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The Criminal Offense of Abuse of Position or Trust in Business Activity and the Limits of Free Economic Initiative

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Abstract The criminal offense of abuse of position or trust in business activity within the meaning of the Slovenian Criminal Code is the most common criminal offense against the economy. To adequately assess such an offense it is essential to clarify at the very beginning of the criminal proceedings that all preliminary questions have their origin in the field of civil, corporative and commercial law. In other words, the difficulty of problem solving for such cases in later stages of the process only intensifies, as the decision-making process becomes more and more difficult and can cause delays. And even in cases where the facts are undisputed, the whole issue concentrates primarily around the dispute regarding the issue of material criminal law. The purpose of this paper is to present the abovementioned issues, firstly from a more theoretical perspective on freedom of economic (business) initiative in a postmodern era, followed by a presentation of the criminal law subsystem dealing also with phenomena from the economic subsystem, and lastly by a presentation of the Slovenian Criminal Code in regards to prosecution and adjudication of economic crimes and its difficulties, specifically by using the example of the abovementioned offense.

Keywords: • free economic initiative • criminal offense of abuse of position or trust in business activity • standard of good businessman • blanket criminal offense • factual questions • legal questions • legal description of the offense •

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1 Introduction

The criminal offense of abuse of position or trust in business activity within the meaning of Article 240 of the Slovenian Criminal Code (CC-1) is, besides the offense of business fraud, (Article 228 CC-1) one of the most common criminal offenses against the economy. It is also the main criminal offense of Chapter 24 of the CC-1[1] ("Criminal offenses against the economy") (Novoselec, 2003: 153).[2] Therefore, it reveals in an exemplary manner of legislative problems arising from determining the legal descriptions of these criminal offenses and their identification. Economic crime is a highly dynamic and complex phenomenon, which is constantly changing in a quantitative and qualitative way, and therefore also in corresponding criminal law. One of the most typical characteristics of economic crime is, according to the general belief, that perpetrators are hard to detect, given the existence of a very large, dark field of undetected offenses, and that it is difficult to prove such offenses during a trial in accordance with legal standards developed in theory and case-law.[3] The notion of economic crime covers a wide range of harmful activities that have, as their common denominator, the pursuit of profit. This is also the normal basis of economic activity and therefore a legitimate economic motive. However, it can hide a criminal motive whereby a person conducting a business activity through abuse of his or her position or the trust placed in him or her, acting beyond the limits of the rights inherent in his or her position, failing to perform any of his or her duties, or under the cover of a normal business a person who wants to procure an unlawful property benefit or is causing damage to the property of another. Therefore, in the controversy about prevention of unlawful conduct in the pursuit of economic activity by criminal law, the question arises in regards to the limits of the explicit constitutional right to free economic initiative, as well as in regards to the legal conditions under which it should be limited so that its abuse could amount to one of the offenses against the economy. The intention of this text is to highlight the pitfalls regarding criminal law intervention in the field of the economy and free economic initiative (as a constitutional right in Slovenia), especially in regards to the issue of mixing legal and factual questions, as well as the issue of blanket disposition and referral to other legal areas, such as corporate and civil law.

2 Overview of the free economic initiative

The Constitution of the Republic of Slovenia in Article 74(1) states that economic initiative is free. Therefore, this provision constitutes a fundamental constitutional definition of the Slovenian economic system based on the freedom of entrepreneurship, unlike the previous socialist constitutional system based on the concept of an administrative-planning economy. Constitutions in countries with a longer democratic tradition do not have such a provision. Such a right in those legal systems has never been questioned, as it constitutes a natural component of the economy. Consequently, it was not explicitly protected in the initial articles of the European Convention on Human Rights (ECHR), which was in principle followed by the Slovenian constitutional assembly (Šturm et al., 2002: 712–713). However, such a right, as is true for the majority of other rights, is not absolute. Not only is it restricted by the prohibition of unfair competition (Article 74(3) of the Constitution), but also restricted by public interest

(Article 74(2) of the Constitution). Thus, commercial activities may not be pursued in a manner contrary to the public interest. An important corrective provision of the principle of the free market in the Slovenian economic system is the provision of Article 2 of the Constitution, which stipulates that Slovenia is not only a state governed by the rule of law, but also a social (welfare) state. Although the Constitution defines, in principle, the freedom of the economic system, it maintains certain neutrality with regard to its specific regulation (Šturm et al., 2002: 713). It gives legislators a wide margin of appreciation regarding the formulation of economic policy and the adoption of appropriate measures, and thus the possibility of interfering with it by criminal law. It is not only a constitutional prerogative for the state to provide conditions for the implementation of the principle of economic regulation, but it also amounts to free economic initiative as a fundamental right, namely a defensive right against unjustified interventions of the state in the area of the economy (Šturm et al., 2002: 722). It is therefore a fundamental right that enjoys a negative status, because it provides for entrepreneurial freedom (Šturm et al., 2002: 714). The provision of Article 74 of the Constitution prohibits interventions in the field of free enterprise initiative if precise legal conditions are not fulfilled. The criminal offense of abuse of position or trust in business activity is legally defined by a blanket disposition, which means that its legal essence must be supplemented by the interpretation of the appropriate combination of legal provisions, which have their origin in the fields of civil, corporate and commercial law. Therefore, its assessment requires resolving a number of preliminary questions (see Article 23 of the Criminal Procedural Act;[4] CPA). The establishment of the boundaries of free economic initiative requires a multidisciplinary approach in each specific case. This means that free economic initiative is caught in a "spider's web" of norms that define real economic criminal offenses, which include, as a typical offense, abuse of position or trust in business activity within the meaning of Article 240 of the CC-1. Economic initiative has always been embedded in certain social determinants, as proven by the history of its emancipation and its new civil and criminal law restrictions. The existence of society depends on organic solidarity, which is directly derived from the economic interdependence of people (Igličar, 2012: 213). Therefore, the key question raised is to what extent criminal law can contribute to such solidarity.

The decisive issue of law is its effectiveness and validity concerning its conceptual foundations, the way of its justification, namely the criteria for recognizing the real law, and its legitimacy. In this regard the question arises, how and by what rules a judge recognizes the right law. Only the criteria for recognizing law can declare a certain law as the right law, because what the right law is can only be expressed in a specific concrete case. Therefore, in the area of modern law, there is no longer a dilemma that the judge's function is a test case to resolve the issue of objectivity, that is, whether legal theory has succeeded in justifying the premise of unity and integrity of the legal system, and justifying its normativity and the objective validity of its primary rules, as well as objectivity of judicial deliberation regarding concepts of its subsystems, such as civil, administrative and criminal law, and their mutual relationships. Hence, the influence of irrational moments on the outcome of judicial deliberations is being reduced, thereby reducing the possibility of arbitrary judicial decision-making.

3 Free economic initiative in the (neo)liberal modern era

Cultural identity is determined by the relationships between four value systems: political, religious, economic and cultural (Verhaeghe, 2016: 123–124). All of these ingredients are indispensable for the existence of society as a whole or of a global society and its culture. As long as those systems existed in social and individual consciousness as a weakly differentiated and inseparable functional unity, they were not visible, although religion and politics were competing with one another for the dominant position over the economy, whereby politics has been more active since it relied on state enforcement mechanisms (Verhaeghe, 2016: 123–124). Religious pluralism has led to the differentiation of the awareness of these individual systems (Haralambos, Holborn, 1999: 463). As long as these normative (sub)systems existed in social and individual consciousness, they were weakly differentiated from one another, while the economy was embedded in religious, political, and ethical determinants. However, its limitations were weakened by religious pluralism. Christianity, which until the 13th century united Europe and took control of the spiritual life, was marked in the 17th century by religious conflicts, which resulted in secularization and individualization (Haralambos, Holborn, 1999: 487). Consequently, religion became increasingly individual and Christianity increasingly visible (Verhaeghe, 2016: 121).

When the liberal state separated itself from the people and other normative phenomena, it became itself even more visible and no longer as self-evident. The same has happened to religion. That is why they became a subject of criticism. As long as those systems were an inseparable whole, they were not visible, although they competed among themselves for the dominant position. The balance between those systems is characterized by social integration that enables the existence of society and its functioning as a whole (Igličar, 2015: 62). Due to the great importance of the normative sphere for social life, normative integration is emphasized in the sociology of law as a special type of social integration. The functioning of the legal system depends on the state of the legal culture and, in particular, the final enforcement of legal norms, which is reflected in the actual conduct of legal subjects. In doing so, trust among individual normative systems is a constituent element of the social system as a whole. The condition for it is the sense of justice with its rational core in the principle of equality and security. The structural differentiation of global society begins in the family field and continues in the sphere of political organization and economic structure. Legal ideology, legislation, judiciary and the general legal culture have a catalytic or inhibitory effect on integration processes (Igličar, 2015). Society shows its normative consistency with its entire normative structure and the embedment of core values as part of the legal consciousness. According to the Greek theoretician Fotopoulos, structural changes that mark the neoliberal version of modernity are the following: the liberalization of global and local markets; widespread privatization of state-owned enterprises and other state assets; privatization of health and social care and education; as well as the dismantling of the welfare state as a welfare state and its replacement with the penal state (Flander, 2012: 31). The technological information revolution is also to be added to this definition. On one hand such changes are expected to increase the concentration of economic and political power, and on the other the unbalanced distribution of social wealth.[5]

Legal culture, with its central element, namely fundamental rights, remains in present day an essential precondition for the actual existence of an integrated society and the rule of law (Igličar, 2015: 220, ft. 8). These rights are an idea-based and reflexive concept, a permanent function of eliminating insufficient legislation. For this reason, law assumes a central place in instituting common social values. Norms come from values (Igličar, 2015: 220, ft. 8). Therefore, values are the starting point and the centre of normative phenomena, because they act as connecting forces of social relations. Legal norms stabilize the social system by generalizing the expectations of participants in social processes, and thus reducing the diversity of actual life and ensuring the security of social relations. In doing so, trust among individual normative systems is a constituent element of the social system as a whole. These cultural movements have created conditions for the liberalization of social life, and thus conditions for the free market and for freedom of the spirit (Haralambos, Holborn, 1999: 466–472, ft. 11).[6] This did not reduce the significance of religion, but the way of expressing it changed. In traditional societies values are of a religious nature, but in modern society (proclaimed in modern constitutions) they still have a quasi-religious character (Igličar, 2015: 62, ft. 14). In the normative sphere of the contemporary world, religious and moral norms are losing their legal significance, recognizing that they only pretend to be universal and reflecting in a concrete case their particularity. In their place, legal norms and legal institutions are entering by performing the same role. Religious belief, as a basis for the legitimacy of law, is being replaced by the doctrine of the protection of fundamental rights as a category of natural law and being the conceptual and philosophical foundation of the entire legal system. The institutionalization of social values is increasingly assuming a central place in the system of modern law, while economic institutions become embodied in the official legal system (Igličar, 2015: 62, ft. 14).[7] In the period of liberalism the economy fully emancipated itself, and at the end of modernity, transformed itself into neoliberalism. In neoliberalism, economic ideology and political economy are replaced by pure economic ideology, the ideology of consumerism as the ideology of neo-capitalism. Some consider such an ideology to be the ideology of ideologies proclaiming end of history, much like only capitalism is supposed to follow capitalism. However, the question is how to give it more of a human face (Žižek, 2012). Legal positivism is accompanied by the danger of political arbitrariness and abuse of power, but such a danger reduces the concept of the rule of law. The essence of legal regulation becomes the systemic nature of judicial procedures that are autonomous procedures, characterized by the exclusivity of judicial discourse and their exclusionary significance. In such a discourse, only the procedural acts of the parties and the court can influence in a legally relevant manner the outcome of criminal proceedings. In that regard it is necessary first to better understand the term criminal offense as the subject of criminal procedure from a cognitive perspective, and thereby criminal law as a legal subsystem with its special argumentation rules. Such a subsystem (with its specific rules) clashes in the field of economic crimes with another subsystem of entrepreneurial freedom (with its specific logic and rules) as it illustrated above. This will be further analysed on a practical case, namely regarding the adjudication methodology for the criminal offense of abuse of position or trust in business activity within the meaning of Article 240 of the CC-1.

4 Criminal offense as a cognitive problem

Law as a normative and linguistic phenomenon is reflected in the sphere of development of human individual and collective consciousness as a consciousness of the rational evaluation of social relations and values that are the source of the normative system. Scattered in a multitude of its various types and practices that reflect its complex nature, law seeks (throughout the long history of its development) its fundamental organizational principle, its autopoiesis, its philosophical conceptual foundation, namely its reflexive instinct in which it is recognized as the right law (richtiges Recht). This provides a binding basis for judicial deliberations, namely those practical reflections that guide judicial decision-making (Riha, Šumič Riha, 1993: 9). The universality, which both natural and positive law seeks, always turns out to be only a particularity, claiming to be universality. Universality of morality and law is merely a smokescreen hiding their relativity (Riha, Šumič Riha, 1993: 9). It is precisely because of the realization of relativity of law that the stoic tension between "*nomos*" and "thesis" began to weaken. "*Nomos*" (the human law as the reduction of the original physis, the divine universal moral law, *lex divina* as the natural law - *lex naturae*) was reduced to "thesis" or a simple rule. Therefore, the key problem of contemporary legal theories remains, in view of the dual nature of law, to articulate its reflexive, self-reflexive, self-referential conceptual basis by which positive law can be recognized as the right law/fair law.

The application of criminal law in the field of continental criminal procedural law cannot be imagined without "solid reins" of legal logical reasoning. The law by its origin, development and application is a logical interpretation of relations, values, views and norms, as well as of a concrete event that has legal significance. The essence of a dispute in criminal proceedings, as Zupančič illustrates, is a "language game" that is possible only if its rules are recognized by both parties (Zupančič, 1988a: 218). It is precisely the procedural norms that create a "logical compulsion" or a logical pressure, without which there would not be the smallest common denominator of procedural communication as a basis to prove to each other to be right or wrong. The written legal rule for itself is empty, but the legal concepts that make it up require a holistic, scientific and systematic treatment. The reference to the legal sense (in a mixed type continental procedure) is not sufficient, since decisions must be derived from the law on the basis of logical reasoning. Only if the legal decision is logical and experimentally acceptable can it be correct. The mere sense of justice is not sufficient, as it is being generated only through a logical and experimentally acceptable explanation. Fundamental logical rules and characteristics of logics concerning the inductive-deductive syllogism method (inference from the particular to the general, and vice versa) have to be taken into account. The laws of reasoning - logics are reflected both in the domains of interpretation of law and its application.

The finding of a criminal offense is a logical explanation of the relationship between established facts, legally important circumstances and the norms of substantive and procedural criminal law, according to which the committed act is adjudicated. The application of law is the search for premises, the design of premises and the use of premises for argumentative decision-making (Aleksy, 1983: 39–40). In the process of

identifying a criminal offense, a logical relationship must be established between the abstract concept of a particular offense and the specific event/act that is supposed to constitute such a criminal offense. The criminal act is not only a material-legal phenomenon that can be dealt with *in abstracto*, but is a real social phenomenon, and as such a cognitive, gnoseological and axiological category that also reveals its procedural aspects. In the procedural sense, a criminal offense is a past event which must be clarified by using a retrograde analysis to such an extent at present that it can be reliably concluded that all of the circumstances that are present represent at the same time legal elements of a given offense. This means that all the circumstances have to be established on which criminal substantive and criminal procedural law base their consequences. A criminal offense can only amount to such a behaviour that corresponds to the concept of a particular criminal offense and is determined in the manner prescribed by criminal procedural law.

The methodology for determining a criminal offense concerns three basic logical categories, namely apprehension/concept (*conceptus*), judgment (*iudicium*) and inference (*ratiocinium*) (Friškovec, 1980: 82–83; Sešić, 1977: 137 and 144–145). Any rational knowledge can only be conceptual knowledge, since each objet of recognition, determined by its characteristics, is a specific methodological process through the knowledge of concepts that emphasize its essential characteristics Consequently, the notion of a particular offense is also a meaningful scheme in which the existence of such an offense can be logically and experimentally justifiable. As the basic category of logic, the term is synonymous with the definition of everything that fits into the content of its understanding (Schneider, 1995: 37–38, 71–94 and 95–167; Jerman, 1990: 85; Friškovec, 1980b: 320; Dežman, 1991: 19–29; Dežman, 1998: 22–34). Thus, the notion of a crime, like any concept, is a mental construction, through which we establish our relationship with reality (Berger, Luckmann, 1988: 25 and 39). Consequently, knowledge of the conceptual structure of a certain criminal offense is knowledge of its legal essence, its constituent elements and their interrelation. This knowledge, however, provides first of all the knowledge of the relationship between the general notion of a criminal offense (enforcement practice, the definition of a criminal offense by law, unlawfulness, the social significance of the act and criminal responsibility) and the specific notions of a criminal offense set in the special part of the criminal code by its constitutive signs. The logical relationship between the general notion and the specific notion of a particular offense is defined as an "abstract object of proof" (Vodinelić, 1985). Through this we form the upper premise of judicial syllogism (*praemissa maior* or *terminus maior*). The established factual situation corresponding to this premise corresponds to the notion of an individual criminal offense, namely a specific offense as a concrete life event. In this subsuming process the question arises as how to overcome the antinomy in a logical and experimentally acceptable way, namely the distance between the legal provisions that form the conceptual structure of a particular crime and concrete life examples. The legal provisions on the basis of which we construct the notion of a particular crime are by their nature abstract, general, hypothetical, simplified and static, and the life situation in question is always concrete, individual, factual, complex and dynamic (Mandić, 1971: 120). When this antinomy is exceeded and when coherence between the normative and the actual is achieved, one must decide the legal decision. Therefore, it is not acceptable

to adopt a positivistic concept according to which the material norm is figured as an independent upper premise, and the individual legal relationship merely is seen as its dependent variable (Zupančič, 1988b: 177). The decision on the existence of a criminal offense foresees that the existence of a criminal offense is proven, namely the argument from which it is apparent to what extent the court assessed the act in question or on what upper premise it based its judgment and how it formed the lower premise. While in the process of establishing a criminal offense, the formation of the upper premise is the result of the interpretation of the appropriate combination of legal provisions of substantive criminal law as criteria for assessing the criminal offense involved (Jescheck, 1988: 135–136), the creation of the lower premise of judicial syllogism (*praemissa minor* or *terminus minor*) belongs in the field of proof/evidence (Dežman, 1991: 19). Therefore, the upper premise is not predetermined, but, as Zupančič states, the adapted abstract reflection of an individual case as the facts influences the composition of the upper premise (Zupančič, 1988b: 170–174).

The difference between law and facts is blurred at the level at which we recognize that the legal interpretation is a dialectical process in which the perception of the norm determines the choice of relevant facts, and in which the perception of facts determines an adequate combination of the upper premise of legal syllogism (Zupančič, 1988c: 189). Consequently, two conditions must be met in order to establish a criminal offense. The first is of a substantive nature and emphasizes the requirement to clearly define the criteria for assessing the offense. Only such criteria that clearly define the constituent elements of the offense and enable the court and the parties to determine, without any major difficulties and by using recognized methods of legal interpretation, whether the event in question corresponds to it. The decision on the existence of a criminal offense is only acceptable if it can be verified. This is only guaranteed when it is evident from its explanation that the logical relationship between the two premises is established according to inductive-deductive reasoning. The second condition is procedural in nature and requires the existence of a criminal procedural law that determines a statutory procedure by which these two premises will be formed taking into account all modern standards of fundamental rights protection. There has to be a clear distinction between factual and legal issues. These are not mixed questions (*questiones mixtus*), but they are in a relationship of subsumption. Actual questions (*questones facti*) refer to the questions of facts, and the legal questions (*qestiones iuris*) to their assessment. Therefore, the procedure for establishing an offense requires a clear distinction between the two. However, it is not so rare that the neglect of the importance of distinguishing the two translates into legal issues, as the most common reason for delaying the assessment of such offenses - issue of adjudicating in a reasonable time (Article 23 of the Constitution). Therefore, in view of the legal nature of a particular offense, the basic methodological question is within what framework of a semantic scheme it is possible to adjudicate that a certain criminal offense has been committed.

5 Adjutication methodology of the offense from Article 240 of the CC-1

The criminal offense of abuse of office or trust in business activity was in Article 133(2) of the former CC[8] entitled "Abuse of the position or trust of the responsible person" and

has been classified as a criminal offense against the management of social assets as a subsidiary offense against the economy. It only came into consideration if there were no elements of any other criminal offense. Such subsidiary nature was also maintained by the criminal offense of abuse of office or trust in Article 244(1) of the first CC of 1994 after Slovenian independence[9] as a purely economic offense. Despite such a subsidiary nature both criminal offenses were applied as basic criminal offenses against the economy. That is why Matijević named the same criminal offense in the criminal law of the Republic of Croatia a "tyrannosaurus," a monster from the past that survived the breakdown of communism and further exists in capitalism (Matijević, 1999: 42–45; Novoselec, 2002: 46). However, it stayed like this even though the new Criminal Code[10] (CC-1) did not consider it as a subsidiary offense according to Article 240 CC. In the new CC-1 the legislator's dropped the words "whereby such conduct does not constitute any other criminal offense", but this criminal offense remained the most common criminal offense against the economy, a criminal offense that the state prosecutor's office mostly applies, besides the criminal offense of business fraud.

The provision of Article 240 CC-1 was subsequently amended several times. First, the notion of using his or her position" from Article 244 of CC/ 97 was replaced with "abuse of position" in Article 240(1) CC-1. CC-1 limited the act to the governing or supervision of economic activity. CC-1B[11] again reworded the concept to anyone who performs an economic activity. While CC-1 abandoned the authentic interpretation of the notion of economic activity from Article 129(5) CC/ 94, CC-1B in Article 99(XI) again provided the interpretation of that term. Business activity is being conducted through a variety of legal business forms based on trust to be fulfilled in the obliged way and that business entities will conduct themselves in accordance with the valid legal order. Only such trust can give security of fortune provided also by commercial criminal law as *ultima ratio* for the necessary protection of legal values in the economic area (Article 16 CC-1). Through this society tries to contain free economic initiative of "playful capitalism" and mark certain limits to it.

However, another important change was introduced regarding Article 240 CC-1. This offense, which despite of all the changes, maintained the legal concept of a crime can only be committed by direct, motivated intent (*dolus coloratus*) should become criminal according to the proposed legislative change (CC-1E),[12] even if the perpetrator acted on the basis of eventual intent as a form of guilt, which requires a subtle distinction between eventual intent and conscientious negligence. From these amendments it is clear that the criminal offense of abuse of the position or trust in business activity remains the basis of commercial criminal law (among the 25 criminal offenses against the economy). According to the existing provision of Article 240(1) CC-1 a person commits a criminal offense of abuse of a position or trust if he or she "in the performance of an economic activity abuses his position or the trust placed in him, acts beyond the limits of the rights or fails to perform his duties under the law, other regulation, act of a legal person or of legal transaction concerning the disposal of another's property or benefits, their management or representation, and thereby procures an unlawful property benefit for himself/herself or for a third person, or causes damage to the property of another". This criminal offense may be committed only by a person engaged in an economic activity.

Therefore, this is a criminal offense *delictum proprium* and is legally defined with a blanket disposition. This means that its legal substance must be supplemented by the interpretation of those provisions in the field of civil, corporate and commercial law, which define the status of the perpetrator in his or her pursuit of an economic activity, the rights he or she has exceeded and the duties he or she has abandoned. Only on such a legal basis can it be adjudicated whether the conduct of the alleged perpetrator is unlawful and, if so, whether it is unlawful from a criminal law perspective.

The provisions defining the liability of economic operators are namely of strictly binding cogent nature (*ius cogens*). Such offenses are characterized by the fact that they are defined not only by factual, but also by normative legislative elements. Those are not evident from the legal formulation of Article 240 CC-1. Therefore, the weakness of the description of this crime, if described only in a descriptive manner, is the same as if it were a criminal offense that was legally defined by a simple disposition. For criminal offenses with such a disposition, it is not sufficient to be described only with legal elements fully exhausted in the abstract description, or only in the description of the alleged facts. But the description of the offense must be of such a nature that it intertwines its factual and legal aspect.

The description of a criminal offense is the most important element of both the request for an investigation and the charge in accordance with Articles 169(3) and 269(1) of the CPA. The description defines the framework in which the criminal proceedings will be conducted. A criminal act is not only a real phenomenon, but rather as a legal concept of a normative category and as such a procedural object of criminal proceedings. It must therefore be concrete and clear to enable the defendant with an effective defence and the court to determine which factual and legal issues should be subject to proof and judgment (Horvat, 2004: 388). Only on the basis of such a description of the offense can it be concluded that the suspect has committed the offense, and only on the basis of such a description, the court can be expected to be convinced of the actual existence of the offense and guilt of the defendant (Article 3 of the CPA). This is often overlooked at the charge stage, even if descriptions are vague, mixing description and explanation. One of the weaknesses of the prosecutorial charges regarding this offense is that the explanation of the charge does not show how the public prosecutor's office resolved the preliminary questions on which the assessment depends, namely that the defendant acted in a prohibited way and on which (factual and legal basis) such assessment is based. Article 23(1) of the CPA provides that the criminal court may resolve preliminary questions which have its origin in other legal areas, however it is a prerequisite for the prosecutor to first show how he or she solved such questions. Not to enable the court to assess what is essentially the object of the charge, since it is presumed that the court knows the law (*ius novit curia*), but primarily to enable defendants to be able to make an effective defence against the charge. By resolving such issues a legal framework is put in place in which the criminal proceedings will be conducted and the object of the criminal procedure determined. However, such a methodological approach requires a clear distinction between factual and legal issues. It is not rare that, in a purely factual situation, legal questions are converted into factual ones, which unnecessarily prolongs criminal procedures by trying to extract from witnesses what is essentially a matter for a legal

assessment. Experts with knowledge from the relevant legal areas are only called at the end of the investigation or even the main trial, although it would be appropriate to already have nominated them at the pre-trial stage.

Further, the Slovenian Criminal Code (CC-1) in Article 17(1) states that a criminal offense may be committed by voluntary act or by omission (Begehen durch Tun und Unterlassen) (Jescheck, 1988: 191, 208, 238, 556–574). A criminal offense is committed by a voluntary act (*delicta commissiva*) if the perpetrator violates a prohibition and acts as he or she shall not. A criminal offense is committed by omission if he or she has failed to perform an act, which he or she was obliged to perform (*delicta ommissiva*). However, if committed by omission, it has to be clarified if it is a genuine or a derivative omission (*delicta commissiva per ommissionem*). The common feature of both is that they are a consequence of a violation of an imperative norm which obliges certain performance (Bačić: 1980: 171–179). The difference is, however, that for derivative omissions, according to Article 17(3) CC-1, the perpetrator is punished, although the offense does not constitute criminal omission under the terms of the statute, however he or she was obliged to prevent the occurrence of the unlawful consequence (Erfolgsabwendung) (Jescheck, 1988: 543, 547, 551, 558, 561) and insofar as the omission for the occurrence of such a consequence is of same value as a positive act. Consequently, as long as it is not clear which value was attacked, which elements of the criminal offense he or her started to fulfil, in the framework of which imperative norm his or her passivity is relevant in the criminal law sense, it is not possible to conclude that a criminal offense has been committed in that regard (Bavcon et al., 2013: 260–271). Derivative omissions are committed through a violation of the duty of care (German Sorgfaltspflicht), meaning a guarantor's obligation (German Garantenpflicht), providing that in the performance of a risky but lawful business the danger stays within certain legal limits (German erlaubtes Risiko), being a risk that cannot be avoided despite taking appropriate care (Jescheck, 1988: 200–201). In that regard we have several different types of such guarantor's duties, and therefore different types of derivative omission criminal offenses.[13] Such obligations/duties are legal standards. The offense according to Article 240 CC-1 is a derivative omission offense. Therefore, it must be clear from the description that there is a duty to act, how it has been violated and why the offender can be attributed with such a criminal offense.

Legal entities must act in concluding legal transactions in accordance with the provision of Article 6 of the Obligations Code.[14] It stipulates that in the fulfilment of their obligations, the participants must act with due diligence required for the appropriate type of obligations (the diligence of a good businessperson or the diligence of a good manager). According to paragraph 2 of the abovementioned Article participants must act with high diligence when performing their obligations from their professional activities, according to the rules and custom of the profession (the diligence of a good expert). The concept of a good businessman is a legal standard, also defined in Article 263 of the Companies Act (ZGD-1, OJ of the Republic of Slovenia, No. 42/2006). For legal standards, however, it is characteristic that they are defined at the abstract level, because they are legally and thus conceptually defined, and in this sense unchanged, but they change their content according to the existence of concrete circumstances. Therefore, the

abstract legal framework provided for by that provision must be "filled in" with specific content, which means that the description of the offense also includes, in this respect, violations of those legal provisions or the misuse of legal transactions in order that such conduct would be unlawful in the sense of criminal law.

The duties defined in Article 263 of the Companies Act can be divided, in the legal theoretical sense, into the duty of care (German *Sorgfaltspflicht)* and to the duty of loyalty (German *Treupflicht*) to their economic company based on its trust, that they will carry out an economic activity on its behalf and at its expense honestly, conscientiously and with care. The duty of loyalty means that the members of the management and the supervisory board must be loyal to the company and operate in the manner required by its interests. If they misuse such trust and intentionally commit an act to the detriment of its property, then their actions are in line with the criminal act of abuse of office and trust as defined in Article 240 of the CC-1. Such behaviour constitutes a gross violation of the standard of a good businessman, since it is in complete contradiction with the meaning of the powers granted to them by the company to act on its behalf and in its favour. If they commit any criminal offense on behalf of the company and in order to obtain the company unlawful material gain, the company is responsible in the sense of criminal law itself according to Article 4 of Liability of Legal Persons for Criminal Offenses Act. Consequently, a reference to those rules shall be in the description of the crime itself and in the reasoning of the charge the reasons on the basis of which it is possible to conclude on the causal link between the violation of such regulations and the alleged prohibited consequence and the perpetrator's guilt. The same applies to the responsible legal person (Article 42 CC-1).

These duties do not apply only to members of the management board and members of the supervisory board, and to executive directors of the management board of a limited company (Articles 514 and 515 Companies Act), but also to all other persons who are carrying out their economic activity, could commit an offense under Article 240 of CC-1. In the event of a breach of the duty and the resulting damage, there must be an adequate causal link. This is given if the damage is experiential, objectively predictable, because only if it is predictable can it be prevented. Therefore, it is only in such cases that criminal law becomes relevant. According to Article 263(2) of the Companies Act, a businessperson shall not be liable for damages if he or she can demonstrate that they fulfilled their duties fairly and conscientiously, which means that the reversed burden of proof applies to the exculpation for the damage suffered, especially if the offense is alleged to have been committed as an omission.

The assessment of business initiative has to be rational, and therefore criminal responsibility for such offenses has to be considered in accordance with the so-called *business judgement rule.*[15] By assessing if business judgment was rational, economic criteria have to be taken into account (Podgorelec, 2017: 725). On such a basis it is assessed what the guarantor's duty was in relation to the businessman that no damage was caused. Only once such questions are answered, a criminal law assessment of the relevant behaviour can be conducted. Based on a prognosis of the effects of a legal business deal, risks have to be assessed in connection with the taken business decision. It has to be seen

if alternatives were possible and what s their risk was (Podgorelec, 2017: 726). Consequently, there must be an adequate causal link between violating the guarantor's duties and the damage. Such a causal link exists only if consequences were foreseeable and avoidable. Therefore, the conduct has to be assessed *ex ante* and not *ex post* (Schünemann, 1975: 440; Roxin, 1994: 303).

A certain deficiency also concerns the descriptions of participation. According to Article 20(2) CC-1 the perpetrator of a criminal offense is also any person, who together with another person, commits a criminal offense by wilfully collaborating in the execution thereof or in any other way decisively contributes thereto (the accomplice). This means that the description of the offense in the request for an investigation must indicate what the contribution was and in what form it was if it is requested for several persons who have allegedly been involved in a criminal offense (Horvat, 2004: 388). Accompliceship exists if accomplices implement, through their behaviour, legislative elements of a criminal offense or divide different roles in committing the offense. Based on this it is clear how they individually contributed to the fulfilment of a particular legislative element of the offense. Consequently, a legislative element of an offense can only be explained by those facts of the concrete factual basis that correspond by content and certainty (*lex certa in lex stricta*). Charges based on presumptions are unacceptable in criminal law, as no defence is possible against hypothetical charges. In its decision the Constitutional Court of the Republic of Slovenia (No. Up-889/2014 of 20 April 2015) underlined that the charge is unconstitutional if the role of one of the suspects is attributed also to all the others without showing their conduct by reference to the specific circumstances on the basis of which it can be concluded that there is an unlawful behaviour existing.[16]

Case-law shows a surprising practice of the prosecution alleging that the defendant acted in violation of the standard of a good businessperson and concluded a void contract, however nobody claimed that the contract is void in a procedure (neither the prosecution). In accordance with Article 135 of the Constitution and Article 19 of the State Prosecutor's Office Act[17] a state prosecutor within the general function of filing and representing criminal charges, a state prosecutor shall perform all the procedural acts of an authorised prosecutor, provide guidance to the police and other competent authorities, apply deferred prosecution and mediation procedure and perform other tasks in accordance with the Act regulating criminal procedures. Therefore, a state prosecutor shall file motions and legal remedies in minor offense procedures if so stipulated by the law, and shall file procedural acts and perform other tasks in civil and other judicial proceedings and in administrative proceedings if so stipulated by the law.

All these questions need to be already clarified in the pre-trial procedure. According to the position of the Supreme Court of the Republic of Slovenia[18] a reasonable suspicion must come from "retrospective forecasting", which must be based on facts that justify the assessment that the degree of probability that the suspect committed the criminal offense. However, such a forecast is not possible if the very nature of the most important legal issues has not been clarified from the very beginning. Their resolution must also have an impact on the selectivity of evidence. It is not justifiable that criminal

proceedings for an alleged economic offense case begins with the submission of material to the court, which covers quite a few thousand pages, although it is clear that much of the provided material is not even applicable. However, it burdens the study of the case and engages judges with fruitless browsing of the extensive materials due to a "fear" of overlooking something, which could be important for deciding on the merits of the case.

6 Conclusion

For judicial deliberation of economic crime it is important that at the beginning of the criminal procedure all disputed legal questions are solved as preliminary questions originating the area of civil and commercial law (Article 23 of the CPA). Otherwise, the problems in resolving such matters in further proceedings will only intensify, which makes the adjudicating process more difficult and time-consuming, even in cases where the objective factual situation is essentially undisputed, and the whole matter is concentrating primarily on the disputed legal issues regarding substantive and procedural criminal law. In resolving legal issues, it often happens that they are transformed into factual issues, which can create the impression that a large-scale investigation is required, although in reality a clear definition of the legal significance of undisputed facts is necessary. The unsolved legal issues in preliminary criminal proceedings are reappearing at the official charge phase and objection to the charge phase when the question is being answered if the act described in the charge corresponds to the elements listed in Article 269(1), point 2, of the CPA regarding the description of the act evincing and showing that it falls within the statutory definition of a criminal offense, the time and place of commission of the criminal offense, the object upon which and the instrument by which the criminal offense was committed, and other circumstances necessary to determine the criminal offense with precision. And they may continue through the rest of the procedure.

The adjudication of criminal offenses against the economy requires a multidisciplinary approach. Knowledge of criminal law is no longer sufficient, just as the general knowledge of a criminal lawyer in the area of civil, commercial or administrative law is not sufficient. The handling of these offenses requires from the very beginning the participation of experts from relevant legal areas. The practice, according to which it is proposed to hear experts only in the formal investigation phase, which means that the investigation is being introduced, although legal issues are not clarified, is unsuitable for such offenses. It is therefore appropriate that the public prosecutor, on the basis of Article 165a of the CPA, proposes that the investigating judge performs a specific act of investigation if the execution of such an act is necessary for his or her decision of whether to dismiss the crime report or start criminal prosecution.

According to the pending proposed amendment to the CPA (Reform CPA-N), the provision of Article 165a of the CPA (Dežman, 2017: 28–32) would undergo a significant change, since, based on this provision, it would be clarified at the preliminary police stage of what is supposed to be clarified in the formal investigation phase. The investigation phase is supposed to remain, but it should be considered and used only if the public prosecutor is not able to decide whether to dismiss the crime report or start criminal prosecution on the basis of Article 165a of the CPA.

The legal possibilities for the investigating judge to clarify those legal issues relevant to the assessment in the request for a formal investigation are provided by Article 178(8) and (9) of the CPA. According to Article 178(9), the investigating judge may, prior to the decision on the investigation and after the questioning of the suspects was carried out, in order to clarify specific expert questions arising in connection with the evidence obtained, the hearing of the suspect or due to other investigative measures, call for an expert to provide necessary expertise. If the parties are present, they may request that this person provides more precise explanations, and if necessary, the investigating judge may also request explanations from a relevant expert.

Only by taking advantage of the possibilities offered by the existing criminal procedure in the area of deliberating on economic crime, the same result can be achieved without a radical reform of the criminal procedure in order to make it faster, more rational, perhaps even fairer and more objective in the deliberation process on economic crime.

Notes

[1] OJ of the Republic of Slovenia, No. 50/1 (officional consolidated text), 6/16 , 54/15, 38/16 and 27/17.
[2] See also the Annual Police Report 2016 (http://imss.dz-rs.si/imis/4018b7ddaa8518ae7235.pdf), p. 85.
[3] On the theoretical, legislative and practical problems of the crime of abuse of position or trust in business activity see also the excellent monography Turinek, 2016.
[4] OJ of the Republic of Slovenia, No. 32/07 (officional consolidated text).
[5] Social theory, as stated by *Kanduč and Flander,* is being flooded by terms marking a new age, such as postmodern, post-industrial, post-Freudian, post-capitalist, late-capitalist, disorganized-capitalist, neo-liberal, gambling, radicalized, high-risk, light, crisis, virtual, digital, reflexive, Darwinistic, society of bourgeois ruthlessness, society of fear, uncertainty, hedonistic, media spectacle society, etc. See Kanduč, 2005, and Kandič, 2008: No. 4.; see also Flander, 2012: 29, ft. 16.
[6] Capitalism is supposed to be based on protestant ascetic ethics, without a consensus existing.
[7] Parsons' idea is being highlighted by Igličar analysing Wallerstein's theory as important but overlooked, probably as being perceived more near to Marxist sociology.
[8] OJ of the Socialist Republic of Slovenia, No. 12/77.
[9] OJ of the Republic of Slovenia, No. 63/94.
[10] OJ of the Republic of Slovenia, No. 55/08.
[11] OJ of the Republic of Slovenia, No. 91/11.
[12] OJ of the Republic of Slovenia, No. 27/2017.
[13] For example, control of a dangerous object, control over third persons (for example, children), employment obligations, etc.
[14] OJ of the Republic of Slovenia, No. 97/2007.
[15] See Supreme Court of Slovenia, No. III Ips 97/2015 of 9 December 2015.
[16] Constitutional Court RS, No. 889/2014, 20. April 2015, para. 16.
[17] OJ of the Republic of Slovenia, No. 58/11.
[18] Supreme Court RS, No. I Ips 10349/2009, 14. 7. 2011

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