIMINAL LIABILITY] 81, 82 (2013) (arguing that the forms of organizational misconduct in Ukraine, such as shell corporate identities, fake managers and shareholders, illegal connections between businesses and politicians, and offshore tax evasion schemes and systemic antitrust violations, are just a few reasons to impose direct criminal liability on blameworthy organizations).

11. Many American legal scholars also support the idea of holding corporations liable for illegal conduct, although their reasoning approaches are different. *See, e.g.*, Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1437–39 (2009) (discussing two reasons for extending criminal liability to corporations: (1) engagement in activities that often harm customers and specific corporate structure, and (2) corporate environment that generally fosters latent opportunities to commit a crime).

12. І. В. Краснова, *Фондовий Ринок в Україні: Стан та Перспективи Розвитку* [I. V. Krasnova, *Stock Market in Ukraine: The Status and Prospects of Development*], 1 ISSUES OF ECON. 129, 129–33 (2014) (detailing the key reasons of the Ukrainian stock market’s underdevelopment); Олександр Мойсеєнко, *Загин Не Помітив: В Україні Стало Ще на Одну Біржу Менше* [Oleksandr Myseyenko, *The Squad Did Not Notice: One Stock Exchange Fewer in Ukraine*], FORBES.NET.UA (Oct. 2, 2015, 7:30 AM), <http://forbes.net.ua/ua/business/1403000-zagin-ne-pomitiv-v-ukrayini-stalo-shche-na-odnu-birzhu-menshe> (stating that the Ukrainian stock market regulator is currently undergoing reform to meet European regulatory standards and boost the country’s stock market development).

13. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479–80 (1996) (imputing wrongful conduct and attributing criminal intentions to corporations have been posed as the most challenging issues for judicial decision-making).

criminal law has significantly advanced by rethinking corporate criminal liability and introducing it into both federal and state legal systems. This was done primarily through judicial decision-making¹⁴ and prosecutorial enforcement. Although the purpose and effectiveness of corporate criminal liability remains contested, its framework has been clearly implemented. Criminal liability is routinely imposed on corporate wrongdoers; it also brings its share of public benefits, and seems to serve at least some goals of criminal law.

Indeed, the American doctrine of corporate criminal liability has proven to be an effective law enforcement tool, and is widely supported by the American public.¹⁵ For example, one often hears the news of aggressive prosecutions of large international corporations by the U.S. Attorney's Office for the Southern District of New York.¹⁶ Moreover, criminal action against Swiss banks Julius Baer¹⁷ and Credit Suisse,¹⁸ a French power and transportation company Alstom,¹⁹ and a German car

14. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909) (finding for the first time that corporations can be held criminally liable for the conduct of their agents acting in the scope of their employment and for the benefit of the corporation); Kathleen F. Brickey, *Close Corporations and the Criminal Law: On "Mom and Pop" and a Curious Rule*, 71 WASH. U. L.Q. 189, 204 (1993) (explaining that judicial recognition of corporate criminal liability was an acknowledgment of large companies' business powers and the overall influence on society).

15. MARGARET P. SPENCER & RONALD R. SIMS, *CORPORATE MISCONDUCT: THE LEGAL, SOCIETAL AND MANAGEMENT ISSUES* 3 & nn.4, 6 (1995) (discussing the recent increase in public awareness and condemnation of corporate wrongdoing).

16. See, e.g., U.S. Dep't of Justice, *Two Cayman Island Financial Institutions Plead Guilty in Manhattan Federal Court To Conspiring to Hide More Than \$130 Million in Cayman Bank Accounts*, JUSTICE.GOV (Mar. 9, 2016), <https://www.justice.gov/usao-sdny/pr/two-cayman-island-financial-institutions-plead-guilty-manhattan-federal-court> (offering a press release on successful prosecution of two financial institutions, registered in Cayman Islands, for conspiracy with United States taxpayers to evade taxes by concealing more than \$130 million in Cayman offshore accounts); see generally JAMES M. ANDERSON & IVAN WAGGONER, *THE CHANGING ROLE OF CRIMINAL LAW IN CONTROLLING CORPORATE BEHAVIOR* 50 (2014) (citing the increased deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) with corporations that the DOJ began to use in the late 1990s).

17. See John Letzing, *Julius Baer Has Agreement in Principle in U.S. Tax Probe*, WALL ST. J. (Dec. 30, 2015, 4:41 AM ET), <http://www.wsj.com/articles/julius-baer-has-agreement-in-principle-in-u-s-tax-probe-1451458700> (stating that the Zurich-based bank stands ready to pay \$547 million to settle a multi-year American government's investigation into its aiding tax evasion in the United States, and noting that two other major Swiss banks—UBS Group AG and Credit Suisse Group AG—have previously settled with the government for \$780 million and \$2.6 billion, respectively).

18. See U.S. Dep't of Justice, *Credit Suisse Sentenced for Conspiracy to Help U.S. Taxpayers Hide Offshore Accounts from Internal Revenue Service*, JUSTICE.GOV (Nov. 21, 2014), <http://www.justice.gov/opa/pr/credit-suisse-sentenced-conspiracy-help-us-taxpayers-hide-offshore-accounts-internal-revenue> (referencing a Swiss bank that pled guilty to conspiracy to aid and assist American taxpayers in filing false income tax returns and agreed to pay \$1.8 billion in fines and restitution).

19. See U.S. Dep't of Justice, *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, JUSTICE.GOV (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> (discussing an unprecedented penalty imposed on the France-based company for its

parts supplier Robert Bosch,²⁰ as well as a civil action against the automaker Volkswagen,²¹ provide some recent examples of the government's actions to address corporate wrongdoing. American media has regularly informed the public of criminal investigations against some of the world's biggest corporate citizens, even more so for the past few years.²² The case of Arthur Andersen, once a prominent "Big Five" accounting firm,²³ serves as a bright example of prosecutorial powers bringing large international businesses down and even reshaping industries.²⁴

One of the recent developments in the corporate criminal liability world came with the release of the September 9, 2015 Department of Justice (DOJ) memorandum on the issue of individual accountability for corporate wrongdoing.²⁵ The document outlines a new government

involvement in a widespread, multi-million-dollar scheme that has spanned over several years and led to bribery in many countries around the world, including Indonesia, Saudi Arabia, Egypt, and the Bahamas).

20. See U.S. Dep't of Justice, *Robert Bosch GmbH Agrees to Plead Guilty to Price Fixing and Bid Rigging on Automobile Parts Installed in U.S. Cars*, JUSTICE.GOV (Mar. 31, 2015), <https://www.justice.gov/opa/pr/robert-bosch-gmbh-agrees-plead-guilty-price-fixing-and-bid-rigging-automobile-parts-installed> (discussing the world's largest auto parts supplier's guilty plea and agreement to pay a \$57.8 million criminal fine for its involvement in a conspiracy to fix prices and rig bids for the parts sold to the manufacturers in the United States and other countries).

21. See U.S. Dep't of Justice, *United States Files Complaint Against Volkswagen, Audi and Porsche for Alleged Clean Air Act Violations*, JUSTICE.GOV (Jan. 4, 2016), <http://www.justice.gov/opa/pr/united-states-files-complaint-against-volkswagen-audi-and-porsche-alleged-clean-air-act> (explaining the civil complaint's allegations that nearly six hundred thousand illegal defeat devices, which Volkswagen had installed in its diesel engine vehicles, caused harmful air pollution).

22. See, e.g., Daniel Gilbert & Sarah Kent, *BP Agrees to Pay \$18.7 Billion to Settle Deepwater Horizon Oil Spill Claims*, WALL ST. J. (July 2, 2015, 6:31 PM ET), <http://www.wsj.com/articles/bp-agrees-to-pay-18-7-billion-to-settle-deepwater-horizon-oil-spill-claims-1435842739> (stating that BP PLC pled guilty and agreed to pay \$18.7 billion, including \$4 billion in criminal fines and penalties, to settle all claims related to the 2010 Deepwater Horizon oil spill); David S. Hilzenrath & Zachary A. Goldfarb, *UBS to Pay \$780 Million over U.S. Tax Charges*, WASH. POST (Feb. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/18/AR2009021802541.html> (discussing the final settlement of civil and criminal tax fraud charges against the largest Swiss bank).

23. See Ken Brown & Ianthe Jeanne Dugan, *Arthur Andersen's Fall from Grace is a Sad Tale of Greed and Miscues*, WALL ST. J. (June 7, 2002, 12:01 AM ET), <http://www.wsj.com/articles/SB1023409436545200> (discussing the auditing firm's history, some of its questionable accounting practices, and its ultimate downfall).

24. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005) (reversing Arthur Andersen LLP's conviction for obstruction of justice in the Enron case). The Supreme Court's reversal of Arthur Andersen LLP's conviction came too late: the prosecution, trial, and negative publicity had caused the company to lose its client base and shut down its auditing business. Bill Mears, Chris Isidore & Krysten Crawford, *Anderson Conviction Overturned*, CNN MONEY (May 31, 2005, 2:58 PM EDT), http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scotus/.

25. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), available at <http://www.justice.gov/dag/file/769036/download>.

policy that emphasizes prosecuting individual employees, not just companies, while investigating illegal business practices.²⁶ More specifically, the memo contains six basic principles that apply to all corporate investigations.²⁷ Prosecutors are expected to focus their inquiries on guilty corporate representatives.²⁸ Cooperation credit²⁹ will be given to the corporation only if the company provides relevant information on the individuals who committed corporate misconduct.³⁰ In addition, government attorneys must ensure that agreements with corporations do not exempt corporate employees from criminal or civil liability.³¹ The internal policy guidance seems to stem from the long-standing criticisms of lenient treatment of corporate offenders that in most cases failed to result in criminal penalties for the guilty corporate representatives. The memo has already caused a wave of concerns,³² since some of its provisions, coupled with scarce prosecutorial resources, make it difficult to force corporations to give up their guilty officers—especially those from the executive suites. While it might be a little early to assess these new rules' effect on corporations and the willingness of corporations to turn in executives, the DOJ made a serious effort to ensure that no entity would designate a “vice president in charge of going to jail” or turn in low-level employees as a shield protecting guilty top managers against government probes.³³ Only time will tell if the DOJ's expectations are met by transparent corporate cooperation.

26. *Id.* at 1–2.

27. *Id.* at 2–3.

28. *Id.* at 4.

29. *Id.* at 3 (“Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit.”). Under USAM at 9-28.700, “Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution.” OFFICES OF THE U.S. ATTORNEYS, U.S. ATTORNEY'S MANUAL at 9-28.700 (November 2015), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.700>.

30. Yates, *supra* note 25, at 3–4.

31. *Id.* at 5.

32. See, e.g., Ellen Podgor, *It's Official—Throw the Employees Under the Bus*, LAW PROFESSOR BLOGS NETWORK (Sept. 9, 2015), http://lawprofessors.typepad.com/whitecollarcrime_blog/2015/09/its-official-throw-the-employees-under-the-bus.html (expressing concerns over the unclear memo term “all relevant facts”; potential changes within corporate culture when a company is pitted against its own employee; and the importance and degree of fairness in corporate internal investigations).

33. See Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), <http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html> (providing an overview of the new DOJ memo and its potential implications for the government investigations).

The landmark decision in *New York Central & Hudson River Railroad Co. v. United States*³⁴ set the momentum for the century-long evolution of corporate criminal liability elements, which is not yet over. Rising from the established tort law principles of vicarious liability and undergoing further development through an extensive line of court decisions, modern corporate criminal liability is both understood and applied through a unique common law framework. Such uniqueness is underlined by the fact that over time American courts have expanded the common law doctrine of *respondeat superior* into the area of corporate criminal law. Thus, modern corporate criminal liability is implemented through a two-prong approach. Corporations are held criminally liable when (1) an employee's or agent's actions were within the scope of his or her professional duties, and (2) were intended, at least in part, to benefit the corporation.³⁵

This, however, leads to the conclusion that a corporate criminal liability regime in the United States should by no means be viewed through rose-colored glasses. Members of the academia and the white-collar defense bar have widely criticized the relaxed two-prong approach to corporate liability along with an even lower legal standard of corporate prosecutions.³⁶ To this day, opponents of corporate criminal liability remain vocal, proposing garden-variety solutions to fix the issue: from the outright abolition of corporate criminal liability in favor of different civil and administrative liability strategies³⁷ to different liability reconstruction options.³⁸ It is fair to say there are

34. 212 U.S. 481 (1909).

35. See Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ's Internal Moral-Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 8 (2011) (explaining that imposing criminal liability on corporations only requires that an employee's or agent's actions were within the scope of his or her professional duties and that such actions were intended, at least in part, to benefit the corporation).

36. See, e.g., Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1184, n.202 (1983) (referring to the unfairness of imputing the lone agent's intent to the corporation without also looking into whether any reasonable efforts were made by other agents to prevent the crime); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648, 661, n.56 (1994) (discussing the potential risks of vicarious liability, when "the connection between the employee's act and corporate policies, decisions, and practices is significantly attenuated").

37. See Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 429, 433 (2007) (stating that, in the cases where a corporation takes all reasonable steps to deter and detect illegal conduct by its agent, corporate criminal liability is unwarranted; and also asserting that "[t]he Supreme Court's analysis strongly supports the thesis that the current scope of the law with respect to the parameters for imposition of vicarious liability in the criminal corporate setting should be narrowed").

38. See, e.g., Fisse, *supra* note 36 (proposing to view the goals of corporate criminal liability broadly and suggesting that careful reconstruction, instead of abolition, will better serve such goals).

many other issues within the broad corporate liability spectrum, from the very origins of such liability³⁹ and appropriate criminalization borders for corporate misconduct,⁴⁰ to the application of sentencing guidelines to organizations.⁴¹ The degree of criticism aimed at corporate criminality is sometimes overwhelming.⁴² Despite the totality of expressed concerns, it makes sense for corporate criminal liability to remain both on the books and in practice.⁴³ It protects a civil society from the massive wrongdoing that can potentially take place in the corporate world⁴⁴ and becomes even more relevant in the modern world with its ever-growing corporate presence.⁴⁵

IV. INTRODUCING QUASI-CRIMINAL LIABILITY FRAMEWORK FOR ORGANIZATIONS IN UKRAINE

Using the American corporate criminal liability model as an alternative perspective and a unique source of research experience, this Part will analyze the first steps taken in a similar direction in Ukraine. On May 23, 2013, Verkhovna Rada—Ukraine’s national parliament—adopted the Law of Ukraine, “On Amendments to Certain Legislative Acts of Ukraine, in Connection with the Plan to Liberalize

39. See, e.g., Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 21 (1957) (colorfully comparing origins and growth of corporate criminal liability with some of the weeds on the surface of criminal jurisprudence).

40. See, e.g., Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 519 (1980) (arguing that, although Congress has enacted numerous regulatory criminal statutes aimed specifically at corporations and the Supreme Court has favored their pro-enforcement interpretation, corporate overcriminalization “demeans the seriousness of criminal convictions in the eyes of corporate executives, prosecutors, and judges” (footnote omitted)).

41. See, e.g., William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1078–82 (1992) (pointing out serious inconsistencies between federal corporate criminal liability statutes, organizational sentencing guidelines, and the element of corporate culpability).

42. See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 57 (2007) (admitting that the “basic rule of corporate criminal liability has few friends”).

43. See *id.* at 60 & nn.39, 40 (discussing the pragmatic impulse that drove courts’ decision-making in the realm of corporate criminal liability and how that effectively placed societal and economic concerns before legal theories).

44. See EDWIN H. SUTHERLAND, *Crime of Corporations*, in THE SUTHERLAND PAPERS 78 (Albert Cohen, Alfred Lindesmith & Karl Schuessler eds., 1956), reprinted in CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY 99, 100 (Leonard Orland ed., 1995) (discussing misconduct by seventy major American corporations, ninety-eight percent of which recidivated; also reviewing major types of corporate wrongdoing, such as restraint of trade, infringements, unfair labor practices, misrepresentation in advertising, and illegal rebates).

45. See Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1531–32 (2007) (discussing certain types of corporate misconduct that involve multiple industries and affect the society a great deal; also pointing at the government to properly address corporate wrongdoing and losses from such misbehavior).

the European Union Visa Regime for Ukraine, on Legal Persons Liability.”⁴⁶ Despite its somewhat cumbersome title, this legislation has become one of the major criminal law reforms in Ukraine, supplementing the General Part of the national Criminal Code with Chapter XIV-1, “Criminal Law Measures for Legal Persons.” These drastic amendments introduced a new type of criminal liability—the quasi-criminal liability for legal entities.

The title of the law, which amended the national criminal law framework with specific criminal measures against organizations, suggests the driving force behind these major statutory changes is Ukraine’s aspiration for membership in the European Union.⁴⁷ There are several international treaties that include recommendations for corporate criminal liability for different types of crimes, which Ukraine has ratified and incorporated into its national legal framework. For example, in 2010, Ukraine joined⁴⁸ the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.⁴⁹ Article 10 of the Convention (“Corporate Liability”) encourages its member-states to adopt liability standards for legal persons (organizations) engaged in money laundering where *natural persons*—either in an individual capacity or as a member of any department, if he or she holds a leading position within the organization—committed the offense.⁵⁰

46. 12 BULLETIN OF VERKHOVNA RADA OF UKRAINE 183 (2014), available at <http://zakon3.rada.gov.ua/laws/show/314-18>.

47. See, e.g., П. П. Андрушко, *Щодо Відповідальності Юридичних Осіб за Корупційні Правопорушення у Вигляді Застосування до Них Заходів Кримінально-Правового Характеру* [P. P. Andrushko, *On Liability of Legal Persons for Corruption Offenses by Application of Criminal Law Measures to Them*], 3 BULLETIN OF MINISTRY OF JUST. OF UKRAINE 104, 109 (2013) (discussing that by adopting corporate liability provisions from several treaties, Ukraine, on one hand, fulfills its international obligation to establish liability standards under its national criminal law, and on the other, targets a broader range of offenses (not just corruption-related) that have traditionally been committed through the legal entity’s name and with its resources).

48. Закон України «Про Ратифікацію Конвенції Ради Європи про Відмивання, Пошук, Арешт та Конфіскацію Доходів, Одержаних Злочинним Шляхом, та про Фінансування Тероризму» [The Law of Ukraine “On Ratification of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”], 12 BULLETIN OF VERKHOVNA RADA OF UKRAINE 81 (2011), available at <http://zakon5.rada.gov.ua/laws/show/2698-17>.

49. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, May 16, 2005, C.E.T.S. No. 198, available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371f>.

50. *Id.* at art. 10. “Leading position” is defined as one related to: “(a) a power of representation of the legal person; or (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person, as well as for involvement of such a natural person as accessory or instigator in the ‘above-mentioned’ offences.” *Id.* at art. 10(a)–(c).

A. The Substance of Legislative Amendments on Quasi-Criminal Liability of Legal Entities

Chapter XIV-1, which has been recently added to the CCU in 2013, contains nine articles that cover legal foundations and statutory mechanisms for imposing quasi-criminal liability on organizations.⁵¹

Article 96³ provides four major grounds for imposition of such measures: (1) commission by the organization's representative (agent) in the name, and for the benefit, of the organization⁵² of any of the following crimes: money laundering; laundering of proceeds from illegal trafficking in drugs; bribing a person who provides public services; offer, promise, or gift of undue benefits to an official; and trading in influence;⁵³ (2) a representative's failure to exercise duties, imposed by law or articles of incorporation, to take measures against corruption that has resulted in the commission of any of the above-mentioned crimes;⁵⁴ (3) commission by the representative, in the name of the organization, of any terrorism-related offenses;⁵⁵ and (4) commission by the agent, in the name and for the benefit of the organization, of crimes such as breach of Ukraine's national security, kidnapping and taking hostages, election violations, creation of paramilitary groups, firearms and ammunition theft, and offenses against peace, security of mankind, and international legal order.⁵⁶

It remains unclear why the Ukrainian legislature has focused on these crimes while ignoring the crimes that are widely committed with corporate authorization and for the benefit of organizations, such as

51. The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine, in Connection with the Plan to Liberalize the European Union Visa Regime for Ukraine, on Legal Persons' Liability," 12 BULLETIN OF VERKHOVNA RADA OF UKRAINE 183 (2014), available at <http://zakon3.rada.gov.ua/laws/show/314-18>.

52. American principles of corporate criminal liability embody a very similar concept of holding an organization responsible for its employees' actions when the employee acted within the scope and nature of his or her employment. See, e.g., Matthew E. Beck & Matthew E. O'Brien, *Corporate Criminal Liability*, 37 AM. CRIM. L. REV. 261, 265, nn.21-22, 266, n.26 (2000) (stating that courts can impose liability on a corporation where its employee had either actual or apparent authority to commit the act, and supporting corporate criminal liability with the long-established principles of agency, regardless of the agent's position within the corporate hierarchy).

53. CRIM. CODE OF UKR. art. 96³(1)(1) (2001), available at <http://zakon5.rada.gov.ua/laws/show/2341-14/> (incorporating by reference articles 209, 306, 368³(1)-(2), 368⁴(1)-(2), 369, and 369² of the Code that describe elements of such offenses).

54. *Id.* at art. 96³(1)(2) (incorporating by reference articles 209, 306, 368³(1)-(2), 368⁴(1)-(2), 369, and 369² of the Code that describe elements of such offenses).

55. *Id.* at art. 96³(1)(3) (incorporating by reference articles 258-258⁵ (listing the prohibited offenses)).

56. *Id.* at art. 96³(1)(4) (incorporating by reference articles 109, 110, 113, 146, 147, 159¹(2)-(4), 160, 260, 262, 436, 437, 438, 442, and 447 (listing the prohibited offenses)).

tax evasion, smuggling, securities violations, and crimes committed against justice or to undermine official investigative proceedings.

Article 96⁴ of the CCU further explains the specific rules of criminal law measures applicable to state and municipal agencies and private-owned or government-owned companies.⁵⁷ Government-owned legal entities cannot be subjected to penalties for money laundering and corruption-related crimes; they can be liable only for the remaining offenses listed under Article 96³.⁵⁸ Further, if the government owns at least twenty-five percent of the liable company's stock or exercises full control over the legal person, the organization becomes fully liable for complete civil restitution of all criminal proceeds or income resulting from its agent's crime.⁵⁹

Regarding the penalties for the organizational wrongdoing, Article 96⁶ of the Criminal Code names only three: fine, property forfeiture, and dissolution (liquidation).⁶⁰ Fine and dissolution can only be imposed as primary penalties, while property forfeitures may only be imposed as an additional penalty.⁶¹ Article 96⁶ demands full restitution of all resulting losses and illegally obtained income.⁶²

Upon imposition of criminal law measures on the corporate wrongdoer, the law requires a sentencing court to consider factors such as, the degree of harmfulness of the corporate agent's crime, the degree of criminal intent, the amount of resulting damage, the nature and amount of illegally obtained benefits, and any preventive measures taken.⁶³ At the same time, unlike the flexible "carrot and stick" approach that was implemented in the United States to deter corporate wrongdoings, which takes into account a corporation's voluntary cooperation in correcting and preventing future misconduct,⁶⁴ Ukrainian criminal law provides no such "carrot," instead relying solely on the punishment "stick." Such a model will unlikely create many incentives for legal entities to approach law enforcement agencies with sincere goals of correcting and preventing misbehavior.

57. *Id.* at art. 96⁴.

58. *Id.* at art. 96⁴(2).

59. *Id.*

60. *Id.* at art. 96⁶(1),(1)-(3).

61. *Id.* at art. 96⁶(2).

62. *Id.*

63. *Id.* at art. 96¹⁰. Such considerations only outline the possible variations in the severity of penalties—thus the enforcement "stick" can become either "short" or "long," with no alternatives to criminal punishment.

64. See William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 644–47, 663–66 (2002) (discussing pros and cons of trading organizational cooperation for government-granted incentives).

The law on corporate criminal law measures has also provided for related procedural changes within the Criminal Procedure Code of Ukraine. The Code has been amended with provisions that cover commencement and termination of corporate criminal investigations, initiation of criminal indictments, the rights and powers of counsel while representing organizations in criminal proceedings, guilty pleas by employees of prosecuted organizations, and imposing criminal law measures on organizations.⁶⁵

B. Expert Analyses on the New Statutory Measures Against Organizations

It is worth mentioning that the legislation expertise division of the Ukrainian parliament—the Main Scientific Expert Department—issued a largely negative report on the organizational criminal liability model when it was first introduced as a draft law.⁶⁶ It analyzed both the legal nature and the expected results for introducing such liability; however, in doing so, it revealed a deep conflict between the proposed amendments and the established doctrinal approaches.⁶⁷

The expert report was based on the following arguments. First, the draft of the law incorrectly interpreted the meaning of several international documents it referred to—Criminal Law Convention on Corruption⁶⁸ and reports by the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of

65. Закон України "Про Внесення Змін до Деяких Законодавчих Актів України щодо Виконання Плану Дій щодо Лібералізації Європейським Союзом Візового Режиму для України Стосовно Відповідальності Юридичних Осіб" [*The Law of Ukraine, "On Amendments to Certain Legislative Acts of Ukraine, in Connection with the Plan to Liberalize the European Union Visa Regime for Ukraine, on Legal Persons' Liability"*], <http://zakon3.rada.gov.ua/laws/show/314-18> (last visited Oct. 25, 2016). Article 2 of this Law incorporates named procedural provisions into the body of the Criminal Procedure Code of Ukraine.

66. Висновок Головного Науково-Експертного Управління Верховної Ради України на Проект Закону України "Про Внесення Змін до Деяких Законодавчих Актів України щодо Виконання Плану Дій щодо Лібералізації Європейським Союзом Візового Режиму для України Стосовно Відповідальності Юридичних Осіб" [*Report of the Chief Scientific Expert Department of Verkhovna Rada of Ukraine on the Draft Law of Ukraine, "On Amendments to Certain Legislative Acts of Ukraine, in Connection with the Plan to Liberalize the European Union Visa Regime for Ukraine, on Legal Persons' Liability"*], RADA.GOV.UA, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=46901 (last visited Oct. 25, 2016) (on file with *Stetson Law Review*) [hereinafter *Report on Legal Persons' Liability*] (providing mostly negative analyses of the proposed legislative framework for criminal law measures against Ukrainian organizations).

67. *Id.*

68. Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, C.E.T.S. No. 173, available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5> [hereinafter *Convention on Corruption*].

Terrorism.⁶⁹ Contrary to the bill sponsors' position, international legislation does not specifically demand establishing criminal liability for organizations from member-states. Rather, these sponsors recommend using national system principles to address corruption, terrorism, and related crimes.⁷⁰ The expert analysis of the proposed bill has also revealed that lawmakers had significantly exceeded the corporate criminal liability framework proposed by the United Nations Convention Against Corruption (UNCAC).⁷¹ Thus, the legislative experts concluded that the whole concept of establishing criminal measures against organizations was not adequately balanced with the related international legislation.

Second, the expert report stated that such amendments would violate basic Ukrainian criminal law principles: in particular, the principle of personal liability⁷² and the principle of guilty liability.⁷³ Contrary to these long-established principles, the draft proposed to impose criminal liability on a corporation based solely on the unlawful acts of its agents. Without any legal requirement to establish organizational culpability, the long-established principles of criminal

69. See, e.g., UKRAINE: PROGRESS REPORT AND WRITTEN ANALYSIS BY THE SECRETARIAT OF CORE RECOMMENDATIONS, COMM. OF EXPERTS ON EVALUATION OF ANTI-MONEY LAUNDERING MEASURES & FIN. OF TERRORISM (MONEYVAL) 72 (Dec. 6, 2012), available at [http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/Progress%20reports%20y/MONEYVAL\(2012\)31_%20Progress%20Report_UKRAINE.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/Progress%20reports%20y/MONEYVAL(2012)31_%20Progress%20Report_UKRAINE.pdf) (referring to the constitutional challenges to organizational criminal liability in Ukraine); see also С. Я. Лихова, *Юридичні Особи як Суб'єкти Кримінальної Відповідальності за КК України* [S. Y. Lykhova, *Legal Entities as Subjects of Criminal Liability Under the Criminal Code of Ukraine*], 4 LEGAL HERALD 128, 130–32 (2014) (arguing that, though fulfillment by Ukraine of international legal obligations before the European Union is a good cause, such action should not ruin the long-established pillars of the national criminal law).

70. See Convention on Corruption, *supra* note 68, at art. 18 (stating that “[e]ach Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering”).

71. United Nations, Convention Against Corruption, art. 12, Dec. 11, 2003, 2349 U.N.T.S. 41, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

72. Under the principle of personal responsibility, only a person who commits a crime is subject to criminal liability and punishment—no one else is held responsible. This principle is enshrined in both the Constitution of Ukraine and the Criminal Code (part 1 of Article 2). CONST. OF UKR. pt. II, art. 61 (1996), available at <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>; CRIM. CODE OF UKR. pt. I, art. 2 (2001), available at <http://zakon4.rada.gov.ua/laws/show/2341-14/page>.

73. According to the guilty responsibility standard, a person may be punished only if his or her guilt has been proven in an official legal proceeding and then supported by a judicial verdict. This principle, which is integral to the concept of presumption of innocence, has been included into the texts of the national Constitution and the Criminal Code. CONST. OF UKR. pt. II, art. 63 (1996), available at <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>; CRIM. CODE OF UKR. pt. II, art. 2 (2001), available at <http://zakon4.rada.gov.ua/laws/show/2341-14/page>.

liability are effectively desecrated.⁷⁴ As previously mentioned, the absence of a “guilty mind”⁷⁵ has always been among the major arguments against corporate criminal liability in Ukraine.⁷⁶

Third, the proposed bill’s provisions refer to a legal fiction, under which the organization is exposed to criminal sanctions in cases when a natural person—a founder, member, manager, or other designated employee of the legal entity—committed a crime.⁷⁷ Under such circumstances, personal gain by an individual may be significant, while the benefit to the related legal entity will remain trivial or even incidental. Thus, the proposed legislative design required treating a legal person as a *de facto* criminal offender, when in reality the entity itself had not committed any “socially dangerous act”⁷⁸ under Articles 209, 258–258⁵, 306, or 368–369² of the Criminal Code.⁷⁹ Such an approach embodies a dangerous potential for legal abuse and risk of corruption in the area of enforcement, since business entities will become vulnerable to extortion, threats, or other types of illegal

74. See Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 325 (1996) (explaining the importance of drawing lines between corporate and individual crime, since in many cases agents may commit crimes that are totally unrelated to the existence or the ongoing business of the corporation).

75. See Carlos Gómez-Jara Díez, *Corporate Culpability as a Limit to the Overcriminalization of Corporate Criminal Liability: The Interplay Between Self-Regulation, Corporate Compliance, and Corporate Citizenship*, 14 NEW CRIM. L. REV. 78, 86 (2011) (arguing that both the corporate *actus reus* and corporate *mens rea* are the elements that can be attributed to the legal entity as a whole, and not just to its individual employees, and referring to the organizational knowledge of wrongdoing as potentially the most important factor behind establishing corporate *mens rea*).

76. See, e.g., Т. С. Батраченко, *Визначення Окремих Проблемних Питань щодо Кримінальної Відповідальності Юридичних Осіб* [T. S. Batrachenko, *Identifying Some Problematic Issues of Criminal Liability of Legal Persons*], 2 HERALD OF ACAD. CUSTOMS SERVICE OF UKRAINE (LAW SERIES) 97, 100 (2013) (maintaining that it is impossible to establish the element of guilt in corporate wrongdoing since a legal entity does not possess mentality, and intellectual or volitional characteristics, it cannot “feel” culpability).

77. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991) (proposing a new corporate criminal liability standard based on the assumption that every legal entity has its unique personality or “ethos,” and can thus be held criminally liable only if the corporate ethos (corporate identity) encouraged its agents to commit an act).

78. Under the Criminal Code of Ukraine, “socially dangerous act” is synonymous with “crime.” CRIM. CODE OF UKR. art. 11 (2001), available at <http://zakon4.rada.gov.ua/laws/show/2341-14/page>.

79. Ukrainian scholar Serhiy Gusarov highlights that the national legislation has been extremely cautious in designating just a few statutory offenses—primarily business-, corruption-, and public-safety related—to serve as the basis for imputing quasi-criminal liability to organizations. Such caution created a new, although limited, type of legal relations between the government and organizations—the criminal law relations. Сергій Миколайович Гусаров, *Коллективний Суб’єкт і Правовідносини у Кримінальному Праві України (Проблеми Теорії)* [Serhiy Mikhailovich Gusarov, *Collective Offender and Legal Relations in the Criminal Code of Ukraine (Problems of Theory)*], 2 HERALD OF CRIMINOLOGY ASS’N OF UKRAINE 7, 11, 13 (2015) (on file with *Stetson Law Review*).

influence, including threats of criminal prosecutions for offenses that companies have never committed.

Fourth, the idea of a compulsory introduction of criminal liability to legal persons by applying criminal law measures looked superficial and far-fetched because Ukrainian law already contained administrative penalties for legal persons for various regulatory violations. In particular, such penalties (largely monetary) are already prescribed by tax, customs, antitrust, securities, town planning, environmental, and other laws.⁸⁰

Overall, the Report on Legal Persons' Liability concluded that under the current sociopolitical conditions, particularly with the historically low level of legal culture and high level of corruption in society, the proposed statutory innovations could negatively reflect on the business climate in Ukraine, while affecting its economy as a whole.⁸¹

Based primarily on these reasons, Ukrainian scholars and practitioners met organizational criminal liability provisions with much skepticism.⁸² As one commentator correctly noted, criminal law

80. See, e.g., CUSTOMS CODE OF UKR. arts. 459(2), 461–65 (2012), available at <http://zakon4.rada.gov.ua/laws/show/4495-17/page17> (explaining the basis for administrative liability for violations of customs regulations and providing an inclusive list of administrative penalties to impose on the offenders); TAX CODE OF UKR. arts. 109–11, 113 (2010), available at <http://zakon0.rada.gov.ua/laws/show/2755-17/page14> (explaining various penalties, including a monetary fine, available to sanction taxpayers (natural persons and legal entities)). See also Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 537–44 (2004) (contrasting public to private law enforcement and thoroughly reviewing the legal literature that argues for corporate and individual criminal liability). Indeed, many Ukrainian scholars still embrace the traditional approach, under which corporate liability for any wrongdoing must be addressed through the avenues provided by other areas of national law—such as civil law, tax law, financial law, labor law—and primarily rely on imposing monetary and licensing revocation sanctions. E.g., М. И. Панов та С. О. Харитонов, *Заходи Кримінально-Правового Характеру щодо Юридичних Осіб як Новела у Кримінальному Законодавстві України* [M. I. Panov & S. O. Kharitonov, *Criminal Law Measures Against Legal Persons as the Innovation of the Criminal Law of Ukraine*], 2 HERALD OF ASS'N OF CRIM. L. OF UKRAINE 44, 54 (2014), available at http://nauka.nlu.edu.ua/wp-content/uploads/2015/07/3_4.pdf.

81. The report also pointed to the negative aspects of collateral damages—namely, massive restraints on rights and freedoms of the persons who are associated with an organization but who bear no relation to the offenses for which criminal liability is imposed. *Report on Legal Persons' Liability*, *supra* note 66 (from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=46901, click on link titled “Висновок Головного Науково-Експертного Управління 22.05.2013”). In particular, the use of criminal law measures, such as liquidation of a legal entity or forfeiture of its assets, may result in lay-offs and the loss of anticipated remuneration for the terminated employees. *Id.*

82. See, e.g., О. О. Кашкаров, *Передумови Реформування Кримінального Кодексу України та Створення Законодавства про Кримінальні Проступки* [O. O. Kashkarov, *Prerequisites of Reforming the Criminal Code of Ukraine and Creating Legislation on Criminal Offenses*], 1 F. OF L. 236, 239 (2009), available at http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&S21P03=FILE=&S21STR=FP_index.htm_2009_1_36 (stating that

measures against organizations should not become a part of the CCU without “saving interaction, interdependence, and substantial consistency of legal standards.”⁸³

C. Approach to New Liability Regime By Ukrainian Scholars: Major Theoretical and Practical Concerns

Implementing corporate liability for criminal violations and identifying the optimal model to impose such liability remain two highly controversial issues. Ukrainian commentators are divided into two camps—those supporting and those opposing criminal liability for organizations.⁸⁴ This highly debated issue has been studied in multiple academic works of various sizes, formats, depths, and levels of credibility.⁸⁵

establishing corporate criminal liability is a multi-vector process that requires reevaluation of some core criminal law principles, such as subjective (personal) incrimination, personal criminal liability, and punishment); В. В. Пивоваров та В. В. Маковецька, *Кримінальна Відповідальність Корпорацій: Проблема Визначення Вини* [V. V. Pivovarov & V. V. Makovecka, *Criminal Liability of Corporations: Problem of Guilt Definition*], 2 THEORY & PRAC. OF L. 1, 8–9 (2014) (concluding that Ukrainian scholars who question the concept of corporate criminal liability directly raise the issues of the legal person’s guilt, while the supporters of this concept overall prefer to avoid using the term “guilt” in the context of corporate criminal liability because of its individual psychological meaning and narrow legal definitions).

83. Ю. В. Шинкарьов, *Правовий Аналіз Окремих Новел Законодавства про Кримінальну Відповідальність* [Y. V. Shinkaryov, *Legal Analysis of the New Legislation on Criminal Liability*], 21 COLLECTED WORKS OF KHARKIV NATIONAL PEDAGOGICAL UNIVERSITY (LAW SERIES) 96, 99 (2014).

84. *Compare, e.g.*, СОТНІЧЕНКО [SOTNICHENKO], *supra* note 10, at 111–12 (supporting the idea that criminal liability for organizations is based on the principles of agency); К. П. Задоя, *Концептуальні Проблеми Запровадження Інституту Заходів Кримінально-Правового Характеру щодо Юридичних Осіб* [K. P. Zadoya, *Conceptual Issues of Introducing Body of Criminal Law Measures Against Legal Entities*], 5 ADVOC. 34, 40 (2013) (arguing that legislative enactments on criminal liability of organizations in Ukraine is just a first step, and further amendments will improve both law and law enforcement practices in this area), with Н. А. Орловська, *Колективні Суб’єкти як Сторона у Конфлікті: Актуальні Питання Кримінально-Правового Дискурсу* [N. A. Orlovska, *Collective Offender as a Party to Conflict: Topical Issues of Criminal Law Discourse*], 1 SCI. HERALD KHERSON ST. U. 67, 71 (2014) (stating that the current model of criminal liability for organizations in Ukraine requires major conceptual revision); Олексій Пасєка, *Заходи Кримінально-Правового Характеру щодо Юридичних Осіб: Окремі Проблемні Питання* [Oleksiy Paseka, *Criminal Law Measures Against Legal Persons: Some Problem Areas*], 2 HERALD LVIV ST. U. INTERNAL AFF. 253, 255–61 (2014) (reaching mostly unfavorable conclusions on the corporate criminal liability statutes in Ukraine).

85. *See generally, e.g.*, ОЛЕКСІЙ ОЛЕКСІЙОВИЧ МИХАЙЛОВ, *ЮРИДИЧНА ОСОБА ЯК СУБ’ЄКТ ЗЛОЧИНУ: ІНОЗЕМНИЙ ДОСВІД ТА ПЕРСПЕКТИВИ ЙОГО ВИКОРИСТАННЯ В УКРАЇНІ* [OLEKSIY OLEKSIYOVICH MIKHAILOV, *LEGAL ENTITY AS CRIMINAL DEFENDANT: FOREIGN EXPERIENCE AND PROSPECTS OF ITS APPLICATION IN UKRAINE*] (2008) (discussing the history of corporate criminal liability, foreign law, and practice in that area, and the conceptual background of such liability in Ukraine); ОЛЕКСІЙ ФЕДОРОВИЧ ПАСЄКА, *КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЮРИДИЧНИХ ОСІБ: ПОРІВНЯЛЬНО-ПРАВОВЕ ДОСЛІДЖЕННЯ* [OLEKSIY FEDOROVICH PASEKA, *CRIMINAL LIABILITY OF LEGAL ENTITIES: COMPARATIVE LAW RESEARCH*] (2010) (focusing the research on the arguments for and against corporate criminal liability in Ukraine).

While assessing newly enacted corporate liability measures, one commentator wrote that although the question of criminal liability of legal persons had been *de facto* resolved in Ukraine in the form of the so-called quasi-criminal or limited-criminal liability, it still remains highly controversial in the national theory of criminal law.⁸⁶ Another scholar made the informed observation that a totally new concept of criminal liability had been introduced to the CCU. According to this concept, only a natural person can be the perpetrator of any crime, while organizations are subjected to narrowly construed criminal law measures, which are far different from the traditional principles of criminal liability.⁸⁷ Thus, a newly established criminal law regime with regard to organizations allows legal scholars to reevaluate the exact nature of corporate criminal liability and to speculate on the public goals that such liability was designed to serve.

Ukrainian legal scholarship has traditionally included diverse approaches to understanding the theoretical and legislative provisions of corporate criminal liability.⁸⁸ Some theorists propose to view criminal liability of organizations through the doctrine of the collective offender—the concept designed to address situations, such as criminal conspiracy, where several persons unite their intents and resources to commit a crime.⁸⁹ Others argue strictly against the idea of corporate criminal liability in Ukraine by referring to the obvious conflict between such a proposal, on one hand, and established criminal liability principles, definition of the so-called subject of crime (offender), causation, criminal intent, definition, and types of criminal penalties, on the other.⁹⁰ One leading commentator on the subject has

86. О. О. ДУДОРОВ ТА М. І. ХАВРОНИЮК, КРИМІНАЛЬНЕ ПРАВО: НАВЧАЛЬНИЙ ПОСІБНИК [O. O. DUDOROV & M. I. KHAVRONIYUK, CRIMINAL LAW: TUTORIAL] 388 (2014).

87. Н. Орловська, *Про Модель Кримінально-Правового Впливу на Юридичну Особу в Україні* [N. Orlovskaya, *On the Model of Criminal Law Influence on Legal Entity in Ukraine*], 2 LEGAL HAROLD 161, 163 (2014).

88. *Е.г.*, Д. В. Каменський, *Кримінальна Відповідальність Корпорацій за Вчинення Федеральних Злочинів у США: Вихідні Засади* [D. V. Kamensky, *Criminal Liability of Corporations for Committing Federal Crimes in the United States: Basic Principles*], 1 UNIV. RESEARCH PAPERS 238, 238–39 (2006).

89. *See, e.g.*, О. О. Кваша, *Поняття Колективного Злочину, Колективної Злочинної Діяльності, Колективного Суб'єкта в Юридичній Науці* [O. O. Kvasha, *The Meaning of Collective Crime, Collective Criminal Activity, and Collective Offender in Legal Science*], 1 J. OF KIEV U. OF L. 270, 271 (2014) (arguing that the introduction of criminal liability for legal entities in Ukraine could ruin the traditional doctrinal understanding of the definitions “offender” and “criminal liability,” and would first require a thorough analysis of the entire body of the national criminal law, which currently is well-balanced and interconnected).

90. *See, e.g.*, В. К. Гришук та О. Ф. Пасєка, *Кримінальна Відповідальність Юридичних Осіб: Порівняльно-Правове Дослідження* [V. K. GRISHYUK & O. F. PASEKA, CRIMINAL LIABILITY OF LEGAL ENTITIES: COMPARATIVE LAW RESEARCH] 219–27 (2013) (proposing a broad set of amendments

extensively criticized legislative introduction of such quasi-criminal measures to the national legal system on the grounds that it had irreversibly violated some fundamental principles of criminalization.⁹¹

Finally, some Ukrainian scholars stress that the existing “criminal law measures” approach toward penalizing illegal conduct of organizations is wrong and as such should be redesigned to fit the principles of criminal punishment.⁹²

D. Cautious Interpretation of New Statutes by the National Judiciary

Meanwhile, the Ukrainian judiciary has started to cautiously explore the legislation tailored to address corporate criminality.⁹³ My own search within the national court rulings database⁹⁴ has generated only a handful of criminal cases that cited the provisions of the criminal law measures against organizations. In most of these cases,⁹⁵ the key issue before the courts was the legal standard for the imposition of asset forfeitures on business entities that have engaged, through the actions of their managers, in financing pro-Russian separatist groups.⁹⁶ No other organizational liability tools have yet come under the radar of

to the Criminal Code of Ukraine that, unlike the current model, would be better equipped to integrate corporate criminal liability into the body of criminal law and ensure its enforcement).

91. П. Л. Фріс, *До Питання про Кримінальну Відповідальність Юридичної Особи* [P. L. Fris, *To the Issue of Criminal Liability of Legal Entity*], 2 LEGAL HERALD 152, 153 (2015) (adding that these amendments lack rationality, which is undermined by the lack of criminal judgments against organizations to this date).

92. See Армен Сабірович Нерсесян, *Заходи Кримінально-Правового Характеру щодо Юридичної Особи: Аналіз Нового Законопроекту* [Armen Sabirovich Nersesyan, *Criminal Law Measures Against Legal Entity: The Analysis of New Law Draft*], 2 HERALD SUP. JUST. COUNCIL 181, 190–91 (2013) (using examples of banking industry regulations to demonstrate the flaws in the current corporate criminal liability framework); Paseka, *supra* note 84, at 256 (arguing that the term “criminal law measure” in the context of corporate liability is nothing but a lawmaker’s attempt to disguise the substantive principles of corporate criminal liability and punishment).

93. See Fischel & Sykes, *supra* note 74, at 320 (explaining that the doctrine of corporate criminal liability—relatively new to American law—has for a long time been rejected by the common law due to the artificial legal nature of corporations and their lack of blameworthiness).

94. *Єдиний Державний Ресстр Судових Рішень* [United State Register of Court Decisions], REYESTR.COURT.GOV.UA, <http://www.reyestr.court.gov.ua/> (last visited Oct. 25, 2016).

95. See, e.g., Opinion of the Appellate Court of Zaporizhzhya Region, Case No. 235/918/15-к (Mar. 31, 2015), available at <http://www.reyestr.court.gov.ua/Review/48561181> (holding that a trading company’s president’s intentional falsification of documents by the president of the trading company was related to the point of commercial freight departure and was done with the purpose of wiring obtained income to the territory under Donetsk People’s Republic’s control; his actions have been correctly charged as terrorism financing, and thus the company was properly penalized with forfeiture for its manager’s wrongdoing).

96. Such activities are recognized as terrorism financing under Article 258-5 of the Criminal Code of Ukraine. CRIM. CODE OF UKR. art. 258⁵, available at <http://zakon4.rada.gov.ua/laws/show/2341-14/page8>.

Ukrainian courts. At the same time, it is safe to guess that such uncertainty is temporary, as prosecutors will become more determined and zealous in their pursuit of corporate wrongdoers, while the judiciary will become more confident in using the new tools of statutory interpretation to bring corporate wrongdoers to justice.

At this point, statutory criminal law seems to have outrun the legal thought⁹⁷—especially judicial rationales—on the issues of organizational criminal liability in Ukraine. This appears to be even more the case, when compared to the evolution of corporate criminal liability in England and, especially, in the United States.⁹⁸ Court opinions in these common law jurisdictions appear to stay on the forefront of the corporate liability developments.⁹⁹

V. SOME OBSERVATIONS ON THE DIFFERENCES BETWEEN AMERICAN AND UKRAINIAN APPROACHES TO CORPORATE CRIMINAL LIABILITY

The analysis of the emerging corporate criminal liability in Ukraine and its fragmental comparison with the much further evolved American corporate liability framework leads to some general observations.

While gaining a foothold as a distinct, complex, and sometimes controversial part of criminal law, corporate criminal liability in the United States has undergone some serious modifications over its century-long history. This particular type of criminal liability has long been viewed as a routinely exercised enforcement mechanism, rather than a rare exception.¹⁰⁰ At least from an outsider's perspective, the American model of corporate criminal liability includes a unique combination of substantive law, procedural rules, and various industry-

97. О. О. ДУДОРОВ, *Проблема Юридичної Особи як Суб'єкта Злочину та її Вирішення у Проектах КК України* [O. O. DUDOROV, *The Problem of Legal Entity as a Criminal Offender and the Solution Offered in the Criminal Code of Ukraine Drafts*], in ВИБРАНІ ПРАЦІ З КРИМІНАЛЬНОГО ПРАВА [SELECTED WORKS ON CRIMINAL LAW] 41, 43, 46 (Oleksandr Dudorov ed., 2010) (supporting the prevailing position in Ukrainian legal literature that under the established doctrinal rules, a legal person should not be recognized as a criminal, who is capable of committing a crime or even a part of the crime, because specific offenses may only be committed by *specific* individuals—organization's agents, including its management and part-time employees).

98. See ANDERSON & WAGGONER, *supra* note 16, at 15–28 (discussing emergence and historical development of corporate criminal liability as well as development of vicarious criminal liability).

99. *Id.*

100. See, e.g., Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1570 & n.54 (1990) (stating that the public attitude to white-collar crime “has precipitated an increasing reliance on criminal prosecutions against corporate defendants”).

related regulatory provisions.¹⁰¹ Even the American academic scholarship, while addressing a wide range of corporate criminal liability issues, often relies on both the substantive criminal law and the enforcement documents (such as corporate guilty pleas and deferred and non-prosecution agreements), and also factors in extensive case law, empirical data, and sentencing guidelines.¹⁰² The extensive wealth of legal literature on the subject enables American lawyers to differentiate between legal business activity and corporate wrongdoing, which is sometimes difficult to do.

The issue of past and future developments of corporate criminal liability in the United States remains largely in the realm of public demands—especially market economy protection. Corporate criminal cases demonstrate the extent of corporate abuse and the level of harm to society that activities of modern corporations may cause in the absence of reliable legislative and enforcement barriers.¹⁰³ According to the extensive commentary by the United States' legal community, only criminal law measures and their effective enforcement can serve as reliable barriers against criminality, as evidenced by modern-era corporate prosecutions.

It is also important to remember that applying only measures available under civil, business, tax, and other areas of regulatory law will hardly address the systemic large-scale wrongdoing by commercial

101. Thus, it seems likely that the American solution to business misbehavior is unique for this legal system and legal culture environment, while it may not effectively prevent and (or) prosecute organizational business crimes in other countries, including Ukraine.

102. Several Ukrainian scholars remain skeptical about the mere justification of corporate criminal liability. *See, e.g.*, Євген Юрійович Полянський, КРИМІНАЛЬНО-ПРАВОВА ДОКТРИНА США: ГЕНЕЗИС, ОБґРУНТУВАННЯ, ПЕРСПЕКТИВИ [EUGENE POLYANSKY, CRIMINAL LAW DOCTRINE OF THE UNITED STATES: GENESIS, JUSTIFICATION, PROSPECTS] 323–33 (2015) (concluding that the American concept of corporate criminal liability demonstrates a serious deviation from the established doctrines of *corpus delicti* and *mens rea*, while shifting liability from real actors—natural persons—to the shoulders of artificial legal entities). I view Professor Polyansky's approach to the issue as unpersuasive. The issue of personal versus organizational liability has long since been resolved in many countries to support the latter, thus pursuing the goal of more effectively prosecuting serious wrongdoing that takes place in corporate offices. The American record in enforcing corporate criminal liability has proved to be effective in restoring public confidence in a strong government holding businesses accountable for their illegal actions. As for the innocent shareholders and customers, numerous studies have demonstrated that damage to such persons is exaggerated.

103. *See, e.g.*, Dep't. of Justice, U.S. Attorney's Office, Office of Pub. Affairs, *BNP Paribas Agrees to Plead Guilty and to Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions* (June 30, 2014), available at <http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>. According to the DOJ press release, BNP Paribas S.A., a big international bank, pled guilty to conspiring to violate the International Emergency Economic Powers Act and the Trading with the Enemy Act by processing billions of dollars of transactions through the U.S. financial system on behalf of Sudanese, Iranian, and Cuban entities. *Id.*

organizations. Under these circumstances, the Ukrainian model of quasi-criminal liability of legal persons should be viewed as a beneficial first step in combating corporate criminality. At the same time, we cannot ignore the fact that formation and development of organizational criminal liability in the United States has been a long, complicated process, with its own challenges and downturns.

VI. CONCLUSION

As pointed out by one scholar, corporate criminal legislation often arises during periods of large public outcries over corporate scandals that reflect economic downturns.¹⁰⁴ Therefore, upon introduction of this type of liability to the criminal law of any country, as is currently the case with Ukraine, detailed guidelines for prosecutors and judges need to be issued to ensure both the responsible and effective use of the newly created statutory provisions. Organizational liability statutes should be used, as designed, to punish and deter corporate misconduct only, and by no means should be used as an abuse of discretion or to corruptly influence lawful businesses. Unfortunately, such legal guidelines have not yet been developed and implemented in Ukraine. However, today more and more experts agree with the suggestion that a balanced application of well-written organizational criminal liability standards empowers prosecutorial and judicial communities with higher integrity, professional responsibility, and impartiality—the qualities that are always important when dealing with a powerful corporate world. Ukraine should learn.

104. See Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 98 (2004) (adding that under such circumstances the national legislature must respond).