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NATURAL PERSON AND LEGAL ENTITY AS A GUARANTOR IN THE CROATIAN CRIMINAL LAW

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Abstract The paper analyzes the specificity of unreal criminal offenses of omission, which is manifested in the fact that those criminal offenses are committed by the guarantor. Given the specificity and rarity of punishable conduct of omission, the paper analyzes the legal position of the guarantor (as a natural person or legal entity) whose duty is to protect certain, but not all, legal goods. In addition to the fact that responsibility for omission is exceptional, the statuses that individuals have in society are explained through the prism of the grounds of the guarantor duty in Croatian but also from the aspect of different legal systems. The concept of the legal bases of the guarantor's responsibility, which represent the sources of unlawfulness and culpability in the guarantor's duty, is elaborated in detail, with a special emphasis on the guarantor's actions in mistake.

Keywords
omission,
guarantor,
natural person,
legal entity,
culpability

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1 Introduction

An omission is punished because of the expected preventive behaviour of the person (Leavens, 1988: 582). According to the Draft Criminal Code of the Federal Republic of Germany from 1962, a guarantor is a person who has a duty, so this fact alone prescribes a special legal position for him and he is entrusted with the protection of certain legal goods. Unreal criminal offenses of omission are criminal acts related to the breach of duty to prevent the occurrence of consequences (Mrčela and Vuletić, 2021: 96-97). In the case of these criminal offenses of omission, the consequence is part of the definition of criminal offense (being of the criminal offense) (Radman, 2012: 67), which may refer to injury or concrete endangerment. In this case, not everyone is liable, but only the person who is legally obliged to avert the consequences. Such a person is a guarantor because he guarantees that the consequences will not occur, so these criminal offenses are committed by a person with special characteristics (delicta propria) (Radman, 2012: 67). However, in rare cases, the guarantor's responsibility is also established in real criminal offenses of omission, but only if the legislator expressly stipulates that the criminal offense can only be committed by the guarantor (as in the case of Failure to Provide Medical Aid in Emergencies, Art. 183 of the Criminal Code in Croatia (hereinafter: CCC), or the Responsibility of Commanders from Art. 96 of the CCC) (Mrčela and Vuletić, 2021: 98). The guarantor is usually a natural person, but the guarantor's responsibility can be shared with a legal entity because Croatian criminal law also regulates the responsibility of legal entities for criminal offenses, which can also be committed by omission (Mrčela and Vuletić, 2021: 98).

For the liability of the guarantor, it is necessary to prove all the assumptions under which the guarantor is liable in criminal law: the ability of the guarantor to act, omission to act is by its effects and meaning tantamount to committing the said act by acting („equal value" clause), the failure to act must be a causal factor in the occurrence of the consequence and there must exist the form of culpability that is required for committing the criminal offense in question (Josipović *et al.*, 2001: 111). This means that the guarantor has a special relationship with the protected legal good, from which a relationship with the special obligation to that legal good also arises. The above is valid in national law, but also in international law, while in international law it is most often a question of a situation when a person, due to his position and duty of supervision, is obligated and responsible for his subordinates (Mrčela and Vuletić, 2021: 100).

In principle, there is no general obligation to avert criminal offenses of third parties, but this obligation exists in the case of guarantor obligations. The fact that there are also responsible perpetrators (who were not criminally prosecuted probably because they could no longer be identified) is irrelevant.

The guarantor duty is considered through Art. 20 of the CCC. Where an unreal criminal offense of omission is described in a Special Part of the CCC, the „equal value" clause is quite clearly described in that same Special Part of the CCC (Roxin, 2003: 636). Guarantor obligations are not prescribed in the CCC, but their determination is the task of legal science and judicial practice (Novoselec, 2003: 966). The guarantor is legally obliged to act, which means that the guarantor's duty must be prescribed by law, not necessarily by the Act, because in criminal law customs are also the source of law. In the case of a criminal offense of omission, the court's duty is to explain the perpetrator's "ability to act", the "equal value" clause, the perpetrator's "awareness", i.e. "intent" or "negligence", as well as all other circumstances important for judging, and they refer to taking into account all other circumstances that are specific to the liability of legal entities for criminal offenses.

Following the above, the paper aims to establish guidelines for the interpretation of the term when the guarantor is "legally obliged to avert the occurrence of the consequence" and when his criminal liability can be excluded. Namely, the identical statement "legally obliged to avert the occurrence of consequences" is found in Croatian law, and Anglo-Saxon law (for example, the Model Penal Code which affects the laws of national legislation in the USA (Section 2.01.par.3 a) prescribes "a duty to perform the imitted act is otherwise imposed by law"). Federal Criminal Code of Germany recognizes the same concept (par. 13 of the StGB prescribes "..., wen er rechtlich dafur einzustehen hat, dass der Erfolg nicht eintritt, ..."). Considering that this term has been part of the mentioned criminal legislation for a long time, it was necessary to see if there is a problem that the current criminal legislation of the Republic of Croatia did not encompass, or if there is a need to amend the mentioned provision in the CCC. Following the aim set in this paper, first general indications of the guarantor's legal position at omission are given, and then concrete cases of guarantor liability are analyzed.

2 Guarantor

It is reasonable to ask the question why, in the case of unreal criminal offenses of omission, only those who have the duty to act are punished for omission, because the consequence is the same for both acting and omission, as well as the intention and the cost of averting the consequence. Would it not be sufficient for the existence of liability for omission if the person had the possibility to avert the occurrence of the consequence, but did not avert it? (Rosenberg, 2013: 16) The guarantor is considered to be a person who has power and control over certain situations (*germ. Kontrollherrschaft*) and only he must have duty to act. So he is obliged to act even in case of involuntary situations and conditions, under the condition that these situations are under the guarantor's control. (Mrčela and Vuletić, 2021: 98) When analyzing unreal criminal offenses of omission, difficulties can only arise in the question where, according to criminal law, there is a duty to take action.

Society has expectations of a guarantor and that is why the law requires him to take action in a certain situation. This cannot be the case with moral obligations. This only means that it is necessary to analyze other laws in the Republic of Croatia to conclude whether someone is obliged to avert the occurrence of the consequence. There is a problem with a bystander, an eyewitness, on the road, who does not help the victim in a traffic accident. Namely, in Croatian criminal law theory, a casual pedestrian, an eyewitness, is not a guarantor, however, the question arises whether a casual pedestrian, an eyewitness who could have averted consequence without greater danger to himself should still be held liable for an unreal criminal offense of omission? Namely, the Law on Road Safety (Zakon o sigurnosti prometa na cestama, Official Gazette No. 67/08, 48/10, 74/11, 80/13, 158/13, 92/14, 64/15, 108/17, 70/19, 42/20, 85/22,114/22,133/23 (hereinafter: ZSPC)) which regulates misdemeanors, prescribes that every traffic participant (pedestrian, driver) is obliged to assist another, and the question arises whether this provision in the ZSPC is the source of a guarantor duty for an accidental pedestrian who is also an eyewitness to a traffic accident? (Leavens, 1988: 569) Is a legal norm from the sphere of misdemeanor law, if it is understood as a source of guarantor duty, protected by the provisions of the CCC? If custom is also considered to be the source of unlawfulness in the criminal law of the Republic of Croatia (Kurtović Mišić and Krstulović Dragičević, 2014: 115), why shouldn't the sources of the guarantor duty be in the Acts of the Republic of Croatia that regulate misdemeanors, not only criminal offenses? Here should be established that such violations can be a source of

unlawfulness, but they cannot be a source of a guarantor duty (Mrčela and Vuletić, 2021: 98). Namely, the real criminal offense of failure to act, the criminal offense of Failure to Render Aid in Art. 123, par. 1 of the CCC describes the above situation and therefore excludes the possibility of punishment for the unreal criminal offense of omission when the CCC has already provided provision for responsibility in the form of the real criminal offense of omission for this situation.

The situation is similar in the case of the Rulebook of the Court of Honor of the Croatian Mountaineering Association, which in Art. 3 stipulates that it refers to members participating in the programs and actions of the Association. But what about non-members? It is one situation when two mountaineers agree on a joint venture for the conquest of a mountain, and it is another thing if a random passer-by in the forest encounters a stranger who has had a heart attack and is not on the hiking trail, and there is no guarantor relationship between them. Such a person cannot be punished for causing death by negligence, but he can be punished for Failure to Render Aid as a real criminal offense of omission. If the person was obliged to call for help, and he was, because there is a criminal offense of Failure to Render Aid that prescribes the duty to assist, the question arises whether such a real criminal offense of omission, which prescribes the duty to assist, can be considered as a source of a guarantor duty in criminal law? However, Roxin states that it is important to recognize that a guarantor obligation that includes duties to avert a consequence can never be derived from a real criminal offense of omission. Therefore, it should never be considered that the real criminal offense of omission or Failure to Render Aid establishes a guarantor obligation. On the other hand, if the legislator prescribed the criminal offense of Failure to Render Aid, perhaps it is precisely to include the responsibility of persons who are not guarantors, and who do not undertake the act of assisting, because Failure to Render Aid is a real criminal offense of omission that can be committed by anyone. Namely, the content of the act of assisting is not the same as the content of the duty to avert a consequence.

In some cases, there can be conduct of acting that is not causal with the consequence. In the Federal Republic of Germany, in a case where the mother left a three-year-old child alone in the house, and she turned on the gas and set fire to the kitchen, the LG established the cause of death by negligence by conduct of acting because the apartment was left at the disposal of the three-year-old child. BGH, on the other hand, considers that, although leaving the apartment is a conduct of acting that is not harmful in itself, it is harmful that the stove is not secured or that

supervision over the apartment is not ensured in some other way while the child is in it (Roxin, 2003: 657). In this case, the mother is the guarantor and the BGH determined that the mentioned measures would avert the consequence, taking into account the probability bordering with certainty. Namely, leaving the apartment is not causally connected with the resulting consequence. Causation with the consequence is failure to take security measures before leaving the apartment, and, in the case of a legal entity, failure to ensure the supervision of a business facility.

3 Legal entity

The constant development of technology causes different situations in social life that require legal regulation. Behind all major projects and initiatives that try to solve a problem or situation in society is a legal entity. Although at the EU level, there has always been a warning about the adaptation of legal systems and legislation to the reached level of technological development of society (Summers, 2015: 60), it is necessary to see how the liability of a legal entity exists from the legal position of the guarantor.

In continental Europe can be found a rigid understanding of the concept of liability, different from the Anglo-American concept of mens rea (Vuletić, 2023: 1). When prescribing criminal liability for legal entities, Croatia followed the trend of post-transition countries (Vuletić, 2023: 2). It encompassed the role model of the French Criminal Code, the German Law on Misdemeanors, and the Slovenian Act on the Liability of Legal Entities for Criminal Offenses (Vuletić, 2023: 2). The liability of legal entities for criminal offenses has been established due to the increase in economic criminality, where the legal entity comes to the fore as the beneficiary of illegally obtained property benefits. The interest in punishing a legal entity with the sanctions of criminal law is also reflected in the fact that the legal person has a „criminal spirit" because there is a corporate culture that serves the interests of the legal entity (Novoselec, 2016: 473). This is also the fundamental reason why both natural persons and legal entities should be punished with the sanctions of criminal law to develop awareness in society, that the commission of criminal offenses for the benefit of a legal entity truly leads to the detriment of the legal entity. All mentioned is supported by the Council of Europe, which Recommendation no. R (88)18 from 1988 indicated the need to punish legal persons with criminal law sanctions. Corpus Iuris in Art. 13. prescribed the necessity of punishing legal entities for criminal offenses if they commit criminal offenses to the detriment of the EU

budget, as prescribed by the Second Protocol to the PIF Convention from 1997. The aforementioned regulation can also be found in the French Criminal Code from 1992 in Art. 121-2 as well as in paragraph 30 of the German Code of Misdemeanors where a legal entity borrows its criminality from a natural person.

When analyzing models of criminal liability of legal entities, the most common theories refer to the objective model, the liability of the legal entity based on the liability of the responsible person, and the autonomous liability model. Most problems from the aspect of criminal law and the principle of culpability can be found in the objective model (vicarious liability) where it is only necessary to establish the harm caused which is beyond the boundary of acceptable risk (Vuletić, 2023: 2). With the type of objective liability of a legal entity, the existence of culpability is not required for regulatory offenses. Liability of the legal entity based on the liability of the responsible person follows the principle of culpability because the culpability of the responsible person is the ground for criminal liability of the legal entity. This is a typical roll model of the European continental system. With the theory of identification, actions of the guarantor undertaken in favor of a legal entity are considered actions of legal entities. According to Art. 3. of the Act on the Liability of Legal Entities for Criminal Offenses in Croatia (Zakon o odgovornosti pravnih osoba za kaznena djela, Official Gazette no. 151/03,110/07, 45/11, 143/12, 114/22, 114/23, hereinafter: ZOPOKD), a responsible person must commit a criminal offense and not a misdemeanor (Vuletić, 2023: 3). If the responsible person acted with mental incapacity or in the mistake of fact or law, then, the liability of the legal person is excluded according to the principle of culpability. The responsible person can be anyone who is in charge of managing or dealing with duties within the competence of the legal entity, and it cannot be limited only to management structures. So the lack of obeying the duty to protect, and the causal link between the lack of protection and the consequence must be established to find the guarantor liable in the case of legal entities. For a legal entity to be responsible, financial benefits acquired by the criminal offense of omission must be in favor of legal persons, because in the opposite case, there can be no criminal liability of the legal entity (Novoselec, 2016: 474). In the case when a legal entity is a perpetrator of a criminal offense, there is a possibility of imposing monetary fines or the termination of the legal entity, which is an exception in the Croatian jurisprudence (Derenčinović and Novosel, 2012: 605).

This means that in case of omission, the legal entity will be liable only for the actions of persons who have the power to decide, that is, the power to avert consequences. However, the legal entity will not be punished if the guarantor has not committed a criminal offense, i.e. if one of the elements: conduct, being of a criminal offense, unlawfulness, or culpability does not exist. Likewise, the question arises of how to act in a situation if the guarantor cannot be tried for some reason. Croatian law has regulated that even in the event of legal (immunity, amnesty) or real (death, impossibility of identification) obstacles to determining the liability of the responsible person, the legal entity can be punished (Art. 5. par. 2 of the ZOPOKD).

3.1 Legal entity and AI

The liability of a legal entity and a natural person within a legal entity is especially relevant in situations of the use of AI. Although there are different degrees of independence of AI when taking action, as a result of the above, different situations of liability are also possible, for example, of legal entity, natural persons in legal entity, or users (Mrčela and Vuletić, 2018: 470). Special problems with AI and the liability of legal entities are visible through the use of "smart robots" that have a degree of autonomy when functioning according to AI. (Vuletić and Petrašević, 2020: 226). A further problem is when robots are working with or instead of people, and maybe sometimes when it is not useful for society (Vuletić and Petrašević, 2020: 227). As has already been said, some legal systems don't recognize the criminal responsibility of legal entities, but analyze it through the rules of civil law. That is a good thing for the current regulation of AI in the EU, even though the current civil law framework on regulation of AI in the EU isn't sufficient without criminal law regulation (Vuletić and Petrašević, 2020: 229). That means that in states that recognize the criminal liability of legal entities, there is the possibility of an adhesion procedure where the same proceedings will finish with a verdict on civil and criminal liability. When talking about the liability of legal entities as guarantor's, legal entity liability for damage caused by AI is analyzed, as well as the relationship of the legal entity (mostly the manufacturer) with the developer. In Germany, when determining liability for the actions of AI, it is always necessary to see who is behind the AI, that is, which natural person. This is mostly about negligent liability, where the foreseeability of the consequence and the causal connection between the omission and the resulting consequence are analyzed, that is, i.e. if timely and legal action would have averted the consequence, which is also characteristic of the guarantor duty. Even though the characteristic of AI is that it makes conclusions

independently, AI cannot be a defendant in criminal proceedings. Given that the German legal system does not recognize the criminal liability of legal entities for criminal offenses, civil liability would be determined, the criticism of which has already been discussed (Mrčela and Vuletić, 2018: 477).

In the law of the Republic of Croatia, the responsibility of the guarantor at AI would be analyzed based on the grounds of danger that is in the power of the perpetrator. According to the law of the Republic of Croatia, it is necessary to see who is legally obliged to avert the consequences (Art. 20. par. 2 of the CCC). In the law of the Republic of Croatia, a single criminal procedure is conducted against a legal entity and a responsible person in a legal person. According to the ZOPOKD, for criminal liability of a legal entity, it is necessary to prove that the responsible person has violated some duty of the legal entity or that the legal entity has obtained an illegal financial benefit for itself or another. (Art. 3. par. 1 of the ZOPOKD).

Analyzing an example of a criminal offense from the Special Part of the CCC, the responsibility of the legal entity for AI will most often be about Endangering Life and Property by Dangerous Public Acts or Means, namely par. 2. which describes omission, that is, failure to act according to regulations or technical rules on protective measures (Mrčela and Vuletić, 2018: 480). If a natural person uses a legal entity to commit a criminal offense to benefit himself, the natural person will be responsible as an indirect perpetrator because he uses an organized apparatus, and the legal entity will be responsible for Endangering Life and Property by Dangerous Public Acts or Means.

4 Grounds of the guarantor duty

The law does not establish a general duty to act that consists in averting the consequences, but there is still a general duty to help others. However, the emphasis is on legal duties rather than moral liability (Dunbar, 2012: 3). For the guarantor to be criminally liable, his action must be unlawful. Unlawfullnes at unreal criminal offenses of omission manifests itself in the violation of the legal obligation to avert consequences. In this way, the judicial practice in the Republic of Croatia defined unreal criminal offenses of omission (VSRH I Kž 456/2006, Mrčela and Vuletić, 2021: 97). Unlawfullnes is manifested through omission, which is fulfilled through the being of a criminal offense.

Some authors, when analyzing the grounds of the guarantor duty, have tried to limit to civil obligations to preserve life, but then the question arises as to which obligations protect life exclusively (Leavens, 1988: 556). There is a point of view according to which the violation of the duty to act should be considered sufficient for the existence of a guarantor duty, and this violation will exist if the provisions of civil law are violated in such a way that the violation of the civil law norm is so "abnormal" that the existence of causation is indisputable. However, this point of view is not justified because there are many acts of violation of the provisions of civil law, which do not automatically lead to criminal liability (Mead, 1991: 157). Namely, civil law also recognizes intent, but if a person intentionally and knowingly violates a contract, then civil law sanctions are applied to him, not criminal law. Therefore, it can be concluded that the determination of the guarantor duty should be connected with the principle of fragmentation and subsidiarity of criminal law, and not exclusively with the creation of risk through the prism of the principle of *ultima ratio societatis*. This is another proof of why it is necessary to prescribe the criminal liability of legal entities for criminal offenses in national legislation.

In continental law, which also includes the Republic of Croatia and the Federal Republic of Germany, there is a division between the duty to supervise the grounds of danger and the duty to protect legal goods in the case of guarantor duties (Ambos, 2020: 28-30). The ruling opinion in the Federal Republic of Germany starts from a pragmatic point of view according to which judicial practice and theory must determine when there is a guarantor duty (BverfG NJW 2003,1030; LG Kiel NStZ 2004,157,158), which is interpreted in the same way in the Republic of Croatia (Novoselec, 1994: 966). When it comes to the duty of supervision, it is a situation in which legal interests are threatened. This is a situation of supervision over the grounds of danger that are under the authority of the guarantor, responsibility for the unlawful behavior of third parties (parent-child relationship, employer-employee, management of a legal entity-director), and previous unlawful behavior. When it comes to the duty to protect legal goods, then one or more dangers threaten the legal interest. It is a situation of family ties, close relationships in situations of emergency or danger, voluntary assumption of obligation, and duties based on an official or responsible person status (legal entity).

Jurisprudence groups guarantor obligations according to the criterion of the ground of the guarantor obligation: law, contract, jurisdiction based on a previously dangerous action, life relationships, that is, a living life community (Schmidt, 2008:

289; Kurtović Mišić and Krstulović Dragičević, 2014: 103). The theory analyzes the duty to protect certain legal goods from danger (*germ. Beschützergarantien, Obhutspflichten*) or to supervise the sources of danger concerning third parties (*germ. Überwachungsgarantien, Sicherungspflichten*) (Horvatić, Derenčinović and Cvitanović, 2017: 15 - 17; Novoselec, 2016: 128 - 130; Mrčela and Vuletić, 2021: 99). Certain circumstances that establish the duty of the guarantor are described in being of unreal criminal offense of omission (BGHSt 16, 155, 158). Newer sources start from the material criterion, and thus analyze special duties to protect a certain legal good (special close natural connection, dangerous undertaking actions, voluntary assumption of duty of protection, official position or position within a legal entity) (Wessels and Beulke, 2000: 239). Other criteria are the duties of supervision over certain sources of danger (the duty of supervision over third parties which does not imply the duty of spouses to prevent the criminal offense of their spouses, but there is the duty of parents to prevent the criminal offense of their minor child if such a possibility exists, supervisory board supervision over management and the director) (Wessels and Beulke, 2000: 242), unlawful dangerous behavior (if the person by his action caused imminent danger to the legal goods of a third party). If there is an acting according to the law, then no guarantor duty is created, but only the obligation to assist (BGHSt 23, 327). If someone undertakes an unlawful attack and then defends himself and thus finds himself in danger through his culpability, the one who defends himself cannot be expected to be a guarantor for the attacker. That would be against the rules on necessary self-defense. The duty to take precautionary measures must also be analyzed (in the case of a legal entity producer who must recall a product from the shelves if it is harmful to the health of the consumer, with the fact that the previous action of the producer does not have to be unlawful, because the omission was made by the supplier of the raw material (similar to Ledersprayfall, BGHSt 37,106). Sometimes it's necessary to analyze the places in the market (such as the responsibility of Internet service providers for unwanted content on the Internet, which has control over the content on the Internet that as such can cause harm). It is important to notice that the guarantor obligation cannot arise from the provision of a real criminal offense of omission.

In Anglo-Saxon law, the first ground of guarantor duty is if the persons are in a joint household, the second is if they are related by blood (Rex v. John (1825), 20-2 where liability for neglect of a child through failure to provide sufficient food or clothing was established), by marriage or adoption (formal or informal), the third is if a person is unable to take care of himself due to youth, illness, old age, senility or other mental

deficiency, and the fourth refers to a person who started assisting, but has in the meantime unreasonably given up (McCutcheon, 1993: 69). In US law, there are formal sources of guarantor duty in the case, where it is based on legal regulations, contracts, and special relationships, which is characteristic of the liability of a legal person and voluntary assumption of care (Jones v. US, 308 F2d 307 (1962)). However, in a later case in Anglo-Saxon law, the emphasis is placed on foreseeing the danger of the one who contributes to the creation of the danger, thus trying to move away from the formal grounds of guarantor duties (R v. Evans (2009) EWCA Crim. 650.; Ambos, 2020: 34). In contrast to the law of the Federal Republic of Germany, where guarantor duties are crystallized through theory, UK law places a strong emphasis on the formal grounds of the guarantor duty (Ambos, 2020: 35). But despite the formalism, the duty of guarantor in continental and Anglo-Saxon law is attributed to a person who is not a guarantor, because if, for example, a person who is not a guarantor has started to help a person in need, then he must continue to help. After all, abandoning the previous effort would leave the victim in a more difficult situation than before assisting. The above statement is also valid if the aid provider has created a new or additional risk (not necessarily hypothetical) that will be materialized if it stops providing aid (goal-oriented assistance). The situation is different if the dangerous situation and the prevention of the dangerous situation can be divided into stages so that leaving the dangerous situation does not worsen the victim's condition (continuing/incremental assistance) (Ambos, 2020: 36-37).

5 Examples of the guarantor duty

Given that the paper analyzes several legal grounds on which the guarantor duty is based, it is necessary to give examples of some guarantor duties, taking into account the scope of the paper.

5.1 Voluntary promise of obligations

Trust and/or confidence in a person is a situation when someone must act following a previously given promise. Likewise, it is necessary to consider the conditions under which the promise was given, because the deviation of life circumstances from the mentioned promise and conditions cannot lead to liability for omission (Mead, 1991: 152). It is also necessary to analyze the severity of the breach of the promise because it needs to have effects on the trust in a person. It is not the same whether a person canceled the obligation at the moment when she was obliged to fulfill it or a few

days before when perhaps the future circumstances were known or foreseeable. It is necessary to understand that a promise is not sufficient to establish a duty to act unless it is accompanied by reliance and conferral of a benefit. If only one of these two conditions exists with a promise, then it is not sufficient by itself to establish a duty to act (Mead, 1991: 155). Likewise, it is a fact that making a promise aims to promote trust in a person. Only these two elements fulfilled cumulatively aim to fulfill the legal phrase "legally obliged to avert the occurrence of consequences". The absence of reliance means that the person does not cause danger to the victim. Then without reliance, the promise has no effect. The fact is that the promise does not cause or absolve others from undertaking the act of rescue. Making a promise is not an exceptional gesture, it is given often and does not cause evil. A promise is morally binding, but not legally binding (Mead, 1991: 155). Therefore, promises are not legal obligations, unless the specified criteria are met. If a legal entity promised to provide aid to the poor and changed its mind, the question is whether its liability can be established. However, if a third party also wanted to provide aid to the poor, but gave up because the legal entity had already offered, the question arises as to whether it could still be a case of liability for acting. Thus, Raz believes that moral obligations should not have their place in the law unless it is a violation of the duty to act, that is, if the moral obligation becomes the legal obligation (Mead, 1991: 157). The duty based on the voluntary promise of obligations also includes the situation if someone has started rescuing another, because then he should continue with the rescue action. Thus, a legal entity as the owner of business premises has the duty to protect its visitors. This does not mean that the owner is obliged to protect any visitor (for example, unauthorized entry) or drug user (for example, a tenant) (BGHSt 30, 391). But if the legal entity did not secure its premises with a padlock or some other means so that the premises could not be misused, then the legal entity is liable. A legal entity must put out a fire on its property to prevent its spread, even when it did not cause it, which also belongs to the category of sources of danger that are in the power of the perpetrator.

Analyzing owner's duty and the duty to supervise others, it is necessary to conclude that it is a civil liability raised to the level of criminal liability, where the owner is obliged to ensure that his property does not cause harm to others (permanent danger in case of necessity). There is also an example of an owner who supervises others who are present on his property (for example, what happens in the car of a legal entity if it allows the driver to drive dangerously while the vehicle is also under the supervision of the legal entity) (Mrčela and Vuletić, 2018: 482). Here it is important

to emphasize that, according to the theory of objective imputation, autonomous actions of third parties cannot constitute criminal liability, that is, there is no guarantor duty, as in the example of the case where the owner rents an apartment or a car and then has no control over them (Ambos, 2020: 38).

5.2 Contract

The contract certainly implies a legal duty to act, however, the question arises whether the legal duty to act prescribed by civil law is sufficient to establish liability in the criminal law (Mead, 1991: 157). A guarantor duty exists if there is a contractual obligation with the victim, a third person, the state itself, or the local community. An express contract for providing of services creates an obligation to provide the services appropriately. Such a contract need not only be express but may also be tacit, for example, if in the case of a person who is dependent on another. In the case of Davies v. Commonwealth, 335 S.E.2d 375 (1985) the liability of an adult daughter was established for the care of her mother who was receiving social assistance and whose social assistance covered the living expenses of both mother and daughter. However, here it is clear that it is not necessary to look only at formal contracts, but also a private agreement can be considered. In the case of a legal entity, there will usually be a written document, statement, or contract, so it will be easier to prove the guarantor's duty.

The CCC punishes an agreement to commit serious criminal offenses (conspiracy), which emphasizes the exceptional nature of punishing private agreements, so the question arises as to whether it is justified to punish the non-fulfillment of any private agreement and analyze it through the guarantor duty. Here it is necessary to draw a comparison with the importance of the agreement through the prism of the conspiracy in the CCC and the severity of the criminal offenses for which the agreement is made. When analyzing the principle of the unity of the legal order, the violation of a private agreement that leads to the commission of more serious criminal offenses should be punished, i.e. criminal offenses for which punishment can be imposed, by interpreting Art. 327 of the CCC, a prison sentence of three years. Therefore, the occurrence of consequences in case of violation of the agreement should not be punished if the CCC prescribes a penalty of less than three years.

In Anglo-Saxon law, the doctor-patient relationship is considered through a contract, but in continental law, including in the law of the Republic of Croatia, it can be seen through the law as a ground of a guarantor duty. However, it is necessary to see the legal regulations and contracts of the legal entity where the doctors are employed, especially private clinics, and whether there is any limitation on the doctor's authority when providing service for patients in each legal entity.

5.3 Duty arising from the creation of risk

If a person covertly puts another in danger, then the person has a duty to save the victim. The duty of the one who creates danger, for example, a robber who takes a drug addict's wallet and leaves him motionless on the road despite his poor health, is a guarantor who violated his duty because the robber is obliged to leave the victim in a safe place so that, for example, he would not be hit by a car. If a person sets a trap for a beast, but a tame dog accidentally gets caught in it, then there may be liability for animal cruelty (Robinson, 1984: 110). This is a particularly important case for legal entities that often appear in the role of investors of certain projects that, during their realization in society, represent the creation of danger. The legal entity must provide the person in charge of the realization of the project, with all the means to prevent possible consequences that may arise as a result of the realization of the project.

The controversial question is whether the person who caused the danger is obliged to take rescue action because the endangered or injured person could have helped himself, or if there were other people present on the spot who could have provided that help. Some authors analyze whether a person unknowingly or knowingly created the danger. Namely, the difference would be whether one naively or accidentally put another in danger (Commonwealth v. Cali, 247 Mass. 20, 24-25, 141 N.E. 510, 511 (1923) in which case the defendant accidentally caused a house fire but did not attempt to put out the fire, unlike a case where the defendant in self-defense defended another person, shot and wounded the attacker, and then was not required to seek medical attention for the attacker (King v. Commonwealth, 285 Ky. 654,659,148 S.W.2d 1044,1047 (1941)). It must not be forgotten here that it is a question of intent and negligence. In this case, there is a liberal and a restrictive understanding. According to the liberal understanding, liability could only exist if a person had committed a previous criminal offense (for example, if he causes a traffic accident by breaking the rules and fails to help an injured pedestrian, but not if the

traffic accident happened by accident and the driver obeyed all the rules). According to the restrictive understanding, responsibility would also exist if some non-criminal legal norm (morality) was violated. Therefore, according to the Croatian legislator, the correct interpretation is that the person who caused the danger is obliged to provide all possible help even when there are other people nearby who can provide help. Anglo-Saxon law here starts from causation and analyzes it alone as the basis of the guarantor duty (Ambos, 2020: 37-38).

6 Culpability of the guarantor

When analyzing the guarantor's duty, it is necessary to start from his culpability, and it is not enough to consider only the fact whether a reasonable observer judged that there is a duty to act. Some authors even consider the motivation when analyzing acting and omission, however, motivation may or may not influence culpability (Androulakis, 1963: 115). The practical test of intent at omission is to ask the offender during his act of omission whether he is doing "this and that" (what the legal duty requires of him), and if the answer is no, and such an answer is given based on the facts and circumstances of which he is aware, then it is an intent (Hughes, 1958: 604). Intent at omission is a decision between omission and possible acting (BGHSt 19, 295, 299). The intent to commit a criminal offense consists of the will not to act with knowledge of all the objective characteristics of the criminal offense, and the awareness that aversion of the threatening consequences is possible. In the case of omission, the guarantor must be aware of the existence of a situation that requires acting, as well as his possibility of taking action (Novoselec, 2016: 132-133).

Some authors do not see the difference between voluntary muscle movement and omission (Fletcher, 1994: 1443), because voluntary movements are also important for determining culpability. Thus, in Anglo-Saxon law, it is debated whether turning off the devices that keep the patient alive is a conduct of acting or omission (Ingle, 2016: 762). Theorists agree that it is difficult to prove intent at omission. The theory in the UK holds that for an attempt it is not necessary to prove causation, but causation is important because, if it doesn't exist, we may be speaking about an inappropriate attempt (Palmer, 1999: 164). However, at least in the continental legal system, including the law of the Republic of Croatia, it is wrong to introduce the concept of causation into the concept of conduct, because conduct is the first element of the formal concept of a criminal offense, while causation is part of the being of a criminal offense (second element of the formal concept of a criminal

offense). The situation of omission is problematic, and can often be described as negligence. Here, it is important to often analyze the guarantor obligation or the duty of supervision and to specify the individual case, and it must not be allowed that all criminal offenses by omission are constituted as criminal offenses of negligence (Roxin, 2003: 655).

During omission, it is typical that sometimes a person may not even be aware of the duty to act, that is, he is not aware of the circumstances that require him to act. Subjective characteristics also play a role in criminal offenses. The existence of an intent that includes awareness and want or acced to the realization of the objective characteristics of the criminal offense is certainly necessary. However, omission lacks the realization of the required acting. Omission by intent is the stage between the decision not to act and possible acting. Therefore, the perpetrator must realize that preventing the consequences is possible. Intent also includes awareness of the circumstances that make a person a guarantor (Schmidt, 2008: 302). Therefore, the perpetrator must: knowingly not act even though it is clear to him that it is possible to avert the consequence, understand that his omission is causally connected with the possible occurrence of the consequence, and be aware of all the circumstances that are essential for the existence of the position of guarantor. Croatian judicial practice and legal literature also analyzed the case of a young man who gave heroin to his girlfriend, who died, because he and his mother did not call the emergency services (Novoselec, 1994: 343-346). The court correctly determined that the young man was a guarantor because of a previous dangerous act, and that the mother had no duty to supervise the sources of danger, and that she was not a guarantor because the son was of legal age. Nevertheless, in this case, the question of the young man's responsibility for intent or negligence arose. It is important to emphasize that the intent at omission has its specifics, but in this case, where the young man made the decision not to call the emergency services, there is no difference compared to the intent at acting. The 8-hour period in which the girl's agony lasted without calling for medical help, when over time it became obvious that the measures of help that the young man provided to her were ineffective, certainly means that he acceded with the fatal outcome, so this case should have been about indirect intent, not punishment for causing death by negligence.

If the perpetrator is not aware that he is a guarantor, then he is in a mistake of fact (mistake about a statutory element of a criminal offense), which leads to the exclusion of culpability. If a father sees a child drowning in a lake without knowing

that it is his child, his mistake about the guarantor's position is in his favor, and he will be responsible for Failure to Render Aid. In the given example, there would be no murderous intent on the part of the father if he did not know that it was his child. The situation is different if the perpetrator is in a mistake about the awareness of the guarantor duty. A mistake about the existence or limits of the guarantor obligation is a mistake of law (mistake about the unlawfulness). A mistake about the guarantor's position is a mistake of fact, and a mistake about the guarantor's duty is a mistake of law (Wessels and Beulke, 2000: 245). Whoever sees his son drowning, but believes that he is not obliged to save his child, acts in the mistake of law. (Schmidt, 2008: 303) A father who knows that he is the child's father, but thinks that in a situation where the mother does not feed the child, he is also not obliged to feed the child, acts with the intention of murder, but in the mistake of law. If there are subjective characteristics of the nature of the criminal offense (for example, motive), it is necessary to prove them to the guarantor, as these are circumstances that can be imputed only to the person who acts with such subjective characteristics.

In the case of a criminal offense, because the realization of the being of the criminal offense manifests the ability to act is necessary to analyze whether there is a possibility of excluding behavior from the concept of conduct (Roxin, 2003: 631). If there is no possibility of excluding conduct, being of criminal offense, or unlawfulness in criminal offense of omission, then culpability should be analyzed in the frame of mistake. Therefore, it can be concluded that the perpetrator's intent according to the current CCC includes awareness of the conduct and of the situation itself in which the duty to act is required. Therefore, the mistake of fact will exist if the person is not aware of the guarantor's position. If the guarantor believes that under the given circumstances he is not obliged to avert the occurrence of the consequence, the guarantor's awareness of the non-existence of the duty to avert the consequence belongs to the awareness of unlawfulness, so in such a situation it is a mistake of law.

7 Conclusion

The paper analyzed the legal position of the guarantor at unreal criminal offenses of omission from the aspect of unlawfulness and culpability. Namely, not everyone can be a guarantor, so it is necessary to consider situations from which guarantor responsibility undoubtedly arises to exclude the guarantor duty. Certainly, the process of proving culpability for criminal offenses of omission is more difficult

than for criminal offenses of commission. It is precisely because of this that it is possible to conclude that, although the guarantor may not be aware of the guarantor's duty, this does not mean that his liability will not exist depending on the mistake in which he acts. The aim of the paper was to determine whether interventions are needed in the term used by the Croatian Criminal Code, which refers to the situation when a person is "legally obliged to avert the occurrence of a consequence". It can certainly be concluded that the mentioned term is established in Croatian and foreign legislation and literature, and when it is understood through the prism of criminal law, it does not cause difficulties in its understanding. When interpreting this term, the emphasis should be on criminal law, not on misdemeanor or disciplinary law. Namely, since for the principle of legality is necessary that the criminal provision has a disposition and sanction in the Criminal Code or that the Criminal Code at least refers to the norm of other regulations, it is necessary to look for the sources of the guarantor duty primarily in criminal law and legal goods protected by criminal law, and not misdemeanor, civil or disciplinary, to fulfill the principle of legality. Certainly, this analysis must be done through the prism of the principle of fragmentation and subsidiarity. When analyzing the sources of the guarantor duty, it is certainly necessary to mention that, with today's understanding of society, the question is to what extent the members of society are aware of the guarantor's duties. Precisely for this reason, the indirect goal of the work was to enumerate and analyze specific situations of guarantor duties to make the obligations of individuals and responsible persons in the legal entity aware, which is also important for lex certa, i.e. the principle of legality following national and European courts. Vuletic correctly states that criminal responsibility is based on principles of legality and culpability that are different from objective liability. So criminal responsibility of legal entities should be determined on these principles and not only on the foreseeability of the consequence. The awareness and will of the members of the social community are certainly important for the normal functioning of the legal order. In legal theory, it is claimed that not doing anything is as valuable as acting and such a point of view should be supported by judicial practice. However, the paper shows that there is less case law for omission than there is for acting, and the reason for that lies in the fact that acting is easier to prove than omission.

In the case of the actions of a natural person in a legal entity, the responsibility for omission comes to the fore, where members of legal entities as guarantors can be punished for not averting violations of certain legal goods by subordinates only if such a situation is under their control. In the same way, the theory of causality

justifies the possibility of imputation of the consequences for a larger number of individuals in legal entities.

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