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Orginalni naučni rad
UDK: 343.229:343.37 ; 343.229:343.53
Primljeno: 18. novembar 2011. god.

MISTAKE IN ECONOMIC CRIMINAL OFFENCES

The article deals with mistake of fact and mistake of law with special accent on mistake in economic criminal offences. The author advocates the standpoint that we should differentiate between the effect of mistake of law in the case of acts of commission and acts of omission. The author advocates the standpoint that we should consider about the solution, that mistake of fact can exclude also negligence, at least recklessness. The author finds that on the one hand exists risk for erosion of law because of excessive "subjectivisation" due to admittance of the effect of mistake also for crimes of negligence, but on the other hand denial of this effect opens the door for strict liability. The author calls attention to the particularities of mistake in economic criminal offences and finds, that despite the differences between mistake of fact and mistake of law in the modern criminal law it is more important to differentiate between evitable and/or inexcusable and inevitable and/or excusable mistake than between mistake of fact and mistake of law.

Key words: mistake, mistake of fact, mistake of law, criminal responsibility, guilt, intention, negligence, economic criminal offences, act of commission, act of omission.

1. Introduction

To be mistaken is a property which is so human, that it should be taken into consideration also in the law. It is possible to find out from the oldest preserved legal

sources, containing unsystematically collected provisions of civil and criminal law, that mistake could exclude criminal responsibility and by that also a perpetrator's punishability. We can take as an example the Hammurabi's Code of Laws from 1673 BC, which determined in the Article 154 the punishment that will be imposed on the person who will be guilty of the carnal knowledge[1] of his daughter. The penalty provided for such a person is to be driven from the place (exiled)[2]. We can see from this provision that this punishment was inflicted only upon the person who had knowingly a sexual intercourse with his daughter. Yet, if a person returned after many years of absence to his native place and had an intercourse with his daughter without having recognized her or known that it was his daughter, he would not be punished. His ignorance or mistake would therefore exclude his responsibility and by that also his punishment. It has nevertheless to be pointed out in this regard that the existing legal orders have always made a distinction between situations that are today denoted as mistake of fact and those which are defined as a mistake of law. This distinction is well illustrated by a couple of known Latin legal maxims from the Roman law.

"Ignorantia facti non nocet – Ignorance of facts does no harm". This Latin proverb indicates that the ignorance of actual circumstances does no harm to a party. Someone, who was due to ignorance of facts in error, can invoke to it and require the annulment of legal effects resulting from the error[3]. In the field of criminal law, a mistake of fact can nevertheless lead to the exculpation of a perpetrator.

It is different with the mistake of law, because it does not have as a rule such a legal effect. "*Ignorantia iuris nocet* – Being ignorant of law harms" indicates that a party cannot successfully invoke his ignorance of the law. Criminal law represents certain exception to this rule, because it takes partially into account also a mistake of law

The content of a maxim "*Ignorantia legis neminem excusat* – ignorance of the law is no excuse to anyone" has basically the same meaning. In general, someone cannot invoke his ignorance of a law – either its existence or its content – that he violated with an act of commission or omission or did not take it into consideration[4]. In this connection a question may arise, whether there is any difference between *ignorantia iuris* and *error iuris*. Professor Korošec supported a view that it is essential for whatever mistake to ignore some fact, certain ignorance *(ignorantia)* of a party. According to him, the expressions *error* and *ignorantia*[5] were used in Roman law as equivalent. If Roman law really used the expressions *error* and *ingnorantia* as a synonym, then there is no difference. But as soon as we define

1 It is a question of a sexual intercourse.

2 Cf. V. Korošec, Slovenski prevod določb Hamurabijevega zakonika (Offprint), p. 73, the provision 154 and M. Višić, Zakonici drevne Mesopotamije, p. 115, the provision 154.

3 J. Kranjc, Latinski pravni reki (1994), p. 109.

4 J. Kranjc, Latinski pravni reki (1994), p. 110.

5 V. Korošec, Rimsko pravo (1972), p. 68.

ignorantio iuris as the ignorance of the law and the *error iuris* as it is defined in some contemporary legal orders – that is as an error regarding the forbiddenness of an act – the difference appears evident in the field of criminal law. Although there is a question of mistake in both cases, the definition of *ignorantia iuris* is nevertheless considerably wider. It namely comprises all norms of a legal order or a statute, including the norms which command or prohibit something, while the *error iuris* would encompass only the norms that prohibit something. Such a distinction is meaningful only in such a legal order which contains in its criminal law besides crimes of commission also the real crimes of omission. In the legal order, defining a mistake of law as a mistake about forbiddenness, the question would arise about the effect of a *mistake on an act being commanded.*

It is possible to see from the preserved legal sources that the oldest sources already contained the real crimes of omission. So it is stipulated, for example, in the Article 109 of the Hamurabi's Code of Laws, that the tavern-keeper shall be put to death, if the criminals, who meet in the house of a tavern-keeper, shall not be captured and delivered by her to the court[6]. It is obvious from this provision that there was a clear duty to apprehend the perpetrators and bring them to court, while the neglect of duty envisaged a death penalty.

The real crimes of omission were known also in Roman law. The famous *crimen maestatis* could be reported to the authorities also by soldiers, women, adolescents and the infamous, because they all had, according to the Paul's references, to take care of the wellbeing of the *princeps* and the *subsistance* of the state. Even slaves were requested to report their masters. Parents were forced to report their children and the children to report their parents[7].

The mentioned examples show that it would be meaningful to make a distinction between *ignorantio iuris* and *error iuris* (as a mistake about forbiddenness), but the question is, whether this distinction has ever been made. It is far more probable that it was not made and that expressions *ignorantia* and *error* were used as equivalent terms, since even the contemporary legal systems do not make any difference.

2. Mistake of law

Slovene penal code (hereinafter PC-1)[8] defines the mistake of law as a mistake on unlawfulness. In the first paragraph of the Article 31 it is stipulated that the

6 Cf.: V. Korošec, Slovenski prevod določb Hamurabijevega zakonika, p. 67, Provision 109 and M. Višić: Zakoni drevne Mesopotamije, p. 112, Provision 109.

7 J. Kranjc, Glavna kazniva dejanja rimskega kazenskega prava. In: Zbornik znanstvenih razprav (1988), p.14.

8 Criminal Code (PC-1), Official Gazette of the Republic of Slovenia no. 55/2008; 66/2008 (amendment); 39/2009.

perpetrator of a criminal offence shall not be held liable if, for reasons which can be justified, he did not know that such an offence was unlawful. In the second paragraph it is set out that there are no justified reasons referred to in paragraph 1 of this article, if the perpetrator was not aware of legal regulations with which he could have familiarised himself under the same condition as other people in his broader environment or he should have known special regulations in relation to his work, role or general position. In the third paragraph it is provided that the court may reduce a sentence to a perpetrator, who committed a criminal offence deemed as a mistake of law, which he could have avoided.

Slovene penal code departed with this solution from the classical regulation claiming that being ignorant of law harms. In distinction from the previously valid regulation of mistake of law, according to which a justifiable mistake of law represented only a ground for the facultative mitigation of sentence or its remission, the current regulation of a justifiable mistake of law constitutes a ground for the exclusion of guilt. It is an important modification which has been differently assessed by authors. Some of them think that it is a positive qualitative change[9], while some other authors oppose this solution[10]. Regardless of one's attitude towards this modification, it has nevertheless to be admitted that it represents an important change that is in conformity with the contemporary trends in criminal law. In spite of such a qualitative change, this provision does not enable a wide application of the institute of mistake of law. If we compare the previously valid (classical) and the current regulation, we can conclude that the previous regulation enabled a broader application of this institute as does the current one. According to the previous regulation, a court could reduce the sentence or even remit a sentence to the perpetrator, who for reasons which can be justified, did not know that such an offence was prohibited. Under the current regulation, the court may reduce the sentence to a perpetrator who acted in avoidable mistake of law, but his sentence may not be remitted. We would like to illustrate this with a concrete case. Let us take, for example, a citizen of an Arab country, brought up in Muslim religion and culture. He comes to Slovenia and concludes a new marriage, although he has already been married in

9 See, for example, L. Bavcon, Uvodna pojasnila h KZ RS (1994), p. 39; L. Bavcon, A. Šelih et al. Kazensko pravo, splošni del (2003), pp. 319-320; Z. Dežman: Spremememba v strukturi krivde in pojem pravne zmote, in: Pravnik 51 (1966) 4-5, p.170.

10 Professor B. M. Zupančič was against such a solution even before it was adopted in the penal code, because he thought that it would mean an excessive subjectivisation of criminal law. See: B. M. Zupančič: Deontologija pravne zmote – Meje subjektivizacije kazenskega prava. In: Pravnik 42(1987) 5-7, pp. 305-320. His attitude is particularly negative on the p. 318, where he puts: It is clear from this viewpoint that the error on the forbiddenness stricto sensu cannot be a ground for the exclusion of criminal responsibility and even less for the exclusion of unlawfulness. It this occurs, we cannot speak anymore about a theory of law but rather about the dying away of the law.

his country three times. Due to his upbringing and religion he did not even imagine that such an act could be prohibited and punishable. If such a case was processed under the previous regulation, it would be established that such an error does not actually exclude criminal responsibility of the perpetrator, but the court could nevertheless remit a sentence to the perpetrator, who for reasons which can be justified, did not know that this act was prohibited. Under the current regulation, the court should assess whether the perpetrator could have avoided the error. If the court established that the perpetrator could have avoided the error, it could only reduce him sentence, but could not remit it.

The question which can also arise in this regard is, whether a mistake of law can be at all unavoidable. Criminal law is a statutory law. That means that criminal offences can be set down only by a statute. Due to the principle of legality, it is necessary that all criminal offences and penalties provided for them should be determined before having been committed. If a perpetrator could have in whatever way avoided the error, his criminal responsibility would not be excluded. It can be therefore concluded that an unavoidable or justifiable mistake of law will be very rare in practice. A justifiable mistake of law is practically excluded in all the cases of offences referred to as mala in se, because the wrongfulness and unlawfulness of such acts is evident to any reasonable man. Yet, it will be necessary for the court to check also in other criminal offences whether the perpetrator could not have in any way avoided the error. It is very likely that such cases will be very rare.

PC-1 defines a mistake of law as a mistake on unlawfulness. This definition is better than the previous one, yet I think that it does not solve all the problems. Crime of commission and crimes of omission present namely two different situations, which should have also different effects on the mistake of law. In crimes of commission, a perpetrator commits an act because he does not know that it is prohibited. A perpetrator has therefore a notion about all elements of the act he committed, yet he does not know that this act is prohibited. In real crimes of omission, the perpetrator does not know that he has a duty to act, nor does he know what the content of his duty is. A perpetrator, who is not aware in a given situation of his duty to actively intervene in some action, also does not know what he should do. A perpetrator who is not aware what is imposed on him by the commanding norm is therefore in error about the statutory elements of a criminal offence. In real crimes of omission, the error about the commanding norm turns out to be an error about statutory elements of crime – it is as a mistake of fact in narrow sense, which must also have such an effect on the culpability. A fact, which also speaks in favour of this view, is that a law is not equally demanding towards the perpetrators committing crimes of commission and those committing crimes of omission. In crimes of commission (prohibitory norm), it requires from the addressees only the passivity, while in real crimes of omission (commanding norm), it requires from them an active conduct in order to avoid the resulting prohibited consequence.

With regard to different degree of demandingness**,** imposed by the law on an addressee, it is reasonable to expect also different effect of mistake in crimes of commission and in real crimes of omission.

3. Mistake of fact

Mistake of fact is set out in the Article 30 of the PC-1. In the first paragraph it is stipulated that the perpetrator, who committed as a mistake of fact an offence, which is defined by law as an intentional criminal offence, shall not be guilty. In the second paragraph it is set out that an offence shall be deemed to be committed as a mistake of fact, if the perpetrator at the time of committing a criminal offence was not aware of the circumstances, determined by law as statutory elements of criminal offence or he erroneously believed that the circumstances were such that this act would be admissible or not punishable. In the third paragraph it is provided that the guilt of the perpetrator for a criminal offence, committed out of negligence, cannot be excluded if he was in error regarding circumstances which he should and could have been aware of within the limits of required carefulness. Prof. Bele points out in his commentary of this article that we should not rely only on the linguistic interpretation, because it could lead us to the conclusion that the statutory text is in the contradiction with itself. The true contents of the mistake of fact, such as defined in the second paragraph of the Article 30 of the PC-1, is that the perpetrator, who realized with his conduct all the elements of a criminal offence, was not aware of individual circumstances of his conduct. In this regard must be stressed, that it is not important to commit an error regarding whatever element of a criminal offence, but to commit only an error regarding those elements of a criminal offence which have to be comprised in the perpetrator's intention. Mistake of fact does not exclude the guilt in all cases, because a perpetrator, who committed a criminal offence out of negligence, can be guilty, although he was in error[11].

A mistake in general means that the perpetrator does not have any notion at all regarding certain fact or that he has an erroneous belief about certain fact or circumstance. Due to his ignorance or erroneous belief, his decisions might be also wrong, as well as the conduct, arising from these decisions.

The analysis of the second paragraph of the Article 30 of the PC-1 shows that criminal responsibility of the perpetrator is excluded in two types of mistake of fact. The first one refers to the statutory elements of a criminal offence and is denoted as the mistake of fact in narrow sense. The second one applies to the circumstances which would exclude the existence of a criminal offence if they were really present and it is called a mistake of fact in wider sense[12].

11 L. Bele, Kazenski zakonik s komentarjem (2001), pp. 179-180.

12 L. Bavcon, A. Šelih et al., Kazensko pravo, splošni del (2003), p. 314. Cf. I. Bele, op. cit. p., 180.

4. Mistake of fact in narrow sense

Mistake of fact in narrow sense is either the ignorance or an erroneous belief about certain element of a criminal offence which is determined by law, or it occurs when the offender was not aware of some of those objective circumstances of his act, which are significant for the determination of this act as a criminal offence. Mistake of fact in narrow sense is the negation of intention, or as claims professor Bele, mistake of fact means the absence of that consciousness (foresight), which constitutes the mental element of a perpetrator's intention[13].

In principle, it is not possible to oppose the mentioned statements. But they nevertheless indicate that the mistake of fact in narrow sense is not only the negation of intention, but also the negation of recklessness. The error has namely an impact on the man's consciousness and only through it, on his will and conduct. With regard to the fact that a conscious component of eventual intent is identical to the conscious component of recklessness[14], it is obvious that the error, which represents the negation of mental component of eventual intent, is therefore also the negation of mental component of recklessness. Prof. Bele supports a view that it is not necessary to specially regulate in the penal code the mistake of fact in narrow sense for those criminal offences which are committed out of negligence[15]. I nevertheless think that this provision is necessary, if the legislator wants to make crimes of negligence punishable, although I am not convinced that the adopted statutory solution is correct. A ground for the reproach, addressed to the perpetrator acting in eventual intent, is that by realizing a conscious component of his act (see note 14), he consented also to the resulting prohibited consequence. If a consciousness, constituting the mental component of intention, is due to error deformed or even absent, there is no ground for reproach, hence it is not possible to speak about a perpetrator's culpability. A ground for the reproach, addressed to a perpetrator who committed an offence out of recklessness, is that in realizing a conscious component of an offence (which is the same as in eventual intent), he carelessly thought that the consequence would not arise or that he could have avoided it. If a consciousness, which constitutes the mental component of recklessness, is due to error deformed or even absent, there is no ground for reproach. Yet, in the third paragraph of the Article 30 of the PC-1, it is explicitly required to establish whether the perpetrator was in error due to negligence. So we are faced with the situation, when it is necessary to establish whether a perpetrator was in negligence due to error, which is the negation of

13 L. Bavcon, A. Šelih et al., op. cit., p. 315; I. Bele, op.cit., p. 181.

14 The perpetrator must be in both cases aware of:
- all statutory elements of the criminal offence
- the possibility that his conduct will entail a prohibited consequence
- a causal connection between his conduct and the resulting prohibited consequence.

15 I. Bele, op. cit., p. 185.

recklessness. This however raises a question whether this solution is in conformity with the principle of legal certainty, because it requires from people, who correctly perceive a world around them, to check all the time whether they have correctly perceived or assessed what is going on, or they might be in error and risk a prosecution on the ground of offence committed out of negligence. Such a situation is far from what we understand as legal certainty.

With regard to the above mentioned, I think that it would be necessary to think about the solution according to which a mistake of fact would exclude also recklessness as an autonomous form of culpability. And what it would remain, if we adopted such a solution. In this case we would have only a criminal negligence, which represents in its essence the criminalization of mistake[16]. Here it has nevertheless to be pointed out that there can be only one form of negligence in the same actual situation (the same state of facts). If a consciousness (although deformed due to error) is present in a perpetrator, we can speak only of recklessness, because in the case of criminal negligence, there is neither a perpetrator's consciousness (foresight) nor his will. It follows that a perpetrator, who would have an erroneous belief about certain fact or circumstance, will be considered to do an act out of recklessness, while in the case when he would not have any notion at all, there could be only a question of criminal negligence.

A question to be posed in this regard, is whether the mistake of fact can have also an impact on (can exclude) criminal negligence. The answer to this question could be best illustrated by the following example. Let us take a farmer who procured himself a chemical fertilizer (that was not toxic) for his meadows and carefully stored and locked it in a storehouse. His neighbour, who wanted to take a revenge on him, entered with a forged key in the storehouse and changed the fertilizer with very toxic poison that was apparently exactly the same as the fertilizer. The neighbour wanted to cause by this act the poisoning of grass which would cause the death of cattle. The farmer, who did not remark that the fertilizer was changed, dispersed it on his meadows. A heavy rain washed out the poison and it entered in the rainwater collector, which was used by villagers for drinking water. Two of villagers got a light poisoning due to the polluted water, because they were drinking the unboiled water. Such a conduct would in objective terms constitute the elements of a criminal offence of the pollution of drinking water under the first and second paragraph of the Article 336 of the PC-1[17]. In such a state of fact, it can be unani-

16 A perpetrator is deemed to commit an act by criminal negligence, when he is not aware that a prohibited consequence might result from his conduct, but according to the circumstances and his personal properties he should and could have been aware. The very fact to not be aware of certain circumstance constitutes a typical mistake.

17 Article 336 of the PC – 1 Pollution of Drinking Water:
(1) Whoever pollutes water used by people for drinking water with any noxious agent, thereby causing danger to human life or health, shall be punished by imprisonment of up to three years.
(2) If the offence under the preceding paragraph is committed through negligence, the perpetrator shall be punished by a fine or by imprisonment up to three months.

mously said that there is no ground for any reproach to be addressed to the farmer, who with regard to the given circumstances and his personal properties, should and could have been aware that a prohibited consequence might result from his conduct, which actually happened. Opinions regarding the reason why there is no ground for reproach can be different. I personally think that the farmer did not know what the state of fact was, which is by its content an error.

By a practically unanimous viewpoint according to which the mistake of fact in narrow sense represents the negation of intention, it has nevertheless to be pointed out that we can also have cases when the mistake of fact concerning one or even all statutory elements does not exclude the guilt of a perpetrator, but have only an impact on the legal qualification of the act. This situation can also be best explained by the following example.

Let us take for example a person A, who promised in advance to the person B to hide the items that B as a warehouseman will take from the warehouse in which he worked. These items were taken from B five times. B took as a warehouseman and carried away the articles from a warehouses four times, while the fifth time he broke in a closed cupboard in the warehouse and took the items out of it. A did not know that. He was convinced that the action was carried out the same way as in the first four cases. Items, which B brought to A, were stored by him in his place and then he sold them. The A's conduct could be defined as a criminal facilitation. Aiding as a form of participation needs a double intention: the intention for aiding and the intention for a criminal offence in which a perpetrator provides his help. A problem in the mentioned case is that A promised his aid for embezzlement, but in the fifth case B did not commit an offence of embezzlement but the offence of grand theft, which was not present in the A' intention. In the case when a perpetrator commits some other criminal offence than that in which he was promised to be helped, we can speak – at least from the viewpoint of the aider - of inappropriate attempt which is not punishable. Yet, in the mentioned case, I think that the aider's error about a criminal offence – about all elements of a criminal offence – would not exclude his guilt, but would have only an impact on different legal qualification of the act. That means that A would be held liable as the aider also for the fifth act, but not for grand theft but for embezzlement. Mistake of fact about statutory elements would entail in this case only a different legal qualification.

The mentioned case seems interesting, because it indicates that it is necessary to carefully consider in judicial practice every single case, as it might happen to be confronted with a case in which it is necessary to depart from the generally adopted solutions.

5. Mistake of fact in wider sense

Mistake of fact in wider sense is an error concerning a particular circumstance, which would exclude the existence of a criminal offence, if it was really present. Professor Bavcon advocates a view, that in the case of mistake of fact in wider sense, the intention is always excluded in that part, which requires a perpetrator's consciousness about the socio-ethical forbiddenness of his conduct and its consequences[18]. On the other side, Professor Bele thinks that when the mistake of fact in wider sense has been established, it is not possible to recognize in the perpetrator's conduct either his intentional culpability or any other subjective elements of culpability. In the mistake of fact in wider sense, the exclusion of intention can be deduced only indirectly, because it is not possible to claim that a person, who erroneously deemed his act to be allowed, committed the offence intentionally[19].

I myself do not have any objections against the fact that the mistake of fact in wider sense excludes a perpetrator's guilt in intentional criminal offences. Yet, a reason for the exclusion of guilt does not lie in the absence of intention, but in the absence of consciousness (foresight) about the forbiddenness of the act, which is according to the Article 24 of the PC-1, an autonomous constitutive element of culpability[20]. For the reasons of logics, I cannot admit the view that a person, who in a putative self-defence consciously and willingly inflicts an injury on the alleged attacker, did not act intentionally. A person who acted in a putative self-defence, intentionally (consciously and willingly) injured the alleged attacker, erroneously believing that circumstances, which would exclude the unlawfulness of his conduct are present, what is ultimately a ground for the exclusion of his guilt. Yet, the view I support leads to the problem, if the legislator insists on a criminal responsibility of a perpetrator, who was in error by negligence and committed by negligence an act which is punishable by law even if committed by negligence. So we are in the situation when a putative self-defence excludes in intentional criminal offences a perpetrator's guilt; on the other hand, in criminal offences which are punishable also when committed out of negligence, the perpetrator, who was in error by negligence, would be punished for an act committed intentionally, as it were committed out of negligence. It is a problem which was already observed in the preparation of the German Draft Criminal Code from 1962, which envisaged in the regard of mistake

18 L. Bavcon, A. Šelih et al., op. cit., p. 316.

19 I. Bele, op. cit., p. 184 and 185.

20 Article 24 of the PC-1: Guilt
(1) Criminal liability shall be imposed against the person with the court judgement, which alleges that he is either guilty of the committing or omission, determined by law as a criminal offence, and on the basis thereof it shall impose a lawful criminal sanction or remit the sentence.
(2) The perpetrator shall be guilty if he has committed a criminal offence with intent or by negligence and when he must have or could have been aware that his conduct was unlawful.

of fact the same solution as it is provided in the Article 30 of the PC-1. They wanted to solve this problem in such a way as to not apply the second section of the Paragraph 20 of the Draft Criminal Code (which was by its content the same as the third paragraph of the Article 30 of the PC-1) to putative self-defence and to impose in the case of avoidable mistake on the perpetrator only milder punishment for a criminal offence committed intentionally. This solution aroused harsh criticism and was even rejected by a positive law and the problem left to be resolved by the theory and judicial practice[21]. It seems that it is not possible to find within the given frames whatever solution. Yet, the solution appears, if we admit that the mistake of fact in wider sense excludes the culpability also in the case of recklessness, while criminal negligence is for the conceptual reasons practically unthinkable in connection with the mistake of fact in wider sense.

What are therefore the implications of mistake of fact in wider sense for the culpability of the perpetrator in the case of recklessness? If I stick to my conviction that this kind of mistake does not represent the negation of intention, I have also to admit that it is not the negation of recklessness. What is therefore a ground for the exclusion of a perpetrator's guilt? The ground is a perpetrator's error about certain circumstance which would exclude the existence of a criminal offence, if this circumstance was really present. I completely agree with the opinion of Professor Bele that the general notion of negligence can apply only to the perpetrator's act and the resulting consequence and not to some other facts beyond the description of a criminal offence. In this case, even the avoidability must be out of question, because it is not possible to expect from anyone that he should and could be correctly aware of these circumstances[22]. It is therefore not possible to reproach a guilt to the perpetrator, who due to an error about circumstances, which would exclude the existence of a criminal offence, if they really existed, is not aware and even does not have a duty to be aware that his act is prohibited. A mistake of fact in wider sense leads to the exclusion of perpetrator's guilt in the case of intention as well as in the case of recklessness, while a criminal negligence is something which is conceptually out of question in this kind of mistake.

When discussing the mistake of fact in wider sense, it is necessary to mention also the use of excessive force. The penal code namely contains only a short provision according to which the perpetrator who exceeded boundaries of self-defence could get a milder sentence[23]. And what would happen if a perpetrator exceeded boundaries of self-defence because an error regarding the intensiveness of attack? In such a case this error should exclude his guilt, because it is not logical

21 Roxin: Strafrecht, Allgemeiner Teil (2. Auflage). Verlag C. H. Beck, München (1994), p. 503.

22 I. Bele, op. cit., p. 185.

23 The third paragraph of the Article 22 of the PC-1.

that the error about the existence of attack would exclude the guilt, while the error on the intensiveness of attack would enable only a milder punishment.

6. Mistake in economic criminal offences

Before dealing with particularities of the mistake in economic criminal offences, it would be reasonable to define the notion of economic crime and to examine some of its characteristics. We have to make a distinction between sociological, criminological and criminal law definitions of economic crime and economic criminal law. I would limit myself to the legal definition.

I am aware that no definition could be perfect. It is possible to reproach to any of them to be either too narrow or too broad, or to have any other shortcoming. In spite of that, it seems meaningful to define the concept that will be discussed.

Economic criminal law in narrow sense consists of criminal offences incorporated in the Chapter 24 of the PC-1 as well as of criminal offences, committed by legal persons and taxatively listed in the Article 25 of the Act on Liability of Legal Persons for Criminal Offences (hereinafter ALLPCO)[24].

Besides the mentioned criminal offences, we have in the frame of economic criminal law in wider sense also economic infractions, a category of offences which are less serious than economic criminal offences.

Economic crime, which is a subject matter of economic criminal law, has some characteristics that are significant in dealing with the mistake. The first characteristic of economic crime is to constitute a phenomenon that tends to be very changeable. This feature requires the kind of law which is capable of being adapted to changes. Economic criminal law necessarily consists of blanket dispositions, which can be an obstacle for the creation of precise dispositions and also a source of a mistake - either a mistake of law or mistake of fact. The second characteristic of economic of crime is to be a general phenomenon which does not depend upon any social order. Economic criminal offences tend to overlap in some political systems (in particular in socialist systems) with political crimes, but not in terms of milder treatment of perpetrators, but just the opposite. Economic criminal offences are connected with the economic system and its changes on the one hand, and on the other, the economic system is linked to a political system. Every country has an interest to regulate its relations in economy according to the needs of its governing structures.

The next characteristic of economic crime is a fast development of economy and the globalization, which puts countries in a situation to decide how to follow these changes and how to intervene. It is not needless to point out that all countries protect their economies by the means of criminal law.

24 Liability of Legal Persons for Criminal Offences Act, Official Gazette of the Republic of Slovenia no. 98/2004 (Officially Consolidated Text); no. 65/2008

A common characteristic of economic crime (regardless of differences in political systems) is a class or interest nature of provisions regarding economic crime.

One of the basic characteristics of economic criminal offences is to be directed against the economy or against some of the values, on which is based a contemporary market economy. Motives for the commission of offence are generally not political and as a rule do not constitute the elements of criminal offences. A motive for the commission of an economic offence is generally a desire to obtain a property gain or a need to avoid a loss which would take place in doing normal business.

Economic criminal offences have to be adapted to the needs of contemporary economic policy. In these offences it is necessary even more as in other criminal offences to take into consideration the subjective elements of crime. All criminal offences under the Chapter 24 of the PC-1 are intentional. All offences under this chapter are formulated as general offences, yet according to their nature or the will of legislator, the majority of them can be committed only by a person, performing an economic activity. Negligence as a form of culpability is extremely rare in economic criminal offences.

One of the characteristics of economic criminal offences is also a great similarity with other offences in economy – for example, with infractions. The delimitation between these categories is made possible in some cases on the ground of elements of the offence, and in other cases with regard to the seriousness of a consequence. Sometimes the distinction is based on the agency which was empowered by the legislator to prosecute these offences.

A particularity of economic criminal offences is also the liability of legal persons for criminal offences, which makes problems related to a mistake even more complicated.

Some of the mentioned characteristics have important implication for the issue of mistake. Blanket dispositions, in which the substance of one of the statutory elements of a criminal offence is set out in some other regulation (as a rule in a statute), can represent a source of mistake of law or mistake of fact. Ignorance of the regulation in which is defined one of the statutory elements of a criminal offence is basically a mistake of law. It changes however to the mistake of fact, because a perpetrator, who is not familiar with such a regulation, is in error regarding some statutory element of a criminal offence, which is by definition a mistake of fact in narrow sense. A similar finding applies to all cases in which the unlawfulness in one or other form is not only an element of the general concept of a criminal offence, but also a statutory element of a criminal offence (an act being unlawful, unjustified, in opposition with someone's duties, not allowed). In such cases the mistake of law passes to the mistake of fact in narrow sense and have also the respective effect – it excludes the perpetrator's guilt in criminal offences which are punishable only when committed intentionally.

With regard to the fact that economic criminal offences are as a rule intentional, the finding that a perpetrator was in mistake of fact means in principle the exclusion of his guilt for the committed criminal offence.

Even more complicated is the situation when a legal person can be liable for a criminal offence besides a natural person. In Slovene legal order the liability of legal persons for criminal offences is not general. Since a legal person has its own ground of liability, its liability for a criminal offence is accessory and limited. According to the Article 4 of the ALLPCO, a legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of or in favour of the legal person in the following cases: if the committed criminal offence means carrying out an illegal resolution, order or endorsement of its management or supervisory bodies; if its management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence; if it obtains by a criminal offence an illegally property gain or objects gained through a criminal offence; if its management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them.

This provision is important, because it shows that a legal person is liable for its own contribution to a criminal offence. This means that it is not necessary to find a perpetrator guilty in order to establish the liability and punishability of a legal person. It is enough that the perpetrator's conduct objectively constitutes the elements of a criminal offence, the commission of which has been enabled also by the actions of a legal person's bodies.

ALLPCO defines in the Article 5 the limits of the liability of a legal person for a criminal offence. The liability of a legal person does not exclude the guilt of natural or responsible persons for the committed criminal offence. A legal person shall be liable for a criminal offence even if a perpetrator is not guilty of criminal offence. In regard of criminal offences committed out of negligence, a legal person can be held liable for negligence only when management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them.

In the Article 23 of the ALLPCO it is set out that the provisions of the General Part of the Criminal Code of the Republic of Slovenia shall apply to legal persons unless provided otherwise by this act. As ALLPCO does not regulate the issue of mistake, it is necessary to use in regard of mistake the Articles 30 and 31 of the PC-1 also for legal persons. By establishing that error has an impact on the man's consciousness and through that on his will and conduct, we come across a difficulty; it is namely evident that a legal person cannot have a consciousness nor a guilty mind as a natural person has. In spite of that, it is not possible to deny that the management or supervisory bodies of a legal person can actually act in error.

In this respect it cannot be disregarded that ALLPCO in the Article 4, in which it defines the grounds for the liability of a legal person, explicitly mentions

in two paragraphs out of four (in the first and the fourth) the implementation of an *unlawful* decision, order or endorsement of the management or supervisory bodies of a legal person, or the omission of their obligatory supervision of the *legality* of the actions of employees subordinate to them. A mistake made by the management or supervisory bodies of a legal person regarding the adoption of a decision that is presumably in accordance with the legal order (which is therefore not unlawful) or a mistake regarding the legality of the actions of an employee subordinate to them, can preclude the liability of a legal person in the very fundament and not only in a concrete criminal offence. A mistake (ignorance) of management and supervisory bodies of a legal person about having enabled a perpetrator to commit a criminal offence or a mistake about the legal person's disposal of unlawfully obtained property benefit or the use of objects obtained through a criminal offence, can also lead to the preclusion of liability of a legal person already in the fundament.

A mistake of management or supervisory bodies can lead to the preclusion of liability of a legal person also in concrete criminal offences. Cases, which are particularly interesting are those in which can be liable besides a natural person also a legal person. In such a case, it is either a natural person who can be in error or the management or supervisory bodies of a legal person, or even both of them, that is bodies of a legal person and a natural person. Under the Article 5 of the ALLPCO, a legal person shall be held liable for a criminal offence even if the perpetrator is not guilty of the committed criminal offence. If a perpetrator (natural person) committed a criminal offence in error and his guilt is for this reason excluded, this does not however preclude the liability of a legal person for the committed criminal offence. If a perpetrator committed a criminal offence in unavoidable or justifiable error, it could mean under certain conditions also the preclusion of liability of a legal person for the committed criminal offence. This would be however out of question, if a perpetrator implemented by error a consciously adopted unlawful decision of the management or supervisory bodies of a legal person. In such a case it would be possible to exclude the guilt of a perpetrator, because he acted in error, but there is no way to preclude the liability of a legal person. It is also possible that only the management or supervisory bodies of a legal person would be in error. In such a case a perpetrator would be held liable for the committed criminal offence, while the liability of a legal person would be due to an error precluded. If they are altogether in error, namely a perpetrator of criminal offence and the bodies of a legal person, this can lead to the exclusion of a perpetrator's guilt and the preclusion of liability of a legal person for the committed criminal offence is possible.

In dealing with the mistake of law in connection with economic criminal offences, we cannot disregard the fact that the Republic of Slovenia became on the 1st May 2004 a full member of the European Union. The community legal instruments, encompassing nearly 100,000 pages, became in this way a part of domestic

law of the Republic of Slovenia. With respect to this fact, the question about the avoidable or unavoidable and the justifiable or unjustifiable mistake of law appears in quite a different light as in time of Roman law. It is possible to confirm with certainty that there is no man who would be familiar with all these regulations. It happens that even ministries are not familiar with all the EU regulations which concern their area of work. Taking account of this situation, it is not possible to address to the bodies of a legal person, who due to the ignorance of the EU regulations adopted an »unlawful« decision, a reproach that they could have avoided the error. In the case when the bodies of a legal person undertook all necessary inquiries within the respective ministry before having taken their decision, such a mistake should nevertheless be deemed unavoidable or justifiable.

7. Conclusion

Nearly all authors writing about the mistake try to argument the differences between the mistake of fact and mistake of law[25]. In spite of their efforts and the differences that actually exist in the current definition of mistake of fact and mistake of law, it is not possible to disregard the fact that all kinds of mistake turn ultimately out to be the mistake on unlawfulness. A person, who takes someone else's fountain pen, believing that it is his, acts in mistake of fact in narrow sense (an error about one of the statutory elements), which is the negation of intention and excludes his guilt. Yet, if we look further, we see that a person erroneously believed that his conduct was not unlawful, because he was entitled as the owner of a fountain pen to possess and use it. The same applies to a person who acts in a putative self-defence. This person is also due to an error convinced, that his conduct was not unlawful. What is in fact characteristic for the mistake of law is that someone committed an act, because he did not know that this act was forbidden or unlawful. By coming to the conclusion that all kinds of mistake prove ultimately to be the mistake on unlawfulness, it is questionable whether it is wise to make a distinction between the effects of mistake of fact and mistake of law, since both of them mean a mistake about the same element of the general concept of a criminal offence (basic element of a criminal offence). With regard to different definitions of the mistake of fact and mistake of law, it is also necessary to make distinction between the effects of one and another. A mistake of fact in narrow sense is the negation of the inten-

25 Compare: F., Bačić, Kazneno pravo (1998), p. 266; F. Desportes, F. Le Gunehec, Le nouveau droit pénal (1996), pp. 504-506; Z. Dežman, Sprememba v strukturi krivde in pojem pravne zmote, in: Pravnik 51 (1996) 4-5, pp. 181-183; E. Foregger, G. Kodek: Strafgesetzbuch, Kurzkomentar (1997), pp. 50-51; Kühl: Strafrecht (1997), p. 449; B. Pavišić, P. Veić, Komentar kaznenog zakona (1999), p. 182; C. Roxin, Strafrecht Allgemeiner Teil (1994), pp. 389-390: B. M. Zupančić, Deontologija pravne zmote – Meje subjektivizacije kazenskega prava, in: Pravnik 42 (1987) 5-7, pp. 312-317.

tion, while the mistake of law has no impact on the intention. For this reason it is not possible in the case of mistake of fact in narrow sense to ask whether a perpetrator, committing a criminal offence punishable only when committed intentionally, was in error by negligence. His guilt is excluded, although he could have avoided the mistake. It is different however in the mistake of law, which does not have any impact on the intention. If a perpetrator of the intentional criminal offence could avoid the mistake of fact, this mistake would not exclude his guilt, but would constitute only a ground for a milder punishment.

It is the fact, that the mistake of fact can exclude a perpetrator's guilt not only in intentional but also in non – intentional criminal offences. The question is only to what extent this effect can be acknowledged and introduced in the criminal code. On the one hand there is a risk that the acknowledgement of the effect of a mistake on negligence would cause the erosion of law, due to an extensive "subjectivisation". On the other hand, the non-acknowledgment of this effect opens the doors wide to strict liability. In spite of this dilemma, I nevertheless consider that the "subjectivisation" of law represents a lesser risk than the intrusion of strict liability. I think that it would be therefore reasonable to envisage a solution, according to which the mistake of fact would exclude also negligence, at least recklessness. Until this problem is solved, it would be perhaps not needless to make a signal to judicial practice to examine carefully every single case in order to prevent the intrusion of objective liability through the wide open doors.

In spite of differences between the mistake of fact and mistake of law it is possible to support a view that it is more important in contemporary criminal law to make a distinction between the avoidable or unjustifiable error and the unavoidable or justifiable error than between the mistake of fact and mistake of law[26].

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26 See for example L. Bavcon, Uvodna pojasnila h KZ RS (1994), p. 39.

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