Univ.-Prof. Dr. Robert KERT,
Vienna University of
Economics and Business

Pregledni članak
UDK: 343.353
Primljeno: 15. juna 2014. god.

ABUSEOF POSITION OFRESPONSIBLEPERSONACCORDING TO ARTICLE 234 ACCORDINGTOCRIMINALCODEOFSERBIA[1]

1. Introduction

The following short presentation shows the results of an expertise which was written on behalf of the Ministry of Justice and the OSCE in spring 2014. A view from outside on a legal system always depends – necessarily – on information which is given to one, and it is clear that it is not based on inside knowledge on the legal system. However, the study is based on a number of interviews with practitioners, representatives of the Ministry of Justice, and NGOs, who gave an overview on the practice of judicial authorities. Such a comparative view from outside helps to highlight specific characteristics or problems of legal provisions. Therefore this comparative view will be the main focus of this presentation.Solutions of the problems always must be found within each legal system. Thus,it is not the aim to prescribe a certain solution as the best for the Serbian criminal law, but to show possible ways to fight against economic crimewhile respecting the requirements of the principle of legality.

1 Paper presented at the Fifty-fourth regular annual conference of the Association for Criminal Law Theory and Practice, 19 September 2014.Many thanks to *Peter Komenda* for his support during the preparation of the presentation.

2. Article 234 Serbian Criminal Code: Abuse of position by responsible person

According to Article 234 a responsible person who through abuse of his position or powers, exceeding his powers or failure to discharge his duty obtains for himself or another natural person or legal entity unlawful material gain or causes material damage to another, shall be punished with imprisonment from three months to three years.

Article 234of the Serbian Criminal Code was introduced in 2012. On the one hand, the reason for its introduction was that Article 359 (Abuse of Office) as an offence which refers to officials after the privatisation of state companies was no longerapplicable to heads of privatised enterprises. On the other hand, statistics showed that economic criminal offences foreseen in the Serbian Criminal Code have not or only rarely been applied to such acts committed in private companies. It was regarded necessary to implement a new offence in orderto punish acts committed by authorised persons in such privatised companies.

Article 234 is constructed very similar to Article 359. The main difference is that the perpetrator is not an official, but a "responsible person". After the introduction of Article 234 most of the cases (around 94%), which had formerly been charged under Article 359, have been re-qualified and prosecuted on basis of Article 234 Criminal Code. Only a few cases were re-qualified asother criminal offences.

During discussions the Serbian lawyers mentioned examples of cases which have been prosecuted and charged on the basis of Article 234 Criminal Code. These examples show that very different types ofbehaviourare subsumed under the provision. The acts which are prosecuted on the basis of this provision range from classical offences against property like issuing a loan without sufficient securities over fiscal offences as tax evasion and smuggling to forms of corruption and infringements of capital market law, or theabuse of public budget used by private entities or the abuse of subsidies.

On the one hand, Serbian practitioners emphasize that such a provision is necessary, since the existing criminal provisions would not be adequate to protect property in a market economy anymore. On the other hand, it was mentioned that it is a problem to prove specific elements of criminal offences. It is seen as an obstacle to prove for example tax evasion or a specific form of intent. Therefore it is regarded as a practical problem to apply specific offences instead of using a far-reaching general offence.

3. Comparative view on the legislation in other states

Article 234 is a very general and comprehensive statutory definition of offence which covers a lot of different behaviour, since it contains quite a lot of vague legal terms. A comparative view on the legislation in other European states shows that comparable statutory definitions like Article 234 only exist in other post-Yugoslavian states. Among the states which were compared, merely Slovenia and Montenegro contain similar provisions. In Croatian criminal law a new provision "Abuse of trust in business dealings" (Article 246) was introduced in 2011 that replaced four other provisions, called "Abuse of a position or power", "Unscrupulous economic activity", "Harmful conclusion of a contract" and "Abuse of economic authorisation". These statutory definitions were partly wide and overlapped, which caused confusion in the practical application of the provisions. The new provision "Abuse of trust in business dealings" is similar to the German and Austrian provisions on abuse of trust, but is different in some details.

Most criminal law systems do not contain one wide criminal offence for the protection of property like Article 234 Serbian Criminal Code, but provide for a number of specific criminal offences to protect another person's property. That is the case e.g. in Germany, Switzerland, Italy, Spain, Austria and France. Even if the provisions on "abuse of trust", which are most similar to Article 234, in the different states differ in detail, they all provide that the offender causes damage to the person, whose property interests he is responsible for. Differences between states exist with regard to the scope of application of the offences. As for example the German provisions are quite wide, the statutory definition of Austria is significantly narrower. Spain implemented a highly specialized provision in 1995, which targets the abuse of trust in certain corporate contexts. The French andItalian legal systems contain no general provision sanctioning the abuse of trust. Instead, some aspects are covered by various provisions. However, all states provide for limits of the scope of application as there are e.g. special requirements regarding the intent. In some states an additional intent of obtaining for himself or a third person an unlawful financial gain is required. Other states require that the trust is abused knowingly. In all systems, the group of offenders is limited in some way, e.gthe perpetrator must be a de facto or de jure director, shareholder or partner of a company incorporated or under formation.

All legal systems provide for a number of other provisions, as e.g. fraud, the non-payment and misuse of wages and salary, the misuse of cheque and credit cards, the misappropriation of entrusted property, computer fraud,insurance fraud, capital investment fraud, obtaining services by deception, receiving of gifts

by officeholders, subsidy fraud, abuse of subsidies, or unlawful appropriation. Moreover, all criminal laws contain provisions on active and passive corruption.

4. The requirement of a sufficiently clear legal basis (Principle of lexcerta)

What are the problems of the provision of Article 234?

According to Article 7 of the European Convention on Human Rights (ECHR) no one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed.

As the European Court of Human Rights pointed out, Article 7 para. 1 of the Convention embodies the principle that only the law may define how a crime is constituted and prescribe a penalty (nullumcrimen, nullapoena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined by law. This requirement complements the principle of legality.

This condition is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will render him criminally liable.[2] This means that at the time the offender commits the offence the relevant law taken as a whole must be formulated with sufficient precision in order to enable the applicant to discern, to a reasonable degree, the scope of the penalty.[3] Also Article 34 of the Constitution of the Republic of Serbia requires legal certainty in criminal law.

The wording of Article 234 Serbian CC is very wide and not clearly defined. Following the jurisprudence of the ECtHR, it is difficult for the individuals to foresee which acts or omissions are punishable. On the one hand the term "responsible person" is not clearly defined. The definition is wide and from the wording the circle of possible offenders is very broad. Nearly every person who has any responsibility can be the offender. In most of the other legal systems analysed the circle of perpetrators is defined more precisely; e.g. by defining the offender as a person who has got the power to dispose of assets of another person or to make binding agreements for another person (Germany or

2 ECtHR 25 May 1993, Case Kokkinakis v. Greece, App.No. 14307/88.

3 ECtHR 12 February 2008, Case Kafkaris v. CYP,App.No. 21906/04; ECtHR 10 February 2009, Streicher v. Germany, App.No. 40384/04; see Grabenwarter, European Convention on Human Rights, Munich 2014, Art. 7 recital no. 10.

Austria). In some countries as e.g. Italy or Spain, a perpetrator of offences similar to Article 234 can only be a person who is member of the managing board or executive director.

On the other hand the incriminated acts – particularly the term "abuse of his position or powers" – are very far-reaching and the scope depends on the interpretation by the courts. In connection with the wide term "abuse of his position and powers" the formulation "obtains […] unlawful material gain or causes material damage" opens a wide scope of application, since there is no limitation. However, not every unlawful gain or material damage which is caused by the abuse of a position must be punished. The current Serbian law and practice can lead to the result that even wrong economic decisions are punished, or that someone is punished for misconduct which enriches him/her, but does not cause any damage to another natural or legal person. Compared to legal provisions in other states such an alternative result of damage or enrichment is not usual. Most legal systems require the damage of another person or at least the endangerment of another's property and additionally at least the intent to enrichment of the perpetrator.

The consequence is that the statutory definition of the offence in Article 234 is extremely broad and it is difficult to identify the limits of the definition. A lot of different behaviour could fall under the provision, which makes it hard to foresee which conductis covered by the provision. In other states such different behaviour is covered by various statutory definitions – e.g. embezzlement, fraud, breach of trust, corruption. As a consequence the provision gives judges the possibility to have a high degree of discretion to decide which behaviour is punished according to Article 234. As a result it is difficult for the individuals – particularly also for businessmen from abroad – to foresee which behaviour is punished and which is regarded as an accepted economic activity. Such a legal situation could deter foreign businessmen from conducting business or to found or take over companies in Serbia, since they might be afraid to get punished because of a behaviour which is justified in other legal systems and they cannot foresee which conductis punishable.

5. **"Fragmentary character" of criminal law**

It is common doctrine that criminal laws have a so-called "fragmentary character". This means that in criminal law the legislator has to introducecertain statutory definitions which constitute clearly defined and distinct offences and that it is accepted that certain behaviour is not punishable, since it is not covered by statutory definitions of offences. It is characteristic for criminal law that gaps

remain. Therefore it is regarded typical for criminal law that it is not complete.[4] The ratio behind this consideration is that a criminal penalty constitutes a serious interference with the rights of the individuals and it is the harshest instrument which a state can use to react toinfringements of legal provisions. Therefore criminal law shall only be applied if other instruments are no longer-effective, in the case that the violation of rules is particularly serious. If also a conduct which does not seriously cause social harm is subject to criminal sanctions, the danger arises that criminal law is not taken serious by individuals anymore.[5] Moreover, the fragmentary character of criminal law is today seen as a symbol of a free and liberal statethat is governed by the rule of law.[6]

Such a far-reaching provision as Article 234 Criminal Code entails the risk that even behaviour which is not seriously social harmful is covered by the statutory definition of the offence. Article 234 Criminal Code is a provision which covers a broad field of cases and it is used by the judicial authorities to prosecute a variety of cases which in other legal systems are covered by many specific provisions. The consequence and risk of such a far-reaching provision are that it can also be applied on cases in which it is doubtful whether they should be punished at all. During discussions the following example was mentioned: A head of a business asks a bank company for a loan for his daughter, otherwise his company would finish the business relationship to the bank company and go to another bank company. This conductis covered by the statutory definition of Article 234. However, it is doubtful whether it is worth to punish, since it is a behaviour which is common in a free market and a justified way of doing business, as long it is not immoral and fulfils the offence of coercion.

It is the task of the legislator to decide which behaviour is regarded so serious that it should be punished under criminal law. If a criminal provision is so broad and not clearly defined, the legislator hands this decision over to the judicial authorities which is problematic with regard to the rule of law.

6. **Necessity of Article 234 Serbian Criminal Code**

Compared to the legislation of other states, the Serbian Criminal Code contains all common statutory definitions of offences, particularly offences against property as e.g. theft, embezzlement, fraud or breach of trust, but also

4 Peters,Beschrnkung der Tatbestnde im Besonderen Teil, Zeitschrift für die gesamte Strafrechtswissenschaft 77, 1965, p. 475.

5 See Maiwald, Zum fragmentarischen Charakter des Strafrechts, Festschrift Maurach, 1972, p. 9 ss.

6 Jescheck/Weigend, Strafrecht Allgemeiner Teil, 5thed., Berlin 1996, p. 53.

provisions on active and passive corruption. These provisions are essentially similar to the provisions in criminal codes of other states.

According to Article 216 para 1 of the Serbian Criminal Code ("Abuse of Trust") "whoever acting as procurator for another person abuses the granted authorisation with intent to acquire for himself or another person, or to cause damage to the person on whose behalf he is acting as procurator shall be punished with fine or imprisonment up to three years". In comparison with other legal systems, the Serbian provision seems to have a wide scope of application: First of all, the means for becoming a procurator are not restricted, as it is only required that the offender has been granted an authorisation. Though, the most striking feature of Article 216 is that the abuse must not necessarily lead to damage for the person on whose behalf the procurator is acting, since this is only an alternative, which must not be fulfilled if the offender acts "with intent to acquire for himself or other persons". To conclude, Article 216 gives the means to prosecute a wide range of criminal acts as it defines low requirements for the elements of the crime and abstains from demanding additional elements limiting the criminal liability.

Beside Article 234, the Serbian Criminal Code contains in Article 238 another criminal provision according to which a responsible officer of a company or other economic entity having the capacity of a legal person or entrepreneur who, with the intention to acquire unlawful material gain for the legal person in which he is employed, for another legal person or another economic entity having the capacity of a legal person, commits certain unlawful acts, is to be punished by imprisonment of three to five years. This provision lists a number of acts which are punishable and is more preciselydefined thanArticle 234.

Moreover, the Serbian Criminal Code foresees provisions on "Soliciting and Accepting Bribes" (Article 367) and "Bribery" (Article 368) which do not only cover corruption in relation to public officials, but also private corruption.

Also regarding the infringement of tax and customs provisions specific offences exist in the Serbian Criminal Code. Article 229 contains a criminal offence of "Tax evasion". In addition,according to Article 229a the "Avoidance of Withholding Tax" and according to Article 230 "Smuggling" are punishable.

Furthermore, several specific economic offences regarding payment cards (Articles 225 ss.) computer related criminal offences (Articles 298 ss.) or the abuse of monopolistic position (Article 232) are contained in the Serbian Criminal Code.

7. **Conclusions**

Regarding all these provisions, it seems that most of the relevant cases mentioned in discussions with Serbian lawyers are not only covered by more specific criminal provisionsin other states, but they would also be covered in Serbia by more specific offences, even if Article 234 was removed. Looking at statistics of criminal proceedings (e.g. in corruption cases) it can be concluded that law enforcement authorities in Serbia prefer to use the offences "abuse of office" and "abuse of position by a responsible person" instead of taking the narrower route of more specific incriminations, although such specific criminal offences do exist in Serbian criminal law.

It is clear that such provisions which require stricter criteria are more difficult to prove and could cause problems of gaining evidence. It is much easier to apply a more general provision which does not require specific objective or subjective elements of crime. However, it is doubtful whether such problems of gathering evidence justify the existence of a far-reaching provision like Article 234. From this point of view, Article 234 does not seem to be necessary. The abolishment of this provision would not cause a lot of gaps of criminal liability, if the existing provisions like Embezzlement (Article 207), Fraud (Article 208), Abuse of Trust (Article 216), Soliciting and Accepting Bribes (Article 367) Bribery (Article 368), and Tax Evasion (Article 229)were applied to these criminal acts. If this is the case, the discussions about Article 234 are not a question of decriminalization, but a question of how such unlawful acts can be prosecuted in a way which is in line with the principle of legality as defined by the ECtHR.

In cases which are not covered by the existing criminal provisions it will be necessary to check whether they are actually serious enough that criminal penalties should be foreseen, whether it is sufficient to provide for less serious (e.g. administrative) sanctions or whether it is a behaviour which is justified in the economy.If gaps appear – and this is the concern of representatives of judicial authorities in Serbia – it is the task of the legislator to establish new – clearly defined – criminal offences. It could be thought of offences of investment fraud, inside dealing or market abuse, fraud in connection with tendering procedures (bidding fraud), subsidy fraud and insurance fraud.

However, to avoid gaps of punishment in old cases, which are considered really serious, but which do not fall under one of the existing other criminal offences, it could be considered not to abolish Article 234 immediately, but to provide a time period of two or three years in which Article 234 still does exist and can be applied.