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РЕЙДЕРЛІК: ҚАЗАҚСТАН РЕСПУБЛИКАСЫНДАҒЫ ҚЫЛМЫСТЫҚ ЖАУАПКЕРШІЛІКТІҢ ТЕОРИЯЛЫҚ ЖӘНЕ ПРАКТИКАЛЫҚ АСПЕКТІЛЕРІ

Аннотация. Бүгінгі күні рейдерлік құқық бұзушылықтың қиын құрамының бірі болып табылады, себебі құқық бұзушының іс-әрекеттері заңды сипатта немесе азаматтық-құқықтық мәмілеге айналды. Бизнесті бұзатын лауазымды тұлғаларға қатысты шешуші шаралар қабылдау қажеттілігі туралы ҚР Президентінің 2019 жылғы 2 қыркүйектегі жолдауында атап көрсетілген. Мақала авторлары құқық бұзушылықтың осы түрі үшін қылмыстық жауаптылықтың негізгі аспектілерін қарауға әрекет жасады. Негізгі көзқарастар құқықтық базаның жеткіліксіздігін пайдалана отырып және мемлекеттік, әкімшілік және әлеуеттік ресурстарды сыбайлас жемқорлық пайдалана отырып жүзеге асырылатын мүлікті, жер кешендерін және меншік құқықтарын бірлесіп сіңіру ретінде рейдерлікті анықтауға негізделеді. Сонымен қатар, авторлар рейдерліктің пайда болуына негізінен заңнамадағы олқылықтар, атап айтқанда Қазақстан Республикасы Қылмыстық Кодексінің 249-бабының қолданыстағы конструкциясының жетілмегендігі ықпал ететінін атап өтті.

Түйінді сөздер: бизнес, кәсіпкерлік, рейдерлік, заңсыз сіңіру, кәсіпті жаулап алу, қылмыстық жауаптылық, лауазымды тұлға.

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РЕЙДЕРСТВО: ТЕОРЕТИЧЕСКИЕ И ПРАКТИЧЕСКИЕ АСПЕКТЫ УГОЛОВНОЙ ОТВЕТСТВЕННОСТИ В РЕСПУБЛИКЕ КАЗАХСТАН

Аннотация. На сегодня рейдерство является одним из трудно доказуемых составов правонарушений, ввиду того, что действия правонарушителя завуалированы под законный характер,

либо гражданско-правовые сделки. О необходимости принятия решительных мер в отношении должностных лиц, подрывающих бизнес отмечено в Послании Президента РК от 2 сентября 2019 года. Авторами статьи предприняты попытки рассмотреть основные аспекты уголовной ответственности за данный вид правонарушения. Основные точки зрения сводятся к определению рейдерства как недружественного поглощения имущества, земельных комплексов и прав собственности, осуществляемого с использованием недостаточности правовой базы и с коррупционным использованием государственных, административных и силовых ресурсов. Кроме того, авторы отмечают, что появлению рейдерства способствуют главным образом пробелы в законодательстве, в частности несовершенство действующей конструкции статьи 249 Уголовного кодекса Республики Казахстан.

Ключевые слова: бизнес, предпринимательство, рейдерство, недружественное поглощение, захват предприятия, уголовная ответственность, должностное лицо.

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RAIDING: THEORETICAL AND PRACTICAL ASPECTS OF CRIMINAL LIABILITY IN THE REPUBLIC OF KAZAKHSTAN

Abstract. Today raiding is one of the difficult crimes to prove, because the actions of the offender are veiled under the legal nature, or civil law transactions. The need for decisive measures against officials who disrupts business was noted in the Message of the President of the Republic of Kazakhstan dated September 2, 2019. The authors of the article attempted to consider the main aspects of criminal liability for this type of offense. The main points of view boil down to the definition of raiding as an unfriendly takeover of property, land complexes and property rights, carried out using the lack of a legal framework and with the corrupt use of state, administrative and power resources. In addition, the authors note that the appearance of raiding is promoted mainly by gaps in the legislation, in particular, the imperfection of the current construction of Article 249 of the Criminal Code of the Republic of Kazakhstan.

Keywords: business, entrepreneurship, raiding, unfriendly takeover, takeover of a company, criminal liability, public official.

The protection of freedom of entrepreneurship, the observance of the legitimate interests and rights of all owners engaged in private business, is one of the important tasks of our government at the present stage. The social and legal danger of raiding is that this phenomenon acts as a factor that seriously affects the interests of legal owners of property and the entire economy of the country.

In this regard, it is quite natural that the Head of State K-J.K.Tokayev in the Message to the people of Kazakhstan dated September 2, 2019 «Constructive public dialogue – the basis of stabi-lity and prosperity of Kazakhstan», it is noted that any attempts to hinder the development of business, especially small and medium-sized ones, should be considered crimes against the state [1].

In a broad sense, raiding can occur in the following forms:

a) raiding involving violation of the norms of civil, administrative and other branches of law (for example, conflict resolution takes place in the framework of a civil law dispute);

b) raiding, the responsibility for the implementation of which occurs under the criminal law.

It should be noted that this separation of forms of raiding is conditional, since this category of crimes borders on civil and corporate disputes, since the illegal goal of the attacking party itself does not mean an offense, if actions were not taken, the responsibility for which expressly provided for by criminal law. This is the difficulty in qualifying such a category of criminal cases.

The criminological nature of raiding consists in unlawfully seizing control in a company by depriving or restricting such a right to persons who have it by law, criminally seizing property and assets, owning, using and disposing of them contrary to the will of the owner. It is the dominance of criminal properties lies in its specificity and difference from the semantic content of this concept, used in western countries [2, p.5].

Based on the foregoing, we can conclude that in the legal science of Kazakhstan lacks the generally accepted definition of raiding as a complex phenomenon.

K.V. Veselkov as a kind of «white raiding» carried out by «legal methods», considers greenmail [3, p.62]. However, identifying corporate blackmail with raiding would be wrong, since they have different goals and characteristics of actions. If raiding aims to seize control and assets of the company being attacked, then corporate blackmail is not intended to establish control over it. Greenmail consists of actions that force the company to redeem shares from the blackmailer at a price that exceeds their real value.

Corporate blackmail can be used in a package of measures for raider seizure, but attributing it to an independent variety of raiding would be unjustified.

The main points of view boil down to the definition of raiding as an unfriendly takeover of property, land complexes and property rights, carried out using the lack of a legal framework and with the corrupt use of state, administrative and power resources.

So, according to M.G. Iontsev, the takeover should be understood as the establishment of physical or legal control over an organization or its asset [4, p.9].

V.V. Gorbov defines an unfriendly takeover as obtaining legal and actual control over a company and its assets, in addition to the will of its shareholders, by using imperfections in the legal regulation of joint stock relations or by violating applicable law [5, p.7]. D.I. Stepanov interprets corporate takeovers as a way of unscrupulously intercepting corporate control, carried out without the consent of internal investors or the payment of fair compensation to them [6, p.125].

L. S. Dubovaya understands raiding as a special type of illegal unfriendly acquisitions that contain signs of any offenses [7, p.18]. According to M.P. Kleimenova, raiding is the destruction of an enterprise by its seizure and subsequent ruin in order to obtain profits [8, p.27].

Modern trends in the evolution of raiding are characterized by a variety of forms of manifestation.

In criminal science, the following types of raiding are distinguished:

1. «White» raiding is carried out in the framework of the current legislation. As a rule, corporate blackmail is used for this type of seizure, i.e., due to a minority block of shares, raiders create problems for the company to force it to buy shares at inflated prices. The company is forced to acquire a block of shares with intentions to eliminate blackmailers from its shareholders. Also, «white» raiding can be carried out by «inciting» control bodies to the company or by organizing strikes. Typically, this type of seizure is applied to firms with poor administration and financial difficulties.

2. «Gray» raiding is carried out outside the framework of civil law. If you do not delve into the details of the methods used by the invaders, it seems that legal methods are used, but in fact raiders forge documents and bribe officials. «Gray» raiding can be applied to almost any enterprise, and therefore this type is the most common. Protecting a company from capture is extremely difficult. When using this type of raiding, fraudsters are difficult to hold accountable, since it is difficult to prove the intent of illegal actions that are externally built according to the law.

3. «Black» raiding is carried out by purely criminal and violent methods, as it includes

fraud, blackmail, forgery of documents (including the register of shareholders), bribery, forceful methods, etc. «Black» raiding can be applied to any enterprise, especially a non-public company.

This classification is conditional, as raiders can use completely different methods of attacking a company.

According to the Art. 249 of the Criminal Code, raiding refers to the illegal acquisition of ownership of a share in a legal entity, as well as property and securities of a legal entity or the establishment of control over a legal entity as a result of deliberate distortion of voting results or hindering the free exercise of the right when a decision is made by the supreme body by entering into the meetings, in extracts from them of knowingly inaccurate information on the number of voters, quorum or results of voting or drafting of inadvertently inaccurate vote counting or accounting of ballots for voting, blocking or restricting the actual access of a shareholder, participant, member of the management body or member of the executive body to non-reporting of information about the meeting or reporting inaccurate information about the time and place of the meeting, voting on behalf of a shareholder, participant or member of the management body by knowingly forged power of attorney, by violation, limitation or infringement of the preemptive right purchase of securities, as well as the deliberate creation of obstacles in the exercise of the right to pre-emptive purchase of securities or other illegal methods that entail causing substantial harm to the rights or interests of citizens or organizations protected by law or the interests of society or the state protected by law.

It should be noted that in order to protect private property and entrepreneurship from external encroachment (including from raiding, in which the objective and subjective side of the crime coincide), other special rules are laid down in the Criminal Code, providing for liability for extortion (Article 194 of the Criminal Code), violation of property rights to the land (Article 201 of the Criminal Code), obstruction of legitimate business activities (Article 365 of the Criminal Code), coercion to complete a transaction or refusal to complete it(Article 248 of the Criminal Code), arbitrariness (Article 389 of the Criminal Code).

Due to the uncertainty of generic characteristics that could distinguish the analyzed category of disputes from others, there is no judicial practice to consider a particular category of cases (such as housing, labor, land, tax disputes) as such.

According to the statistical report №1-M for the period from 2015 to 2019 (hereinafter – analyzed period) for the commission of a crime under art.249 of the Criminal Code, a total of 14 crimes were registered (in 2015 – 9, 2016 – 3, 2017 – 2, 2018 – 0, 10 months 2019 – 0), convicted – 1, acquitted – 1, interrupted – 2.

Thus, since 2015, only 2 criminals have been sentenced.

The first criminal case against person «A» is one of the brightest examples of black raiding.

In August 2018, the verdict of the Specialized Inter-district Criminal Court of Aktobe region person «A» together with other participants found guilty under art. 226-1 part 3, paragraph «a» of the Criminal Code (as amended on July 16, 1997), that is, in raider seizure and theft of property of LLP «T», committed by unlawful establishment of control over a legal entity as a result of deliberate distortion of voting results and obstruction free exercise of the right when making a decision by the supreme body, by introducing deliberately inaccurate information on the number of voters, the quorum and voting results, and other illegal methods that entailed a material violation into the minutes of the meeting rights and legitimate interests of individuals.

The second criminal case against person «B» contains all signs of «gray» raiding.

In November 2016 the district court of Shymkent found guilty person «B» under art. 384, part 3, art.385, parts 1,2,3, art.416, part 1,5, but was acquitted and found not guilty under art. 249 of the Criminal Code due to the absence of the elements of crime in his actions, since the circumstances of the case reliably established the fact of having a purchase and sale agreement of a 50 % stake in the authorized capital of LLP «O» dated February 13, 2014.

Thus, raiding is a direct obstacle to the development of the institution of private property, economic growth, investment attractiveness and the formation of a market

economy in the country. It is no coincidence that raiding is called economic banditry and economic terrorism , since the often goal of the raiders is not the enterprise itself, but its property, which the raiders plan to quickly sell at a lower price, which leads to the bankruptcy of the target company with all the consequences: loss of jobs, future tax revenues, including loss of unique experience and equipment.

Raiding primarily violates the constitutional right of entrepreneurs and encroaches on the basis of state economic relations – property.

In art . 6 and 26 of the Constitution stipulate that in the Republic of Kazakhstan state and private property is recognized and equally protected, as well as property, including the right of inheritance, is guaranteed by law.

Russian authors identify the following threats to the economic security of the state, such as:

– increase in unemployment;
– tax evasion;
– increased corruption of officials and judges;
– monopolization of a number of market segments;
– the destruction and decline of production;
– loss of competitiveness;
– discrediting representatives of the authorities, law enforcement agencies and courts;
– worsening investment climate;
– intensification of the processes of money laundering obtained by criminal means;
– stimulation of criminal bankruptcy and hostile takeover processes [9, p.33].

Most researchers note that the emergence of raiding is promoted mainly by gaps in the legislation. The existing legal framework does not allow the separation of civilized methods of doing business in the field of mergers and acquisitions and illegal seizure of enterprises [10, p.17]. A similar situation exists in Kazakhstan, as raiders primarily use the imperfection of the legislation and the lack of a single law enforcement practice.

Before the introduction of raiding as a criminal offense, raiders were mainly held accountable for fraud, extortion, arbitrariness and other types of crimes.

Today, corporate seizures of enterprises are possible through abuse of the rights of shareholders, participants in partnerships, government officials, the artificial creation of debt obligations, using bankruptcy procedures and other complex schemes for the withdrawal of assets and removal of their rightful owners.

In this regard, civil law disputes related to the unlawful seizure of a business or property in the sense that means «raiding» are not considered by law enforcement agencies and judicial authorities.

The multicomponent nature of raiding, the range and extent of its criminal influence, as well as the relative novelty for domestic science, determine the lack of unity of views on the content-specific components and the concept of raiding. All this negatively affects the effectiveness of legal regulation.

A study of international experience indicates that the raider seizures that took place in the United States and European countries did not have such a pronounced criminal connotation. In foreign countries, the term «unfriendly takeover» is used similarly to the term «raiding».

In the United States, one of the key laws that counteracts «unfriendly takeovers» is the Securities and Exchange Act of 1934 [11]. The Act contains:

1) requirements for public companies to submit annual, quarterly and periodic reports to the Securities Commission in order to monitor the financial condition of the organization itself;

2) requirements for state-owned companies to maintain accounting records;

3) requirements prohibiting the trading of insider information;

4) requirements for a ban to mislead or provide false information to auditors of public companies.

Thus, any person who intentionally violates one of the above requirements may be fined up to $ 5 millionUS dollars and (or) imprisoned for a maximum of twenty years. In case that a legal entity is found guilty, the amount of the fine will increase up to 25 million US dollars.

A certain barrier to the raiders in the United States creates the Williams Law,

which regulates the market for corporate control in the United States. This Law primarily requires applicants to participate in the business of the company to report the details of their tender proposal to the US Securities and Exchange Commission in compliance with the time limits of the offer, allowing shareholders to consider the circumstances of what is happening.

In France, Section IV of the French Commercial Code «Provisions of criminal law» contains a set of criminal law standards that protect corporate relations and provides penalties for offenses against the management procedure in all forms of legal entities.

So, art . 242-1-L. 242-4 of the French Commercial Code establishes criminal liability for illegal actions in the formation of the authorized capital of the company [12]. In particular, art. L. 242-2 establishes a penalty of imprisonment for up to 5 years and a fine of up to 20 thousand euros for fraudulently inflating the value of inventory deposits made to the authorized capital.

Illegal issue of shares and illegal trade in shares (including until 1/4 of the authorized capital is paid) are punishable by deprivation of liberty for a term of up to 1 year and a fine of up to 9 thousand euros.

Since joint-stock companies are a legal entity with a more complex corporate governance system, French law provides enhanced legal protection for the general meeting of shareholders and decisions made by this body.

Thus, obstructing the participation of a shareholder in a general meeting of shareholders, gaining benefits or promising them to vote in a certain way, or not taking part in a vote (i.e. bribing shareholders during a vote) is punishable by art. L. 242-9 imprisonment for up to 2 years and a fine of up to 9 thousand euros.

In the Criminal Code of Spain there is a rule that criminalizes external invasion of the management system [13]. This is art. 292 ch. XIII «Crimes against the interests of associations», which stipulates that the punishment by imprisonment for a term of 6 months to 3 years, as well as a fine in the amount of triple the value of the profit earned, is imposed on the person who takes or uses for himself or third parties a damaging decision, fictitious accepted using a signed blank form, illegally appropriating the voting right not belonging to him, illegally denying the right to vote from persons who have it by law, or in another way or by a similar method.

It should be noted that this criminal law norm is regularly and very effectively applied in practice by Spanish law enforcement.

The disposition of this article partially covers the methods of raider seizures (in particular, the submission to the tax authorities of fictitious decisions of participants in legal entities on changing the sole executive body).

The study of foreign experience leads to the conclusion , that the essential difference countering raiding in foreign countries is the fact that in foreign practice raider operates within the framework of existing legislation and the use of market mechanisms «capture» [14]. As a result, all legislative and corporate methods of protection against raiding are aimed at limiting the possibility of uncoordinated redemption of shares on the open market, and that is why they are recognized as effective and efficient.

Thus, the theoretical and legal analysis of counteraction and criminal liability for raiding allows us to conclude that this type of offense is one of the most difficult to prove because the actions of the offender are veiled under the lawful character or civil law transactions.

Along with this, the objective side of raiding intersects with a number of other kinds of crimes (fraud, extortion, banditry, coercion to commit a transaction, appropriation and embezzlement of property, violation of property rights to the land, forgery, production or sale of forged documents, stamps, seals, forms and etc.), which causes many qualification problems.

Moreover, statistics indicate a low level of enforcement of art. 249 of the Criminal Code. It seems that one of the reasons for this is the imperfection of the current construction of this article, which as a result does not fully ensure the implementation of the principle of the inevitability of punishment.

Therefore, the study of this legal phenomenon requires additional comprehensive research, not only from the point of view of the theory of law, but also law enforcement practice.

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