

# Employer's criminal liability due to inconsistency in paying social security contributions during a financial crisis period

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## Introduction<sup>1</sup>

Social security expresses state's welfare to protect its citizens from various kinds of dangers that may confront within society. Social security systems emerged during the last years of 19th century and were established after the Second World War, when social security was lifted to a basic state concern. International conventions, such as the Universal Declaration of Human Rights, the European Social Charter, the Charter of Fundamental Rights of European Union and the International Labor Convention Nr. 102, highlight the importance of social security and include provisions that guarantee and regulate the right for social security.<sup>2</sup>

Social security in Greece is conducted through the social security organizations. Greek citizens are classified and belong to seven social security organizations, depending on whether they are employees, freelancers, scientists, farmers, civil servants, seamen or journalists.<sup>3</sup> It should be noted that a further merging of the social security organiza-

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<sup>1</sup> The judgments which are mentioned below are derived from the legal database 'NOMOS' (lawdb.intrasoftnet.com).

<sup>2</sup> Stergiou, *Social Security Law*, 2nd edition, Sakkoulas Publications, Athens-Thessaloniki, 2014, p. 1.

<sup>3</sup> Stergiou, *Social Security Law*, pp. 54-55.

tions is intended, aimed at assimilation of benefits. Of course, such a merging would raise the tangible risk of deterioration, rather than the improvement of benefits.

Employees come under the insurance of the Social Security Institution (SSI)<sup>4</sup>. Social security contributions are paid through a tripartite funding by the worker (labor contributions), the employer (employer contributions) and the state<sup>5</sup>. Employer contributions do not constitute contributions that the employers pay as insured themselves to the social security organization of freelancers for their own social security, but the employer's contributions as attributable for the social security of each employee to the employees' social security organization (SSI).

The Greek state has penalized the employer's inconsistency with paying employees' social security contributions, in order to force employers to pay the contributions allocated to them and ensure the collection of the employer's contributions. In fact, such legislative provisions that criminalize the employer's inconsistency in paying social security contributions exist in many countries, such as the Netherlands, Germany, Belgium, Norway, Sweden, Portugal and Austria.<sup>6</sup>

### **Legislative Framework: The Penal Offenses of Non-payment and Non-imputation of Social Security Contributions**

The Law 86/1967 standardized employer's criminal liability for two separate offenses: the offense of non-payment employer contributions and the offense of non-imputation labor contributions to SSI.<sup>7</sup>

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<sup>4</sup> Stergiou, *Social Security Law*, pp. 379 ff.

<sup>5</sup> Stergiou, *Social Security Law*, pp. 486 ff.

<sup>6</sup> Hoenig & Hammerl, *Insolvency and Restructuring Law in Central and Eastern Europe*, Linde, Wien, 2014, p. 53; Kirchner, Kremp & Magotsch, *Key Aspects of German Employment and Labor Law*, Berlin-Heidelberg: Springer, 2010, p. 78; Wood, *Principles of International Insolvency*, 2nd edition, London: Sweet & Maxwell, 2007, para. 19-018, Boone, *International Insolvency*, 3rd edition, London: European Lawyer Reference Series, 2002, p. 61.

<sup>7</sup> Stergiou, *Social Security Law*, p. 480 ff.

An employer who fails to pay the employer social security contributions within one month after they become due and provided that the amount exceeds € 20.000, shall be punished with imprisonment from 3 months to 5 years and fine.<sup>8</sup> When an employer withholds and does not impute the labor insurance contributions to the SSI within one month since they become due and the amount of labor insurance contributions withheld exceeds € 10.000, shall be punished with imprisonment from 6 months to 5 years and fine<sup>9</sup>. When the total debt exceeds € 150.000 within a period of 20 months, which begins one month since the social security contributions become due, it is a continuous flagrant crime.<sup>10</sup>

The standardization of penal offenses of non-payment and non-imputation of social security contributions intends to protect the legal right of property of the social security organizations and, allegedly, “the obligation of solidarity that social security embodies”.<sup>11</sup> The state considered that the solidarity of the social security is affected by non-payment of social security contributions and the survival of the social security organizations and the response to their obligation to offer benefits to their insured are threatened, thereby criminalized these employers' behaviors.

If a new law that increases the threshold of persecuted acts is issued, it applies as more lenient for the prosecuted employer. Hence, since the debt, after the increase of the amounts, does not exceed the increased criminality limit, the prosecutions are being discontinued in accordance with the principle of the prohibition of retroactive foundation or augmentation of the offense.

In the case of the employer is a legal entity, the person who is criminally liable and is prosecuted as perpetrator of the offenses of non-payment and non-imputation of social security contributions should be specified. The crucial element for a person to be deemed as criminally

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<sup>8</sup> Art. 1 par. 1 of Law 86/1967, as amended by the Law 4038/2012.

<sup>9</sup> Art. 1 par. 2 of Law 86/1967, as amended by the Law 4038/2012.

<sup>10</sup> Art. 1 par. 6 of Law 86/1967.

<sup>11</sup> Stergiou, *Social Security Law*, p. 482.

liable is the actual exercise of management of the entity at the time<sup>12</sup> the offense was committed, i.e. the participation in administrative and financial decisions of the legal entity.<sup>13</sup>

The above provisions do not apply and the employer is not prosecuted for non-payment of contributions that is obliged to pay as insured in the freelancers' social security organization.<sup>14</sup> The criminal proceedings against freelancers for non-payment of their own contributions as insured is contrary to the principle "nullum crimen sine lege", as the employer in that case is prosecuted for an act which is not standardized into law by proceeding to an unacceptable analog extension and application of criminal law.<sup>15</sup>

### Constituent Elements of Offenses

It is crucial to point out the constituent elements of the offenses of non-payment and non-imputation of social security contributions, which must be also included in the reasoning of court's decisions against an employer.<sup>16</sup>

Firstly, the total amount of chargeable contributions is part of the constituent elements of the offenses, in order to establish whether it

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<sup>12</sup> Stergiou, *Social Security Law*, p. 484, Supreme Court, Judgments 501/2013, 1394/2012, 1115/2008.

<sup>13</sup> Art. 1 par. 7 and 8 of Law 86/1967 specifies the persons who are criminally liable in certain types of legal entities, see also Stergiou, *Social Security Law*, p. 484-486.

<sup>14</sup> Art. 30 of Law 4321/2015, see also Kremalis, *Social Security Law*, Ant. N. Sakkoulas Publications, Athens-Komotini, 1985, p. 170. Due to Stergiou, *Social Security Law*, p. 480, f.n. 258, the employer should be prosecuted even if he owes the social security contributions to the freelancers' social security organization for his own social security.

<sup>15</sup> Nonetheless, in the past employers were prosecuted and punished for non-payment of social security contributions owed to the freelancers' social security organization, see also Supreme Court, Judgments 1214/2013, 928/2009.

<sup>16</sup> Stergiou, *Social Security Law*, p. 483.

falls into the criminality threshold formulated for each of the offenses.<sup>17</sup> The state considered that the protected legal right is not affected by non-payment and non-imputation of smaller amounts than those indicated and the prosecution does not seem appropriate and decriminalized debts of smaller amounts, since the means of enforcement of the Tax Code were considered as adequate in order to collect them.<sup>18</sup> Furthermore, it must be indicated the social security organization to which the contributions are chargeable, in order to clarify whether it is about labor contributions which are attributable for the insurance of each employee to SSI and not for social security contributions to be paid from the employer as a freelancer for his own social security.<sup>19</sup> Another constituent element is the capacity of the persecuted as employer or their status as a legal representative when the employer is a legal entity,<sup>20</sup> in order to be secured that the prosecution has been brought and the sanction was imposed to the person who actually bears criminal liability because of his status as the employer who is under the obligation to pay social security contributions.

In contrast, the number<sup>21</sup> and the names<sup>22</sup> of the workers whose contributions were not paid, the duration that each of them worked<sup>23</sup> and the regular earnings for each of them<sup>24</sup> do not refer to the constituent elements which are included in the law and establish the criminal liability of the employer.

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<sup>17</sup> Supreme Court, Judgments 178/2014, 773/2014, 1061/2013, 1727/2011, 1809/2011, 2/2010, 151/2010, 1095/2010, 681/2009.

<sup>18</sup> Konstantinou–Mpaltas, The offenses of non-payment and non-imputation of social security contributions (Art. 1 par. 1 and 2 of L. 86/1967), after the amendment of Art. 33 of L. 3346/17.6.2005', published in the legal magazine *Armenopoulos*, 2006.1369 ff. (1370).

<sup>19</sup> Supreme Court, Judgments 773/2014, 1061/2013, 1727/2011, 681/2009.

<sup>20</sup> Supreme Court, Judgments 1727/2011, 2/2010, 635/2010, 1358/2009.

<sup>21</sup> Supreme Court, Judgments 78/2015, 773/2014, 1105/2011, 658/2009, 683/2009.

<sup>22</sup> Supreme Court, Judgment 78/2015.

<sup>23</sup> Supreme Court, Judgments 78/2015, 773/2014, 683/2009. In contrast, Supreme Court, Judgments 178/2014, 1061/2013, 2/2010, 635/2010, 1095/2010, 681/2009.

<sup>24</sup> Supreme Court, Judgments 78/2015, 658/2009, 683/2009, 1302/2009.

As far as the culpability is concerned, the Law 86/1967 does not require additional information to determine the intent of the deceit, nor discern between immediate or potential, as presumed inherent in the production of the events leading to the affirmation of the offenses.<sup>25</sup>

### Means of Preventing Imposition or Execution of Sanction

The standardization of non-payment and non-imputation of social security contributions aims at forcing the collection of contributions from the debtor-employer and creating insurance awareness among employers.<sup>26</sup> The threat of sanctioning serves as a means of preventing the commission of the offenses mentioned above. Elimination of offence, suspension of prosecution, postponement and interruption of execution of the sanction are means which prevent the imposition or execution of the sanction. These means suggest that the primary purpose of the statute is the collection of contributions and not the conviction nor punishment of the employers who have paid or regulated their debt and whether they are consistent with the arrangement either have paid their debt.<sup>27</sup>

First, the offense is eliminated when the employer pays the contributions owed until the day before the hearing of the case at first instance. The payment results from receipt or other document by the social security organization, which shall immediately inform the judicial authorities that the debt has been paid and the employer is no longer criminally liable. In this case, the case is withdrawn from hearing and shall be closed by a Prosecutor's act.<sup>28</sup>

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<sup>25</sup> Stergiou, *Social Security Law*, p. 484.

<sup>26</sup> Stergiou, *Social Security Law*, p. 480, Petroglou, 'The debtor's penal confrontation of social security contributions in case of arrangement or payment of the debt', *Inspection of Social Security Law*, 1999.522 ff. (522).

<sup>27</sup> Petroglou, 'The debtor's penal confrontation of social security contributions in case of arrangement or payment of the debt', *Inspection of Social Security Law*, 1999. 522 ff. (524).

<sup>28</sup> Art. 1 par. 5 of Law 86/1967, see also Stergiou, *Social Security Law*, p. 483,

Furthermore, prosecution against the employer gets suspended, if the employer makes a payment arrangement of the debt, as long as he abides by the conditions of the arrangement, while, in case of total repayment, the offense is eliminated.<sup>29</sup>

Finally, when the employer has entered into an arrangement for partial payment of the debt, the execution of the sanction is postponed or is not executed, if it has already begun. Postponement or interruption of execution of the sanction is intended to facilitate the payment of debt. The sanction is eliminated if the debt, for which the sanction was imposed, is fully paid.<sup>30</sup>

### **The Employer's Moral Damage Due to Untimely Notification of Elimination of Offense on Behalf of the Social Security Organization**

When the social security organization fails to inform the judicial authorities that the employer has paid the debt and the sanction has been eliminated, the employer suffers from moral damage and insult of his personality<sup>31</sup>. In that case the award of compensation stands for its legal correctness and is also attuned with the purpose of the law. First, it is legally correct, as the employer has suffered moral damage and insult of his personality, because of the failure of the social security or-

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Margaritis, 'Embezzlement (Art. 375 of Penal Code and 1 par. 1 of L. 1608/1950) and social security (labor and employers') contributions' (Art. 1 of L. 86/1967)', *Penal Justice*, 2006.68 ff. (72), Petroglou, The debtor's penal confrontation of social security contributions in case of arrangement or payment of the debt', *Inspection of Social Security Law*, 1999. 522 ff. (522).

<sup>29</sup> Art. 28 par. 15b' of L. 4321/2015 and Art. 18 par. 11b' of L. 2434/1996, see also Stergiou, *Social Security Law*, p. 483, Petroglou, The debtor's penal confrontation of social security contributions in case of arrangement or payment of the debt', *Inspection of Social Security Law*, 1999. 522 ff. (523).

<sup>30</sup> Art. 28 par. 15b' of L. 4321/2015 and Art. 18 par. 11b' of L. 2434/1996, see also Stergiou, *Social Security Law*, p. 483, Petroglou, The debtor's penal confrontation of social security contributions in case of arrangement or payment of the debt', *Inspection of Social Security Law*, 1999. 522 ff. (524).

<sup>31</sup> Athens Court of Appeals of Administrative Justice, Judgment 1570/2012.

ganization to carry out its obligation to inform the judicial authorities regarding the payment of the debt and the elimination of the offense.<sup>32</sup> Thus, the employer is ethically and personally exposed through the penal proceedings to an indefinite number of persons (courts, colleagues, family etc.) without a lawful cause, because of the negligence of the social security organization to inform the judicial authorities. At the same time, the award of compensation is attuned with the purpose of the law. The possibility that the employer would bring actions against the social security organization and ask for adjudication of compensation may be a means of pressure on the organizations in order to perform their tasks as required and the employer will not be exposed to unlawful penal proceedings and unjustified mental damage.

### Conclusions

The provisions of Law 86/1967 are characterized by their preventive, rather than for their retributive and repressive aim. Their intend is to prevent the employers from non-payment and non-imputation of social security contributions and to force them to correspond to such employer's obligation.<sup>33</sup> Criminal Law is used as a means of collection of social security contributions, when other means of coercion of employers (enforcement by means of Tax Code) are deemed insufficient.

The modern era is marked by a strong economic crisis and social unrest. Business turnover as well as income are reduced, resulting in discontinuation of operation of more and more businesses, as they are unable to pay their debts to the state and individuals. The interest of social security organizations to defend the legal right of their property by pursuing penal proceedings against debtors in order to collect the contributions owed is, of course, reasonable. But the prosecution and punishment of employers in such cases now represents a very common

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<sup>32</sup> For the civil liability of the State for compensation, see Council of State, Judgments 1970/2009, 2536/2008.

<sup>33</sup> Stergiou, *Social Security Law*, p. 480.

phenomenon. Although there are no official statistic records, the cases that led to courts and sanctions that are imposed against employers grow increasingly. Obviously, the non-payment of social security contributions is not always due to employer's recalcitrance to pay his debts, but may be due to real inability to pay because of the general economic hardship and scarcity.

First, the state might have to adjust the amounts constituting the offenses of Law 86/1967 and review the facilitation means of repayment of debts by the employer. The amounts of € 20,000 and € 10.000 respectively are considered to be very low. Inconsistency of payment of social security contributions for a few months (depending on the size of each firm and the number of employees) leads to extensive cases of employer's criminal liability. This inconsistency, as mentioned above, is not necessary due to employer's recalcitrance or unwillingness to pay, but it may be caused by temporary financial crunch, in view of the general liquidity problem that exists in the economy. Besides, the employer may fail to pay such contributions, whereas simultaneously is expected to receive large sums of money from their debtors, so their culpability for non-payment is placed under dispute. The liquidity problem swells amid restrictions on banking transactions (capital controls), especially if the employer depends on financial remittances from abroad. Therefore, a first step could be to increase the amounts that standardize the criminality of the two offenses.

Secondly, it is proposed the reform of the procedures of suspension of the prosecution and postponement or interruption of execution of the sanction. The Law 86/1967 already provides procedures that facilitate the employer and prevent the latter's prosecution and punishment. These procedures should become more flexible, by prompting, for example, a grace period of non-payment or extending the number of doses of adjustment of payment of debts<sup>34</sup>. Otherwise, the criminal

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<sup>34</sup> In contrast Stergiou, *Social Security Law*, p. 480, where it is mentioned that the means of suspension of prosecution and postponement or interruption of the execution of the sanction may lead to circumvention of the legislative framework.

proceedings and the sanction imposed against the employer without enabling, ultimately, the collection of contributions does not meet the objective of protecting the legal right of property of the social security organizations.

In conclusion, we must always take into account that the aim of the standardization of the offenses of non-payment and non-imputation of social security contributions is the facilitation of the collection of the contributions owed. A system that only ensures the employer's criminal liability and the enforcement of a sanction against him, without guaranteeing and enabling the collection of contributions, is unfair and ineffective. Thereby, we suggest the review of the legislative framework that would make the payment system of social security contributions fairer for the employer and prompt insurance awareness, without invalidating employer's criminal liability as a means of pressure for the collection of social security contributions.