Lucija Sokanović

Fraud in Criminal Law

A Normative and Criminological Analysis
of Fraudulent Crime in Croatia and the Regional Context

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Lucija Sokanović

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List of Abbreviations

AERCP	Act on the Election of Representatives to the Croatian Parliament
AFCOS	European Anti-Fraud Coordination System
ALLPCO	Act on Liability of Legal Persons for Criminal Offences
BG	Swiss Federal Court (<i>Bundesgericht</i>)
BGB	German Civil Code (<i>Bürgerliches Gesetzbuch</i>)
BGBI. I	Official Gazette of the Federal Republic of Germany (<i>Bundesgesetzblatt</i>), Part. I
BGH	German Federal Supreme Court (<i>Bundesgerichtshof</i>)
BiH	Bosnia and Herzegovina
CA	Companies Act
CC / CC97 / CC11	Criminal Code / Croatia Criminal Code of 1997 / Croatia Criminal Code of 2011
COA	Civil Obligations Act
Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
CPA	Criminal Procedure Act
ECHR	European Court of Human Rights
Engl.	English
EPPO	European Public Prosecutor's Office
Fr.	French
GDP	Gross domestic product
Germ.	German

Lat.	Latin
LG	German Regional Court (<i>Landgericht</i>), Austrian Regional Court (<i>Landesgericht</i>)
OG	Official Gazette of the Republic of Croatia (<i>Narodne novine</i>)
OGZ	Austrian General Civil Law (<i>Opći građanski zakon</i>)
OJ	Official Journal of the European Union
OLAF	European Anti-Fraud Office
RCCC	Criminal Code of Republic of Croatia (1990–1997)
RCSC	The Supreme Court of Republic of Croatia
SGA	State Grants Act
SFRY	Socialist Federal Republic of Yugoslavia
StGB	German Criminal Code (<i>Strafgesetzbuch</i>)
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

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Summary

Given the current very dynamic development of all aspects of social life, different forms of criminal fraud are constantly emerging and their incidence increasing. The study of whether, and how exactly, criminal law perceives and adapts to these changes provides a deep insight into inventive acts of commission, greed as motive and final aim, problems with establishing the amount of property damage caused by this behaviour and special traits of the perpetrators. It also allows one to better understand the whole criminal justice system, the importance it puts on property protection, enforcement of decent/non-fraudulent behaviour and appropriate punishment of the perpetrators. These are not only core questions of criminal law as a modern and applicable normative discipline, but also at the very heart of fundamental criminological questions that investigate the reaction of the state in terms of criminal law to potentially harmful behaviour.

At the centre of the study are normative and criminological questions regarding fraud, fraud in economic transactions, subsidy, computer and electoral fraud. In order to set the stage for the more complex analysis, the first chapter provides a detailed introduction into the historical development of the named offences, while also taking a close look at the criminological and victimological meaning of such offences. Finally, the offences' objective and subjective characteristics in terms of act of commission, their object, consequences, and casual link, the traits of the perpetrator and motive or aim of the perpetrator will be thoroughly analysed. This introductory setting of the stage is then followed by five major chapters, each of them dealing with one of the offences. The seventh chapter investigates fraud in other criminal offences contained in the Croatian Criminal Code and creates a framework for a comparative analysis of the findings, based on an analysis of criminal codes of European countries as case studies, with the ultimate goal of recognising similarities and differences in incrimination that is effective in combating fraud. The eighth chapter contains specific examples of fraud in the Balkan region to provide a better understanding of the way in which fraud is dealt with by criminal law in the Croatian context, enhanced with an understanding of neighbouring countries that share similar historical, legal and criminological traits.

The study concludes by providing answers and solutions to some of the most intriguing legal and criminological questions about fraudulent behaviour. These questions range from very basic issues like whether the existing provisions on fraud, fraud in economic transactions, subsidy, computer and electoral fraud adequately protect the appropriate legal good; or whether the provisions of the Croatian Criminal Code, in relation to the subject of research, largely correspond to the relevant provisions of

the German, Austrian and Swiss criminal legislation, given the historical connections in the European legal environment as well as the relevant provisions of the Balkan countries. The investigation continues to highly complex nomotechnical problems like establishing the notion of external and internal facts, predictions, value judgments, non-existing perception in error, special types of fraud as offences of abstract endangerment and damage, while also considering very ramified criminological disputes about traits of the perpetrator or appropriate punishment.

Finally, the study shows that there is a specific group of offences scattered throughout the Criminal Code which all fit the same pattern and reveal the same core-features of fraud. These are dealt with by criminal law in the same manner, hence a “fraud-related criminal law” can be identified. This is applicable for the Croatian Criminal Code, as well as for the criminal codes of the selected European case studies, and even for the Balkan countries’ criminal codes. This should help us in applying adequate measures for effective detection and prosecution these offences.

Keywords: fraud, economic business, subventions, computer fraud, electoral fraud, illicit material gain

Chapter 1

Introductory Remarks

1. Introduction

The second book of Plato's Republic covers the story of a shepherd, Gyges, who found a magical invisible ring, which enabled him to disappear whenever he wanted. The fable of Gyges demonstrates that people do not act morally by nature, but do so purely for conventional reasons. They are forced and obliged by laws and agreements – which they invented – to conceal their weaknesses and prevent each other from threatening each other's survival, i.e., to avoid *bellum omnium contra omnes*.¹ Can this principle also be applied to fraud? Is the history of mankind in fact a history of fraud?² Is fraudulent conduct *modus vivendi* of contemporary societies burdened by corruption, where poverty and destitution intersect with wealth and abundance (or has it always been like that)? The media reports on some type of fraud virtually every day and the manner, circumstances and means of committing the offences are constantly changing, which indicates the perpetrators' ingenuity.

Damages caused by the criminal offence of fraud inflicted upon national economies exceed billions of euros (e.g., according to the 2009 German police statistics, the total fraud-related damages amounted to approximately EUR 2.2 billion).³ Recent research into business crime in Germany, Austria and Switzerland shows that damages resulting from business crime average EUR 30,000 per case. The majority of criminal offences relate to some type of abuse of trust and fraud.⁴ In organised crime, fraud is a fundamental component.⁵

Fraud, a criminal offence which was based on falsification (regarding the units of measure), has become the most common material criminal offence and offence of harm, and a significant guarantee of the criminal law protection of property. It has a tendency to develop into an offence of (abstract) endangerment (in terms of subsidy

¹ Plato 2004, 19.

² From the Garden of Eden to present times, fraud motifs have been recurrent in poetry, literature, theatre and film: "... Exercise caution in your business affairs; for the world is full of trickery. But let this not blind you to what virtue there is: many persons strive for high ideals and everywhere life is full of heroism ..." Desiderata by Max Ehrmann, 1948.

³ Kraatz 2011, 269.

⁴ Heerden, Weller & Weidinger 2013, 32, 46, 55.

⁵ Definition of organised crime is found in Derenčinović, 2001, 71–75.

fraud). The *ultima ratio* function of criminal law is something that should not be forgotten in the development referred to.⁶

I should emphasise two main circumstances which affected the course of the study and the final content of the research. Chronologically and in terms of their significance, these circumstances refer to considerable changes in substantive criminal law in 2011 and the accession of the Republic of Croatia to the European Union on 1 July 2013.

According to the applicable Criminal Law of the Republic of Croatia,⁷ there are four particular criminal offences of fraud, besides the foundational provision on fraud of Article 236: fraud in economic transactions (Article 247); subsidy fraud (Article 258); computer fraud (Article 271); and electoral fraud (Article 338). The Criminal Code which was effective at the beginning of this study⁸ included provision on the criminal offence of fraud (Article 224), electoral fraud (Article 121), computer fraud (Article 224a), fraud to the detriment of the EC (224b), fraud in economic transactions (293) and violation of official duty (Article 344). It is evident from the overview of these criminal offences that there are numerous legally protected objects (assets, the economy, computer systems, programmes and data, electoral rights) affiliated with specific and relatively new branches of law – including economic criminal law, computer crime and financial criminal law – whose understanding requires interdisciplinary knowledge. In Croatian and foreign criminal law literature, there has not been an integral research or paper on criminal law fraud. Therefore, I consider this issue a particularly valuable source of thorough scientific research given the frequency of these criminal offences and the fact that some of them represent novel prohibitions in Croatian (and foreign) criminal law. This also includes numerous issues and ambiguities in Croatian and foreign court practice, as well as inadequate definition of criminal law terminology.

1.1 Aim and Hypotheses

A particularly dynamic development of all aspects of social life is followed by a fast increase of numerous forms of fraud. Therefore, in order to achieve the standard of legal security in a country that strives to be a state governed by the rule of law, it is essential to evaluate the extent to which modern national criminal law protects

⁶ Judges often state that, in many cases, the prosecution of criminal offences of fraud has become the method of coercive collection of due receivables through the sentence of “conditional probation”.

⁷ Criminal Code, OG No. 125/11, 144/12, 56/15, 61/15, 101/17, hereinafter CC or CC11.

⁸ Criminal Code, OG No. 110/97, 27/98, corr. 50/00, 129/00, 51/01, 111/03, 190/03 – Decision of the Constitutional Court of the Republic of Croatia, 105/04, 84/05 – corr. 71/06, 110/07, 152/08, 57/11, 77/11. – Decision of the Constitutional Court of the Republic of Croatia, hereinafter: CC97.

property, the economy, computer systems, programmes and data, electoral rights and the right to evaluate the need for legislative changes *de lege ferenda* in relation to fraudulent offences. This is, in fact, the aim of this research.

As I have already mentioned, virtually every day the media report on various instances of fraud. In order to demonstrate the scope and frequency of these offences, I shall present summaries of several cases.⁹

I.

“King of fraud”, *A.N.* (38), a man from Solin, has finally been arrested! He is the “proud owner” of over 120 criminal charges, mostly for fraud and forgery. He used various aliases. He swindled *N.Š.* (61) from Labin Istarski out of HRK 141,000 using a police badge and the name, *Doris Močibob*. He promised the injured party that he would ensure electricity connection, water supply and entirely service his residential facility. He took the money, but never acted on his promise ... *I.H.* (43) lost HRK 400,000 in a business operation with *A.N.* He met him at the end of September 2008 near Rabac, where he lived in a 300 square metre house, with a pool, protected by video surveillance and Staffordshire terriers. *A.N.* left quite an impression on him at their first meeting. *A.N.* offered one thousand square metres of land outside of the building zone for sale. The construction of a building, approximately 15 metres from the sea, had already begun. He convinced him that construction could go on since the building had already been planned, and that the land belonged to his uncle who would transfer it to him the following day. He requested EUR 50,000 for the land. By 2009, *I.H.* delivered five cars to him and a speedboat to the value of EUR 57,000 as an equivalent to the purchase price. Before the defendant completely disappeared in 2009, *I.H.* received an SMS that the scheduled meeting had to be postponed because he had to attend a seminar in Vienna with his FBI colleagues ... When *I.H.* finally tracked him down, the defendant revealed his true name and said that he had lost his father at a young age and had consequently gone astray, but that he was willing to return the money. At the time of his arrest, a total of nine warrants of apprehension had been issued against him.¹⁰

II.

The con man met the elderly man on the street in the middle of the day. He introduced himself as a member of a charity organisation which helps the elderly, “smooth talking” him and offering him a set of dishes for free which he would carry to his house. As soon as they entered the flat, the con man started requesting money. When the helpless host said that he did not have any money, the con man immediately started ransacking the house, turning over drawers and checking under the mattress. The

⁹ These fraud stories were taken from newspaper articles without any major changes being made to the text itself.

¹⁰ *Didić* 2010.

elderly man then realised that he had got himself into trouble and became terrified. He thought that the con man would kill him if he did not somehow present the money and, as a result, said that he had some money in the bank. The con man took him against his will and they went to the bank, where the elderly man withdrew all his savings (approximately ten thousand kunas) and handed it over to him ... The following day, the same scenario was reported in a street in the centre of Split with an elderly woman.¹¹

III.

“At a commercial presentation in a hotel in Zagreb in March this year, we bought a trip to Tenerife. We were welcomed by a British man, who described those holiday suites and it all seemed wonderful. We were told that we would be getting a vacation at a considerably more favourable price than what those trips usually cost. The agency from Varaždin sold us the vacation package, collected the money and issued a receipt. We signed the contract and paid the bill. At the beginning of November, we were contacted by an unknown person from a resort in Tenerife and we were asked to confirm our booking. We regularly contacted that company until May, and now no one answers our calls, their telephone line is disconnected and there is nothing at that address.”¹²

IV.

D.M. (19), a young man from Makarska, saw an advertisement about the sale of a VW Golf and dialled a mobile phone number 099 6779776 to ask about the terms of sale. The man who answered his call said that the car was in Slavonski Brod and told him to dial 060 603605. *D.M.* did not suspect anything and dialled the 060 number, where a man tried to keep him on the line as long as possible. The man stalled the conversation, made him wait on the line and even convinced him to call four times. The young man was eager to buy the car so he dialled the 060 number until his mobile network provider notified him that he was unable to make further calls since he now owed HRK 2,326. When he realised that he had been deceived, *D.M.* reported the case to the police, and they are currently conducting an investigation.¹³

V.

Jean-Louis Borloo from the UDI political party demands a referendum on the prospective attack on Syria. Other French parties are imposing vigorous pressure on the ostracised French president who, evidently, has become the most adamant hardliner in Europe and the most devoted USA ally in the attempt to punish the *Assad* regime, which allegedly used chemical weapons against civilians on 21st August. The quest-

¹¹ *Kavain* 2013.

¹² *Grund* 2012.

¹³ *Kuzmić* 2009.

ion is whether *Hollande* would succumb to the increasingly loud opposition, the media and to the majority of displeased Frenchmen who, according to survey results, oppose military intervention. In the words of Professor Emeritus *Nikola Visković*: “In line with international conventions, the use of chemical weapons, in general, and against civilians, in particular, undoubtedly constitutes a war crime. The issue with Syria is that the Americans claimed in advance that sarin gas was used by *Assad*’s forces even though it contradicts the previous findings, including those of former prosecutor, *Carla del Ponte*, who claimed that the insurgents, i.e., Al-Qaeda terrorists, also possessed said weapons. It is also logical that *Assad* had no interest in using sarin at the very moment UN inspectors arrived to Damask, but it was only of interest to the insurgents. This is clearly very close to the fraudulent situation created globally by US President *Bush* in 2003, when the US Secretary of State, *Colin Powell*, presented vials containing chemical weapons to the UN Security Council, alleging that *Saddam Hussein* possessed them as weapons of mass destruction ...”.¹⁴

VI.

“The largest trial in Croatian history: Trial in front of 500 people in the Student Centre. Preliminary hearing for nine confidence tricksters in the Forex case, which is the largest trial in Croatian history due to as many as 500 injured parties. The trial was held before the County Court, which rented the Student Centre cinema hall for that purpose. The indictment in the Forex case against the confidence tricksters who allegedly swindled 700 gullible investors out of 130 million kunas was confirmed at the end of November 2012. Four defendants immediately settled, and the second indicted, *G.P.*, shot himself in a bar in Samobor in March. Therefore, the first indicted, *T.P.*, and his eight accomplices will face trial. *P.*, who was briefly a detention cellmate of the former prime minister, *I.S.*, was charged with organising a scamming operation from July 2007 until May 2010.”¹⁵

VII.

“The police from Varaždin have warned about new types of mail fraud. Authorised mail services delivered to some citizens’ home addresses envelopes with their exact name and address. The envelopes were designated as relating to a “lawsuit” and signed by a Zagreb based law firm. In order to be given the envelope, recipients had to pay cash on delivery and shipping fees. Upon opening the envelopes, recipients discovered that they only contained promotional materials for the sale of certain products. Later on, the Police Administration of Varaždin advised its citizens against falling for these scams and receiving mail of this kind, i.e., paying any cash on delivery for such mail.”¹⁶

¹⁴ *Visković* 2013.

¹⁵ *I.Ž.* 2014.

¹⁶ *I.La* 2014.

VIII.

"*Vice Varalica* robbed me ... : ... I met him on Facebook where he stalked me and, I assume, other similar victims, i.e., divorced vulnerable women. He found out I was single and that my father was ill. When we met for a very pleasant date, he wholeheartedly offered to help me with placing my father in a suitable nursing home (he died in the meantime). He also offered to help my mother with legalising the house with the help of *V.* That is when the scams started: he took my mother's documents and five thousand kunas, but he did not do anything; legalisation proceedings have never been instigated. My father's health deteriorated, and *Vicko* was really supportive during those hard times, but at the same time he took two credit cards with 35 thousand kunas limit each, and told her were blocked, but that he would take care of it, as he worked at Erste Bank. He does not even work at that bank, and I am not sure if he had ever worked anywhere or what his level of education is. Through some personal connections, I found out that he had only completed elementary school, said *T.*, angrily. He, however, continued to charge those blocked cards for various purposes: he used my money to buy food, clothes, trips to Sarajevo, petrol and pay rounds for his friends. He would tell them that those were his business cards from the bank, where he supposedly worked. Today, with two minor children, I dread receiving a new foreclosure notice every day. I do not even have money to buy milk, said *T.*, tearfully. He constantly bragged about large investments, millions of Euros of inheritance, his alleged car wash, wellness resort in Lika and business transactions across the former Yugoslavia, whereas the entire time he was actually spending my money. Before he came into my life, I could make a decent living from my teacher's pay check, since I teach English at an elementary school ... I had already been pregnant with previous children and my father had died, so I was the ideal victim, said *T.*, who decided to keep the baby, since her former partner encouraged her to do so. I also met *Vicko's* parents who had no idea about their son's supposed job at the bank. They were in bad health and in a poor financial situation ... He constantly talked about large business transactions, influential friends, and then, all of a sudden, he came up with the story about a huge inheritance. He supposedly could not receive those millions of euros into his account because it was blocked, so he needed just a small financial injection to have it unblocked. So I got an 85 thousand Kuna loan from a bank and handed the money to him, said *T.*, painfully. He has completely changed since November last year, when I was very much pregnant and he had already got his hands on my money. He would yell at me for no reason over the phone and he kept telling me, without any reason, to leave him alone and stop chasing him."¹⁷

¹⁷ *Gospodnetić* 2014.

IX.

“A construction company from Split is accused of swindling 41 tenants out of 29 million kunas: After two and a half months ago, the police of Split filed criminal charges against *N.J.*, a 63-year old businessman from Split, for fraud amounting to almost 29 million kunas in economic transactions and forgery of an official document. On 14 February, the Municipal State Attorney’s Office in Split delivered an order about conducting an investigation against the businessman and the company, “N”. Between 29 December 2008 and 17 August 2012, the businessman, as the sole founder and the member of the board of the company, “N d.o.o.” concluded negotiations with a total of 41 buyers interested in the purchase of flats and parking places in his residential building, “Lipi običaji” in the neighbourhood of Sućidar in Split. *J.* is suspected of omitting to tell the buyers to pay the money to the account of Zagrebačka bank and not to the account of his company, “N, which they in fact did as per his advice. As a result of that, Z. bank failed to issue the title of deed to the buyers so they could register ownership, but instead filed a foreclosure proposal for said properties. He is also suspected of forging pages of the sale and purchase contract concluded with the buyers, which he subsequently delivered to the bank. *J.*’s land is encumbered with the right of lien in favour of Z. bank for the purpose of insuring the repayment of the loan granted by Z. bank to the company “N”. The loan was granted for financing the repurchase of the land and construction of the building, “Lipi običaji”. *J.* is suspected of requesting from the buyers to execute the payment in instalments, according to the speed of the construction. He also deceived them into thinking that, once they made the final payment, he would hand over possession of the flats to them and enable free registration of ownership with the statement of release from the bank, even though he decided in advance not to act accordingly. Instead, he referred the buyers to execute the payment of the sale and purchase price to the business accounts of company “N”, as stated in the contract or in cash at the teller. However, he withheld the fact that he was obliged – according to the loan contracts concluded with Z. bank – to execute all payment transactions to a special project account at Z. bank. In that way, the bank could redirect the payments from that account to the loan of company “N”, and later on issue a statement of release for each flat and garage parking place. The money or the majority of the money paid by the buyers for the flats in the building, “Lipi običaji”, was not used by *J.* to settle the loan at Z. bank, but instead to settle the debts of company “N” from his previous business transactions.”¹⁸

The hypotheses of the research are as follows:

1. Existing criminal law provisions regarding fraud, fraud in economic transactions, subsidies, computer and electoral fraud properly protect respective legal assets. However, the basic concepts of these criminal offences – namely, the notion of

¹⁸ Didić 2014.

facts, differentiation between external and internal facts, predictions, value judgments, non-existing perception in error, special types of fraud as offences of abstract endangerment and damage – have not been adequately analysed or clarified in terms of legal doctrine and are often interpreted and implemented differently in judicial practice, which endangers the principle of equality of all before the law and, in turn, causes legal insecurity.

2. Provisions of the Croatian CC with respect to the research subject are, to a great extent, in line with the relevant provisions of German, Austrian and Swiss penal legislation due to historical affiliation with the continental European legal tradition (the Roman-German legal family).¹⁹
3. Given the dynamics of change in the European population, frequent cross-border economic transactions and monetary, fiscal and market integrations between European countries, it is essential to standardise guarantees and legal protection against different types of fraud, as confirmed by statutory alterations in the countries included in this research. In fact, our contemporary times are characterised by economic globalisation (with the conversion of national economies into a single, global economy)²⁰ and it is of the utmost importance to accompany the fast changes in economic trends with adequate criminal law protection.
4. Although the catalogue of offences of the special part of the CC classifies criminal offences according to the legal assets they protect, such categorisations are also common in criminal law doctrines. Several chapters of the Criminal Code contain a special set of fraudulent criminal offences, which indicates the existence of special criminal law of fraud or fraud-related criminal law. It is essential to determine the demarcation criteria: the legislator's will to designate certain criminal offences as fraud (fraud *ex lege*), error or error by misrepresentation, or concealment in addition to causing material damages (accumulation of material gain).

1.2 Terminological Notes

Earlier criminal law literature reveals an abundance of imaginative terminology related to fraud. In his book, *Šilović* places “international pickpockets, who operate

¹⁹ For continental Europe, see *Gavella, Alinčić, Klarić, Sajko, Tumbri, Stipković, Josipović & Gliha* 1994, 7–8.

²⁰ See *Panian* 2002, 3. The author listed seven main trends in economics: so-called cyber economics (as an increasingly appealing and more cost effective manner of conducting business transactions), remote work (and so-called internet workers), open corporations (participation of buyers and their influence on the companies' operation), products become merchandise, buyers turn to online purchases, new types of partnerships and communities appear, and a trend towards life-long learning. *Idem*, 7–9. Cf. *Dragičević & Dragičević* 2003, 361–367. *Castells* also states that, in the late 20th century, the world economy had the potential of becoming truly global based on the new infrastructure enabled by information and communication technologies. *Castells* 2000, 125.

only at festivals, burglars who use state-of-the-art tools [and] con men (*Hochstapler*)” in the category of perpetrators “with a pre-disposition to criminal behaviour”.²¹ Even earlier, in the renowned *Prinos za hrvatski pravno-povijesni rječnik*, *Mažuranić* used the terms *prijevара*, *prevара*, *privара* (“*fraus*, *dolus*, *deception*, etc.”) and pointed to numerous synonyms in Croatian and Latin; “*himba*, *zla šega*, *čalarna šegavost*, *ciganija*, *vkanljivo delo*, *haramzadstvo*, *prekanenje*, *prihinjenje*, *varanje*, *varka*, *zasjena* ...”.²²

The CC97 and CC used terms *prijevara* and *prijevare* (Lat. *fraus*; Engl. *fraud*; Germ. *Betrug*, *Täuschung*; Fr. *escroquerie*, *fraude*). However, in standard Croatian, the terms *prijevara* and *prevара* are used interchangeably (*prevара* derives from the verb *prevariti* (Engl. to defraud)).²³ Therefore, in *Rječnik hrvatskog jezika* (Dictionary of Croatian Language), the term *prijevara* refers the reader to the term *prevара*, whose meaning is to intentionally mislead another person; it signifies a false act committed for the purpose of deceiving another person. In law, it refers to a procedure whereby one contractual party misleads the other party about the essential elements of a legal transaction, or a criminal offence of deceiving a person and thereby damaging the personal property of such a person or leading to the property of his/her associate to be damaged.²⁴ An error is the act of misleading another person by deceit. In law, it is known as fraud and refers to the act of one contractual party misleading the other about the essential elements of a legal transaction.²⁵

By considering the legal foundations, it is possible to distinguish between the notions of fraud in criminal law, civil law and litigation proceedings.²⁶ In criminal law, the basic form of fraud is realised when a person gains illicit material gain (*animus lucri faciendo*) for himself or others by misleading someone through misrepresentation or concealment, or by deceiving a person into acting or failing to act to the detriment of his personal property. In this aspect of the offence, property is referred to in an economic sense, including economic rights and interests.²⁷ In civil law, fraud represents direct error, qualified error or deficiency of will, which occurs after a person deceives or misleads another person into concluding a legal transaction. Hence, fraud

²¹ He says that crime is their trade; they are irreparable and cannot, therefore, be expected to adapt to the lawful social life, see *Šilović* 1913, 162.

²² *Mažuranić* 1908, 1125–1126. Some of the Latin synonyms include: *astutia*, *calliditas*, *sagacitas*, *stelatura*, *sycophantitas*, *stellionatus*. *Idem*.

²³ *Babić & Finka & Moguš*, 1995, 353, 356.

²⁴ *Šonje* 2000, 958. The notion of deception is also mentioned, as well as the third meaning, an illicit marital affair or adultery.

²⁵ *Idem*, 719.

²⁶ *Pezo* 2003, 1284. See *Horvatić* 2002, 453–456.

²⁷ *Ibid.*

encompasses an unconscious incongruity between internal and expressed will.²⁸ Legal transactions thus concluded are rebuttable legal transactions which may be contested within the subjective deadline of one year from acknowledging the fraud, or the objective deadline of three years from the conclusion of the legal transaction. As much as this criminal offence may only be committed deliberately, civil law requires the establishment of intent to deceive or mislead another person into concluding a legal transaction. In other words, a causal link must exist between the fraud and the decision to conclude the legal transaction.²⁹ In litigation proceedings, court decisions based on fraudulent dispositions of the parties may be contested by appeal and a renewed motion for retrial: judgement based on confession or recantation.³⁰

It is very important to detect the connection between the notion of fraud in criminal and civil law, as well as their differences, because fraud-related criminal prosecution was instigated in some relationships that were previously subject only to civil law. This situation was rectified only with the decision of the appellate court (I will address this issue subsequently). In 1908, *Šilović* indicated that it is undoubtedly difficult to draw a line between so-called civil and criminal fraud, and stated that criminal law sets the limit at deceit: “Misleading is considered deceitful if it has been done with such trickery that it is impossible for a person to detect or realise it, even with substantial effort. Wherever there is no deceit, there is no criminal fraud either.”³¹

Since the introduction of the CC, court practice and recent legal literature have applied the term “fraud”. This study shall adhere to the legal notion.

Finally, a distinction between the following terms is made: “several persons”, “company of persons”, “group of people” and “joint criminal venture”. There are two reasons for this. Firstly, one of the forms of fraud in German legislation is when it is committed within a gang (“*Bande*”). Therefore, we need to consider the meaning of that term. The second reason is that the new CC has removed the notions of “several persons”, “company of persons”, “group of people” from the statutory definitions

²⁸ Ibid.

²⁹ According to *Srdić*, in contrast to legal transactions concluded under fraudulent pretences, there was a right to annulment with a statute of limitation of 24 years with *extunc* effect. *Srdić* 1979, 1104.

³⁰ It also applies to the decision based on confession and the decision based on recantation. *Idem*.

³¹ *Šilović* considers the “deceitful misleading” as the foundation of the distinction, adding that it is a concept that can be widely interpreted and that, as a result of which, a fundamental distinction between civil and criminal fraud cannot be made. *Šilović* 1908, 367.

of Article 87 (formerly Article 89 of the CC97), whereas the notion of “criminal organisation” was replaced by the notion of joint criminal venture in the Article 328 para. 4.³² “Several persons”, pursuant to Article 89 (20) of the CC97, refer to at least two or more people. “A company of persons” refers to at least five or more people (Article 89 [21] of the CC97). “A group of people” includes at least three who join together for continual or occasional perpetration of criminal offences, whereby each of these persons partakes in the perpetration of the offence (Article 89 [22] of the CC97). Pursuant to a Decision of the German BGH,³³ the notion of “*Bande*” refers to an enterprise of at least three persons united with intent (*mit dem Willen*) to commit several independent, yet unspecified, criminal offences determined by law as a certain type of offences (*im Gesetz genannten Deliktstyps*).

1.3 Structure

As previously stated, this research is based on the new CC. Therefore, the structure of the research is based on five criminal offences of fraud: (1) fraud; (2) fraud in economic transactions; (3) subsidy fraud; (4) computer fraud; and (5) electoral fraud.³⁴ Hence, the research was divided into five large chapters. Each chapter first examines the historical background of each criminal offence, criminological-victimological or only criminological significance, and the objective and subjective features of the offence in question. The integrated part of the research includes examples from domestic and foreign case law, as well as solutions from comparable legislatures (primarily Germany, Austria and Switzerland). The seventh chapter researches different types of fraud stipulated in other criminal offences of the CC and the criminal codes of the selected comparable jurisdictions. The eighth chapter contains basic information about fraud in the Balkan region. The final, ninth chapter presents the conclusion of the thesis and remarks on the existing solutions and proposals *de lege ferenda*.

³² A joint criminal venture is composed of at least three persons united with common intent to commit one or more criminal offences punishable by law to three years of prison or more, not including an enterprise composed of persons unintentionally united to directly commit one criminal offence. See *Derenčinović & Horvatić* 2011, 61–62.

³³ *Gaede*; <http://www.hrr-strafrecht.de/hrr/1/00/gst-1-00.php3> [23/01/2014]. See *Beukelmann* in Heintschel – Heinegg, 2010, 1862.

³⁴ This study deals with fraud in the Criminal Code. A comparative view of criminal legislation from other jurisdictions reveals that there is a whole set of criminal offences which could be analysed in the context of fraud. However, these are outside the ambit of this study.

Chapter 2

Fraud

*The confidence trickster's tool is deception.
He uses no force, but achieves by trickery.*³⁵

2.1 Historical Development

The research into the historical development of the criminal offence of fraud is extensive and exceptionally interesting. In the history of criminal law before the foundation of the Republic of Croatia, the research includes the following statutes from littoral and Dalmatian cities: *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* of *Stjepan Verböczy* from 1514,³⁶ *Josephina* from 1787, *Code Penal* from 1791, the general Prussian land code *Opći pruski zemaljski zakonik* from 1794, the Austrian Crimes Act from 1803, which entered into force in Dalmatia and Istria in 1814, the collection of *Skupozakonik* laws from 1804, the Austrian criminal code on crimes, malfeasances and misdemeanours *Kazneni zakon o zločinima, prestupcima i prekršajima* from 1852, *Derenčin's* *Osnova* from 1879, the Criminal Code of the Kingdom of Yugoslavia from 1929, the Criminal Code from 1951 and the Criminal Code of the Social Federal Republic of Yugoslavia from 1976, i.e., Criminal Code of the Socialist Republic of Croatia from 1977.³⁷ The second part of the research refers to criminal offences in the Republic of Croatia after the passing of the Croatian Constitution on 22 December 1990.

2.1.1 Fraud in Medieval Criminal Codes³⁸

The research on *Tripartitum opus iuris consuetudinarii inclyti regni Hungariae* was available in *Lanović's* old textbook on tripartite private law: *Privatno pravo Tripar-*

³⁵ Šilović 1908, 365

³⁶ See Lanović, 1929.

³⁷ See Cvitanić & Križman & Kolanović 1990; Cvitanić 2006; Cvitanić & Kasandrić 1991; Cvitanić 1998; Margetić 1998; Cvitanić & Lučić 1994; Milović 2005; Čepulo 2011; Lonza & Jelinčić 2010; Tomičić 2006; Krapac 2004.

³⁸ This chapter examines (at least partially) medieval criminal codes. See Horvatić 2003, 108–113, dividing the Croatian medieval criminal law into two sub-periods: period I, between 1102 and 1527; and period II, between 1527 and 1790.

tita.³⁹ In terms of fraud regarding measurements and weights, we distinguish between the use of false measurements or scales and the fraudulent use of allowed measurement.⁴⁰

In his renowned work, “On Crimes and Punishment”, *Beccaria* – who was the head jurist tasked with the preparation of the so-called *Codice Leopoldino* in 1786, i.e., the Tuscan Criminal Code,⁴¹ – discusses “going into bankruptcy”. He distinguishes between the debtors “who went into bankruptcy as a result of fraud being conducted against them (*il fallito doloso*) and those who became insolvent through no fault of their own”.⁴² He proposed that the former be punished equally in the same was as counterfeiters, because “[so-called] counterfeiting of the mutual obligations of citizens is as serious a crime as counterfeiting a piece of coined money, the collateral of these obligations”.⁴³

According to § 149 of *Josephina* (1787), “defrauding” take place where the culprit aims to deceitfully obtain or damage the other person’s property, or in the exact words of the provision: “*krivac biva, koi kakvomgodir privare i lukavštine verstom, tuđa dobra k sebi privući, ili koga drugoga mogućstvu, proštenju, slobostini, pravica zločestom himbenošću nahuditi, nastoi*”.⁴⁴ However, the § 6 guarantees certain protections against fraudulent conduct. In fact, it prescribes that each crime has to be sanctioned according to the viciousness of the perpetrator, and not according to the condition and circumstances of the person subjected to the crime. Therefore, “crime can be committed against criminals, fools, children, sleepers, and also those who wish harm and perpetration upon themselves”.

Provision § 155 prescribes that, with regard to different types of cheating, crimes should be sanctioned more severely or more mildly – depending on the circumstances. In general, the perpetrator shall be punished with a lengthy or short-term prison sentence, and subjected to strict or mild conditions and general duties, while the “injured victim” shall be entitled to seek damages and full compensation for the “harm”

³⁹ The collection of customary law originated in the state community of Hungarians and Croats. *Lanović* claims that “the law presented in *Verboč’s Tripartite* was as Croatian as much as Hungarian, because it was not only the product of the heritage shared between Croats and Hungarians, but it had by the nature of its origin Croatian, i.e., general Slavic, roots”. *Gavella et al.* 1994, 13, Note 20.

⁴⁰ *Lanović* 1929, 298.

⁴¹ *Novoselec & Bojanić* 2013, 35.

⁴² *Beccaria* according to *Cvitanović* 1990, 138.

⁴³ *Ibid.* “But he who went into bankruptcy in good faith, hence the person who managed to prove, after an extensive investigation before the judges, that he was deprived of his assets due to dishonesty of others or their misfortunes or events unavoidable by human wisdom – for the love of which barbarian law can such man be thrown to jail or deprived of the only value he possesses, his bare freedom?” *Idem.*

⁴⁴ *Cvitanović in Derenčinović* 2013, 203.

suffered. If special circumstances of this crime so require, “a more severe punishment may be administered”. “A more severe punishment should be administered when a person causes extensive damage to another person by defrauding him so deceitfully that he could not have predicted (or avoided) it; if the liar repeatedly deceives and is punished for such crime several times, or disdainfully violates any of the duties (known to him) that he swore to protect before the king or another master or if he commits perjury.” A person who withholds or hides his property, thus deceiving those who should collect any kind of debt from him is considered a thief (§ 158). The crime of theft associated with fraud which caused damage was punishable by imprisonment. This imprisonment could be harshened with an additional sentence of flogging or other similar methods (§ 32). If such crime was repeated after the culprit had been incarcerated for a certain period of time, then he was to be kept under surveillance “until he change[d] his disposition and accustom[ed] himself to making an honest living”. According to § 33, which refers to legitimate games, “whoever uses any form of cheating or fraud in a legitimate game, e.g., by using false or marked cards, false jack or dice, or seizes someone else’s cards or colludes with a third person to cheat someone else in a game of chance, shall be found guilty of a crime against fair conduct”. If the impostor would conduct trade with this form of fraud, if he would defraud those who are unable to manage their property on their own, if he would cause grave and substantial harm to those he deceived, if this fraud was executed in such a masterly and skilful manner that it could not be avoided, he shall be exposed to public shaming and punished with public works. If such circumstances are not considered to exist, “the culprit” shall be punished with “temporary imprisonment”. “And finally” the perpetrator is obliged to return to the deceived person his entire winnings. Foreign perpetrators of this crime shall first be exposed to public shaming and then expelled from all states of the monarchy. Co-perpetration was regulated by § 35, whereby “accomplices of this crime are those who are aware of the fraud and nevertheless aid the impostor in any manner or teach a third person to commit fraud” (with a prescribed mild temporary confinement, the conditions of which can be harshened by food deprivation). Strict confinement is a punishment for those who teach others to cheat in games, and it can be harshened with flogging. The victim was entitled to seek the entire damages from the co-perpetrator (“*skuppa-krivacah*”) to the amount which could not be collected from the other perpetrator. Illicit games were, according to § 37, considered a crime against fair conduct (the perpetrator was the one who played them and upon whose premises they were played).

In the Code Penal from 1791, fraud was regulated in Articles 30 and 31. The prescribed punishment for all false bankruptcies and those whose aim was to deceive legal creditors was to be placed in shackles (under solitary confinement) for 6 years (Article 30). The same punishment was prescribed for all who aided or encouraged false bankruptcies, covered the outcomes, accepted transports, sold or made other

false donations, or signed all other documents, which they knew were made for deceiving legal creditors.⁴⁵

The General Prussian land code, *Opći pruski zemaljski zakonik*, from 1794, was the first code in which fraud was explicitly mentioned.⁴⁶ In fact, § 1256 para. 2 describes fraud as the deception of another person, whereby such a person acts to the detriment of his rights.⁴⁷

Provision § 197 of The Austrian Penal Code from 1803 prescribes that fraud is committed by a person who deceives another person or a person who takes advantage of someone's ignorance and, that after such deception, the deceived person is entitled to seek damages: "*koj himbenim predstavljanjem ili činjenjem zavede koga u bludnju, kojim tkogod, budi država, budi občina, budi ina koja osoba, ima podnieti štetu, budi u vlasništvu svojem, budi u ostalih pravih; ili koj se s tom nakanom i na način prije pomenuti posluži bludnjom čijim ili neznanjem*".⁴⁸ In 1896, Radits examined the difference between the Austrian and Hungarian Penal Code in terms of fraud, stating that the legislator's task is to "*strictly demarcate between the punishable act of deceiving and the legal rational behaviour of taking advantage of the given circumstances*".⁴⁹ In his opinion, the demarcation between those two laws is the impostor's fraud, deception of another person caused or maintained by deceitful conduct causing the deceived to act in a harmful way, the impostor's intent to cause damage and the fact that damages have to refer to substantively existing rights of the injured party ("formal right damages" do not suffice).⁵⁰

In *Skupozakonik* or royal or imperial orders about crimes and punishments, *Naredbama kraljevim i cesarovim o zločinstvima i kaznama određenim protiv zločinaca*, printed in Zadar, 1804, Chapter 24 deals with "misleading into fraud and deceitful conduct". The crime of "misleading and falsity" is regulated by § 176 and it is committed by the anyone who verbally, fraudulently or deceitfully misleads another person by causing harm to his assets or property, or anyone who gains illicit profit from the delusion or ignorance off another person. The crime of misleading into fraud can occur either due to the type of committed offence or the amount of caused damage.

⁴⁵ According to *Derenčin*, the Code Penal from 1810 "does not define fraud in the general way that we adopted by following the German laws, but it punishes only some cases of fraud, acting on the basis of the assumption that fraud or error are not offences per se, but means of committing an offence, and that harm caused by incited or maintained error is not punishable". *Derenčin*, 1879, 351.

⁴⁶ *Cvitanović* 2013, 203.

⁴⁷ *Idem*. *Cvitanović* states that this code provides a summarised and more abstract description.

⁴⁸ *Ibid*.

⁴⁹ *Radits* 1896, 588.

⁵⁰ *Ibid*, 589. For "diverging moments" see 590–596.

Provision § 178 prescribes types of misleading with respect to the nature and manner of behaviour: 1) when soliciting or requesting perjury before the court, when solicited perjury is used in court; 2) when a person abuses the seal of the public authority by pretending to act in conformity with a royal order or authorisation; 3) when a person uses false measures or ratios in trading; 4) when a person alters or forges a public letter or sign or notice implemented by public order with a seal or embossed seal; 5) when borders or signs placed for demarcating borders are removed or relocated; 6) when a person, due to reckless squandering, fails to pay his creditors or delays repayment, or provides false representation as to his assets by concealing part of his estate, or presents false creditors or acts otherwise deceitfully. Misleading becomes a crime when the resulting harm or “harm which is the object of the impostor’s malevolent desire” exceeds the price of twenty-five fiorins or thirty groschen (§ 179). Given the multiple forms of lies and deception, § 180 states that it is impossible to provide a comprehensive list but, with respect to the aforementioned price, the culprit of the crime is: 1) any person who reads “false” personal letters and “modifies” the real ones, “distributes read or forged documents” (“privileged documents”) or counterfeit banknotes except to “collude” with the counterfeiter; 2) a person who takes advantage of another person’s mental disability with the intent to defraud him to his own or someone else’s detriment; 3) a person who conceals property that he found and keeps it for himself; 4) a person who steals another person’s identity, existence and form and misrepresents himself as the owner of another person’s property or uses misrepresentation to acquire illicit gain, to the detriment of another person’s property or ownership, or misleads someone into illicit conduct which would not have been committed unless forced by deceit; 5) a person who uses old or falsified cards in a game and concludes false agreements or other types of fraud. Punishment for deception tending to fraud was six months to one year of solitary confinement which could be extended by up to five years due to gravity of the crime, necessity to offer retribution, the repeated nature of the offence or the high monetary values in question§ 181).⁵¹ *Skupozakonik* contains punishment for acquisition. In fact, § 183 prescribes: “when misleading is accompanied by false testimony or perjury in court, the culprit shall, besides being sentenced to confinement, be publicly exposed and if his false testimony has caused substantial harm, be sentenced to confinement for up to twenty years, or even to life imprisonment if circumstances should so require”. Deceit which is not committed under the postulations given in §§ 178 and 179 is to be considered and punished as grave offences by the police, as set out in the second part of *Skupozakonik*.

⁵¹ If the value of property fraudulently acquired by the perpetrator would exceed 300 fiorins or 360 groschen or the deceived person is substantially harmed due to his condition, or the criminal acts with excessive impertinence or is accustomed to cheating, he should be sentenced to confinement for 5 to 10 years.

In *Kazneni zakon o zločinstvih, prestupcih i prekršajih od 27. svibnja 1852.*, §§ 197 to 205 in Chapter 23 deal with fraud,⁵² with § 197 containing the definition of fraud. Hence, the “perpetrator” of fraud is the person who misleads somebody⁵³ by fraudulent misrepresentation or conduct so as to cause harm to his property or any other right, or the person who abuses another person’s delusion or ignorance with that aim and in that manner. However, the provision does not merely state that; it also outlines the possible motives as follows: “he was motivated by personal gain, passion, intent, to illicitly harm someone or by any other additional intent”.⁵⁴ Considering how exhaustive and meticulous the nomotechnical regulation of this offence is, it is evident that fraud is one of the most elaborately regulated criminal offences. The essence of fraud, according to this legal text and the spirit of the times, is the intent to cause illicit harm, and not to acquire illicit gain for others. In most cases, fraud is aimed at material interests.⁵⁵

The circumstances in which fraud becomes a crime are dual; they depend on the nature of the offence and the amount of damage (when the caused or intended damage exceeds the amount of fifty forints). Special cases of fraud – in the event of the caused or intended damage exceeding fifty forints – include: creation of false, or forgery of, genuine private instruments of proof (“each instrument whose purpose is to attest to the legally relevant facts”); concealment of private or public instruments of proof which do not belong to the perpetrator or do not belong to him exclusively to the detriment of another person; distribution of manufactured or forged public securities or counterfeit money without collusion with counterfeiters or accomplices (knowing they are counterfeited); abuse of another person’s mental disability by exploiting superstitious beliefs or other cultivating “deceitful delusions” to the detriment of said person or a third person; appropriation of found property or property gained by error; fraud committed by misrepresentation (“whoever appropriates another person’s name, title or merit, or pretends to be the owner of another person’s estate or hides under a false identity”); use of falsified dice, cards or deceitful enterprises or other trickeries in a game.⁵⁶

⁵² Šilović 1901, 170.

⁵³ Somebody may refer to the “state, municipality or any person”. Idem. In Criminal Act (1908), the same author states that the injured party may be a natural or legal person or the state.

⁵⁴ Idem. See *Janka* where fraud is defined as misleading or deceiving by misrepresentation with intent to cause illicit harm. *Janka* 1890, 273.

⁵⁵ However, not necessarily only against material interests; Šilović believes that one of the cases of fraud is also deceitful misrepresentation of personal attributes or relationships so as to persuade another person into marriage. Šilović 1908, 366; *Janka* 1890, 274.

⁵⁶ Šilović 1908, 369–372.

Special cases of fraud, regardless of the amount of damage, include: false deposition before the court which, if confirmed by an oath or solemn promise equal to oath, becomes perjury;⁵⁷ “when a person assumes the position of a public editor or the government granted him the privilege of public power”; when a person uses lower measures or weights in a public trade; making or forging of the public instrument of proof (“issued by a public authority within the scope of its official competence or by a person appointed by public faith within the scope of his legal activities”); removal or relocation of demarcation marks; or “fraudulent bankruptcy”. When it comes to forgery of public instruments of proof, it not only suffices to have the intent to defraud, but also the intent to harm which corresponds to the notion of fraud. Special intent with fraudulent bankruptcy is to cause damage to the creditors. In fact, punishment does not necessarily require the formal opening of the bankruptcy proceedings, but the inability to settle with creditors.⁵⁸

The analysis of the provisions relating to fraud has revealed that this criminal offence incorporates an entire range of other criminal offences: present-day forgery (money, securities, value marks, trademarks, measures and weights, documents), false depositions, embezzlement, trust abuse and causing bankruptcy. Šilović, who is aware of this issue, states: “The existing criminal code is based on an outdated perspective. Its concept of fraud has thus far not been entirely clarified or established. Therefore, fraud in our existing criminal code seems too general, because all its cases are categorised by a single general feature, i.e., deceitful delusion, whose purpose is to illicitly harm another person.”⁵⁹ Another resulting conclusion, considering the research so far, is that the legal regulation of the Criminal Code confirms the continuing tradition of the statutory criminal law’s protection against fraud, particularly through provisions concerning forgery and false depositions.

In *Derenčin’s* *Osnova* from 1879,⁶⁰ the special chapter (XX) is entitled “Fraud and error”, with § 316 regulating fraud as follows: “Whoever causes damage to another person’s property with the intent of illicitly gaining for himself or a third person by

⁵⁷ We distinguish between oath of truth (*iuramentum veritatis*), oath of recollection (*iuramentum credulitatis*) and oath of ignorance (*iuramentum ignorantiae*). Whether an oath is *promissory* (sworn before the deposition) or *assertorial* (after) is not crucial for the existence of the criminal offence. *Idem*, 375–376.

⁵⁸ Šilović 1908, 372–384. The person who squanders his assets and is thus unable to settle his debts; or who attempts to extend the repayment period with trickery; “who falsifies his true standing, whether by inventing a creditor or by some other fraudulent agreement or by concealing a part of his assets. It includes concealment or removal of certain items and a decrease of his assets in general.”

⁵⁹ Šilović 1908, 365.

⁶⁰ *Derenčin* 1879, 352.

misleading or deceiving the person, is guilty of fraud.”⁶¹ The “special case of fraud” is prescribed by § 318: “The person who commits the crime of fraud with the intent to gain illicit material gain for himself or others, incinerates property insured against fire, or sinks an insured ship either for freight or a carriage fee, or destroys any kind of insured property, is to be punished with up to ten years in prison or with a confinement no less than three month and a pecuniary fine.”⁶²

Punishment for recidivism is prescribed by a special provision. In fact, § 319 prescribes that the perpetrator who was once or several times punished for fraud can be sentenced to double the most harsh punishment (but never to incarceration over 10 years).⁶³ A mitigated form was provided by § 322: “Whoever causes damage to another person’s property by misleading or deceiving the person without the intent of illicitly gaining for himself or a third person, is to be punished for the offence of fraud with incarceration for up to six months, or two years if the damage exceeds 500 forints.”⁶⁴ Prosecution takes place in this instance only at request and does not include intent.”⁶⁵ A special sanction (*nuzkazna*) prescribed for the perpetrators of fraud is the loss of official duty and the revocation of political rights (§ 324). *Derenčin* supports it with a claim that whoever violates “the trust bestowed upon him” demonstrates that he does not possess the principal characteristic required from the state official.⁶⁶

2.1.2 Fraud in Croatian Criminal Law Before the 1990 Constitution

In the Criminal Code of the Kingdom of Yugoslavia from 1929, fraud was included among the criminal offences against property in Chapter 4 entitled “Fraud and Bankruptcy”. This regulation distinguishes between nine types of fraud: “regular fraud of acquiring material gain of over 300 dinars” (§ 334), “regular contractual fraud”

⁶¹ § 317 prescribes the difference between “criminal offence” and “malfeasance” with respect to the amount of damage.

⁶² See § 263 para. 3 item 5 of the German CC.

⁶³ Such punishment cannot be pronounced if ten years have passed since the last punishment (§ 319 para. 2).

⁶⁴ In Croatian legal theory there is a difference between “privileged and qualified circumstances” (hereinafter privileged and qualified offences) and “mitigating and aggravating circumstances”. The former includes circumstances that make an offence more or less grave (they are included in the statutory elements of a particular offence). The latter applies to punishment (reasons for a judge to impose a less severe or harsher punishment). As the terms “privileged and qualified offences” are not visible in English legal context, terms “mitigating and aggravating” were used.

⁶⁵ *Derenčin* states that the cases of fraud without “usurious intent” are very rare in practice and provides an example: when a person deceives another person out of jealousy into believing that his (original) painting is not authentic, and thus causes the other person to destroy it. *Idem*, 353.

⁶⁶ *Idem*, 354. See with modern safety measures.

(§ 335), “public procurement fraud” (§ 336), “trade fraud” (§ 337), “petty fraud” (§ 338), “false issuance of items with designated pecuniary value” (§ 339), “insurance fraud” (§ 340), and return of an item or damage and mitigated cases of fraud (§ 341), “commercial or trading fraud” (§ 342), and “falsified measuring or weighing” (§ 343).

Provision § 334 presents the basic form of fraud committed by the person who, with the intent to acquire illicit material gain for himself or others, misleads or deceives another person by misrepresentation or concealment or distortion of facts, thus causing said person to act, fail to act or suffer to the detriment of his own or another person’s estate or material interest. The statutory penalty prescribes the enforcement of a period of imprisonment, a pecuniary fine and the revocation of “honourable rights”. If the perpetrator’s intent was merely to cause harm to another person, as prescribed in § 334 para. 2, the prescribed punishment is incarceration for up to three years or a fine. Legal literature states that material gain, i.e., the increase of the perpetrator’s property value, is not identical to *lucrum cessans* and *damnum emergens* on the injured party’s part.⁶⁷ Regular contractual fraud from § 335 is committed by the party who concluded the contract only as means to defraud and to materially damage the other party’s property, who replaced the stipulated subject with a subject of lower value or lowered the value of the stipulated subject, who deceived the other party about the nature or essential features or composition and quantity of useful parts of goods and, finally, the party who deceived the other party about the type of goods or their origin, under the assumption that the trademark or specified origin, which is falsely assigned to said goods, is an essential requirement for the conclusion of the contract. In addition, § 334 applies to public procurement fraud, which is punishable by at least three years in prison and a pecuniary fine. Incarceration of ten years is prescribed for a fraud committed as a trade, whereby “trade” is understood as similar to the criminal offence of forging personal identity documents (“falsification of identity documents” from § 222), if there is a perpetrator’s intent to gain profit from repeating such criminal offences, as opposed to a single acquisition of material gain.⁶⁸ Petty fraud from § 338 is committed if the value of material gain acquired by fraud does not exceed three hundred dinars. A special mitigated form is when the fraud has been committed out of hardship, which caused minor harm (up to three hundred dinars). Prosecution for petty fraud is based on the proposal and the law prescribes optional acquittal, particularly for petty crimes. A special type of fraud is, according to § 339, the issuance of items with false pecuniary value. The perpetrator issues these items under the assumption of their full value; letters, money bags or deliveries are sealed with the official stamp and designated content, even though the

⁶⁷ Dolenc 1930, 426.

⁶⁸ Dolenc 1930, 301; the author states that the German term is *gewerbsmässig*, and according to the Roman law “*quasi artem exercere*”.

perpetrator is aware that they had been opened and money taken from them.⁶⁹ Insurance fraud is committed by the person, who, with the intent to gain the insured amount from the insurance company, destroys, damages or conceals insured property or causes a boat or any other vehicle, which is insured or whose cargo is insured, to sink or crash. The legal literature is limited to two types of insurance contracts for this kind of offence: insurance against fire and flood (hence, it does not include life insurance contracts). It is also believed that the criminal offence is punishable only if committed with intent; if someone inadvertently incinerated something, he did not commit the offence under § 340, regardless of how adamant he is about acquiring the insured amount *ex post*.⁷⁰ *Dolenc* stated for trading or commercial fraud that “it manifests as an aggravated form of fraud though the level of punishment corresponds with the mitigated form of the offence”. In fact, punishment of up to one year in prison is prescribed for the person who commits commercial or trading fraud by selling substitute merchandise as genuine or attributing non-existing properties to the merchandise. Commerce refers to commercial activity as a salesman, and trade refers to the sale of such goods which are distributed *en masse*.⁷¹ An aggravating form of this offence is when fraud is committed within the trade. The third line of the provision which prescribes the publication of the court judgement and forfeiture of goods is particularly interesting. The criminal offence of falsified measuring or weighing is also considered as a form of fraud in § 343. The conclusion of the sale and purchase contract is assumed for the perpetration of the offence, which is committed by the person who sells falsely measured items first.⁷² An aggravated form of the offence is prescribed in the event of return.

The contemporary description of the criminal offence of fraud is presented by the Yugoslavian Criminal Code from 1951.⁷³ The criminal offence of “fraud” from Article 258 is committed by the person who, with the intent of acquiring illicit material gain for himself or another person, misleads or deceives the person by misrepresentation or concealment, thus forcing said person to act or fail to act to the detriment of his personal or property or another person’s property (punishable by a prison sentence of at least three months or solitary incarceration for up to five years). Para. 2 prescribes the aggravated form of this offence (if damage exceeds the amount of

⁶⁹ Perpetrator is the person who is not a civil servant, since special regulations of Chapter XXVIII apply to civil servants. *Ibid.* 430.

⁷⁰ *Idem*, 431.

⁷¹ Boasting for commercial purposes is excluded both here and in contemporary court practice, since everyone is aware of it, as opposed to serious attestation of properties. *Dolenc* 1930, 432.

⁷² Institution under § 343 includes, for example, weighing without weights or without measurements, i.e., by the length of one’s arm; weighing or measuring with irregular weights or measures. *Idem*, 433.

⁷³ Official Gazette of the Federal People’s Republic of Yugoslavia No. 13/51.

three hundred thousand dinars – it is punishable by solitary incarceration for up to ten years), whereas para. 3 prescribes a pecuniary fine or one-year prison sentence if the offence was committed with the intent to cause harm to another person. Petty fraud is a mitigating form of fraud under Article 259.⁷⁴ Despite the hardship of the period and frequent statutory alterations, provisions on fraud were not subsequently altered.⁷⁵ The Criminal Code of the Socialist Federal Republic of Yugoslavia from 1976⁷⁶ contains general and special revived constitutional provisions from 1974 about divided competence between the federation and the federal states. The special part does not regulate the criminal offence of fraud. In fact, the special part consisted of the following criminal offences: criminal offences against the socialist self-governing order and national safety; offences against humanity and international law; offences against the reputation of SFRY, its entities and representatives; offences to the reputation of the foreign country and organisation, their bosses, i.e., representatives; offences against official duties of officials in the federal entities; offences against the armed forces; offences against the single Yugoslavian market; and finally criminal offences that violated federal regulations.⁷⁷ Fraud, on the other hand, was covered by legislative competence of the republics, i.e., autonomous regions, as a typically material criminal offence. In the Criminal Code of the Socialist Republic of Croatia from 1976,⁷⁸ fraud was not substantially altered either.⁷⁹

⁷⁴ The name of the offence is as follows: Petty theft, embezzlement or fraud exist in terms of fraud when the value of damages thus committed does not exceed the amount of five thousand dinars and when the perpetrator intended to cause only minor harm.

⁷⁵ Act on Amendments, Official Gazette No. 30/59, Act on the Criminal Code Amendments, SFRY Official Gazette No. 31/62, correction in 37/62, Act on the Criminal Code Amendments, SFRY Official Gazette No. 15/67, 20/69, 6/73.

⁷⁶ SFRY Official Gazette No. 44/76, 36/77, 56/77, 34/84, 74/87, 3/90 and 38/90.

⁷⁷ *Bačić et al.* 1978, XXI.

⁷⁸ Official Gazette No. 25/77, 50/78, 25/84, 52/87, 43/89, 8/90 and /91.

⁷⁹ In the period from 1990 – i.e., since the establishment of the independent and sovereign Republic of Croatia – until the delivery of the first Constitution in the Republic of Croatia, the Criminal Code of the SFRY and the Criminal Code of the SR of Croatia, and certain regulations of secondary criminal legislation were applied. After the introduction of the Constitution of the Republic of Croatia, the aforementioned two codes from the former state with necessary modifications – such as the Basic Criminal Code of the Republic of Croatia and the Criminal Code of the Republic of Croatia and the new Act on Criminal Offences of Incendiarism and Terrorism Against National Sovereignty and Territorial Integrity of the Republic of Croatia – were applied as Croatian criminal law until the new 1997 Criminal Code entered into effect on 1 January 1998. *Horvatić* 2003, 116.

2.1.3 Fraud in Croatian Criminal Law After the Introduction of the 1990 Constitution

In the Criminal Code from 1997⁸⁰ *prevara* became *prijevarena* and the following wording “the person who, with the intent of acquiring illicit material gain for himself or another person” was substituted by “the person who, with the aim of ...”⁸¹ The element of this criminal offence under para. 1. remained unaltered. In fact, it could be said that the nomotechnical development of this criminal offence has been completed.⁸² In para. 4, the aggravated form of fraud remained if it was committed by a person who acquired a substantial material gain or caused substantial damage, acting with the aim of acquiring such material gain or causing such damage. In para. 5, the mitigating form of fraud remained if minor material gain was acquired or minor material damage caused, and the perpetrator acted with the intent of acquiring such material gain or causing such damage. The punishment for committing an offence with the aim of causing damage to another person was retained under para. 6 with the same prescribed sanction. However, new provisions (paras. 2 and 3) were introduced; they regulate pyramid schemes, which is a modern concept associated with fraud and characterised by the implementation of advertising, soliciting or other activities to attract participants or to professionally expand the system, with the expected gain of profit from the invested funds.⁸³ Such schemes guarantee winnings, provided that more participants are constantly (progressively) included.⁸⁴ Research into the cause of incorporating the provisions on pyramid schemes into the criminal offence of fraud was futile, despite the fact that, within those games, fraud may or may not (if the organiser complies with the rules of the game) be committed.⁸⁵ Such games, though not fraud, are considered special criminal offences throughout European acts/codes.⁸⁶

⁸⁰ Official Gazette No. 110/97, 27/98 as amended.

⁸¹ In order to emphasise the distinction between intent, as a form of guilt and the aim of acquiring illicit material gain as a subjective feature of the criminal offence.

⁸² Between 1997 and 2011, only the penal framework for this form of fraud was altered. Hence in 1997, the prescribed punishment for fraud under para. 1 was a pecuniary fine or prison sentence of up to three years, whereas the Act on Amendments of the Criminal Code from 2006 (OG No. 71/06) prescribed a harsher punishment of three months to three years in prison.

⁸³ Šeparović *et al.* 1999, 279. These provisions were often subjected to criticism, both in terms of legal doctrine and court practice.

⁸⁴ Novoselec & Bojanić in Novoselec 2007, 40.

⁸⁵ In fact, in the Elaboration of the 1997 CC Draft, the reasons for introducing this criminal offence were not mentioned.

⁸⁶ In the novel 2003 Criminal Code, provision 224 (b) prescribed a special criminal offence: pyramid schemes, and eight years after that, CC11 prescribed, with section 237, simple punishment for the person who organises or promotes a game or a system where participants who invested certain funds can expect winnings only by inclusion of

In the *new* Criminal Code, the mental element of the criminal offence of fraud remained unaltered in the first paragraph of Article 236 (the range of the prescribed punishment was increased from three months to three years was increased to six months to five years). After sixty years, a five-year prison sentence has once again become the upper limit of the prescribed punishment for the basic form of the criminal offence of fraud. It would be excessive to say that, from the 1951 Criminal Code, different forms of fraud were tolerated or even encouraged by mild sanctions. Paras. 2 and 3 were removed from Article 224 because they refer to the criminal offence of chain games prescribed by Article 237 of the CC as illicit games of chance.⁸⁷ Para. 4 – which was previously the aggravated form of fraud – became para. 2 (the only difference being that the special aim of acquiring such material gain by causing such damage is not required) and the prescribed punishment range of six months to five years was increased to one to eight years. The previous para. 5, mitigated form of fraud, became para. 3, but the part referring to petty material damage was removed from the legal text and the prescribed punishment was increased from six months (or a pecuniary fine) to one year in prison. Para. 6 was deleted (fraud committed only with the aim of causing harm to another person) because it was considered superfluous in terms of doctrine, and not used in court practice (using the example provided of a marriage confidence trickster who persuaded a girl to buy a dress which remained unused, taken from the Swiss Criminal Code).⁸⁸

additional participants (hence, punishment for pyramid schemes was removed from the integrity of the criminal offence of fraud).

⁸⁷ Article 237 included all games from the Games of Chance Act (in particular, pyramid schemes, i.e., pyramidal fraud in para. 2). We believe that such solution is a better nomotechnical solution from the criminalisation of pyramid schemes within the criminal offence of fraud for the following reasons: 1. this way the essence of pyramid schemes, which consists of enabling profit only by adding more participants, is more discernible; 2. punishable actions concerning (illicit) games of chance are encompassed by one criminal offence; and 3. these schemes do not require misleading of another person (as required for fraud offences). Furthermore, there is no reason to include just the pyramid scheme into the legal description of the fraud offence when there is a whole range of other fraudulent activities not incriminated by this provision. Finally, pyramid schemes, as a special criminal offence outside of the ambit of fraud are regulated by comparable legislation (e.g., § 168a of the Austrian CC). See *Turković et al.* 2013, 307–309.

⁸⁸ *Idem*, 107.

2.2 Criminological-Victimological Significance of Fraud

The research into the criminological significance of fraud was conducted in two phases. First, I analysed data from the Statistical Yearbook of the State Bureau of Statistics and Statistical Reports, and then the results of the personally conducted research on court practice obtained from the Municipal Criminal Court in Zagreb and Municipal Court in Split. The planned research was supposed to encompass the court practice of four major courts: the Municipal Criminal Court of Zagreb, and the Municipal Courts of Split, Rijeka and Osijek. However, due to the lack of funding, only the first two municipal courts approved the research. The data from the Statistical Yearbook of the State Bureau of Statistics were analysed for the period between 2005 and 2012.

*Table 1: Data about convicted adult perpetrators between 2005 and 2012*⁸⁹

Year	2005	2006	2007	2008	2009	2010	2011	2012
Total number of perpetrators	21,731 (10.4%)	24,216 (9.9%)	24,442 (9.8%)	24,168 (10.4%)	25,368 (9.9%)	24,430 (9.8%)	23,389 (10.3%)	20,548 (9.6%)
Criminal offences against property	6,534 (9.7%)	7,200 (9.7%)	7,266 (9.5%)	7,417 (9.5%)	7,288 (9.8%)	7,367 (9.3%)	7,370 (9.7%)	6,460 (9.5%)
Aggravated theft	2,228 (3.9%)	2,455 (3.7%)	2,549 (3.9%)	2,529 (4.2%)	2,478 (3.5%)	2,744 (4.3%)	2,719 (4.3%)	2,279 (3.7%)
Theft	1,767 (11.3%)	1,900 (11.1%)	1,906 (12%)	1,882 (11.6%)	1,910 (12.6%)	1,904 (11.5%)	2,130 (11.5%)	1,872 (11.7%)
Fraud	1,028 (16%)	1,140 (18.2%)	1,198 (18.3%)	1,290 (18.6%)	1,180 (19.9%)	1,131 (18.4%)	965 (20.1%)	959 (19.3%)

I first wanted to establish the percentage of perpetrators of fraud in the total number of perpetrators of criminal offences, and then the percentage of fraud in criminal offences against property. Between 2005 and 2012, in the total number of committed criminal offences, this ranged between 4.1%. From 2005 to 2009, the total number of perpetrators of criminal offences increased. A mild decrease was statistically recorded only in 2008. Since 2010, that number has continually decreased. The share of fraud also decreased; it peaked in 2008 at 5.3%, and recorded its lowest level in 2011

⁸⁹ Data taken from the Statistical Yearbook of 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012, respectively. Available at http://www.dzs.hr/Hrv/publication/stat_year.htm [13/04/2018]. Numbers in parentheses refer the share of women in the number of convicted perpetrators of criminal offences.

at 4.1%).⁹⁰ With respect to criminal offences against property, that percentage is between 28.7% and 31.4% (highest in 2012), and for aggravated theft between 34% and 37.2%,⁹¹ while the figures for theft were between 25.3% and 28.9%. Therefore, if we observe only the judicial statistics for convicted adult perpetrators, the myth about fraud as the most common criminal offence against property no longer holds true. In the Republic of Croatia, aggravated theft was continuously predominant from 2005 to 2012. We should also take into account the hidden figures and other drawbacks of statistics as a criminological method. How many persons are convicted of fraud according to the European Sourcebook of Crime and Criminal Justice Statistics? Since the research of comparable legislation encompasses Germany, Austria and Switzerland, I focussed on the data for those countries in particular. In Germany, from 2003 the number of persons convicted of fraud per 100,000 citizens was 96, and by 2005 that figure rose to 138. It decreased successively in the years 2006 and 2007 (in 2007 there were 135 persons convicted of fraud per 100,000 citizens).⁹² In Switzerland, Croatia and Austria, the share of persons convicted of fraud was considerably lower. In Switzerland, it was the highest in 2005 – with 22 convicted persons per 100,000 citizens, and the lowest in 2003 and 2004 (20 convicted persons per 100,000 citizens). In Austria and Germany that number increased (from 7 to 40) between 2003 and 2005, only to decrease in 2006; it reached its lowest point in 2007 with 36 convictions per 100,000 citizens. In Croatia, the number of persons convicted of fraud ranged from 23 (the lowest number in 2005) to 29 (the highest, in 2003). In Germany, Austria and Switzerland that number has decreased since 2005, in Croatia it increased to 26 between 2005 and 2006, and in 2007 it was equal to the previous year. The share of women as perpetrators of the criminal offence of fraud increased from 2005 to 2012. In this timeframe, it ranged from 16% to 20.1%, decreasing marginally to 19.3% in 2012. That figure is considerably higher than the share of women in the total crime rate (from 9.6% to 10.4%) and criminal offences against property (9.3% to 9.8%).⁹³

The data refers to the total value of material damages committed by fraud, but we have not managed to establish in this research because the exact perception about the share and consequence of fraud in the total crime rate of the Republic of Croatia would consist of both the number of those criminal offences (based on convictions) and the amount of damages caused by those offences. In fact, statistical reports did

⁹⁰ The decrease in the share of fraud is a logical consequence of the decrease in the total number of perpetrators of criminal offences.

⁹¹ Hence, it has been continuously rising since 2010. For earlier data see *Horvatić* 1994, 74–76.

⁹² European Sourcebook of Crime and Criminal Justice Statistics, 4th Edition, 2003–2007, 187; <https://english.wodc.nl/onderzoeksdatabank/european-sourcebook-4e-editie.aspx> [19/08/2017].

⁹³ See *Derenčinović* 2004, 177.

not contain data about the amount of damages. Therefore, in the future collection of statistical court data, it would be advisable also to include the amount of material damage.

The following two tables show the number of fraud charges and the proceedings initiated between 2007 and 2012. I chose to analyse data with respect to the basic form of fraud (Article 224, para. 1) and the aggravated form (Article 224, para. 4), because, apart from referring to the forms of offences committed the most in practice, the statistical reports of the State Bureau of Statistics only provide this data.

*Table 2: Charges for fraud under Article 224 (1) against adults by type of decision*⁹⁴

	Total	Unknown perpetrator %	Dismissed charges %	Bill of indictment %		Indictment	
				Without criminal order	With criminal order	Immediately	After conducted investigation
2007	1,577 (17.6%)	10.1	42.8	41	5.3	—	6
2008	1,572 (20.9%)	12.1	45.3	37.8	4.4	—	1
2009	1,490 (19.7%)	15.1	47.9	31	5.9	—	—
2010	1,443 (19.4%)	15.5	46	32	6.3	—	—
2011	1,429 (18.1%)	13.4	47.3	32.9	6.2	—	—
2012	1,157 (16.4%)	17.9	52.1	12.7	17	—	—

⁹⁴ Data from the *tables 2–7* is based on the data obtained from the Statistical Reports: 1366/2008, 1394/2009, 1421/2010, 1451/2011, 1478/2012 and 1504/13.

Table 3: Charges for fraud under Article 224 (4) against adults by type of decision

	Total charges	Unknown perpetrator %	Dismissed charges %	Bill of indictment %		Indictment %	
				Without criminal order	With criminal order	Immediately	After the conducted investigation
2007	1,386 (23.5%)	1.2	54.7	39.7	0.1	0.1	3.3
2008	1,098 (25%)	1	57.6	40.1	0.1	0.09	0.3
2009	1,048 (24.7%)	1.5	63.1	34.5	0.09	–	0.6
2010	1,253 (24.5%)	1.5	61.8	34.7	–	0.07	1.1
2011	1,361 (25.6%)	1.1	65	32	0.2	0.07	1.4
2012	772 (23.1%)	0.7	70.7	17.6	8.1	0.1	2.3

With respect to fraud under Article 224 (4), there was a decrease in fraud in 2008 and 2009. However, after 2010 the number of charges had increased and, by 2012, it had decreased by almost half. The percentage of dismissals is even higher; it had increased from 54.7% to the extremely high level of 70.7% by 2012. According to the Report of the State Attorney's Office of the Republic of Croatia for 2012, 47% of charges were dismissed, which emphasised the need for the grounds for dismissal to be examined. The Report states that investigations revealed that those were the charges mostly filed by citizens due to unresolved disputes in other cases. For this reason, charges were dismissed in such cases because criminal proceedings act to resolve legal disputes which should be addressed by other proceedings.⁹⁵ When it comes to charges with respect to fraud, the most common reason for dismissal is that creditors, by filing charges, aim to coerce the debtors to settle their mutual civil relations, i.e., commercial relations (in most cases this refers to payment for goods). This claim is supported by the number of judgements denying the charge collected in the doctoral research (see 2.4.2). With respect to criminal proceedings, the dominant type is once again a bill of indictment without criminal order.

⁹⁵ Report of the State Attorney's Office of the Republic of Croatia for 2012, 19; <http://www.dorh.hr/IzvjescjeORaduDrzavnihOdvjetnistavaU> [26/06/2017]. This claim is repeated on the Reports on the work of State Attorney's Offices for 2011 and 2010, p. 21, 14. In fact, in 2011, 44.6% of charges were dismissed and, in 2010, 41%.

Table 4: Persons indicted for fraud under Article 224 (1): Adults according to attempt and type of decision

	Total	Attempts %	Convicted persons %	Dismissal %	Stay of criminal proceedings %	Acquittal %	Judgement denying the charge %	Unaccountability – involuntary placement
2007	1,158	4.9	58	–	21.5	7.5	12.7	1
2008	1,172	6.1	62.3	5.3	13.3	7.8	10.9	1
2009	1,115	3.4	64	4.6	14.6	7.8	8.8	–
2010	920	6.4	68	4.5	11.4	7.8	8.1	–
2011	914	3.9	62	5.4	11.8	9	11.5	–
2012	732	3	70.2	5.4	11.3	8.6	4.3	–

Table 5: Persons indicted for fraud under Article 224 (4): Adults according to attempt and type of decision

	Total	Attempts %	Convicted persons %	Dismissal %	Stay of criminal proceedings %	Acquittal %	Judgement denying the charge %	Unaccountability – involuntary placement
2007	1,151	5.4	44	–	28.7	11.3	15.8	–
2008	1,146	5.7	48.3	6.5	15.9	15.9	14.3	1
2009	909	4.8	50.4	5.3	10.6	10.6	12.6	–
2010	844	6.6	53.1	5.2	17.8	17.8	10.3	–
2011	792	5.3	54.3	7.4	16	16	11.6	–
2012	841	3.9	52.1	6.3	12.6	16.6	12.2	–

After indictments, guilty convictions made up the largest number; with respect to Article 224 (1) from 58% to as many as 70.2%, and with respect to Article 224 (4), from 44% to 54.3%. There is a high percentage of stays of criminal proceedings, from 28.7% to 10.6%, however that trend is fortunately descending. Acquittals with respect to Article 224 (1) refer to only 7% of judgements (exception is 2011 with 9% and 2012 with 8.6%), whereas for Article 224 (4), that percentage ranges between 10.6% and 17.8%.

Table 6: Adults convicted of fraud under Article 224 (1) according to attempt and sanctions

		2007	2008	2009	2010	2011	2012
Total N		672	731	714	626	567	514
Women %		18.9	18.3	21.4	18.6	19.7	20.2
Attempt %		6.6	6.7	3	6.3	3.1	2.3
Duration of prison sentence	Total N	641	714	694	620	565	513
	Probation %	80.8	75.7	81.2	78.7	79.8	81.6
	5–10 y. %	–	0.1	–	–	–	–
	3–5 y. %	–	–	–	–	–	–
	2–3 y. %	1	0.8	0.7	0.4	0.7	1.3
1–2 years %	Total	6.3	5.7	6	7.4	9	7.4
	Probation	53.6	53.6	64.2	45.6	49	73.6
6–12 months %	Total	33.8	35	38.7	32.7	34.6	37.8
	Probation	78.3	78	81	77.8	81.6	80.9
3–6 months %	Total	36.6	41.7	34.7	39.8	37.6	43.4
	Probation	85.1	74.1	80	80.5	81.2	85.6
2–3 months %	Total	18.8	14.7	18.1	18.3	16.9	9.5
	Probation	89.2	86.6	91.2	91.2	97.7	85.7
1–2 months %	Total	1.8	2.1	1.1	0.9	0.8	0.1
	Probation	91.6	73.3	100	83.3	80	100
30 days %	Total	1.2	0.1	0.4	0.1	–	0.1
	Probation	87.5	100	100	100	–	–
Pecuniary fine %	Total	4.8	1.9	2.5	0.6	–	–
	Probation	6.4	37.7	–	–	–	–
Court warning		–	0.1	–	0.1	0.1	–
Guilty conviction, but without a sentence		–	–	–	–	–	–
Corrective measures %		–	0.2	0.2	0.1	–	0.1

In the analysis of sanctions, probation prison sentences predominate; the lowest number of 75.7% was recorded in 2008 and the highest, 81.6%, in 2012. With respect to the duration of the prison sentence, the largest number of convictions resulted in a sentence from three to six months (34.7% to 43.4%) and six to twelve months (33.8% to 38.7%) and less frequently two to three months (9.5% to 18.8%). Pecuniary fines were rare for fraud (e.g., not once in 2011 and 2012; in 2010 in 0.6% of cases; in 2009 in 2.5% of cases; in 2008, 1.9 % of cases; in 2007, 4.8% of cases). Why do

courts resort to pecuniary fines so seldom? The Criminal Code clearly prescribes that a pecuniary fine may be adjudicated as a secondary sanction for criminal offences committed for personal gain, even when it is not prescribed by law.⁹⁶ The prescribed punishment for fraud is a prison sentence from six months to five years, and fraud is undoubtedly a criminal offence committed for personal gain. I believe that such “reflective” punishment would have the best special preventive effect on perpetrators, certainly more effective than the probation sentence, and it would achieve the principle of individualisation of punishment in the contemporary sense.⁹⁷ In fact, if a criminal offence is committed for personal gain, i.e., with the aim of illicit material gain, then it is logical that the most effective punishment would be precisely a pecuniary fine. However, while adjudicating a pecuniary fine with a prison sentence for fraud, the courts should carefully assess all circumstances of a specific case and the personal and financial standing of the perpetrator. Only when those circumstances justify such sanctions should they pronounce both sanctions cumulatively (by forfeiting material gain, i.e., adjudicating an indemnification claim as *condicio sine qua non*). A pecuniary fine in that sense should not favour or discriminate against certain perpetrators based on their financial standing but should be pronounced when the court evaluates that it would have the best effect on the perpetrator, such that he would refrain from committing any future offences. Court warnings are equally as rare.

With respect to the aggravated form of fraud from Article 224 (4), a probation sentence is once again most common. These sentences accounted for 79.2% of the total in 2007, and only 70.9% in 2011. The most common duration of a prison sentence was six to twelve months (from 51% to 60.3% cases), then from three to six months (from 16.6% to 20.3%), whereas prison sentences of two to three years and three to five years (from 1.5% to 3.4%) were rare. Prison sentences of five to ten years were extremely rare, with only one or two per year. Taking into account that the aggravated form of fraud is related to the acquisition of material gain (i.e., material damage being caused) of over 30,000 kunas, I believe that these probation sentences are too mild.

In the study, I collected and analysed 65 fraud-related final judgements from Article 224 of the CC97.⁹⁸

⁹⁶ Art. 49, para. 4 of the CC97, and Art 40, para. 5 of the CC.

⁹⁷ See Cvitanović 1999, 342. For more details on pecuniary fine see Kurtović Mišić *et al.* 2009, 629–686.

⁹⁸ Inquiry sent to the Municipal Courts concerned the request for the delivery of final judgements in the five-year period between 2007 and 2011.

Table 7: *Adults convicted of fraud under Article 224 (4) according to attempt and sanctions*

		2007	2008	2009	2010	2011	2012
Total N		507	554	459	449	396	439
Women %		17.4	18.9	17.8	17.8	20.7	19.1
Attempt %		6.7	5.9	3	7.3	5.3	4.7
Duration of prison sentence	Total N	507	554	459	449	396	439
	Probation %	79.2	74.7	72.7	73.7	70.9	72.4
	5–10 y. %	0.1	0.3	0.2	–	–	0.2
	3–5 y. %	2.3	1.6	1.9	2.6	1	1.36
	2–3 y. %	3.4	3.6	1.9	1.5	1.5	3.4
1–2 years %	Total	16.9	16.6	16.3	23.8	21.2	20.5
	Probation	72	64.1	58.6	63.5	58.3	66.6
6–12 months %	Total	56	59.2	60.3	52.3	59.3	51
	Probation	85.2	80.1	80.1	83.4	79.1	85.2
3–6 months %	Total	20.3	18.4	18	19.1	16.6	18.4
	Probation	89.3	85.2	77.1	75.5	68.1	81.2
2–3 months %	Total	0.3	1	0.4	0.4	0.2	0.4
	Probation	100	83.3	100	100	100	50
1–2 months %	Total	4	–	–	–	–	
	Probation	100	–	–	–	–	
30 days %	Total	–	–	0.2	–	–	
	Probation	–	–	100	–	–	
Pecuniary fine %	Total	–	–	–	–	–	
	Probation	–	–	–	–	–	
Court warning		–	–	–	–	–	
Guilty conviction, but without a sentence		–	–	–	–	–	

Who is a “typical” Croatian confidence trickster, i.e., what is their criminological profile and does it even exist? In most cases, they are male (amongst 44 convictions, there were 9 women and 39 men).⁹⁹ Of the eight cases in which women were convicted, they were involved as co-perpetrators in two cases (with a man as the other

⁹⁹ Hence, the share of women is 20.4%. The share of women in the number of committed criminal offences of fraud between 2002 and 2010 is approximately 18%, with this share amounting to 9% of the total number criminal offences committed in the same period. See Table 1.

co-perpetrator with whom they were in an intimate relationship). With respect to age, persons 20-30, 30-40 and 40-50 years are most represented (exceptions were perpetrators aged 60, 62 and 80).¹⁰⁰ Twenty perpetrators were, at the time of the offence, 20-30 (45%), fourteen perpetrators 30-40 (31%) and ten perpetrators 40-50 years of age (22%). The majority of perpetrators have received secondary education (30 or 68%), nine only primary schooling (20%), and five judgements did not include such data (11%). Two perpetrators had a college degree (4%) and three had a university degree in economics (6%). The largest number of perpetrators, ten, stated that their level of education was the secondary school of economics (commerce). Finally, there are manual workers (eight perpetrators).¹⁰¹ For thirty-two perpetrators (72%) this is their first conviction for a criminal offence; they had no previous convictions, and two were subject to another criminal proceeding parallel to this one in which they were convicted of fraud. There are ten recidivists (22%).¹⁰² In the largest number of cases, the defendants stated that they had no material possessions (32 or 72%) or employment (36 or 81%). Hence, statistically, a “typical” Croatian confidence trickster is male, in his twenties with a secondary level of education, unemployed and without any assets.

The most common aggravating circumstances taken into account were previous convictions in general or convictions for material criminal offences, persistence during perpetration, “the fact that the perpetrator, besides the damage caused to the injured party, substantially violated peace and financial stability of third persons and committed a large number of criminal offences”,¹⁰³ “the perpetrator’s behaviour after committing the offence and his attitude towards the injured party whom he had not since contacted”.

¹⁰⁰ Including a one 19-year-old younger adult.

¹⁰¹ There is no data on the occupation of the four perpetrators; one perpetrator had no occupation, and there were three retirees, three seafarers. In individual cases the perpetrators were administrators, chemical technicians, electric welders, nurses, etc.

¹⁰² Judgements do not contain any data on the offences from previous convictions. In the reasoning behind only one judgement did the court list previous convictions for material criminal offences as an aggravating circumstance.

¹⁰³ In some cases, the courts stated that the level of violation of the protected property, i.e., amount of acquired material gain, was an aggravating circumstance, which could amount to the forbidden dual evaluation of circumstances required for sentencing (prohibition of dual evaluation does not exclude the court’s right to take into account circumstances which specify the quantity or quality of certain features or the manner of perpetration). See *Novoselec & Bojanić* 2013, 439.

Chart 1– 4: Criminological profile of the “typical” confidence trickster

Mitigating circumstances that were taken into account include: “fair conduct before the court”, “truthful confession of criminal offences”, perpetrator’s contribution to the establishment of the facts, expressed regret for the committed criminal offences, “willingness to change one’s lifestyle expressed before the court, obvious change of lifestyle, especially in terms of abstaining from gambling”, no previous convictions, injured party’s desistance from prosecution, “familial and financial circumstances”,¹⁰⁴ grave personal and familial circumstances,¹⁰⁵ complex personal circumstances, “the fact that he is a relatively young man, hence this offence is the result of his immaturity”, compensation of damages before the beginning of the trial, and an expressed willingness and readiness to return the money to the injured parties.

¹⁰⁴ These circumstances were taken into account for a perpetrator who is divorced, with one minor child, employed as a seafarer and with numerous debts with banks.

¹⁰⁵ Sometimes even the voluntary participation in the Homeland War.

Of 44 convictions, there were seven in which the perpetrator was convicted concurrently of fraud and another criminal offence, namely, forgery of documents (Article 311, paras. 2 and 1 of the CC97) in seven cases (15.9%),¹⁰⁶ and verification of false content (Article 315, para. 1 of the CC97) in two cases.¹⁰⁷ In several cases, the courts believed that the continued offence of fraud had been committed, although the identity of the injured party was not revealed.¹⁰⁸ This confirms the already expressed critique in Croatian legal theory that court practice lacks consistency with respect to reliable criteria in determining what constitutes a continued criminal offence.¹⁰⁹

In terms of pronounced sentences, the courts resorted to probation without exception (from six to twelve months, see tables 10, 11). Of 4 convictions, there were only two in which the perpetrators were sentenced to an effective prison sentence (4.5%). In one judgement, the female perpetrator was sentenced to a total prison sentence of one year for committing fraud (continued) concurrently with forgery of documents (continued), already having been previously convicted for similar crimes.¹¹⁰ In the second case, the perpetrator was sentenced – for the concurrently committing fraud, forgery of documents and verification of false content – to a total prison sentence of one year, and the material damage was quite substantial (181,900.42 kunas).¹¹¹

Since the criminal offence of fraud is also characterised by the contribution of the victims who bear some liability, due to their gullibility and greed,¹¹² I have examined the victimological aspect of this offence as well. Statistically speaking, the largest

¹⁰⁶ See Chart 1. Among the convictions, there are ten judgements in which the natural persons were only convicted of fraud committed by acquiring a certificate from J.M. about their alleged employment in the Union of Judiciary, Administration and Local Self-Government, which contained the amount of their salary. They used the certificate to request a loan and open a current account (and for overdraft approval). They would get the loan and open the account, and would nominally reach the limit of their overdraft with their transactions. It is not discernible from those judgements why they have not been convicted for crimes committed concurrently under Article 311, para. 1 of the CC97.

¹⁰⁷ See VSH-Kzz-13/90 of 30th Aug 1990.

¹⁰⁸ Municipal Criminal Court in Zagreb KO-103/11 of 24 February 2011 and Municipal Court in Split K-1512/10 of 24 March 2011.

¹⁰⁹ See *Novoselec & Bojanić* 2013, 361.

¹¹⁰ Municipal Court Split K-1512/10 of 24 March 2011.

¹¹¹ Municipal Criminal Court in Split K-842/11 of 18 October 2011.

¹¹² *Novoselec & Bojanić* 2007, 234. *Cvitanović* states that fraud is a criminal offence with a pronounced victimological feature. It is often characterised by the victims' contribution to their own victimisation. At the same time, in cases when such contribution does not exist or is negligible, the perpetrators are nominally attributed with, as earlier sources say, "deceitfulness" or "trickery" by which they persuade their victim to inflict personal material gain, which is what distinguishes this offence from fraud. Op. cit. *Cvitanović* in *Derenčinović* 2013, 204.

number of parties injured by fraud are legal persons: banks, insurance companies or telecommunications companies (in 28 judgements or 63.6% of the total, while the remaining 16 are natural persons).¹¹³ In terms of natural persons, the victims are “acquaintances or friends” of the defendant who borrowed money or bought a vehicle from them, victims of purchases after viewing personal advertisements (3 cases) or unknown persons whose data was obtained by theft of forgery (1). In terms of abusing a friendly relationship, in one case the defendant convinced his friend to get a loan whose instalments should have been repaid by the defendant, and in two cases the defendants borrowed money from their friends, but never returned it, not even partially. This is really a case of taking advantage of the victim’s gullibility and good faith.¹¹⁴ There are two judgements where the defendant misrepresented himself as a real-estate agent for the sale of a flat and requested and received money as a down payment. In one case, he represented himself as the owner of the leased flat and kept the rent. Confidence tricksters are accustomed to taking advantage of people with poor financial standing. Hence in one case, they promised the victim a better job and, in two cases, persuaded their victims to get a loan in order to settle their previous debts. In general, we may conclude that the data on victims in these judgements is superficial, and that misleading or deceiving of said victims is not particularly elaborate, but the courts usually repeat the factual description from the dictum in their reasoning.

2.3 Objective Features

Within the objective features, I examined the notion of facts (misrepresentation and concealment) and error, disposal of property and damage. Research into the objective features of the criminal offence of fraud in Swiss criminal law¹¹⁵ pointed to four stages of perpetration, which are actually consistent with objective features: a) motivating behaviour, which usually – but not necessarily – represents fraudulent action; b) creating motives in others as a result of this behaviour, which is based on error; c) possession of property motivated on this basis;¹¹⁶ and d) occurrence of material damage resulting from the possession of property.¹¹⁷

¹¹³ Hence, in 63.6% cases, the injured parties are legal persons.

¹¹⁴ In Croatia, this is (not necessarily) associated with regional affiliation. In specific judgements, the perpetrator took advantage of the fact that he comes from the same place as the injured party (same region).

¹¹⁵ § 146 para. 1 of the CC.

¹¹⁶ The term possession of property is used for Croatian “*raspolaganje imovinom*” or German “*Vermögensverfügung*”. It refers to any action or failure to act which directly affects the amount of property owned. Possession of property is used instead of the term “disposal of property”, a common mistranslation of the term.

¹¹⁷ *Stratenwerth et al.* 2010, 379. See *Donatsch* 2010, 272–277.

2.3.1 Facts

The examination of fraud is based on facts. I have encountered difficulties in the very definition of this notion. Facts are – according to traditional criminal law theory – all past and present events and conditions which can be proved. They are divided into internal and external facts.¹¹⁸ Within the research of fraud, special attention should be given to the demarcation of facts, value judgements and predictions.

2.3.1.1 External Facts

In Croatian criminal law, it is common to define external facts as those which can be determined through the senses or which can be empirically verified.¹¹⁹ There is an unlimited number of possible circumstances, but they usually refer to the properties of items or goods: quality, origin, veracity and credit rating of claims, and the characteristics of the person: identity, family relations, social or financial standing. When it comes to a person's identity, the perpetrator nominally obtains or makes false documents, thus committing the criminal offence of forging documents in concurrence with fraud. *Janssen* similarly defines external facts: All specific, past or present events or conditions of the external world and person's internal (spiritual) life which can be determined by senses, empirically examined or proved.¹²⁰ According to BGH court practice, facts are not only actual, but also alleged events or conditions, as long as they can be objectively determined and if their existence can be established with certainty. This may refer to properties, trafficability, origin or age of an item or a person, their identity or familial, social or financial standing.¹²¹ However, what is the possibility of proof? Primarily, it is a criterion set by court practice, which, in German legal theory and practice, enables the expansion of the element of the criminal offence of fraud towards the criminal offence of endangerment. The following text shows the extent to which that criterion has been accepted in our and other legal systems. The establishment of the notion of facts has proved to be particularly interesting with fraud related to betting in sports criminal law. In fact, if the object of fraud is a sports result, it refers to a future event and, as a result, this criminal offence

¹¹⁸ *Novoselec & Bojanić* 2007, 235. See *Bačić & Pavlović* 2004, 811: "A fact is something objective which can be proved accordingly. It encompasses all events from the external and the internal world (will, aim, motive, intent). A fact cannot be untrue because it would imply *contradictio in objecto*. Only factual claims can be untrue." In the civil law theory, legal facts are associated with origin, alteration or termination of a legal relationship and, consequently, origin, alteration or termination of subjective rights. With respect to their origin, they are divided into natural events and human action; with respect to their function, they are divided into assumptions, legal grounds, presuppositions or presumptions and fictions. *Vedriš & Klarić* 2004, 25–31.

¹¹⁹ *Novoselec & Bojanić* 2007, 235; *Cvitanović* 2013, 204.

¹²⁰ *Janssen* in *Achenbach & Ransiek* 2012, 530, same as *Cramer & Perron* in *Schönke & Schröder* 2006, 2188.

¹²¹ *Idem*.

cannot be applied (in the specific case, the BGH claimed that the person who concluded a betting contract simultaneously implied that he did not manipulate the object of betting).¹²²

Something in the future cannot be deemed a fact yet; it becomes a fact only after it occurs. However, “scientific findings or conventions resting on future events, such as a solar eclipse, the beginning of spring, i.e., Easter”, according to *Cramer* and *Perron*, should be considered present facts.¹²³ There is no fraudulent action in the claim that the future event will occur, hence there is no fraud when a person encourages another person to conclude an adequate insurance policy by claiming that a heavy hailstorm is going to affect a certain area. Fraud is considered only when there are laws of nature, such as when a person claims – based on scientific findings – that there would be an earthquake at a certain moment in time.¹²⁴ Swiss legal theory is even more resolute when considering external facts. In fact, it considers future events as facts when they occur as a logical result of the laws of nature.¹²⁵ On the other hand, events expected with lesser or greater certainty, which represent a value judgement based on that statement, are not considered fraud because they refer to a reality which has not been established yet.¹²⁶ In Austrian criminal law theory, external facts are primarily considered events of the external world.¹²⁷

In the judgements covered by the research, external facts as objects of misleading, i.e., deceit prevailed (in 30 judgements or 68% of cases). These generally referred to the perpetrator’s false identity which would help him get a loan, open a current or conclude a subscription contract (12 cases). False identity (e.g., as representatives of Austrian investors) was used to get loans on behalf of the injured parties, rent vehicles, or lease or sell a flat.¹²⁸ In terms of the properties of items, fraud referred to, for example, the type of labelled goods or concert tickets (forged).

¹²² For more details, see *Pajčić & Sokanović* 2011, 864–867.

¹²³ *Cramer & Perron* 2006, 2188. It is further claimed that, as a result, fraud was committed by a person who sells stained glass for observing the alleged forthcoming solar eclipse.

¹²⁴ *Idem*.

¹²⁵ For instance, the claim that person X will not die, theoretically, constitutes fraud.

¹²⁶ *Stratenwerth & Jenny & Bommer* 2010, 379.

¹²⁷ *Fabrizy* 2010, 460. It is stated that facts are circumstances, legal relations and legal conditions, even the perpetrator’s aims. *Bertel & Schwaighofer* 2010, 249.

¹²⁸ Material damage referred to “costs of the loan”, “down payment for the flat” *et sim*.

2.3.1.2 Internal Facts

In the current Croatian criminal law, internal facts are defined as past or present physical circumstances.¹²⁹ Internal facts, applicable to fraud, include knowledge and will of the perpetrator, as well as his intent.¹³⁰ This usually refers to the perpetrator's readiness for payment, i.e., execution of the contract, or the perpetrator's belief that he would, despite his current insolvency, meet the contractual obligation within the stipulated deadline (serious intention to conclude the contract, intention to perform or not perform certain actions).¹³¹ When it comes to fraud in the area of economic criminal offences in Germany, the most common examples of internal facts include the awareness that a certain financial investment or commercial transaction will bring only a minimal chance of profit, or the intent to invest money on the stock market.¹³² Value judgement may also contain the factual claim that the assessor should be qualified based on the personal knowledge of the matter (e.g., doctor's knowledge about the development of the disease).¹³³ Hence, e.g., when the attorney provides legal counselling and claims that the judgement corresponds to the court practice of appellate courts, or the art expert says that he is convinced of the authenticity of the painting, there is no fraudulently relevant fact in the internal belief about the truthfulness of the judgement or the assessment as such. Otherwise, every statement of value judgement or prediction would also contain the claim of this fact and thus be subject to a fraudulent action.¹³⁴ Swiss theory clearly indicates that when a person expresses his intention to pay for a purchase or his good faith to repay a loan, it does not refer to a future event of payment or repayment, but to his present willingness to undertake such actions. This willingness is not a regular judgement, but

¹²⁹ *Novoselec & Bojanić* in *Novoselec* 2007, 235; *Cvitanović* 2013, 204; *Bačić & Pavlović* 2004, 811. According to *Fischer*, those are internal subjective states, processes, knowledge and intentions. *Fischer* 2012, 1784; according to *Janssen*, those are knowledge and intentions, *Janssen* 2012, 533.

¹³⁰ In judgements, they are generally expressed as follows: "untruthfully stating that he shall regularly settle his contractual obligations, even though he decided not to comply in advance ... untruthfully stating that he shall repay that sum no later than 31 December 2010, even though he decided in advance that he shall never return it ... untruthfully stating that he shall repay the monthly loan instalments, even though he decided not to comply in advance ...".

¹³¹ *Janssen* 2012, 533. See *Cramer & Perron* 2006, 2189; *Fischer* 2012, 1784.

¹³² *Janssen* 2012, 533.

¹³³ *Ibid.*

¹³⁴ *Cramer & Perron* 2006, 2189.

undoubtedly a fact which exists at the present moment (or does not exist at all).¹³⁵ Austrian theory also clearly determines internal facts as internal events if they can be rationally established. It further states that payment competence, serious intent to conclude the contract, willingness to act upon one's promise are all considered typical.¹³⁶

Establishment of internal facts as physical circumstances indicates similarity with the issues arising from establishing the perpetrator's motivation or knowledge (by interpreting other behaviour patterns).¹³⁷ As long as the perpetrator acts in a way which leads to the conclusion about the internal fact, such evidence may be adduced.¹³⁸ The issue arises in those cases in which internal facts are not reflected by external conduct, for example, if the lessee fails to pay the third instalment after he regularly paid the previous two upon concluding a contract with the lessor for a three-month lease of a flat. If this is a creditworthy lessee, how can we prove that he intended to withhold payment of the third instalment when he concluded the contract? In order to establish the facts, the court has to rely on non-binding circumstantial evidence which may lead to the conclusion about the possible lack of intent to pay.¹³⁹ According to *Janssen*, this provides an early mechanism for protecting "the victim of fraud at the time when the relevant content of the matter is still developing and where damage may still occur".¹⁴⁰ The element of fraud in that aspect changes its character towards the criminal offence of endangerment. This is particularly problematic in the area of economic criminal law, as economic risk is imminent in the economic market and criminal law cannot provide protection from this risk.¹⁴¹

Internal facts associated with fraudulent misconduct or deception in the collected judgements included: willingness to pay for ordered and received goods, repayment of a loan, settlement of services, settlement of the unpaid price for the purchased vehicle, repayment of a grant.¹⁴²

¹³⁵ *Stratenwerth & Jenny & Bommer* 2010, 381. Such willingness should, as present fact, be distinguished from a prediction which represents the untruthful presentation of belief or hope and represents an internal fact. Said internal fact implies a future development, over which the person expressing the claim has no influence, as opposed to the personal intent to pay or repay.

¹³⁶ *Fabrizy* 2010, 460.

¹³⁷ *Janssen* 2012, 533. See Article 10 of the CPA.

¹³⁸ *Idem*.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*. Compare to criminal law subsidiarity; punishment as *ultima ratio*.

¹⁴² As expected, the courts did not conduct any analysis on whether specific fact/s is/are external or internal.

2.3.1.3 Demarcation of Facts, Value Judgements and Predictions

As opposed to factual claims, there are regular assumptions, conclusions, presuppositions, assessments or opinions where, by expressing subjective personal judgements, the facts are compared with the norms.¹⁴³ As an example of a regular value judgement, *Cramer* and *Perron* mentioned a statement of a jurist who said that he could provide the same legal services as an attorney. The boundary between the value judgement and the fact is difficult to determine. When trying to distinguish them, we should focus more on whether the value of the statement has the objectively evaluable factual core whose existence or absence creates a false perception with the deceived party than to the form of the statement or the possibility of a sensory observation of the subject of the statement.¹⁴⁴ Hence, some judgements are considered facts as long as they are related to a specific case in the legal transaction, since they are familiar to non-jurists (e.g., with respect to purchase, loan, lease).¹⁴⁵ Statements about the quality and value of items can be mere assessments (e.g., about the value of a painting), but also factual claims when they denote a certain characteristic of an item; e.g., trade value of an item, mortgage safety, possibility of using a patent, quality and availability of certain goods, good business operation of a catering facility, scientific proof of effectiveness of a slimming or a hair growth product.¹⁴⁶ The difference between facts and value judgements is substantial in advertising and similar activities; fraud exists only when specific facts are seriously asserted. According to the rules of trading, excessive boasting and advertisements are usually not perceived as serious in the advertising domain.¹⁴⁷ With advertising or boasting, recommending goods or services, we should consider the context where the disputable factual information is given. On the one hand, the consumers are aware that they are often presented with “embellished descriptions”; whereas, on the other hand, the descriptions are so vague that they cannot be deemed as facts. Also, the assessment of whether something is a fact or a value judgement can change over time.¹⁴⁸ In many cases, these are value judgements which cannot be proved and are therefore contrary to facts that are fraudulent. According to the prevailing attitude in the German court practice, value judgements do not contain the inter-subjectively provable reality, but

¹⁴³ *Cramer & Perron* 2006, 2188.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Cramer & Perron* 2006, 2189. See *Fischer* 2012, 1784.

¹⁴⁷ *Ibid.* Same as *Janssen* 2012, 531. According to the German court practice, value judgements do not generally contain claims of verifiable (provable) inter-subjective truthfulness, but only inner subjective assessments. Such assessments strongly depend on the context in which they are presented and the attributed content according to the trading concept of a specific environment.

¹⁴⁸ *Janssen* 2012, 531.

only the inner subjective assessment.¹⁴⁹ If a value judgement has a factual core, it contains a fraudulently relevant fact.¹⁵⁰ From the aspect of consumer protection, is there a need to subsume the boasting of goods within promotional offers under the element of fraud? In Germany, the existing effective protection system is represented by § 5 of the Act on Unfair Competition (*Gesetz gegen den unerlaubten Wettbewerb, UWG*), which meets the requirements for cease and desist claims, and the claim for compensation (§ 8 and § 9 UWG).¹⁵¹ The substantial element of punishable advertising is regulated by § 16. Although the court practice has established so-called legal loopholes since 1986, substantial UWG legislative reform from 2004 pleaded against the expansion of punishment of § 16.¹⁵² In our system, the criminal law consumer protection is prescribed in Article 255, i.e., criminal offence of deceitful advertising. Common examples used in the Austrian theory include: e.g., whoever sells his vehicle by (falsely) claiming that it had never been in a traffic accident is considered to have committed fraud, whereas the person who claims that his vehicle is “outstanding”, “the best on the market” is not considered to have committed fraud.¹⁵³ Swiss theory clearly distinguishes between excessive boasting or market advertising and

¹⁴⁹ Ibid. A common example in the German criminal law theory is the explanation of whether the statement: “Our company is well-positioned on the market” refers to a value judgement or a pure value judgement. A value judgement may, in some cases, represent the facts (factual claims) if it contains a provable factual core. The issue here once more is the specific situation and context where the statement was uttered, which are the requirements for this “factual core”. The resulting conclusion is that more factual elements entail greater substantial factual portion of the statement. *Idem*.

¹⁵⁰ *Janssen* 2012, 530. See *Novoselec* 2009, 96. “This is important with exaggerated advertisements which do not represent fraud as long as they are not taken seriously, but may constitute fraud if they contain a factual claim, e.g., if certain non-existing properties are attributed to a product.”

¹⁵¹ *Janssen* 2012, 531.

¹⁵² *Idem*. Act on Illicit Advertising in the Republic of Croatia was delivered in April 2009 (OG No. 43/09) and it distinguishes deceitful and comparative advertising (Article 3), whereby deceitful advertising is defined as any advertising which, in any manner, including its presentation, misleads or is likely to mislead the target customers, and hence affects their financial behaviour i.e., which causes or is likely to cause harm to the competition. Comparative advertising is any advertising which directly or indirectly points to the competition, i.e., which directly or indirectly points to goods or services of the competition. Aside from the assessment of deceitful advertising and the assumptions of permissibility of the comparative advertising, in the event of a cease and desist claim the commercial court has actual competence.

¹⁵³ *Bertel & Schwaighofer* 2010, 250. Criminal offence of fraud is committed by the person who sells a motorbike which he does not own. The doctors who offer their patients to take personal care of them for a fee, are not considered to have committed fraud – even if the fee is illegal. However, the doctors commit fraud when they make such offers to the patient but fail to mention that the care of other doctors is also available and equally as valuable, or if they do not discuss any fees with their patients in advance, but request such fees afterwards. *Idem*, 251.

fraud with recognisable and nominal judgements (e.g., “the best and the cheapest bed in Switzerland” excludes fraud, and the only possible offence would be illicit advertising; whereas fraud exists when the claims refer to certain properties or characteristics of the products (e.g., 100% pure wool).¹⁵⁴ Rumours concerning the company position on the stock market provide an interesting example. The rumours, in fact, have an adverse effect on the stock exchange rate and can thus cause damage to the investors. If a person explicitly or implicitly claims that he is aware of a certain rumour, although such rumour does not exist, this false statement reveals fraud.¹⁵⁵ *Janssen* points to the inconsistency of BGH court practice, stating that BGH established that the advertisement “the most commonly purchased razor” does not contain a factual claim suitable for fraud. However, the BGH adjudicated differently in the case of the advertisement: “unrivalled product”. If the content of the factual core is connected with the rumour, it may also be deemed fraud (see 3.5.4.).¹⁵⁶ If predictions are examined as the subject of a fraudulent action, their establishment has substantial demarcation issues. These include the following: predictions of future development of the exchange rate or increase in value, market circumstances or contributions.¹⁵⁷ According to *Cramer* and *Perron*, predictions are difficult to make due to the notion that facts are only past or present events and are valued as such. Also, future circumstances cannot be verified by present proof.¹⁵⁸ *Tiedemann* claims that predictions are often connected with value judgements or are in fact value judgements.¹⁵⁹ *Haft* defined predictions as untruthful presentation (*lügnerische Vorspiegelung*) of beliefs and hopes different from factual claims.¹⁶⁰ Therefore, predictions are closer to the notion of value judgements. However, if they have a factual core, they can result in fraud (as with value judgements). The German theory subsumes “the possibility of profit” under the notion of prediction.¹⁶¹ When it comes to predictions, legal scholars and theorists agree on the following: if they contain a factual core which can be the subject of fraud, the implementation of § 263 is possible, otherwise they are only speculations which cannot represent facts.¹⁶²

The issue of demarcation of facts, value judgements and predictions in the criminal offence of fraud is comparable to the demarcation of the statements of facts, value

¹⁵⁴ *Stratenwerth & Jenny & Bommer* 2010, 381.

¹⁵⁵ *Idem*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*. 532. See *Wodzak* 2006, 34 and further.

¹⁵⁸ *Cramer & Perron* 2006, 2188.

¹⁵⁹ *Tiedemann* according to *Janssen* 2012, 532.

¹⁶⁰ *Haft* according to *Stratenwerth & Jenny & Bommer* 2010, 380.

¹⁶¹ *Janssen* 2012, 532. The notion is more graphic in German: *Gewinnchance*, it is often used with stock trade in German practice.

¹⁶² *Ibid*.

judgements and value laden statements of facts in the case law of the European Court of Human Rights in terms of the breach of Article 10 of the Convention (in the context of the criminal offence of insult, slander and disparagement). Before the judgement *Karsai v. Hungary* (2009), the ECtHR dealt with the demarcation of statements of facts and value judgements (*Scharsach and News Verlagsgesellschaft v. Austria* (2003), *McVicar v. United Kingdom* (2002), *Rumyana Ivanova v. Bulgaria* (2008), and the decision against the Republic of Croatia (*Europapress Holding d.o.o. v. Croatia* (2009), *Vesna Balenović v. Croatia* (2010), *Rujak v. Croatia* (2012), *Stojanović v. Croatia* (2013)).¹⁶³ The principle applied here was that the existence of facts can be proved, whereas the truthfulness of value judgements is not provable; even though there should be sufficient factual grounds to support it. Otherwise, they would be considered as exaggerations.¹⁶⁴ Therefore, the difference between the facts and value judgements lies in the amount of factual proof to be determined. Whereas the requirement of proving truthfulness of a value judgement is in general impossible to meet as it would result in the violation of Article 10. The requirement of proving that the statement of facts is substantially truthful, in conformity with the reasonable standard of proof, is not contrary to Article 10 of the Convention (58d). Hence, the demarcation criterion is again the factual core which is the factual basis for these cases. One of the most recent decisions of the Constitutional Court, U-III-1728/2013 of 17 April 2014, is in conformity with the previously cited decisions. It abrogated the conviction of the Municipal Criminal Court in Zagreb (the claimant was convicted of the criminal offence of defamation) and the judgement of the County Court in Zagreb which dismissed the claimant's appeal and confirmed the original judgement. The Constitutional Court did not accept the courts' claim that the facts presented by the claimant (in one part) were untruthful; it stated that the courts failed to examine whether contested claims can be perceived as rumours, whose contents are not expected to be true and whose truthfulness is not subject to verification. These rumours could also represent the factual basis for expressing a value judgement.¹⁶⁵

2.3.2 Misrepresentation or Concealment

The perpetration of the criminal offence of fraud has been defined in a different manner; fraud can be committed by commission or omission. Commission or active action consists of misrepresentation of facts which can be express and implied; whereas

¹⁶³ The notion of value laden facts was introduced in the matter of *Karsai v. Hungary*. According to Omejec, it represents a grey zone between two clean formulae. *Omejec* 2013, 1250.

¹⁶⁴ Judgement *Stojanović v. Croatia*, p. 21 (58(d)). See *Omejec* 2013, 1249. We should emphasise here that the only purpose of reckless slander is a type of defamation whose only purpose is to insult beyond the protection of Article 10 of the Convention. See the decision of *Rujak v. Croatia*, § 30.

¹⁶⁵ § 11.2.1.

omission, i.e., failure to act, represents concealment. The value of the statement of conduct is established in the same manner as the subject of the statement contained within a statement- according to the general rules of interpretation.¹⁶⁶ It means that in terms of the objective content of a statement, the court should establish what can be perceived from the circumstances from a certain case with respect to the perpetrator; it should always aim to establish whether a false statement can be deduced from the perpetrator's overall behaviour.¹⁶⁷

Swiss theory states that in general the facts are presented or concealed in verbal or written form; by implied action or gesture, i.e., by every type of conduct with attributed statement value in social transactions.¹⁶⁸ Austrian theory defines fraud as misrepresentation (*Entstellung*) or concealment of true facts.¹⁶⁹ It may include being misled through certain implied actions; regular value judgements, hopes, emotions and feelings are not facts because they cannot be subjected to objective control.¹⁷⁰ The verbal claim of truthfulness may be considered a fraudulent action. The perpetrator may not revoke the objectively expressed content of his statement when he knows that the recipient would misconstrue it or when that is his particular intent. For instance, when the claim is expressed under circumstances which are designed to leave an impression of a humorous remark (bank clerk presents a counterfeit banknote and indicates that it is "fake").¹⁷¹ The aim of misrepresentation or concealment is to mislead another person so as to have a false conception of the facts. According to the Croatian CC, any action which achieves this said aim without any trickery would suffice.¹⁷²

¹⁶⁶ *Cramer & Perron* 2006, 2190.

¹⁶⁷ *Idem*. The authors further claim that mere creation or alteration of an external situation does not have a statement value. The statement value occurs when the communication act refers to this situation, thus causing misconception, e.g., when the perpetrator exchanges price tags in a store in order to achieve a cheaper purchase, and then places the clothes with the exchanged price tag on the cashier's desk; here the perpetrator states that the tag corresponds to the price specified by the seller.

¹⁶⁸ *Stratenwerth & Jenny & Bommer* 2010, 382.

¹⁶⁹ *Fabrizy* 2010, 461.

¹⁷⁰ *Idem*.

¹⁷¹ *Cramer & Perron* 2006, 2190. See *Fischer* 2012, 2190.

¹⁷² *Novoselec* 2009, 97. "As opposed to the French CC from 1992 which limited misrepresentation to scams connected with the use of false identity or property and the abuse of the actual property – not any lie would suffice, it needs to be substantiated by an external element; presentation of false documents, inclusion of third persons or re-enactment." *Idem*. Swiss theorists also believe that, according to the legal text, fraud as such would not suffice, but it would require vicious deceit (*arglistig irreführen*) modelled after the French *Code Pénal* (Article 313-1), therefore, it would require the existence of a special conniving behaviour (with a limitation that such interpretation is present in one part of Swiss cantons with the predominant influence of French law,

2.3.2.1 Misrepresentation

Misrepresentation can be express or implied.

2.3.2.1.1 Express Misrepresentation

Express misrepresentation is an active action by which the perpetrator verbally or in writing expresses an untruthful claim about a fact.¹⁷³ Express misrepresentation is often described as *expressis verbis* presentation of untruthful factual claims, for instance, by guaranteeing non-existent properties of products. It is irrelevant if they are either an integral part of a written agreement or merely a verbal guarantee.¹⁷⁴ An example is when a bidder in a public procurement procedure claims that there was no agreement on the price in the bidding procedure, but there was.¹⁷⁵ According to *Janssen*, in addition to spoken or written word, direct fraud can be committed by all kinds of communication gestures or symbols. They are characterised by an unambiguous meaning of expression according to standard social conventions.¹⁷⁶ If a person seeking employment provides false information about previous convictions, it is also express fraud, as well as providing false information regarding the amount of investment costs (because only the actual costs are covered at the allocation of required funds).¹⁷⁷ Can fraud be committed by presenting truthful factual claims? German theory provides an affirmative answer to this question stating that it occurs when the perpetrator intends to cause disagreement or error. It refers specifically to cases where the perpetrator takes advantage of the lack of fluency in a foreign language or special professional terms in order to commit fraud.¹⁷⁸ Such forms of fraud are also possible when a truthful statement supports the fraud committed in another manner. It becomes relevant when a customer humorously asks if a specific work of art is a forgery, and the seller confirms it. In this case, the humorous context, and not the truthfulness of the answer, represents grounds for fraud.¹⁷⁹

whereas regular fraudulent action suffices in German-Swiss cantons with the predominant influence of German law). *Stratenwerth & Jenny & Bommer* 2010, 383.

¹⁷³ See *Novoselec & Bojanić* 2007, 235; *Cramer & Perron* 2006, 2190. According to *Janssen* express fraud occurs when the perpetrator verbally or in writing expresses a misstatement of facts. *Janssen* 2012, 534.

¹⁷⁴ *Cramer & Perron* 2006, 2190. Fraud is also possible when the written agreement contains a clause that secondary agreements are meaningless.

¹⁷⁵ *Janssen* 2012, 535.

¹⁷⁶ *Janssen* 2012, 535. A valid question would be what the difference is between express misrepresentation and implied fraud. According to *Janssen*, express misrepresentation refers to the use of communication *gestures and symbols*, and implied fraud to implied *behaviour*.

¹⁷⁷ *Idem*.

¹⁷⁸ *Idem*. Same as *Fischer* 2012, 1787.

¹⁷⁹ *Ibid*.

2.3.2.1.2 Implied Misrepresentation

Implied misrepresentation occurs when the perpetrator expresses false facts with his conduct, and not with direct verbal or written communication.¹⁸⁰ The deciding factor is the type of statement value of the perpetrator's overall behaviour according to the perception in a business transaction (and the due care with which some groups of persons are obliged to act).¹⁸¹ The significance of conduct may be understood only in relation to the socio-cultural environment where the behaviour takes place, as well as the situational context. Furthermore, understanding and evaluation of the significance of implied actions is subject to change over time, which can be described as an interpretation of statement values.¹⁸² One cannot understand implied fraud without understanding the implied expression of willingness. The existence of implied fraud should be established for each specific case from the recipient's perspective.¹⁸³ In any case, the conclusion about an error that occurs due to the existence of implied fraud should not be made lightly.¹⁸⁴ Willingness is manifested when the contract is concluded. It can be manifested by any conduct which shows the existence of will, its content and the identity of the person that express it (Article 249, para. 1 of the Civil Obligations Act).¹⁸⁵ The safest manner to express willingness is by words (spoken or written). Expression of willingness with signs or other actions is equal to expression of willingness with words, i.e., with the conduct which provides answers to the previous three questions or implied actions.¹⁸⁶ At the conclusion of commercial

¹⁸⁰ Ibid. *Cramer & Perron* 2006, 2190. See *Novoselec & Bojanić* 2007, 235: "implied actions are those which, according to business conventions, contain an implied statement."

¹⁸¹ Idem. It should be determined according to objective standards of conduct with respect to a specific type of transaction (purchase, loan, securities, risky operations etc.), whereby the distribution of risk among partners in various business situations that form an important, but not the only point of view. False information should not be presented *expressis verbis* to the partner who bears the risk. Besides, the minimum of integrity should be guaranteed in business transactions. With the assessment of statement value of a specific conduct, factual and normative points of view should be taken into account; the question of which ones prevail depends on the specific case or specific group of cases, therefore the differences between the abstractly formulated "factual" or "normative" theories are practically minor. Ibid.

¹⁸² *Janssen* 2012, 536. See *Cramer & Perron* 2006, 2190.

¹⁸³ Idem. See *Lackner & Kühl* 2007, 1148–1152.

¹⁸⁴ Idem. See *Kraatz* 2011, 272–285, distinguishes between factual-normative standard of court practice, the normative factual concept of the Bonn School ("*Bonner Schule*") and the personal model of the individualised perspective. Interestingly, he refers to the criminal offence of fraud as a communication offence.

¹⁸⁵ Civil Obligations Act (OG No. 35/05, 41/08, 125/11), hereinafter: COA.

¹⁸⁶ *Slakoper & Gorenc* 2009, 264. According to these authors, expression with words and signs is categorised as direct statements, and expression with implied actions as indirect statements.

contracts, one or both parties often express their willingness by implied action, and not by expressed words. Typical examples are the payment of the price specified in the received offer, after previously accepting the price in a different form of communication, or referral of merchandise with an invoice, which the recipient pays and keeps the merchandise.¹⁸⁷ Silence in civil obligations produces exceptional bilaterally binding effects. According to *Miladin*, if silence is considered as acceptance and the silent party may refer to it, the other party cannot interpret that silence only to personal advantage.¹⁸⁸ In order for silence to be valid as acceptance, there needs to be a business relationship (see Article 764 of the COA). In that sense, German banking law states that liability based on the relationship of trust is a residual category of civil obligations.¹⁸⁹

Examples of implied misrepresentation of facts in German court practice include the presentation of a forged power of attorney for the collection of pecuniary claims, the concealment of the intention to use the investment loan against its purpose, the calculation of medical expenses under the wrong provision of the fee regulation.¹⁹⁰ In terms of sale or purchase, the court practice has revealed a belief that there is implied fraud with a manipulative concealment of defects or a common use of goods.¹⁹¹ On the other hand, the court practice has decided on the distribution of risk – entrepreneurial risk includes demanding and paying an excessive price. The subject of

¹⁸⁷ *Ibid*, 265.

¹⁸⁸ *Miladin* 2008, 990.

¹⁸⁹ *Hopt* cited according to *Miladin* 2008, 990. *Miladin* further claims that the institution of written confirmation as trade customs complements the dispositive Article 265 of the COA (recipient's silence) and requires a wider implementation, it has to be also applied to persons without the status of a trader (but who act as traders in business and legal transactions), which reflects the trend of the commercialisation of civil law in the area of customary law.

¹⁹⁰ *Janssen* 2012, 536. Conclusion of a contractual obligation may contain implied expression of will for the execution of the contract; whoever presents a shopping cart at the cashier in a store, tacitly states that the merchandise taken from the shelves has been properly labelled and that he is prepared to pay for it in full; the attorney who takes on an obligation which he cannot meet is also considered to have committed fraud (e.g., transfer or real property); while selling some property, the seller implies that he thus transfers ownership, or, similarly while ceding a claim, the cedent implies that he is entitled to dispose of it. *Cramer & Perron* 2006, 2191. In the judgement of the Municipal Criminal Court of Zagreb KO-658/11 of 30 May, the defendant was convicted of attempted fraud when he brought his shopping cart to the cashier, and had four boxes labelled "baked noodles", whereas two boxes contained "merchandise of greater value" (alcoholic beverages, vegetables, coffee, chocolate), and when he saw that the cashiers were going to open the boxes, he attempted to run away, but he was prevented by the security guards.

¹⁹¹ *Idem*. See *Cramer & Perron* 2006, 2192. Whoever demands a certain price for goods or services does not imply that the price is adequate (it can be argued with the prescribed prices of services).

implied representation may also include the negative factual claims, i.e., claims that certain factual circumstances have not been presented.¹⁹² Cases of fraud include using false evidence, incomplete statement about the manipulated purchase item, fraudulent treatment of the person authorised for a claim, concealing defects or manipulating chances of winning with investment transaction, games or betting.¹⁹³ A special case of implied fraud refers to the non-payment of bills in the catering business, because payment ability and readiness to pay are usually implied in cash transactions in the gastronomic or hotel business, or other branches of economy.¹⁹⁴ As a result, legal scholars and theorists believe that German court practice of the highest appellate courts does not always homogeneously specify implied fraud contrary to the requirement of certainty guaranteed Article 103. para. 2 of the Constitution.¹⁹⁵ However, according to the court practice of the Constitutional Court, no excessive requirements should be set for the certainty of the Criminal Code. In fact, taking into account the fragmentary character of criminal law, the characteristics of the element should not be expanded without limitations (the boundary between the criminal offences against ownership and property is becoming more difficult to determine).¹⁹⁶ Since changes in the economic domain seek stronger legal safety, German criminal law theory proposes a new direction in the legal foundation of court practice, namely, the certainty of the institution of implied fraud.

2.3.2.2 Fraudulent Concealment

Concealment is an alternative manner of misleading or deceiving. This form of fraud is known in the German criminal law theory as fraud by omission (*Täuschung durch Unterlassen*). In Croatian criminal legislation, fraudulent concealment is represented by omission as well. Fraudulent concealment occurs when the law or legal transaction rules oblige the perpetrator to present the other party with a certain fact.¹⁹⁷ It is difficult to demarcate between fraud by implied actions and fraud by omission. In both cases, the deceived has a misconception which arises from the lack of perpetrator's expression. *Novoselec* states that in this particular case the precedence of action

¹⁹² Fischer 2012, 1787.

¹⁹³ Fischer 2012, 1787; Lackner & Kühl 2007, 1148.

¹⁹⁴ Konhäuser & Lindemann 2011, 806. Same as Fischer 2012, 1788; Cramer & Perron 2006, 2190; Lackner & Kühl 2007, 1149.

¹⁹⁵ Janssen 2012, 537. This issue is presented with respect to establishing material damage. See Rönna & Soyka 2009, 12–14. Compare the principle of legality from Article 31, para. 1 of the Constitution of the Republic of Croatia.

¹⁹⁶ Idem.

¹⁹⁷ *Novoselec* & Bojanić 2007, 235; Cvitanović 2013, 204. Janssen states that fraud by omission occurs when the perpetrator is a guarantor in terms of non-genuine criminal offences by omission. Janssen 2012, 537. For more details on the guarantee obligation of expression, see Lackner & Kühl 2007, 1152; Fischer 2012, 1792.

should be taken as the starting point, hence wherever there is an active action which contains some sort of delusion, we should consider error by implication.¹⁹⁸ German theory offers various models for resolving the issue of demarcation between implied fraud and fraud by omission. *Janssen* presented the following decision of the Higher Regional Court of Celle as a demarcation guideline: “What a business transaction and, in the specific case, a business partner may imply about the perpetrator’s conduct or, more precisely, about the expression of a specific content as intended content, is to be determined in accordance with the general perception in terms of characteristic distributions of risk for different types of positions (...).¹⁹⁹ If further clarifications are to be sought from the participant’s statement, which may or should mislead another participant as a result of his expectations or hopes, they shall depend on the distribution of risk according to the workload for each position”. Recent findings in the theory of power over the act corroborate this; they recognise the limited possibility of the completed non-contradictory demarcation.²⁰⁰ If the statement of the deceived requires further explanations, then it is a case of implied fraud, otherwise it would be fraud by omission, provided that other requirements are met, in particular the guarantee obligation.²⁰¹ Amidst the crisis on the financial market, subprime mortgages trading in the USA showed that the banks had been selling products against which they personally speculated, without warning their clients.²⁰² This can also be considered fraud by omission.²⁰³

Fraudulent concealment is a non-genuine statutory criminal offence by omission. In this offence, the consequence is part of the element of the criminal offence. The description of the offence defines omission (concealment), consequence (deceived person is the one who acts or fails to act to the detriment of personal or another person’s property) and guarantor. The guarantee obligations need to be specified, since the only person liable for fraudulent concealment by omission is the guarantor (person obliged to act). In legally unregulated non-genuine criminal offences by omission, (until the entry into effect of the new CC), the Article 25, para. 2 of the CC97 represented the general formula according to which the guarantor is a perpetrator who is bound by law to prevent the occurrence of the legally described consequence. According to the Article 20, para. 2 of the CC: whoever fails to prevent the occurrence of the legally described consequence of the criminal offence shall be held liable for omission as well, if he is legally bound to prevent the occurrence of such conse-

¹⁹⁸ *Novoselec* 2009, 100.

¹⁹⁹ Op. cit. *Janssen* 2012, 538.

²⁰⁰ Idem.

²⁰¹ Idem.

²⁰² The notion of *subprime mortgages* refers to secondary mortgage loans. For more on the concept and effects of the crisis see HUB ANALIZE 2008.

²⁰³ *Janssen* 2012, 538. German theory particularly discusses fraud in the event of expressing risk.

quence and if omission is equal to the perpetration of the offence by action.²⁰⁴ By connecting the formal and functional theory of legal duties, guarantee obligations can be divided into two basic groups: obligations to protect a legal asset and obligations to control the sources of risk.²⁰⁵ Obligations to protect a legal asset are further divided into obligations based on natural connectedness, on the existence of a close living community and on the voluntary assumption of an obligation.²⁰⁶ Obligations to control the sources of risk can be divided into obligations based on previous hazardous actions, control over the sources of risk owned by the perpetrator and control over third persons who pose risk.²⁰⁷ Fraud most commonly refers to the obligation of protection based on the voluntary assumption of an obligation, which is usually based on the contract. However, other guarantee obligations can also be considered. In Germany, a guarantee obligation can be derived from law, the assumption of a guarantee, competence and good faith. According to Swiss sources, the obligation of expression does not only derive from the provisions of the positive law and voluntary assumption of obligations, but also from the legal principles of good faith (*Treu und Glauben*) in legal transactions.²⁰⁸ In terms of non-genuine criminal offences by omission, all comparable legislation is focussed on fraud by concealment (*Betrug durch Schweigen*). With respect to the obligation of expression, they present equal requirements as with other guarantee obligations.²⁰⁹ Hence, the violation of contractual obligations, according to Swiss doctrine, cannot be considered a criminal law fraud. In fact, guarantee obligations arise from the contract characterised by a particularly close relationship of contractual partners (those of a longer duration on which rests a greater degree of trust).²¹⁰ Normal bilateral contracts are excluded here.²¹¹

²⁰⁴ With respect to the equal value clause, Austrian doctrine states that the equal value of silence and fraud is not common. See *Fabrizy* 2010, 461; *Bertel & Schwaighofer* 2010, 253.

²⁰⁵ *Novoselec* 2007, 163. See *Novoselec & Bojanić* 2013, 145.

²⁰⁶ *Idem*.

²⁰⁷ *Idem*. For that reason, it is not a criminal offence of fraud when the injured party lends money to the defendant (cousin), being well-aware of his poor financial standing and credit rating. He acts with a certain business risk and he is not misled by the defendant's conduct about his creditworthiness or possibility of repayment. *Op. cit. Cvitanović* 2013, 205.

²⁰⁸ *Stratenwerth & Jenny & Bommer* 2010, 386–387.

²⁰⁹ *Fabrizy* 2010, 461; *Stratenwerth & Jenny & Bommer* 2010, 387; *Cramer & Perron* 2006, 2195–2196.

²¹⁰ *Idem*. See *Cramer & Perron* 2006, 2196. – special relationship of trust.

²¹¹ *Idem*. The remaining requirements are that silence has to be the cause of the construed delusion. Fraud by silence can be committed only when the perpetrator does not contradict the misconception of the deceived, after he became aware that such misconception is imminent. *Ibid*.

2.3.3 Error

In Croatian criminal law theory,²¹² an error is defined as a misconception or lack of any perception of the perpetrator about legally relevant content.²¹³ Fraud exists if the perpetrator misleads or deceives another person by misrepresentation or concealment of facts.²¹⁴ An error is contrary to the subjective perception and truth.²¹⁵ The existence of error is a factual issue, so the court needs to exhaust all evidentiary means to prove that the person who possesses the property was in fact the victim of a misleading statement or error.²¹⁶ Many conclusions can be made about the existence of an error based on circumstantial evidence (if the person who possesses the property had a personal interest or was obliged on behalf of someone else to establish the veracity of the perpetrator's claims).²¹⁷ The court should not, in any case, be satisfied with the mere assumption of error of the person who possesses the property.²¹⁸ Error as a

²¹² Horvatić, 2002, 650. See Novoselec & Bojanić 2007, 235–235; Novoselec 2009, 100; Bačić 1995, 226–234.

²¹³ Cvitanović states that in general error can be defined as the misconception of relevant facts. Traditionally, it has to be tolerable (not the result of gross negligent, *error iustus* – in terms of criminal law, this requirement should be understood very restrictively), essential (*error essentialis*) and, in terms of quality, it has to refer to the lack of knowledge about those facts which are deciding factors in the future actions of the deceived. In that case it may refer to an error of fact – *error facti* (*error in negotio*, -*corpore*, -*persona*, -*substantia*) or error of law (*error in iuris*). Cvitanović 2013, 205.

²¹⁴ In civil law, error is a perception about a circumstance. Depending on the circumstances to which it refers, we distinguish error of law (*error iuris*), error of fact (*error facti*), error of motive (*error in motivo*), etc. An error which refers to elements or ingredients of a legal transaction, and particularly to the motives for assuming an obligation, are referred to as a legal business error (in theory, it is divided into error of expression (*Erklärungsirrtum*): involuntary incongruence between expression and will, when the declarant has unintentionally expressed something, and business error in the most narrow sense: the declarant expressed what he wanted, however, the incongruity between will and expression is indirect because such will was generated and expressed because the declarant was deluded about one element of the legal transaction (*Geschäftspunkt*). Vedriš & Klarić 2004, 148–154. According to Article 280, para. 1 of the COA, error is essential if it refers to the subject of the contract, essential elements of the subject of the contract, the other contractual party if the contract is concluded with respect to that person, and the circumstances which, according to business conventions or the parties' intent, are considered deciding factors, and the deceived party would not have concluded such contract otherwise. With gratuitous contract, an essential error refers to the error of motive which was a deciding factor for the assumption of the obligation (Article 281 of the COA). Deceived party may request the annulment of the contract due to essential error.

²¹⁵ Fischer 2012, 1796. Same as Janssen 2012, 541; Cramer & Perron 2006, 2201.

²¹⁶ Cramer & Perron 2006, 2201.

²¹⁷ Idem.

²¹⁸ Cramer & Perron 2006, 2201. See Janssen 2012, 542.

fraudulent action should refer to a fact presented to the victim expressly or tacitly, or a fact which the perpetrator failed to declare within the relevant legal obligation, otherwise it will lack causality, i.e., necessary functional relation between fraud, error and possession of property.²¹⁹ *Cramer and Perron* state that attempted fraud occurs when a seller claims that he is selling an antique statue, and the buyer does not believe him, but still decides to purchase it, because he is deceived about its weight and believes it is made of precious metal.²²⁰ An error should relate to a fraudulent action and disposal of motive, otherwise it lacks causality. If, e.g., deliveries of goods continue despite the outstanding invoices, it is necessary to determine whether these deliveries are still based on the expression of credit rating and willingness to pay, whether the deliverer was aware of irregular payments and why the deliveries continued.²²¹ The existence of fraud is, therefore, a psychological fact. It is difficult to establish it in court with external marginal manifestation.²²² In every communication between two or more people, there is a substantial risk of misunderstanding or misinterpretation.²²³ German theory questions the extent to which error can be defined with the parameters of psychological content.²²⁴

Error is any positive misconception, and the ignorance of truth (therefore, *ignorantia facti*).²²⁵ In both cases, there is contrast between perception and truth. With fraud by omission, the description of error as “ignorance of truth” cannot be avoided, because in these cases where an error has not been eliminated, the partner is not aware of the truth.²²⁶ In other cases, “positive misconceptions” and “ignorance” are interchangeable (*austauschbare Begriffe*): whoever is not aware of the truth, has a positive mis-

²¹⁹ *Idem*. In civil law, motive is one form of the defect of will (Chapter V of the COA), in addition to threat and coercion, misunderstanding, quasi contract and fraud. Fraud occurs when a party misleads another party or deceives another party into concluding a contract (Article 284, para.1). In that event, the other party may request the annulment of the contract even when error is not essential. The party which concluded the contract under fraud is entitled to claim compensation for endured damage. If fraud was committed by a third person, it effects the contract if the other contractual party was aware or should have been aware of fraud at the conclusion of the contract (para. 3). Gratuitous contract may be annulled if fraud was committed by a third person, regardless of the fact that the other contractual party had been or should have been aware of fraud (para. 4).

²²⁰ *Cramer & Perron* 2006, 2201.

²²¹ *Idem*.

²²² *Janssen* 2012, 542. Same as *Fischer* 2012, 1796.

²²³ *Janssen* 2012, 542.

²²⁴ *Cramer & Perron* 2006, 2201.

²²⁵ *Idem*. Different in *Lackner & Kühl* 2007, 1154.

²²⁶ *Cramer & Perron* 2006, 2202.

conception about it, and the contrary means the ignorance of truth.²²⁷ Furthermore, it should be taken into account that the deceived believes that both truth and lie are possible, e.g., with *non liquet* in the proceeding.²²⁸ Not every misconception constitutes error, but only that which, within an affirmative action, occurs as a result of intellectual influence on the perception of the deceived or, which has not, within failure to act, been eliminate contrary to the existing legal obligation.²²⁹ In Swiss legal literature, error is defined as every incongruence between perception and truth, whereby misconception and ignorance are treated as equals.²³⁰

2.3.3.1 Victim's Suspicion

The evaluation of the situation where the injured party is in doubt about the perpetrator's fraud is questionable. Such examples are not analysed uniformly in German court practice, with the highest courts and the majority of legal literature stating that an error is imminent if the victim believes that the factual claim is true, but as a result of this perception he can be deceived into a questionable possession of property.²³¹ On the contrary, some legal literature states that a victim should consider the existence of a questionable fact more credible than its non-existence.²³²

According to some claims, error should exist only if suspicion rests on specific grounds.²³³ Croatian legal literature predominantly states that error exists even if the person who possesses the property has doubts about certain facts on which he bases his decision, but still decides to possess the property because the perpetrator convinced him to do so.²³⁴ There is no fraud if the suspecting person possesses the property despite being aware of the false facts, e.g., if a said person is indifferent about the actual state of the matter.²³⁵

²²⁷ Idem.

²²⁸ Idem. *Miladin* states that the procedural principle of *non liquet*, whereby the judge is obliged to unconditionally solve every case presented before him; a procedural postulate where a gram of evidence is worth more than a ton of jurisprudence. In addition, the adage that what is uttered disappears, and what is written remains – *verba manent scripta volant*, emanate a powerful impression about the precedence of procedural law over substantive law. See *Miladin* 2008, 992.

²²⁹ *Cramer & Perron* 2006, 2202.

²³⁰ *Stratenwerth & Jenny & Bommer* 2010, 390.

²³¹ *Janssen* 2012, 542.

²³² Idem. See *Fischer* 2012, 1796.

²³³ *Janssen* 2012, 542. BGH issued strict instructions to the courts for the area of economic criminal law concerning the manner and the extent to which the existence of actual requisite error should be proved and established. Ibid.

²³⁴ *Novoselec & Bojanić* 2007, 236.

²³⁵ *Novoselec* 2009, 102.

2.3.3.2 Content of Perception

Nominally, only the person who has a positive misconception about a matter is considered deceived. Although fraud is nominally defined as misconception or lack thereof, a part of the German criminal law theory states that ignorance of the relevant fact; i.e., the non-existence of perception, does not represent fraud *per se*.²³⁶ In specific cases there are, however, limitations to this fundamental principle based on the type of occupation, specific position and the circle of duties of the participants, as well as the existing possibility of expression.²³⁷ In that sense, there is an example of a pharmacist who is not considered deceived when he is presented with a medical prescription; even though there are no medical indications for administering the prescribed medication. The pharmacist is obliged to question it only in exceptional cases. German court practice is not unanimous in the evaluation of the quality of error either. Hence, it does not assume that error is the result of a voluntary and substantial process of reflection, but it settles on unpremeditated awareness of reality in terms of “all will eventually be fine” (“*es werde schon alles in Ordnung sein*”).²³⁸ Typical examples of such error: when a train operator asks if anyone else needs to board the train and no one replies, or when the waiter who takes the order assumes that the guest would pay.²³⁹

2.3.3.3 Causal Link

Fraud should cause or maintain error. Error is caused when the victim’s misconception occurs as a result of a fraudulent action. Error is maintained when the existing error is supported or confirmed. However, in the event of mendicancy fraud, such a link may not exist if a person who gives money does not pay attention to the perception of the beggar (he would nevertheless give him some money).²⁴⁰

2.3.3.4 Subject of Error

Subject of error is a person that possesses the property; the deceived has to possess some property. Person is the only living being capable of being liable for error (only humans have subjective perception). Legal persons, associations or authorities, according to German and our positive legal legislation cannot be subject to fraud.²⁴¹

²³⁶ Fischer 2012, 1797; Lackner & Kühl 2007, 1155. It is different in Croatian system; see the definition of fraud under 2.3.3.

²³⁷ Janssen 2012, 543.

²³⁸ Idem. Same as Lackner & Kühl 2007, 1154.

²³⁹ Janssen 2012, 543.

²⁴⁰ Janssen 2012, 543. See Lackner & Kühl, 2007, 1155.

²⁴¹ Fischer 2012, 1800. In such cases it should always be determined which entity or partner was specifically defrauded and thus subjected to error. See “*Fere libenter homines*

Some typical cases of fraud specified by German theory refer to money exchange fraud, winning notification and public procurement fraud.²⁴²

2.3.3.5 Money Exchange Fraud (*Wechselgeldbetrug*)

Money exchange fraud includes cases where the perpetrator, for the purpose of paying for goods or exchange of money, places a banknote on the seller's counter and then repossesses it by distracting or confusing the seller.²⁴³ It differs from theft based on whether a decrease in property occurred by possession of exchanged money or by a perpetrator's repossession of the banknote.²⁴⁴ If the perpetrator repossesses the banknote before the recipient has taken it, there is imminent fraud with respect to acquiring exchanged money.²⁴⁵ This constitutes a decrease in property resulting from the possession of exchanged money. Fraud is excluded if the recipient takes the banknote and reissues it; because the recipient first establishes possession and then the perpetrator repossesses it – this is when theft occurs.²⁴⁶ Regular acceptance of transfer of the exchanged money does not, nominally, represent fraud in that sense, since the recipient claims the acquired money.²⁴⁷ This is a mitigating form of the offence and the best way to prevent it is to raise the sellers' awareness and warn law enforcement officials about the re-occurrence of the offence in certain instances.

2.3.3.6 Winning Notification (*Gewinnmitteilung*)

The superior notion of “winning notification” refers to all cases where the recipient receives, either by telephone or e-mail, a notification of winning in a sweepstake.²⁴⁸ In order to collect the winnings, the recipient has to pay the costs or make a contri-

id, quod volunt, credunt”, is a saying attributed Caesar (People usually believe what they want). Novak 2002, 86.

²⁴² The same applies to physicians' fraud in terms of issuing receipts (there is a distinction of whether it is a contractual physician or a private physician “*Vertragsärzte*” or “*Privatärztliche Verträge*”).

²⁴³ As defined by Janssen 2012, 543. Recent cases from Germany usually have the following *modus operandi*: a buyer enters a store and buys an item which costs less than EUR 10 and pays with a EUR 100 bill. When the seller exchanges the banknote, the buyer changes his mind and cancels the purchase. The seller then returns the “larger” banknote, and the buyer returns the change. Only after the buyer has left the store, the seller notices that she received only a portion of the change. RBB 2013; <http://mediathek.rbb-online.de/rbb-fernsehen/tatler-opfer-polizei/der-schoene-schein-neue-spuren-beim-wechselgeldbetrug?documentId=18334532> [13/03/2014].

²⁴⁴ Janssen 2012, 544.

²⁴⁵ Idem.

²⁴⁶ Idem. See Binding 1885, 363; Rönnau 2011, 83.

²⁴⁷ Idem. This applies to all cases of non-cash and cash payment.

²⁴⁸ Janssen 2012, 544.

bution, dial a chargeable telephone number or order some merchandise.²⁴⁹ Fraud occurs if the person making the offer does not intend to issue the advertised winnings. If the recipient accepts the offer, he is subject to error. Error should not be caused by his gullibility or naivety (the deciding factor is that the recipient has to be under the impression, while objectively considering to participate, that he had won an award).²⁵⁰ The norm here is not the perspective of a seasoned attorney, but a consumer role-model of an informed average consumer. Finally, material damage occurs in the cases where the consumer pays the cost, dials a chargeable number or pays a higher price than the actual cost of the service.²⁵¹ Recently, many police warnings have been issued across the Croatian media regarding this particular type of fraud.²⁵²

2.3.3.7 Public Procurement Fraud (*Submissionsbetrug*)

The superior notion of submission fraud – public procurement fraud in German criminal law theory – includes all cases in which public procurement agreements, especially in the area of civil engineering, are subsumed within the scope of fraud. The existence of objective features can be questionable for many reasons.²⁵³ Problems occur with the evaluation of (implied) expression that there was no illicit agreement about the price or establishment of material damages, and with doubts about the application of § 263 (*Betrug*; fraud) or § 298 (*wettbewerbsbeschränkende Absprachen bei Ausschreibungen*; agreements about restrictions in public procurement tenders) StGB. Fraud occurs when the tenderer, when submitting the bid to the competent authority, implies that no illicit agreement about the price had been committed.²⁵⁴ Even greater issue occurs in interpreting material damages. In fact, BGH's attempts to establish material damages based on the economic notion of property are questionable in terms of comparison of the market value of services and the actually paid price.²⁵⁵ Difficulties arise from the fact that the mortgage market price is not easily established. Statistical analyses of average values in the agreement on prices are

²⁴⁹ Idem.

²⁵⁰ Ibid.

²⁵¹ Janssen 2012, 545.

²⁵² E.g., Krajcar 2012.

²⁵³ Janssen 2012, 545. BGH believes that public procurement fraud committed by the bidder is fraud during the conclusion of the contract. For more details, see Rönna 2002, 546. See Lackner & Kühl 2007, 1174.

²⁵⁴ Idem. See Cramer & Perron 2006, 2227. The criminal offence is as follows: Whoever during (public) tender for the procurement of goods or performance of trading (*gewerblich*) services (public procurement) submits a bid based on illicit agreement aimed at persuading the recipient to accept a certain bid, shall be punished by a prison sentence of up to five years or a pecuniary fine. Compare to Article 254 of the CC.

²⁵⁵ Idem. See Rönna 2002, 547.

irrelevant for the establishment of the difference.²⁵⁶ A possible chain of circumstantial evidence, on the other hand, points to issues regarding the burden of proof: individual guilt cannot be established by assessments or statistical median value.²⁵⁷ Agreements which are contrary to the tenders are grounds for punishment, and not the evaluated material damage. In 2011, the Croatian legal system introduced a new criminal offence of abuse in the public procurement procedure (Article 254), modelled after § 298 of the German StGB and Article 2 of *Corpus juris* (“tender fraud”).²⁵⁸ This criminal offence is committed by a person who, in the public procurement procedure, presents a bid based on illicit agreement between economic operators with the aim of having it accepted by the contracting party. Hence, the offence refers to illicit agreements and the contracting party does not have a claim to damages, unlike the criminal offence of fraud.²⁵⁹ If there is an agreement between the contracting party and the economic operator in a public procurement procedure, there is a possibility of the criminal offence of illicit preferential treatment being committed (Article 292) and abuse of trust in an economic transaction (Article 246).²⁶⁰ In fact, if the contracting party’s official or competent person shows preferential treatment to either of the economic operators based on an agreement, by adjusting the terms of the public procurement, or concludes a contract with the tenderer whose bid was contrary to the terms of the tender documentation, there is a possibility of the criminal offence of illicit preferential treatment being committed. Statistical reports of the State Bureau of Statistics do not contain any data on this offence (yet) and, as

²⁵⁶ Idem. *Rönnau* states that material gain refers to the difference between the market price and the price achieved by an illicit agreement between the bidders and concludes that, since there is no “appropriate price” in the market economy, it has to be determined in the exchange of supply and demand for every product.

²⁵⁷ Idem. For the solution based on circumstantial evidence (“*Indizienlösung*”) see *Rönnau* 2002, 549. See *Cramer & Perron* 2006, 227.

²⁵⁸ *Turković et al.* 2013, 326. See Public Procurement Act (OG No. 90/11, 83/13, 13/14).

²⁵⁹ Idem. The qualified form of the offence is represented by the case of substantial material gain being acquired or substantial damage caused.

²⁶⁰ For more details, see *Turković et al.* 2013, 327. Contracting parties are divided into: contracting authorities and contracting entities. Contracting authorities include state authorities of the Republic of Croatia, units of local and regional self-government, legal persons founded for specific purposes of satisfying the needs of general interest, without industrial or commercial significance (that are funded from the state budget or the budget of the units of local or regional self-government budget or budgets of other legal persons to an amount greater than 50%, or that transactions of those legal entities are supervised by state authorities, units of local and regional self-government or other such legal persons; or that the half of the members of the supervisory board, board of directors or relevant entity for administration or management are elected by state authorities, units of local and regional self-government or other such persons) and associations of entities from items 1 and 2, para. 1 of Article 5 or legal persons from item 3, para. 1 of the Public Procurement Act. For the notion of contracting entities, see Article 6. Public Procurement Act.

a result, it will be interesting to see how the judiciary reacts to it with respect to common public remarks.²⁶¹ Total public procurement value in 2012 in the Republic of Croatia amounted to HRK 39,326,349,167; the total value of published contracts and framework agreements amounted to HRK 33,250,330,011; the value of recorded petty procurement to HRK 6,074,941,964; and the value of procurement for the needs of diplomatic-consular posts HRK 1,077,192.²⁶²

2.3.4 Possession of Property

2.3.4.1 Notion of Property

Since property is not only a legal, but an economic and an accounting category too, everyday communication and legal jargon often lead to the unwanted confusion of various notions of property,²⁶³ which has created “an unbelievable mess” in the specialised literature and legislation.²⁶⁴ In German theory, the basic problem of material damage – in the sense of the criminal offence of fraud according to § 263 StGB – is the specific scope of protected property in terms of criminal law. I believe that the scope of criminal law protection of property constitutes one of the crucial problems that are insufficiently addressed by national criminal law theory and practice.

²⁶¹ Public remarks primarily referred to the procurement of official vehicles for certain officials. Public Procurement Act set out the obligation to publish public procurement announcements in the Electronic Public Procurement Classifieds (EPPC) for all procurements whose estimated value is equal to or greater than HRK 70,000. EPPC is a service which enables the contracting parties to enter their data online, which is necessary for the preparation and publishing of public procurement announcements; it grants access to unallocated published public procurement announcements to all users free of charge. EPPC is set, managed and maintained by Narodne novine d.d. (Official Gazette). It enables free and unlimited access to search the EPPC database to the authority competent for the public procurement system, State Commission for Supervision of Public Procurement Procedure and State Attorney’s Office of the Republic of Croatia. Statistical Annual Public Procurement Report for 2011, 4; www.javnabava.hr [23/01/2014].

²⁶² Statistical public procurement report of the Republic of Croatia for 2012, 11; www.javnabava.hr [23/01/2014]. Since GDP for 2012 amounted to 330,232 million kunas, the share of the total value of public procurement in GDP was 11.9%.

²⁶³ Op. cit. *Vedriš & Klarić* 2004, 93.

²⁶⁴ Idem. Authors further claim that ferocious and often fiery discussions occur when authors accuse each other of ignorance and lack of understanding or both accuse the legislator thereof. This is why authors persistently use the economic notion of property, convinced that they are providing the most accurate legal term.

2.3.4.2 Economic Notion of Property

In the economic sense, property is a set of assets which belong to a certain entity.²⁶⁵ A “genuine economic notion of property” (“*rein wirtschaftlicher Vermögensbegriff*”) – according to the most recent finding of BGH – includes all pecuniary assets of a person. The evaluation of the pecuniary asset of a certain person should be executed from the purely objective economic point of view.²⁶⁶ This notion of property includes “everything which can be turned into money”.²⁶⁷

2.3.4.3 Legal Notion of Property

Property is a set of subjective material rights represented by a single holder.²⁶⁸ German legal literature states that the legal notion of property is determined accessorially in terms of civil law and it includes the totality of subjective material rights of one person.²⁶⁹ Personal rights and the highest personal rights – such as life, health and honour – should not be encompassed by the legal notion of property.²⁷⁰ Swiss legal literature states that the legal notion of property (*juristischer Vermögensbegriff*) is the earliest notion of property. It was primarily developed and considered by *Karl Binding*.²⁷¹ Based on this notion, fraud is defined as “legal robbery”, analogous to theft (seizure is replaced by fraud, and violation of property by violation of material rights).²⁷² Therefore, property is defined as the totality of all material rights and obligations.²⁷³

²⁶⁵ Vedriš & Klarić 2004, 93.

²⁶⁶ Janssen 2012, 555. *Beukelmann* refers to two notions of property: economic, which is accepted by the BGH and some legal theorists, and legal-economic, which is upheld by the majority of theorists. *Beukelmann* 2010, 1850.

²⁶⁷ Idem. See *Fischer* 2012, 1805, *Popp* 2005, 693.

²⁶⁸ Vedriš & Klarić 2004, 94.

²⁶⁹ Independent of their economic value. *Janssen* 2012, 555. The genuine legal notion of property (“*rein juristischer Vermögensbegriff*”) is no longer mentioned. *Fischer* 2012, 1805.

²⁷⁰ Idem.

²⁷¹ *Stratenwerth & Jenny & Bommer* 2010, 397. See *Binding* 1885, 363 and *Cramer & Perron* (2006) who stated that this earliest theory of property was represented by *Merkel, Binding* and *Gerland*. *Cramer & Perron* 2006, 2212.

²⁷² Idem.

²⁷³ Idem. This definition may be subjected to a theoretical objection that there is an unresolved question as to which rights are represented by material rights, and a practical objection – i.e., the legal notion of property substantially expands the notion of property to include each violation of a claim even when it does not represent economic damage. On the other hand, that notion is too narrow because it does not encompass some economic values which do not always have legal properties (e.g., regular possession or insured rights (*gesicherte Anwartschaften*)).

2.3.4.4 Legal-economic Notion of Property

Croatian civil law theory, also distinguishes the accounting notion of fraud (it consists of rights known as assets and obligations known as liabilities), in addition to the economic and legal notion.²⁷⁴ According to the predominant theory in Germany, the legal-economic notion of property is the most acceptable one, since it encompasses the totality of all economic assets of a person attributed to that person, regardless of the discrepancy with the law (*ohne rechtliche Missbilligung*).²⁷⁵ The legal-economic notion of property should not, therefore, encompass illegal property items.²⁷⁶ With respect to fraud and bearing in mind that ownership has criminal law protection, the predominant opinion in German criminal law literature is that fraudulently relevant damage is caused to property only if the ownership has some market value.²⁷⁷

According to the legal-economic notion of property, void claims²⁷⁸ are not considered protected values.²⁷⁹ With natural obligations, realisation only depends on the debtor's will, they do not represent any fraudulently relevant property items.²⁸⁰ Therefore, fraud is non-existent when the creditor fails to file a claim due to deceit, or when the debtor fails to pay his cash obligation as a result of fraud. There is no adequate legal stringency. Predictions of profit, i.e., expectations which have no subjective power in terms of civil law, according to court practice, constitute a protected property item if their realisation allows them to have market value according to busi-

²⁷⁴ Vedriš & Klarić 2004, 96. "The issue whether a civil law operator is economically active or passive should not be resolved with the legal notion of property, but in terms of accounting, via the balance sheet"; Idem.

²⁷⁵ Janssen 2012, 556. See Kindhäuser 2006, 592.

²⁷⁶ Idem. Same as Cramer & Perron 2006, 2213.

²⁷⁷ Idem.

²⁷⁸ Prostitutes' salary ("*Lohn*") was considered a void claim in earlier German court practice. In fact, the criminal offence of fraud protected only the fee ("*Entgelt*") obtained by the prostitute. However, since the passing of the Prostitution Act on 20th December 2001, prostitutes' civil law claims have been recognised. Beukelmann 2010, 1851.

²⁷⁹ Idem. Court practice does not grant them the existence of market value. Pursuant to Article 322, para. 1 of the COA, a contract which is contrary to the Constitution of the Republic of Croatia, coercive regulations or social morals, is considered void, unless the aim of the violated right points to another legal consequence or the law prescribes otherwise. In the event of a void contract, each contractual party is obliged to return to the other party the sum received based on such a contract, and if that is not possible, or if the nature of what has been met is contrary to return, the adequate pecuniary compensation should be presented to the other party according to the prices at the time of delivery of the court decision, unless otherwise prescribed by law. The contract shall remain valid even if the void provision constitutes a term or a deciding factor when nullity has been established, so that the contract released of said provision would still be valid (Article 323).

²⁸⁰ Idem.

ness conventions.²⁸¹ This is the case with, for example, estimating the possibility of sale of a certain product on the market or renting a real property,²⁸² as there is no property value with undetermined prospects and hopes.²⁸³

2.3.4.5 Possession of Property

Possession of property is any action or failure to act which directly affects the amount of property owned.²⁸⁴ In Swiss doctrine and theory, possession of property is defined as any action, omission or failure to act of a deceived person, which may cause the reduction of property.²⁸⁵ The right of possession (*ius respondendi*) is a non-transferable property power.²⁸⁶ Possession of property is primarily enabled by positive, affirmative action. It basically includes all direct actions resulting in the reduction of property. These refer to all kinds of legal transactions, or the conclusion of contracts (assumption of contractual obligations). German criminal law theory states that possession includes conclusion of contracts even when they are contestable or void.²⁸⁷ In terms of liability for damages prescribed by the COA, civil law protection comes first in the event of contestable and void contracts; however, it should not exclude criminal law protection if all elements of the criminal offence of fraud have been met. Work ability does not affect possession of property.²⁸⁸ Possession by omission,

²⁸¹ *Cramer & Perron* 2006, 2215. See demarcation of facts, value judgements and predictions.

²⁸² *Idem*.

²⁸³ *Fischer* 2012, 1807. Such as speculative expectations from interest or profit.

²⁸⁴ *Janssen* 2012, 548. This notion should not be considered in terms of civil law, because it encompasses the actions of disabled persons, as well as the factual possessions. *Lackner & Köhl* 2007, 1157.

²⁸⁵ *Donatsch* 2010, 275.

²⁸⁶ *Op. cit. Cvitanović* 2013, 206. "It is possible, however, that a different person possess the property based on a statutory or contractual power of attorney. In that case, this person acts to the detriment of another person's property, e.g., the perpetrator of forgery by a judgement persuades the competent judge to adjudicate foreclosure based on which the authorised person is obliged to pay a non-existing claim to the perpetrator (Supreme Court of the Republic of Croatia, I KZ-904/05).

²⁸⁷ *Janssen* 2012, 548. Pursuant to Article 330 of the COA, the contract is contestable if it is concluded with limited work ability, if defects of will were present at its conclusion or if it is prescribed by the COA or a special regulation. If the person with limited work ability used trickery to persuade his interlocutor that he is able to work, he shall be liable for the damage caused by the annulment of the contract (Article 334).

²⁸⁸ *Idem*. For examples of demarcation of the criminal offence of embezzlement and fraud, see *Garačić* 2006, 326. However, I disagree with the view that the defendant who rented a personal vehicle and sold it to another person, by misrepresenting himself as the owner of the vehicle, is only liable for embezzlement and not fraud, because the very act of cashing in the embezzled vehicle is consumed by the previously perpetrated

i.e., failure to act, is also possible; it primarily refers to the non-payment of claims or rights. State acts can also possess the property; it is particularly the case with decisions, allocation of jobs by government authorities or approval of social contributions and social welfare.²⁸⁹

2.3.4.6 Direct Possession of Property

According to many German authors, immediacy is requisite for the possession of property as the most essential element of self-damage.²⁹⁰ Immediacy has the function of restriction in terms of actions of possession encompassed by § 263 StGB.²⁹¹ Furthermore, as an element of self-damage, it demarcates fraud from the criminal offence of causing third person damage in which possession is represented as the act of giving.²⁹² Immediacy means that possession without the perpetrator's further actions causes change of property.²⁹³ Swiss theory states that the deceived person (*Irrrende*) should have the power to possess the property. It further states that the deceived and the possessor are the same person (which does not apply to the injured party and the possessor).²⁹⁴ A different view is necessary in cases in which multiple possession results in the reduction of property, hence, there are further possessions of third persons after the possession of the deceived, which eventually result in the reduction of property. In the matters of economic criminal law, this is the most common case due to the organisational structure of companies and management boards. When it comes to multiple possessions of property, should the action of the third person resulting in the reduction of property be considered fraudulent or is this the obligatory economic consequence of possession?²⁹⁵ The predominant view is that the action of the third person resulting from influence and competence of the deceived can be attributed to the deceived (cases where the deceived may prevent said

act of embezzlement. I believe that this constitutes the concurrence of embezzlement and fraud, because a new victim was drawn into it.)

²⁸⁹ See *Novoselec & Bojanić* 2007, 236; *Cvitanović* 2013, 206; *Fischer* 2012, 1801.

²⁹⁰ In fact, German theory categorises fraud as a “*Selbstschädigungsdelikat*” because the victim causes self-damage by possession of property. *Fischer* 2012, 1803; *Cramer & Perron* 2006, 2228.

²⁹¹ *Fischer* 2012, 1803; *Cramer & Perron* 2006, 2228.

²⁹² *Idem*.

²⁹³ *Idem*. See *Janssen* 2012, 548. Immediacy does not occur when the disponent with his action only opens up the possibility for the perpetrator to perform a harmful intervention on the property. Direct possession of property in this sense does not occur with the transfer of assets on a foreign currency account, with restricted access to assets or when the third person has the actual account access (as with the broker account).

²⁹⁴ *Donatsch* 2010, 275.

²⁹⁵ *Janssen* 2012, 550. For three principles of fraud-related immediacy, see *Jäger* 2010, 761–768.

reduction of property).²⁹⁶ This is the case in which the employer persuades his subordinate (employee) to perform an action resulting in the reduction of property; this action represents the possession of property, and not the employer's instruction.²⁹⁷ According to *Janssen*, possession of property resulting from the action of the deceived occurs if the deceived can no longer prevent the reduction of property, and in the event of property endangerment which is equal to material damage.²⁹⁸ Providing all input data for credit cards, or "*EC-Karten*" (banking cards), in order to use online banking, is described as phishing (elaborated upon in 3.5.2). It is also stated that possible pay out without further participation of the victim should represent specific possession of property, so that fraud should be completed by voluntary disclosure of online banking input data.²⁹⁹ *Janssen* finds this view dubious, since specific material damage of the deceived is not discernible from the very act of providing data. The objection that the act of seizure by the perpetrator precedes as the intermediate level of property endangerment, which is equal to material damage by the deceived person's immediate possibility of action, does not affect the fact that the damage he aims to cause in line with the perpetrator's perception would be immediately caused only by his action.³⁰⁰

Provision of input data for online banking may, under certain circumstances, only represent attempted (computer) fraud. In fact, if the perpetrator has opportunity in terms of time and place to realise the element of computer fraud (transfer money from the victim's account to his own) by committing an act that conforms with the Article 34, para. 1, which spatially and temporally precedes the realisation of the material elements of the criminal offence (taking into account the subjective norms, i.e., intent to commit the criminal offence), there is no reason not to evaluate such conduct as an attempt (or arguments to consider it a completed act).

2.3.4.7 Voluntariness

Possession has to be voluntary. According to *Janssen*, there is no possession of property when the alleged police officer formally forfeits the wallet of the deceived. The deceived submits himself to this seizure, assuming that the loss of property will happen as a result of his resistance.³⁰¹ From the perspective of the deceived, the impasse

²⁹⁶ *Idem*.

²⁹⁷ *Ibid*. See *Lackner & Kühl*, 2007, 1159.

²⁹⁸ *Ibid*. This occurs with a fraudulent bank order by the deceived on account of a third person. In the remaining cases where the third person's action should be attributed to the deceived or when property endangerment equal to material damage is imminent, only fraud of the deceived in immediate complicity may be considered.

²⁹⁹ *Janssen* 2012, 550. The problem of immediate disposal of property is actually associated with the demarcation between an attempt and a completed act.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid*. See *Novoselec & Bojanić* 2007, 237; *Cvitanović* 2013, 206.

does not allow him to possess the property freely based on the voluntary decision.³⁰² If the deceived lacks the possibility of free choice, this does not represent, according to the external event, pure fortuity that should not be relevant for the evaluation of action.³⁰³

2.3.4.8 Causal Link

Possession of property has to be caused by error. *Cvitanović* states that the causal link between error and possession does not have to be exclusive, i.e., allows the deceived to possess under the influence of other causes, such as gross negligence, gullibility or indifference.³⁰⁴ Error is causal for disposal even if additional grounds cause the deceived to dispose.³⁰⁵ There is no requisite causal link if completely different grounds are a deciding factor for the deceived person's possession, rather than the facts resulting in fraud.³⁰⁶ It also applies if the disponent does not even consider the content of truth.³⁰⁷ A part of the causal link may be absent in a speculative transaction, e.g., when the investor enters into a deal knowing the risk – attempted fraud may apply here.³⁰⁸ Possibility or awareness that the injured party has undertaken possession knowing the true state of the matter for some other reason does not infringe the causal link.³⁰⁹ This is a specific possession influenced by error. Consequently, the causal link between possession and error exists when fraud was the deciding factor for possession, since the disponent's decision-making process included the fact based on error.³¹⁰ As a result there is no causal link when the disponent takes into consideration a false fact based on error, but possesses the property for completely other reasons.³¹¹

³⁰² *Idem*.

³⁰³ *Janssen* 2012, 551. He further states that limitation reflects on the free will requirement to the extent that involuntariness of possession of property is prevented only when there is no free choice. It would not suffice that the deceived was coerced by fraud, as long as his decision between enduring wrongdoing and loss of property, and consequently alternative action, is still open. Based on the above, in the case of “*Chantage*” where fraud consisted of non-existent endangerment, the court has justly adjudicated on the possession of property of the deceived and the punishability of the perpetrator for fraud.

³⁰⁴ *Cvitanović* 2013, 206.

³⁰⁵ *Janssen* 2012, 551.

³⁰⁶ *Janssen* 2012, 551. See *Cramer & Perron* 2006, 2211–2212.

³⁰⁷ *Fischer* 2012, 1805.

³⁰⁸ *Idem*.

³⁰⁹ *Janssen* 2012, 552.

³¹⁰ *Idem*.

³¹¹ *Idem*. This distinction is also subjected to criticism, because fraud could be excluded in both cases, even if this had not prevented the disponent from possession of property.

2.3.4.9 Triangular Fraud

Fraud requires the identity of the deceived, the person subjected to error and the disponent to be known. Identity between the disponent and the injured party is not required. Triangular fraud includes cases when the person possesses the property as the proprietor.³¹² The material elements of the crime detailed in § 263 StGB as a self-damaging offence (*Selbstschädigungsdelikt*) is completed only when possession should be attributed to the injured party.³¹³ Cases of triangular fraud are common in business and commercial life, especially when damage is caused to the legal person. In Germany, three views were developed with respect to the assumptions of attributing possession to the injured party, namely, the theory of proximity, the theory of position and the theory of authorisation.³¹⁴

³¹² Schur 2011, 517–519. Novoselec defines it as the case when the disponent causes damage to the other person's property. *Novoselec & Bojanić* 2007, 236.

³¹³ *Janssen* 2012, 552. Cfr. *Bittmann* 2012, 7.

³¹⁴ Assumptions of attributing possession to the injured party have very contestable particulars. Court practice sets special proximity of the disponent to the property of the injured party: "proximity theory" (*Nähetheorie*) in a way that the disponent, before the fraud and regardless of the proprietor's will, has factual or legal authorisation to possess the object of the offence. Since it is difficult to demarcate the criteria of the special relationship of proximity from the regular actual possibility of action, it is necessary to apply specific consideration of each individual case. The assumption is, hence, to determine that in each individual case the disponent is closer to the property of the injured party than the perpetrator. This, for instance, always occurs when the deceived transfers the existing property onto the perpetrator, because the deceived is, through ownership, closer to the damaged property than the perpetrator. Fraud occurs if in such cases no further intermediate steps are required. According to the position theory (*Lagetheorie*), the disponent has to be in the position of the injured party. In this case, position refers to the affiliation of the deceived to the property domain of the injured party, which is connected with the task of preserving the material interests of the injured party. Such position requires more than a purely factual relationship of proximity. In the economic life, the item of position is usually institutionalised, even though this is not requisite. Position theory requirements ensue when, e.g., a co-proprietor or defender (guardian) of the property possess in the interest of the proprietor. Within the position theory, specific requirements for establishment vary from normative to institutionalised establishment between the disponent and the injured party. Critique questions the position theory, because the disponent's placement in the position of the injured party is neither legal nor factual. Theory of authorisation (*Befugnistheorie*): Part of the legal literature which advocates the theory of government limits attribution within triangular fraud to the cases of authorised possession. This points to the objective authorisation and subjective perceptions of the disponent about his authorisation. This is where inappropriateness of authorisation as a demarcation criterion becomes obvious. In objective authorisation, the relevant fraud cases become very limited – only the highest acts and legal representations are considered. Subjective authorisation includes all cases where the disponent is deemed as authorised, without requiring a closer relationship with the property or the injured party. *Janssen* 2012, 553–554. Same as *Fischer* 2012, 1804.

2.3.4.10 Procedural Fraud

Procedural fraud is a subtype of triangular fraud. It has been committed when the court or another judicial entity, e.g., judicial clerk authorised for decision making, delivers a decision which is harmful to the property of the other party to the proceedings, based on a false fact provided by one party.³¹⁵ The notion of procedural fraud, as one of the forms of the criminal offence of fraud, has been studied and acknowledged in German legal literature and practice. Fraudulent action can, *inter alia*, be committed if one party, contrary to provision § 138 of the Civil Procedure Act (*Zivilprozessordnung, ZPO*), provides false claims or encourages the witness to provide false depositions and the judge then bases his decision on these.³¹⁶ Besides the civil procedure, one court decision in constitutional proceedings in Germany was found to be tainted by procedural fraud.³¹⁷ In criminal law, it is seldom discussed.³¹⁸ Nevertheless, procedural fraud may occur when the injured party tampers with evidence in order to cause the defendant to be convicted and to gain compensation within the adhesion procedure pursuant to § 403 of the Criminal Procedure Act (*Strafprozessordnung, StPO*).³¹⁹

Novoselec states that, in our system, this legal figure has not been acknowledged yet, since the starting point was that the state authority does not base its decision solely on the deposition of one person, but on the adduced evidence verifying this deposition.³²⁰ He states that this view derives from the fallacy that the decisions of state authorities are always correct, which is not even supported by the law, otherwise it would not allow legal remedies: “every, even the most conscientious judge who acts in conformity with the law can be deceived, especially if the perpetrator uses a document in the process”.³²¹ If, in a procedure (it does not have to be only a court

³¹⁵ *Lackner & Kühl* 2007, 1153–1154. *Janssen* 2012, 554. Perpetration of procedural fraud occurs in immediate complicity. *Idem*. Cfr. *Fischer* 2012, 1804.

³¹⁶ *Idem*. § 138 refers to the obligation of deposing facts; obligation to tell the truth (*Erklärungspflicht über Tatsachen; Wahrheitspflicht*).

³¹⁷ OLG Karlsruhe NSTZ 1996, 282. Cit. according to *Janssen* 2012, 554 (note 288).

³¹⁸ *Idem*. German theory recognises the notion of “fraud concerning instruments of proof” or “*Beweismittelbetrug*”. See *Lackner & Kühl* 2007, 1166; *Fischer* 2012, 1793.

³¹⁹ *Idem*. Provision § 403 is in the third chapter regulating indemnification, i.e., compensation of damages to the injured party (*Entschädigung des Verletzten*).

³²⁰ *Novoselec* 2010, 965. See historical sources.

³²¹ *Idem*. In Croatian court practice, there are judgements indicating procedural fraud. *Novoselec* quotes the judgement K-474/09 of the Municipal Court in Osijek which considered the concurrent commission of fraud under Article 224, para. 4 of the CC and verification of false content under Article 315, para. 1 of the CC, where a defendant persuaded the notary public to instigate the enforcement proceeding against the injured party based on the lease contract, failing to mention that the loan had been repaid, after which the notary public presented a notarial deed, according to which, the defendant gained ownership of the house of the injured party.

procedure, but, for example, a procedure before the notary public or arbitration), the deciding person is deceived due to a false deposition or otherwise (e.g., use of falsified documents), and thus makes a decision to the detriment of the third party, the perpetrator's criminal conduct includes the false deposition from Article 305 of the CC, as the criminal offence against judiciary, and fraud from Article 236, as the criminal offence against property.

Austrian and Swiss doctrine and court practice recognise the notion of procedural fraud. In Austria, parties' claims referred to a competent authority (*Behörde*) – which is obliged to verify these claims before making a decision – are considered fraud according to § 146 only if the parties used additional fraudulent instruments to support the deliberate false claims (e.g., delivery of subsequently made or forged documents or other instruments of proof).³²² If the decision of the authority or possession is based on the deposition from the proposal (statement) known to the proponent, the act constitutes fraud of the competent authority by the very false party claim.³²³

Swiss theory states that the case of procedural fraud has been disputable for a long time.³²⁴ The very concept refers to courts defrauded by false parties' claims whose aim is to achieve a false judgement, which is unfavourable to their procedural opponent.³²⁵ Although according to the doctrine § 146 (§ 148) should be applied, the BG believes otherwise advocating imposition of punishment according to §§ 306, 307: false deposition of the parties, false testimony (*falsche Beweisaussage der Partei, falsches Zeugnis*).³²⁶

2.3.5 Material Damage

In this chapter, I examine the notion of material damage and the manner of establishing damage. I have analysed some typical cases of material damage (especially in terms of endangerment of property that amounts to damage of property, which is characteristic of German theory and court practice). Certain issues shall be pointed out during the establishment of damage and adjudication of indemnification claims in Croatian court practice.

³²² *Fabrizy* 2010, 462.

³²³ *Idem*. Current court practice has a stricter approach towards “*Behördenbetrug*”, which refers to the deliberate provision of false deposition of the parties for the purpose of acquiring material gain, when the competent authority is obliged to verify the deposition, and if no false evidence or false instrument of proof have been used.

³²⁴ *Stratenwerth & Jenny & Bommer* 2010, 395.

³²⁵ *Ibid*.

³²⁶ *Ibid*.

2.3.5.1 Notion of Material Damage

Fraud is a material offence³²⁷ and property offence (damage has to be caused to property).³²⁸

Material damage is generally defined as a negative balance between the value of property before and after the possession of property of the deceived.³²⁹ In Croatian criminal law literature, damage is predominantly defined as the reduction of total economic value of property. It consists of reduced assets or increased liabilities, with an obligatory increase in the assets of the injured party due to the perpetrator's countermeasures, which provide unwanted economic value to the injured party.³³⁰ Since the Civil Obligations Act³³¹ defines damage as the reduction of someone's property (regular damage), prevention of its increase (lost profit) and infringement of personality right (non-material damage), it is obvious that the criminal law notion of damage, at least when it comes to fraud and Croatian justice practice, is different from its civil law notion, i.e., the criminal law notion includes only regular damage.³³² In other comparable legal systems, the notion of damage is similarly determined. Austrian theory states that the issue of damage is a combined factual and legal matter.³³³

³²⁷ Novoselec & Bojanić 2013, 131. "Criminal offences of infringement and specific endangerment are *material* criminal offences, because not only infringement, but specific endangerment are also consequences in the narrow sense, i.e., the effect on the object of action. On the contrary, criminal offences of abstract endangerment are *formal* criminal offences because action is only punishable therein." Idem, 133. See Kurtović Mišić & Krstulović Dragičević 2014, 105.

³²⁸ See Novoselec & Bojanić 2007, 238; Cvitanović 2013, 206.

³²⁹ Janssen 2012, 557. See Statenworth, Jenny & Bommer 2010, 401.

³³⁰ Novoselec & Bojanić 2007, 238. Or Cvitanović: "damage (*damnum*) denotes any deterioration or destruction of legally protected material or non-material values of the injured party. Resulting material damage – as a consequence of this action or an act of possession – is damage to subjective material rights or generally a reduction of the total economic value of property. It can be expressed as a pecuniary counter-value and implies the reduction of assets or increase in liabilities (in that sense, further division into direct and indirect, and realised future and prospective material damage is possible). It should not, however, be understood that the criminal law notion of material damage includes lost profit. Material damage is constituted by this type of relationship or ratio of endured loss and realised gain by disposal in which loss in the specific case exceeds gain." Cvitanović 2013, 206.

³³¹ See Vedriš & Klarić 2004, 552–561.

³³² Hence, the criminal law notion of damage is narrower than the civil law notion, e.g., damage caused by material defect of purchased item in civil law can be classified under three groups: *damnum quoad rem* – the reduced value of items; *damnum circa rem* – damage resulting from material possession of the buyers on the basis of trust in the absence of defects (damage to trust); *damnum extra rem* – damage to other legal assets of the buyers beyond the purchased item. Klarić 2003, 193.

³³³ Fabrizy 2010, 463. See Bertel & Schwaighofer 2010, 255.

When it comes to facts, damages encompass all economic effects (*wirtschaftliche Effekte*) of fraudulent actions, omissions and failures to act, so as to subsequently determine, if and to what extent, someone's property is damaged.³³⁴ This type of damage calculation raises legal issues, given that Austrian property criminal law derives from the economic consideration and includes only the realised effective loss of property (*effektiver Verlust an Vermögenssubstanz*) in terms of possession of property of the deceived within the criminal offence of fraud.³³⁵ Therefore, damage of property is every reduction of assets and increase in liabilities. In Swiss legal literature, material damages are defined as every reduction of property resulting from the reduction of assets, increase in liabilities or loss of gain (*Entgehen von Gewinn*). This also includes receivables, if they are authorised, which may be expected with certainty bordering on probability.³³⁶ If there is only property endangerment, there is no damage. Damage occurs if endangerment is such that property should entirely or partially be written off according to accounting principles.³³⁷ In Germany, according to § 263 StGB, material damages result from the possession of property.³³⁸ The issue whether material damage exists in terms of § 263 StGB should be clarified according to the principle of total netting: The status of property before possession should be compared to property after possession.³³⁹ Hence, the notion or scope of material damages are not regulated in Croatian or comparative legal systems. Here, I use civil law definitions, which are restrictively interpreted so that material damages encompass only the reduction of property. This notion refers to the principal (pecuniary) claim and interests, which usually form an accessory claim associated with the existence of capital claims.³⁴⁰

2.3.5.2 Establishment of Damage

Fraud results in material damage when one protected part is deducted from the assets, without being compensated with an equivalent value.³⁴¹ The economic value of property is the starting point. We should not only compare the normal value of the claim and the counter-claim, but their economic values as well.³⁴² Swiss criminal

³³⁴ *Fabrizy* 2010, 463–464.

³³⁵ *Fabrizy* 2010, 464. See *Bertel & Schwaighofer* 2010, 255.

³³⁶ *Donatsch* 2010, 275.

³³⁷ *Idem*. Incurring a gambling debt can also represent damage according to *Donatsch*.

³³⁸ *Donatsch* 2010, 276.

³³⁹ *Derenčin* states in his *Osnova* that “gain acquired by the culprit corresponds to the damage caused to the injured party”. *Derenčin* 1879, 343.

³⁴⁰ *Janssen* 2012, 557.

³⁴¹ *Ibid*.

³⁴² *Stratenwerth & Jenny & Bommer* 2010, 402. Same as *Bertel & Schwaighofer* 2010, 255; *Fabrizy* 2010, 464.

law theory states that, on the one hand, the conclusion of (a not only) void, (but at least) contestable contract reduces property. On the other hand, a request for an equally valid counter-claim does not exclude damage incurred when its fulfilment is at risk through a regular measure due to the lack of will or debtor's ability.³⁴³

I will now investigate whether the existence of damage should be questioned – despite the acceptance of the purely objective economic equal value of the claim and the counter-claim – if the value of the counter-claim does not correspond to the subjective expectations, contractual safeguards or individual needs of the deceived.³⁴⁴

There are two perspectives on this. The first confirms the existence of damage when the claim and the counter-claim are in a less favourable value relationship with respect to the injured party.³⁴⁵ The base for calculating damage is not objective, but a presented (*vorgetäuschte*) economic value of the counter-claim: “the deceived obtained the counter-claim of lesser value than the one promised to him”.³⁴⁶ It actually means that damage is represented by the infringement of civil law claim and thus fraud becomes an offence against the freedom of disposition. Since fraud is a material criminal offence, and not an offence against the freedom of disposition, such a perspective is not acceptable. The other viewpoint requires the non-usability (*Unbrauchbarkeit*) of the counter-claim for a special purpose by the injured party, i.e., the personal value (*persönlicher Wert*) of the counter-claim is expected (objective-individual norm).³⁴⁷ An individualised influence during the calculation of damage may only mean that the claim and the counter-claim refer to the needs of the deceived even when they do not have market value. Such needs are considered objectively only to a limited extent.³⁴⁸ The perspective of a “fictitious, neutral observer” does not apply here.³⁴⁹ It means that where other norms are absent, only the agreement between the participants may define the needs upon whose fulfilment the value of a claim or a counter-claim depends.³⁵⁰ In mutual (bilateral) contracts, equal value of

³⁴³ *Stratenwerth & Jenny & Bommer* 2010, 402; state that these principles also apply to credit fraud.

³⁴⁴ *Idem*. An example of this is the delivery of an allegedly high value wine for the price of a medium value wine and solicitation for a magazine subscription which the consumer does not need. In any case, it is concluded that it is no longer possible to use only objective value.

³⁴⁵ *Idem*, 403. BG adjudicated that fraud exists to the event of the delivery of cooking butter instead of fresh butter, even if the required price corresponds to its value.

³⁴⁶ *Idem*.

³⁴⁷ *Idem*, 404. An example of newspapers which do not correspond to the needs of the injured party.

³⁴⁸ *Stratenwerth & Jenny & Bommer* 2010, 404.

³⁴⁹ *Idem*.

³⁵⁰ *Idem*.

allowances and counter-allowances should be proved.³⁵¹ In German literature, the applicable time for establishing damage is the moment of possession of property. In the offence of “fraud during the conclusion of the contract” (*Eingehungsbetrug*) this refers to the conclusion of the contract, and in the offence of “fraud during the fulfilment of the contract” (*Erfüllungsbetrug*) this refers to allowances.³⁵² The criminal court always takes into account specific contractual relations. Occurrence of damage is often excluded if the contractual partner is, according to the contractual relationship, obliged to make a concession in advance or when the rights of return can be applied according to § 273 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*). Contractual or voluntary third person compensation allowances – especially insurers’ allowances – are not included.³⁵³ Basically, the issue of existence of material damage should be evaluated by the objective consideration of the facts because § 263 StGB does not protect the affective interest of the person or his freedom of disposition.³⁵⁴ Departing from this principle, court practice holds that there is material damage in the following groups of cases if there is levelling according to the principle of total netting: a) when material position – which is necessary for property maintenance or living expenses – is deprived from the victim due to fraudulent possession; b) when possession of property results in further measures which reduce property; c) with equal value of claims and counter-claims there may be material damage if the victim is unable to use the gained facility within its total scope for contractual or other purposes.³⁵⁵ So far, according to the predominant view and existing court practice in Germany, “risk for property equal to damage” or “damage from endangerment” (“*schadensgleiche Vermögensgefährdung*” or “*Gefährdungsschaden*”) constituted material damage.³⁵⁶ Schur defines damages resulting from endangerment as follows: it is a special type of damages, not a different or lesser form of damage; hence, damages resulting from endangerment are in fact economic damages (since the criminal law notion of property equals the economic notion of property).³⁵⁷ They occur when the economic value of the endangered property has been reduced as a result of endangerment, which entails the actual occurrence of the loss

³⁵¹ Donatsch 2010, 276; Janssen 2012, 557.

³⁵² Janssen 2012, 557. See Fabrizy 2010, 463.

³⁵³ Idem.

³⁵⁴ Same as *Novoselec & Bojanić*: “contrary to some authors, property is a legal asset subject to protection, and not the freedom of disposal.” *Novoselec & Bojanić* 2007, 237.

³⁵⁵ Idem.

³⁵⁶ Schur, for example, uses the term “*Gefährdungsschaden*” stating that another term has been frequently used: “*schadensgleiche bzw. schadensbegründende Vermögensgefährdung*”. Schünemann states that the term “*schadensgleiche Vermögensgefährdung*” has since evolved into “*Gefährdungsschaden*”. See Schünemann 2009, 666.

³⁵⁷ Schur 2011, 530.

of value, because the mere possibility of loss does not suffice.³⁵⁸ This renunciation of *actual* damage (“*tatsächlicher Schaden*”) substantially broadens the element of fraud and seriously questions the structure of the criminal offence as a material criminal offence and a criminal offence of infringement.³⁵⁹ The inclusion of endangerment of the property position under the notion of material damage results in the delay of the occurrence of the consequence.³⁶⁰ A typical example is the risk of subsequent reduction of property.³⁶¹ The First Senate of the BGH requested from appellate courts to establish and determine the damages realised within the endangerment.³⁶² It should be taken into account that the structure of market and economic depositions of the contractual parties in civil engineering, games of chance or trade of securities imply risk to the property of a specific person.³⁶³ Court practice in Germany results in there not being a qualitative, but only a quantitative difference between the damages and endangerment from the economic view. This represents a factual court explanation in the long existing controversy about the figure of property endangerment equating to damage.³⁶⁴ It results from the structure of fraud as a material criminal offence that every endangerment of property cannot represent an already risky position. For such endangerment of property, it would be necessary to first determine the specific risk for the protected property position.³⁶⁵ Facts which represent the grounds for endangerment have to be established with certainty and not probability.³⁶⁶ Furthermore, endangerment of property has, at the moment of disposal of property, to represent the reduction of property value.³⁶⁷ Since these assumptions provide only

³⁵⁸ Ibid.

³⁵⁹ In critiquing of this evaluation, *Schlösser* states that fraud is an “*Erfolgssdelikt*”, and not a criminal offence of endangerment, and manifests itself in two ways: It is either emphasised that property endangerment according to the dictum of the legal text is not material damage, or property endangerment is described more as final damage than as endangerment. The first view was advocated by the Second Senate of the BGH in the so-called Kanther decision from 2006, and the second view by the First Council. See *Schlösser* 2009, 666.

³⁶⁰ Idem. For more details on the formal and material completion of an act, see *Kühl* 2002, 729–736.

³⁶¹ Idem. Therefore, according to Janssen, it should demarcate the bare risk of subsequent reduction of property from endangerment, which already represents material damage.

³⁶² *Janssen* 2012, 558. For detailed analysis of the interpretation of the First Senate (*I. Senat*), see *Schlösser* 2009, 663–666.

³⁶³ Idem. For more details on material damage from risky transactions, see BGH, decision of 20/3/2008 – 1 StR 488/07 (LG Mannheim), *NStZ* 2008, Heft 8, 457–458, and BGH, *Beschl. v. 18/2.2009*. – 1 StR 731/08 (LG München I), *NStZ* 2009, Heft 6, 330–331.

³⁶⁴ Idem. Critical review of court practice, *Schlösser* 2009, 666–667.

³⁶⁵ *Janssen* 2012, 558.

³⁶⁶ Ibid. Same as *Schur* 2011, 530.

³⁶⁷ *Janssen* 2012, 559.

quantitative and not qualitative differences between effective damages and property endangerment, from the theoretical viewpoint, it is believed that the court practice of the First Senate considers only realised damages, and not the “unnecessary” notion of specific property endangerment.³⁶⁸ This is dubious not only from the perspective of expansion of the criminal offence of fraud towards endangerment, but also in terms of the extension of the statute of limitations on punishability.³⁶⁹ In terms of property endangerment, Swiss theory deals with the intensity of necessary damages (*Intensität des erforderlichen Schadens*), which means that endangerment would not suffice since the material elements of fraud requires damages.³⁷⁰ However, if endangerment is such that it already represents the reduction of property from the economic viewpoint, it consequently results in damage.³⁷¹ This is explained by the fact that the risk of non-fulfilment may reduce the economic value (e.g., sale of stolen or embezzled items).³⁷² In terms of intensity, the issue of duration of damage is also examined. The BG has adjudicated that temporary damage (*vorübergehende Schädigung*) suffices.³⁷³ It can be considered actual damage only if the delay of the counter-claim renders it unusable for the deceived (because subsequent fulfilment does not compensate it either).³⁷⁴

Analysis of material damages and endangerment damages is inseparable from credit fraud or loan fraud (*Kreditbetrug*). In the broader sense, loan fraud refers to the fraud to the detriment of the crediting banks.³⁷⁵ Fraud is evident in all cases of active fraud or misrepresentation.³⁷⁶ Implied fraud is also considered an act of perpetration. Implied fraud occurs when the applicant, upon the submission of the loan application, acknowledges that he will be able to repay the loan based on the current assessment of his future financial standing.³⁷⁷ Special attention should be attributed to the establishment of intent, since fraud ensues only when the debtor is aware of his lack of creditworthiness at the very conclusion of the loan contract.³⁷⁸ According to *Janssen*,

³⁶⁸ Idem.

³⁶⁹ *Janssen* 2012, 559.

³⁷⁰ *Stratenwerth & Jenny & Bommer* 2010, 405.

³⁷¹ Idem. This is particularly important with fraud during the conclusion of the contract (*Eingehungsbetrug*), but not only in that case.

³⁷² Idem.

³⁷³ Idem.

³⁷⁴ *Stratenwerth & Jenny & Bommer* 2010, 407.

³⁷⁵ *Janssen* 2012, 561. Contrary to the scope of provision § 265b (credit fraud – *Kreditbetrug*), there are no limitations with respect to the perpetrator and the victim.

³⁷⁶ Idem. See *Fischer* 2012, 1815; *Cramer & Perron* 2006, 2233–2234.

³⁷⁷ Ibid.

³⁷⁸ Ibid. Credit fraud in German criminal law is evaluated as fraud during the conclusion of a contract or “*Eingehungsbetrug*”. Fraud during the conclusion of a contract has a

there is a demarcation issue with the criminal offences of insolvency. He justly wonders whether § 263 StGB should provide better protection of good faith in the debtor's repayment ability than the civil law. Consequently, the creditor's error may consist in the wrongly assessed level of risk of its claims.³⁷⁹ Whereas court practice has previously accepted the figure of "property endangerment equal to property damage" (*schadensgleiche Vermögensgefährdung*), when the property value of the deceived creditor decreased after the payment of the loan, the First Senate of the BGH holds that the damage has already occurred and that it can no longer depend on the extent to which the property was endangered in monetary terms.³⁸⁰ In one conclusion about the certainty of the criminal offence of abuse of trust (*Untreue*), the Federal Constitutional Court stated that the terms "damages from endangerment" (*Gefährdungsschaden*) or "property endangerment equal to property damage" (*schadensgleiche Vermögensgefährdung*) do not refer to "judicially determined special categories of offences", but to the reduction of property.³⁸¹ The question whether the perpetrator approved of the potential damage, or he intended to subsequently reduce property, is irrelevant in this regard. In the event of fraudulently acquired consent for a risky operation, court practice has been shrouded in controversy with respect to the figure of property endangerment being equal to damage.³⁸² Property should be compared in order to determine whether "property endangerment equal to damage" exists according to popular opinion or if the damage has already occurred. Issues arise in cases where damage does not occur at a subsequent point in time, because, for example, the loan is repaid entirely and in due time. Loan granting is always a risky operation. There is no guarantee that the loan will be repaid in full; the risk is compensated by appropriate pertaining interests. When the BGH states that "risk of loss which is no longer imminent to the contract, and which, from an economic point of view, results in the payment of a pecuniary fine as value loss", this raises serious additional issues in terms of mental element of the offence.³⁸³ The First Senate has clearly stated that intent should refer only to the risk of loss; the approval of potential ultimate damage is not at issue here.³⁸⁴ However, a loan application implies the applicant's knowledge that he will be able to repay the loan based on the current

long history – this classic institution of economic criminal law, as denominated by *Schlösser*, was established in the decision of the Supreme Court of the German Reich (*Reichsgericht*) in 1910 in the following manner: "performance and consideration may not be separated in bilateral contracts ...". For more, detail see *Schlösser* 2010, 164.

³⁷⁹ Ibid. See *Cramer & Perron* 2006, 233.

³⁸⁰ This refers to the BGH decision of 18/02/2009 – 1 StR 731/08; <http://www.hrr- strafrecht.de/hrr/1/08/1-731-08.php> [19/01/2014]. See *Schlösser* 2010, 165 and *Gaede* 2009, 4–16.

³⁸¹ Idem.

³⁸² *Janssen* 2012, 562.

³⁸³ *Janssen* 2012, 563.

³⁸⁴ Ibid.

assessment of his future financial standing. If he, at the moment of submission, even has the slightest doubt that he can repay the loan, he has already committed punishable fraud and caused damage, according to the First Senate, provided that his loan is subsequently granted. This also applies if the application is returned in full and he never wanted or intended to repay the loan.³⁸⁵ The only limitation, according to the court, is the issue of interpretation with respect to “the risk of loss which is no longer imminent to the contract”.³⁸⁶ In the area of risky transactions within the criminal offence of abuse of trust (*Untreue*), the figure of property endangerment equal to damage leads to the expansion of punishment of fraud. In addition, the mental element for indirect intent in cases of property endangerment amounting to damage should refer not only to endangerment, but also to the ultimate loss of property.³⁸⁷ This deliberate limitation has been revoked by the court practice of the First Senate.³⁸⁸ If we include “insolvency punishment” beyond § 263 StGB, good faith in the debtor’s ability would ultimately be protected to a greater extent than in civil law, which casts doubt on the *ultima ratio* function of criminal law.³⁸⁹ A very significant fact is that the Federal Constitutional Court, in its conclusion about the abuse of trust, was not fundamentally opposed to the notion of property endangerment amounting to damage, but only in one special interpretation.³⁹⁰ The monetary establishment of damage (*bezahlter Schaden*) is necessary, otherwise there is no punishment.³⁹¹ In this nominal establishment of the notion of damages resulting from endangerment, there is an indirect non-acceptance of the judicature of the First Senate of the BGH, even though both decisions result in detailed assessment of material and endanger-

³⁸⁵ Ibid. See *Novoselec* 2009, 112: “In the business world, property is considered less valuable if tied to a risk, hence no one will agree to substitute safe property with a risky one, e.g., substitute a safe claim with a doubtful claim. According to that understanding, fraud is deemed completed at the moment of conclusion of the contract resulting in the doubtful claim. In other words, fraud during the assumption of the loan, which the perpetrator has no intention of repaying, has been completed on the conclusion of the loan contract, because at that moment the property of the deceived is already endangered. If the debtor, after the completed fraud, still fulfils his obligation, such fulfilment shall be only considered compensation of damages and shall be deemed an extenuating circumstance for the perpetrator’s positive conduct after the perpetration.”

³⁸⁶ Ibid. With respect to the provisions, there is a three-week deadline prescribed by insolvency law according to which the manager has three weeks between the acknowledgement of insolvency until the instigation of the insolvency procedure to efficiently remove the reasons for the procedure and avoid prosecution due to procrastination. It seems that the assumption that the debtor may exclude probability of risk of repayment at the conclusion of the contract may be deemed contradictory.

³⁸⁷ Idem. See *Cramer & Perron* 2006, 2234.

³⁸⁸ Idem.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ *Janssen* 2012, 564.

ment damages.³⁹² According to Austrian doctrine and judicature, damage must have taken actual effect and be precisely calculated.³⁹³ Credit fraud in Swiss doctrine requires essential endangerment (*erhebliche Gefährdung*) of repayment, which substantially depreciates its value (*wesentlich herabsetzt*).³⁹⁴ However, the BGH has pointed out that damages should not be considered if the creditor acquires the loan claim (whose actionability is not certain), since that is a standard risk assumed by the creditor.³⁹⁵ Nevertheless, there is damage when the debtor, contrary to the creditor's expectation, offers such a negligible guarantee (security) for the stipulated repayment that he substantially endangers the loan claim and, by doing so, considerably reduces its value.³⁹⁶

In view of the above, we can conclude that the distinction between material and endangerment damage originates from German and Swiss doctrine. The notion of damages from endangerment is nominally associated with credit fraud as a form of fraud during the conclusion of the contract, with no equal value between performance and consideration due to the perpetrator's non-existing or insufficient credit rating. Although *Novoselec* states that *Zlatarić* opted for the notion of endangerment damage, which is also found in court practice (he mentioned the decision of the County Court in Koprivnica, KŽ 132/98), there is no notion of endangerment damage in the judgements analysed in this doctoral research. The courts have regularly established that the offence is committed (and completed) at the moment of conclusion of specific contracts.

2.3.5.3 Typical Cases

German theory lists some typical cases of material damage in the criminal offence of fraud. Those are: employment fraud, mendicancy fraud, donation fraud, possession fraud and sports betting fraud. Since similar or the same forms of fraud are also common in Croatian court practice, I have analysed them here.

³⁹² Ibid.

³⁹³ Op. cit. *Novoselec* 2009, 113. *Novoselec* further states that the exact calculation of damage is not easily achieved, which is partially due to the technique of the Austrian CC, where the existence of an aggravated fraud depends, inter alia, on the amount of the pecuniary damage. It eliminates the notion of fraud during the conclusion of the contract. In credit fraud, the damage does not occur upon the very conclusion of the contract, but by issuing goods or paying out the debtor, whereas the conclusion of the contract, i.e., property endangerment, suffices only for attempted fraud. See *Fabrizy* 2010, 464; *Bertel & Schwaighofer* 2010, 255.

³⁹⁴ *Donatsch* 2010, 276.

³⁹⁵ *Stratenwerth & Jenny & Bommer* 2010, 402.

³⁹⁶ Ibid.

2.3.5.3.1 Employment Fraud

In German theory, employment fraud (*Anstellungsbetrug*), as subtype of fraud during the conclusion of the contract, refers to cases where the injured party is deceived about the existence of relevant employment-related facts. The deceived party is thus erroneously obliged to repay a part of his personal income or salary.³⁹⁷ The damage consists of the difference between the fee and the promised service (“*versprochene Dienstleistung*”).³⁹⁸ German criminal law theory distinguishes between employment caused by fraud in civil service (*Beamtenstellung*) and outside of civil service (*Anstellung*). In civil service employment, material damage refers to professional qualifications or employment (business career) requirements without which there would be no employment.³⁹⁹ It is based on special relations of government trust in its employees, i.e., the right of the state to check on its civil servants.⁴⁰⁰ The fact that an employee’s work is satisfactory does not eliminate the material damage.⁴⁰¹ In the private sector or civil service, material damage results from fraud concerning the facts upon which the employer’s trust is based, which in turn incurs a higher fee.⁴⁰²

In Croatian criminal law theory, Novoselec dealt with employment fraud by commenting on the judgement of the Municipal Court in Ludbreg, No. K-21/06 from 2 April 2006.⁴⁰³ In this judgement, the defendant was pronounced guilty for the criminal offence of forging a document stipulated in Article 311, para. 2 of the CC97, verifying false content from Article 315, paras. 1 and 2 and committing fraud under Article 224, para. 4.⁴⁰⁴ Novoselec concluded that material damage was caused to the

³⁹⁷ Janssen 2012, 559. See Lackner & Kühl 2007, 1170; Cramer & Perron 2006, 2232.

³⁹⁸ Idem. See Fischer 2012, 1819.

³⁹⁹ Idem. See Prittwitz 2000, 335–336. See Lackner & Kühl 2007, 1170–1171. Hence, material damage to the state occurs when the state pays for the work of a person with a higher professional qualification (and the perpetrator has lower professional qualifications or none) or the work of a person with a specific work experience (which the perpetrator does not have or only to a lesser/unsuitable extent). This material damage can be established by evaluating the work coefficient. Obligatory content of the written employment contract, i.e., written confirmation of the concluded employment contract pursuant to Article 13, para. 1, item 8 of the Employment Act (OG No. 149/09, 61/11, 82/12, 73/13) refers also to information about the base pay and contributions.

⁴⁰⁰ Idem. According to the opinion of BGH, there is no difference between civil servants and employees.

⁴⁰¹ Idem. See Fischer 2012, 1820.

⁴⁰² Idem. The issue is whether the actual or expected work effect counts. In the long run, the actual work effect should be relevant, whereas in the short term, there should be a potential incapacity to work. If this refers to employment without the special relationship of trust, the omission of a previous conviction does not suffice.

⁴⁰³ Novoselec 2007, 295–297.

⁴⁰⁴ The defendant procured a false certificate that she graduated from the Faculty of Economics in Osijek, based on which the clerk from the State Administration Office issued

employer because the employer paid for the work of a graduate economist, but was given the services of a person with inferior qualifications. This person would not even have been employed if the employer had been aware of her true qualifications.⁴⁰⁵ He states that the ratio of performance and consideration is not only an economic calculation, but should also include the social value criteria.⁴⁰⁶ He further believes that performance and consideration are not equally valuable even if the employee performs his duties regularly (but without the professional qualification).⁴⁰⁷ The court adjudicated over an indemnification claim involving the Croatian Bureau of Employment regarding co-payment of the defendant's contributions (to the amount of HRK 50,919). What would the defendant be charged for if the new CC had been effective at the time of perpetration? Most likely for the forgery of a document (Article 278, para. 1), verification of false content (Article 281, para. 1 and 2) and fraud (Article 236, para. 2). What about subsidising the payment of contributions? Even though the subjective feature of the element of the offence allows for the possibility that support is achieved for another person (*whoever, with the aim of gaining state support for himself or others*), the employee could be charged for subsidy fraud as a direct perpetrator, since she did not provide false data directly to the grantor (Croatian Bureau of Employment), but to the employer which forwarded it to the Croatian Bureau of Employment. What if the already employed person submitted a forged diploma about a higher qualification (for the purposes of future advancement), but the coefficient of work is still calculated for secondary level of education? I believe that there are no grounds for criminal prosecution; because there is no material damage to the employer (the employment is not concluded as a result of error and the employee is not paid a higher salary due to a higher qualification). Liability for attempted fraud should be thoroughly examined.

an employment booklet. She used that certificate to apply for a company competition for the position of the "Logistics Manager" which required higher level of education. She was accepted, after which she concluded an employment contract as a trainee. Based on that contract, the Croatian Bureau of Employment was obliged, within the programme of stimulating higher qualification employment ("*S faksa na posao*"/From University to Work), to co-pay her contributions as a one-off amount. The defendant worked of 15 July 2003 until 24 May 2005, for which she received the total gross salary of HRK 106,302.87, which included the amount of HRK 50,919 paid by the Croatian Bureau of Employment to the employer." *Idem*, 295.

⁴⁰⁵ *Ibid.* 296.

⁴⁰⁶ If the perpetrator's work is equally valuable as the work of another person considering the criteria such as the level of education, skills, responsibility, work conditions. See Article 83. Employment Act.

⁴⁰⁷ *Idem*.

2.3.5.3.2 Mendicancy, Donation and Gifting Fraud

In mendicancy, donations and gifting, material value (money) is given in order to fulfil a special social purpose.⁴⁰⁸ This mainly includes gifting with a special purpose, donations to charities or homeless people. The element of fraud is not excluded by the fact that those who donate know that they would not receive consideration for their donation which results in the reduction of their property, because the loss of property should be compensated by fulfilling a special non-material purpose from the donor's perspective.⁴⁰⁹ In mendicancy fraud, there is usually no error if the disponent does not care about the intended purpose.⁴¹⁰ If the purpose is not achieved, it was previously believed that the damage was inflicted according to the theory of purpose infringement (*Zweckverfehlungslehre*), which is not widely accepted today.⁴¹¹ Property damage may occur due to fraud or error when said expenditure represents economically reckless expenditure.⁴¹² In general, § 263 StGB provides a restrictive interpretation; not every error regarding a motive based on fraud provides grounds for punishment.⁴¹³ Material damage exists, for instance, when the intended purpose vanishes as a result of the illicit sale of property, and the value of the property depreciates in the social sense (lack of social purpose, *soziale Zweckverfehlung*).⁴¹⁴ It is not enough to only violate the purely affective interest.⁴¹⁵ With respect

⁴⁰⁸ Janssen 2012, 560. See Fischer 2012, 1816.

⁴⁰⁹ Fischer 2012, 1816. Same as Cramer & Perron 2006, 2232; Beukelmann 2010, 1852. These cases are not rare in the Republic of Croatia, e.g., "Municipal State Attorney's Office in Split filed a claim against the Croatian National V.D. (1966) due to the perpetration of successive criminal offences of fraud (25 August 2011). The defendant is charged with drafting false memoranda between 15 January 2007 and 13 May 2011 in Split on behalf of the Ministry of Health and Social Welfare of the Republic of Croatia with the aim of acquiring illicit gain. He asked for financial contributions for his daughter, signed the memoranda with the name and surname of a fabricated physician and sent them to various addresses of natural and legal persons with the indicated account number. He falsely claimed that the money would be used for hospital treatments of his sick daughter. The targeted persons believed him, since 93 legal persons and 6 natural persons paid the total of HRK 309,300, which caused them individually determined financial damage." <http://www.dorh.hr/spl2508> [28/04/2014].

⁴¹⁰ Janssen 2012, 560. See Novoselec 2009, 111–112.

⁴¹¹ Idem. See Fischer 2012, 1816.

⁴¹² Ibid.

⁴¹³ Ibid. It is more relevant if the conclusion of a transaction is determined by a social purpose. See Humanitarian Aid Act, OG No. 128/10.

⁴¹⁴ Idem. See Novoselec 2009, 119–122.

⁴¹⁵ The notion of affective interest refers to a special subjective (personal) interest. According to Klarić, it is recognised by the Austrian OGZ in § 1331 (as value of special affection), Turkish Civil Obligations Act (Article 49) and French court practice. Affective damages result from material or non-material damages in the form of a violated sense of justice, indisposition or excitement (affection). Klarić 2003, 263–271. Affect-

to donations-related fraud, the recent issue in Croatia has been the monitoring of charitable organisations, i.e., control of allocated (unallocated) spending of funds collected through charity events.⁴¹⁶

2.3.5.3.3 Possession Fraud

Possession fraud includes all cases in which material damages result in the loss of property, and not in the loss of ownership.⁴¹⁷ For instance, in the final loss of property, when the trader with the right of lien delivers a repaired item without previous payment as a result of fraud.⁴¹⁸ *Cramer* and *Perron* state that indirect and direct possession are protected if the holder acts fairly.⁴¹⁹ Pursuant to the notion of property based on German court practice, inclusion of possession in the property protected by § 263 StGB is not an issue, if possession has economic value.⁴²⁰ With respect to illicitly gained possession, Beukelmann claims that it is protected by § 263 StGB, since it belongs to the notion of property according to the legal-economic notion of property.⁴²¹ This phenomenon is known in German theory as “thieving fraud” (“*Ganovenbetrug*”).⁴²² However, can we completely accept the German definition that, in possession fraud, material damages arise from the loss of property? If a person delivers a valuable ring to the goldsmith who then inserts a priceless diamond (which had been previously lost), and the perpetrator “pays” with counterfeit money – material damage not only results from the loss of possession, but also from the perpetrator’s failure to meet a claim, since he committed concurrent offences of counterfeit

ive price (*pretium affectionis*) is a special subjective value of an item which could not be evaluated by objective norms (only the value that a specific item has for a specific person, regardless of its trade value or its connection with other items). *Vedriš & Klarić* 2004, 87.

⁴¹⁶ In fact, after the charitable event “*Nora u srcu*/Nora in our hearts” and the subsequent demise of the girl whose treatment was the subject of the event, a scandal arose from the media outings of her parents and the members of the charitable association, which eventually resulted in the Government’s initiative to make a new Humanitarian Aid Act. See, for example, *RTL* 2014, Humanitarian Aid Act (OG No. 128/10) and Associations Act (OG No. 88/01, 11/02).

⁴¹⁷ *Janssen* 2012, 561.

⁴¹⁸ Also, temporary loss of possession may result in material damage if temporary use leads to (partial) wear and reduction of value. *Janssen* 2012, 561.

⁴¹⁹ *Cramer & Perron* 2006, 2216.

⁴²⁰ *Idem*. Limitations are discussed with respect to the inclusion of possession into legally protected property when the loss possession had been previously obtained through an offence. Same as *Cramer & Perron* 2006, 2216. They state that protection does not only refer to the possession obtained through an offence (hence a thief cannot be protected from fraud).

⁴²¹ *Beukelmann* 2010, 1851.

⁴²² *Idem*.

and fraud. Of course, if the injured party had not lost possession, he would be eventually entitled to retention and settlement from the lien.

2.3.5.3.4 Sports Betting

Sport was an important element of spiritual and moral education in ancient Greece and it reached a new level through the statutory acclaimed social value. Today sports teams are joint-stock companies based on large capital, and professional athletes are motivated by large prizemoney. Endorsements and advertising have assumed the leading, almost defining role, in sport.⁴²³ Prizemoney for winning certain sports events has encouraged people to take measures to ensure they win even before the commencement of a competition, and the fast development of various types of manipulation in sport (including different types of betting) has led to the fixing of results with the aim of profiting. The illicit effect on the outcome differs with respect to whether it is manifested in the achievement of a certain sports objective (usually winning) or the achievement of certain sports result is followed by profiting from sports betting (or profiting is its exclusive aim).⁴²⁴ In terms of criminal prosecution for manipulating results and its influence on sports betting, Pandora's box was definitely opened by the "*Fußballwettsskandal*", the famous decision of the BGH of 15 December 2006, referred to in legal literature as "*Quotenentscheidung*" (decision on quotas). It is a scandal known by the name of the football referee, *Robert Hoyzer*, who was the most notorious defendant in that case. *Hoyzer* agreed with the betting mafia (the main organiser was the Croatian national, *Ante Šapina*, residing in Berlin) to influence the outcome of many matches in the German third league football cup in 2005.⁴²⁵ The judgement of the BGH raises two important issues concerning fraud: the manner of perpetration (misrepresentation or concealment) and the scope of damage.⁴²⁶ With respect to the former, the essential question was whether the person

⁴²³ *Pajčić & Sokanović* 2011, 858: *unsportsmanlike* conduct is exhibited more frequently, and the hunger for winning has always been present. Winning is often motivated by the use of illicit substances or substances of artificial origin to improve sports achievements.

⁴²⁴ *Ibid*, 859. Even "exclusively sports" goals have a direct financial effect (participation premiums awarded by the competition organiser) or indirect financial effect (mostly by sponsors).

⁴²⁵ German betting companies alone have an annual turnover of EUR 3,000,000,000. German Federal Crime Police has been warning for a long time that this is a "global betting mafia" with the European centre in Berlin, and the main bosses located in China, Malaysia, Taiwan or Singapore. *Idem*.

⁴²⁶ *Modus operandi* of manipulations is when payments in betting shops (in a large total amount, but usually distributed across several smaller payments) ensure substantial illicit gain after a certain outcome of a sports event or other elements of a competition offered by the sports shop (e.g., that all goals in a football match would be scored in the first half or that a certain player would get a yellow card) have been agreed.

concluding a betting contract tacitly expressed that he had not arranged the manipulation of sports competition results (specifically a football match). In fact, the outcome of the sports competition is uncertain and as such does not represent a certain fact in the sense of the criminal offence of fraud. The Regional Court in Berlin began its judgement – which resulted in conviction – with the view that whoever concludes a betting contract simultaneously tacitly expresses that he is not manipulating the results.⁴²⁷ The BGH confirmed this decision and, in three steps, elaborated upon its conclusion that the defendant, *Šapina*, deceived the employees of the betting shop by implied actions. Firstly, the court presented the general assumptions about implied misleading or deceiving, and then it applied those principles to sports betting: They were interpreted as a subtype of games of chance, where success is case-specific. Referring to civil law theory, the BGH established the sports event as the subject of the betting contract and stated that, during the conclusion of the betting contract, each party implicitly expresses that he has not (and shall not) manipulate the prospects for the achievement of a certain result.⁴²⁸ An argument in favour of the claim that there is no fraudulent concealment is that there has to be a trust relationship for the obligation of expression about the influence on the outcome of the subject. This trust relationship can derive from a long business relationship or friendship (which cannot be at issue in manipulation for gaining betting profit).⁴²⁹

Another theoretical issue of sports betting refers to material damages. BGH has, in the *Hoyzer* case, supported the view that damage was caused to the betting shop as the injured party by the very conclusion of the betting contract and has thus developed a legal institution of the so-called “coefficient damage” (*Quotenschaden*).⁴³⁰ This refers to the difference between the formal and actual coefficient of probability regarding the outcome of a sports event.⁴³¹

In fact, the integral part of the betting contract is a certain coefficient on which the amount of money paid by the betting shop depends on the desired result. The BGH pointed out that if the person who bets manipulated the result, he substantially affected (increased) his prospects of winning which are expressed by a coefficient.⁴³² In comparison with these actual prospects of achieving the desired result, the coefficient specified in the betting contract is too low, i.e., too favourable for the betting

⁴²⁷ *Idem*, 865. See Janssen stated that the fact that the person who bets tacitly expresses one negative fact does not change anything. *Janssen* 2012, 585.

⁴²⁸ The third element was the earlier court practice of that court and other high German courts. *Idem*.

⁴²⁹ *Schlösser* 2005, 428.

⁴³⁰ The Regional Court in Berlin stated that the very conclusion of the betting contract led to endangerment of property equal to damage (*schadensgleiche Vermögensgefährdung*), which was confirmed by BGH. See *Saliger & Rönna & Kirch-Heim* 2007, 364.

⁴³¹ *Pajčić & Sokanović* 2011, 865.

⁴³² *Saliger et al.* 2007, 365. See *Janssen* 2012, 585.

person who manipulates the results. Therefore, such “difference in coefficients” represents material damage for the betting shop, which does not even have to be expressed in pecuniary units.⁴³³ Damage measured in pecuniary units occurs afterwards, when the amount is paid according to the concluded betting contract.⁴³⁴

Even though our cities are covered in billboards encouraging betting⁴³⁵ and betting has become the habit which fits in with the lifestyle of many citizens, which consequently leads to many manipulations in this area,⁴³⁶ there is little possibility that our courts would accept the establishment of material damage according to the principle of “*Quotenschaden*” without a previous relevant decision of the Supreme Court. In fact, since the injured parties are instructed to claim statutory interests in a civil procedure (since the scope of property protected by criminal law proceedings is nominally limited to the damage principal), it is less likely that the courts would deal with the establishment of coefficient difference by establishing material damage (which is a far more complex and difficult procedure than adjudicating statutory default interests).

2.3.5.4 Material Damage in Court Practice

Analysis of the collected data from the judgements of the Municipal Court in Zagreb and the Municipal Court in Split raised a whole new set of issues. In fact, it has been established that the courts deliver four types of convicting judgements:

- 1) In the largest number of judgements the defendant is sentenced to a suspended prison sentence with an additional condition to compensate damages to the injured party; the defendant is also obliged to pay for the indemnification claim.
- 2) Secondly, there are judgements where the defendant is sentenced to a suspended prison sentence and is obliged to pay for the indemnification claim.⁴³⁷

⁴³³ For a critical review, see *Rönnau & Soyka* 2009, 12–14.

⁴³⁴ *Saliger et al.* 2007, 365.

⁴³⁵ Which became even more convenient since betting is now enabled through mobile phones as well. Society usually remains silent on the problems of betting addictions.

⁴³⁶ Since there is organised crime wherever there are large amounts of money.

⁴³⁷ In three judgements, the courts adjudicated the indemnification claim in the amount of the damages; however, it is not discernible from the judgements if the indemnification claim referred only to the principal or to statutory default interests as well. Because, if it included the interests as well, the court has not entirely decided on the submitted claim (to which it is obliged). There is certainly a potential possibility that the injured parties submitted the claim which contained only the principal, knowing that the criminal courts usually refer claims regarding interest to civil proceedings. Another reason may be that they do not request interest because they are hoping to recover at least a part of the lost money, i.e., the principal.

- 3) The judgements where the defendant is sentenced for the criminal offence of fraud are rare; the injured party is instructed to realise his entire indemnification claim in civil proceedings.
- 4) In only one judgement was the defendant sentenced for the criminal offence of fraud, and the dictum does not contain the decision on the indemnification claim or forfeiture of material gain.

1) The so-called additional condition actually represents a special obligation of a probationally sentenced person from Article 68, para. 1 of the CC97.⁴³⁸ Even today the courts may adjudicate such special obligation in addition to the suspended sentence pursuant to the Article 56, para. 4 of the CC. In fact, one of the special obligations from Article 62, para. 1 is the remediation of the damage committed by a criminal offence.⁴³⁹ It should be particularly pointed out that the deadline for fulfilling such special obligation shall be determined by the court within the specified probation period (Article 68, para. 2 of the CC97), i.e., the duration of special obligations should not exceed the probation period (Article 56, para. 5 of the CC). Courts, in general, obligate the defendant to compensate damages within the deadline, shorter than the probation period, and in fewer cases within the deadline, equal to the probation period.⁴⁴⁰

2) The courts based the decision regarding the obligation to pay the indemnification claim on Article 132 of the Criminal Procedure Act.⁴⁴¹ In terms of indemnification claims during this research, the following questions were raised:

First, why were statutory default interests, in addition to the amount of material damage, adjudicated in only one case where the indemnification claim was adjudicated?

⁴³⁸ In addition to the suspended sentence, the court may determine the following obligations: that the perpetrator compensates caused damages, returns the gain acquired by the offence, or fulfils other legally founded obligations regarding the offence.

⁴³⁹ However, Article 63, para.1 prescribes that unreasonable and impossible obligations should not be imposed upon the perpetrator or any obligations which violate his dignity for that matter. In view of the above, the question arises regarding the extent to which the obligation is “realisable”, e.g., obligating the perpetrator who is an unemployed addict without property to compensate, within three years, the damage in the amount of HRK 150,000.

⁴⁴⁰ These are cases with higher amounts which the defendant needs to compensate to the injured party, and the defendant is unemployed, without income or property.

⁴⁴¹ Rare judgements, in addition to citing the statutory provision of the CC or CPA, cite the number of the Official Gazette, where the act was published. It practically means that the defendants do not know which act applies to their criminal offence, since there are many amendments to these basic acts of the criminal judiciary.

Or, why are the injured parties referred to claim statutory default interests in civil proceedings?⁴⁴²

Second, in the cases where the entire or partial indemnification claim was adjudicated in favour of the injured party, is it necessary to deliver a decision in the dictum about the forfeiture of material gain?⁴⁴³

When the defendant, after the perpetration, compensates damages to the injured party prior to the pronouncement of the judgement, is it necessary to deliver a decision on the forfeiture of material gain?

With respect to the first question, every student who has attended lectures in Criminal Procedure Law would immediately reply that the decision on the indemnification claim is an adhesion procedure, which may be discussed only if it would not delay the criminal proceedings. However, if the court had already decided on the indemnification claim by ordering the perpetrator to pay the damage in the amount established in the dictum as illicit material gain, the decision on statutory default interests does not require the establishment of additional facts, hence the criminal court may adjudicate them as well. According to the Article 132, of the CPA, i.e., 158 of the CPA⁴⁴⁴ if the data from the criminal proceeding does not provide reliable grounds for complete or partial adjudication, the court shall refer the injured party's indemnification claim to the civil proceeding. Since the criminal judgement in that case represents an enforcement deed,⁴⁴⁵ i.e., part of the indemnification claim dictum represents an enforcement title, it has to be complete (i.e., contain data about the perpetrator, amounts, statutory default interests applicable from the day of the perpetration

⁴⁴² In the judgement of the Municipal Criminal Court in Zagreb No. KO-2206/10 of 7 March 2011, the indemnification claim was partially adjudicated in favour of the injured party, whereas the rest of the claim which includes statutory default interests and enforcement costs is referred to civil proceedings. It is the only judgement where the indemnification claim includes the costs of other proceedings (enforcement) and not only statutory default interests.

⁴⁴³ In the judgement of the Municipal Court in Split No. K-1512/10 of 24 March 2011, the injured party did not file an indemnification claim, hence it was not subjected to a decision, but the court forfeited material gain acquired by the criminal offence from the defendant based on Article 82 of the CC in the amount of the principal.

⁴⁴⁴ OG No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, hereinafter CPA08.

⁴⁴⁵ Enforceability is the property of a deed based on which a person may request coercive realisation of a claim determined therein. A court decision ordering the realisation of a claim for certain dues or actions (*dare, facere*) is usually enforceable if it has become final and if the deadline for voluntary fulfilment has expired. *Dika* 2007, 236. See Enforcement Act, OG 112/12, 25/13, Articles 23, 25, paras. 1 and 2. For the enforceability of decisions of courts of original jurisdiction and settlements, see Articles 26 and 27 of the Enforcement Act.

until payment, rate, deadline).⁴⁴⁶ What are the consequences of this court practice? Instead of two procedures (criminal and enforcement), there are four (lengthy) procedures (criminal, enforcement for the principal amount, civil for statutory default interests and, finally, enforcement for the statutory default interests).

With respect to the second question, the CPA provides a simple answer. The same provision (Article 557, para. 2 of the CPA08) prescribes that the court would deliberate only in the part excluded from the indemnification claim, if the injured party filed an indemnification claim whose grounds exclude the forfeiture of illicit material gain. *Ivičević Karas* states that the measure of forfeiting material gain is subsidiary, which means that the court pronounces it only if the material gain is not entirely encompassed by the adjudicated indemnification claim of the injured party.⁴⁴⁷ Also, Article 77, para. 2 of the CC prescribes that, if the indemnification claim whose nature and contents correspond to the acquired material gain is adjudicated to the injured party, the part of the material gain exceeding the adjudicated indemnification claim shall be forfeited. However, the new CC in Article 77, para. 3 prescribes that the court shall forfeit the material gain, even if it refers the injured party to realise his indemnification claim in civil proceedings. In fact, until the adoption of the CC11, the courts forfeited material gain if the injured party had not filed an indemnification claim, with respect to the difference (if the indemnification claim encompassed a minor part of the material gain).

In one of the analysed judgements (Municipal Court in Split, K 414/11 from 29 September 2011), the defendant *A.V.* was convicted of fraud against the company “G d.d.” Split from Article 224, para. 4 for acquiring illicit material gain in the amount of HRK 30,599.99. Until the delivery of the judgement of the court of original jurisdiction, the defendant compensated the damage to the injured company, which was taken as an extenuating circumstance by the court. The company did not file an indemnification claim. The court did not forfeit material gain. Was the court wrong, considering the fact that there was an effective nominal provision that no one could

⁴⁴⁶ See *Dika* 2007, 283. See Article 39 of the Enforcement Act (listing the contents of the enforcement proposal). This would be an example: Pursuant to Article 158, para. 2 of the CPA08, the defendant A.A. is ordered to pay to the injured party B.B. the amount of HRK 30,000 with statutory default interests applicable of 12/12/2012 (date of perpetration), within 15 (fifteen) days.

⁴⁴⁷ And sometimes for the costs of the enforcement proceeding or other costs pertaining to material damage. The Enforcement Act prescribes with Article 30, para. 1 that the court shall – if default interest rate changes after the delivery of the decision, stipulation of settlement or composition of a notarial deed – issue an order at the request of either party for the collection of default interest according to the altered rate for the period to which such alteration applies. Proposal for the delivery of such order may be filed until the completion of the enforcement proceeding.

keep the material gain acquired illicitly?⁴⁴⁸ The Supreme Court practice has so far indicated that, if the injured party has not filed an indemnification claim, the court should forfeit material gain, regardless of whether the injured party received insurance compensation and the extent to which the damage was compensated.⁴⁴⁹ However, if the purpose of forfeiture of material gain is to confiscate illicitly and unjustly acquired gain from the perpetrator,⁴⁵⁰ I am not convinced that the purpose of this provision is realised by voluntary compensation of damages to the injured party in the amount of acquired gain and subsequent forfeiture of said amount by another court decision.⁴⁵¹

3) Analysis of the judgements where the defendant was convicted of the criminal offence of fraud and the injured party was referred to seek indemnification in civil proceedings indicated some new issues. In fact, in one judgement of the Municipal Criminal Court in Zagreb (KO-361/11 from 23 May 2011), the defendant was convicted of fraud to a prison sentence of ten months which would not be executed if she does not commit another criminal offence within three years. She committed fraud by procuring a certificate from *J.M.* that she is employed at the company “S” and that her salary is HRK 8,046. Although she was aware that this was false, she presented said certificate to the employees of “HVB Splitska banka” together with the request for untied cash loan in the amount of EUR 13,300. After they believed in the authenticity of her certificate which presupposed that she would regularly repay the loan, they granted her the amount of HRK 99,750, whereby she acquired illicit

⁴⁴⁸ It refers to the Supreme Court Judgements VSRH, I Kž 444/04-5, 13 July 2005, Supreme Court of the Republic of Croatia, I Kž 334/08-4, 7 May 2008 stating that, if the indemnification claim included a lesser amount than the established material gain, material gain should be forfeited only in the remaining part. Op. cit. 45. See *Ivičević Karas* 2004, 108-109.

⁴⁴⁹ However, in Article 82, para. 1 of the CC97, and not as previously in Article 5: “No one is allowed to keep material gain acquired illicitly.”

⁴⁵⁰ “Appeal delays the decision on the forfeiture of material gain with respect to the amount of HRK 4,220 confiscated from the defendant ... considering that the court unduly forfeited said material gain, since it is covered by the insurance company and that the court neglected the fact that compensation of damages entitles the insurer to the recourse from the defendant in the sense of Article 963, para. 1 of the COA. However, prevention of dual forfeiture of material gain from the defendant is prescribed by Article 82, para. 5 of the CC ... If the court had not forfeited material gain, then the defendant could have kept the illicitly acquired material gain, which is unacceptable under Article 82, para. 1 of the CC.” Supreme Court of the Republic of Croatia I Kž 736/07-3, Jan. 20 2009, p. 2.

⁴⁵¹ “Although the forfeiture of material gain as a criminal law measure inevitably contains a certain amount of repression, the measure is not punitive in nature, its purpose is rather restorative: forfeiture of material gain contributes to the establishment of property status as it was before the perpetration of the offence resulting in illicit material gain, whereby a wider principle of justice is achieved.” *Ivičević Karas* 2004, 7. See *Derenčinović* 2005, 65.

pecuniary gain and damaged the bank. In its rationale, the court states that the defendant's confession is entirely supported by enclosed evidence, hence it can be concluded that the defendant deliberately and intentionally misled the representatives of the injured bank by misrepresenting facts and persuaded them into concluding a loan contract to their detriment, whereby she acquired substantial illicit material gain. After that, the court states "since the evidence submitted to the case file does not provide reliable grounds for partial or complete adjudication of the indemnification claim filed by the injured bank, said bank should be referred to realise its entire indemnification claim in civil proceedings". This rationale is contrary to the dictum. Moreover, the dictum is contradictory in itself.⁴⁵²

In the second case which should be presented here, the defendant *M.O.* is convicted to a prison sentence of eight months with two years of probation, because he procured a loan in the amount of 97,552.72 HRK based on a falsified certificate that he is an employee of the company "S".⁴⁵³ In the rationale of the decision stating that the injured party should be referred to realise his indemnification claim in civil proceedings, it is indicated that there is an ongoing enforcement proceeding in this particular case. The Supreme Court has made a decision in several cases that if the civil proceedings for indemnification have been instigated, and the final judgement has not been delivered yet, the entire amount of the material gain should be forfeited in the criminal proceeding.⁴⁵⁴ In the event that the indemnification claim has not been filed, the amount of HRK 97,552.72 should be forfeited in the criminal proceeding regardless of the ongoing enforcement proceeding.⁴⁵⁵ If, by the finalisation of the main

⁴⁵² If the court does not determine in the criminal proceeding whether the defendant compensated the damage to the injured party, but instead refers the injured party to realise his indemnification claim in civil proceedings, it should, according to Article 77, para. 3 of the CC, forfeit the material gain.

⁴⁵³ Judgement of the Minicipal Court in Zagreb KO-364/11 of 19 December 2011.

⁴⁵⁴ Supreme Court of the Republic of Croatia, I Kž 972/03-3, April 5, 2006., Supreme Court of the Republic of Croatia, I Kž 99/06-5, June 10, 2009, see by *Ivičević Karas* 2004, 7.

⁴⁵⁵ Since the criminal court, with respect to the filed indemnification claim, can adjudicate or refer the injured party to civil proceeding. "Forfeiture of material gain with respect to the indemnification claim is subsidiary in nature only if the injured party has been adjudicated the indemnification claim in the criminal proceeding, and if its amount corresponds to the illicit material gain. In that case, the decision on the forfeiture of material gain is not delivered. However, it is evident from the motion of the injured party dated 24 July 2003 (sheet 222) that the civil action has been filed for the amount lesser than the amount of the acquired material gain in this criminal procedure. This means that the indemnification claim has not been filed or consequently adjudicated in the criminal proceeding and that the final judgement has not been delivered on the injured party's compensation claim for the damages filed against the defendant in lower value than the illicit material gain. Consequently, in the regular application of Article 82 of the CC, legal circumstances were met for the delivery of the decision on the forfeiture

hearing in the criminal proceedings, the defendant delivers proof that the material damage has been compensated in the enforcement proceedings, the criminal court is *de facto* obliged to deliver a decision on referring the injured party to realise the indemnification claim in civil proceedings, since it cannot dismiss his claim (of course, provided that the injured party does not withdraw his claim). If the enforcement proceeding for the settlement of material gain caused by fraud is concurrent with the criminal proceeding – more precisely the enforcement proceeding with respect to the claim equal to material damage – the injured party is entitled to a double settlement. The first is based on the enforcement proceeding (e.g., based on the authentic document-invoice), and the second on criminal court's adoption of the indemnification claim of the injured party. In fact, the basic question is: does the enforcement order (to which no objection was filed within the statutory deadline) prevent a penal judge from adopting the indemnification claim? Is the final judgement of the civil court equalled to the enforcement order in that sense? The question can be paraphrased as follows: if the enforcement debtor (perpetrator of the criminal offence of fraud) filed an objection to the enforcement order, can the criminal court still adopt the indemnification claim? In practice, these issues have no essential consequences in the criminal proceeding, because it can be argued that the penal judges have a certain privilege with respect to them (in the sense of the conditional *non liquet*). In fact, in these cases the judges will refer the injured party to the civil proceeding (hence, they nevertheless provide unconditional solution, however not in the substantive sense; they do not solve the merits, but refer the matter to a different proceeding). If the enforcement debtor, i.e., the perpetrator filed an objection to the enforcement order, the criminal court could nevertheless adopt the injured party's indemnification claim. Here, I refer to the enforcement debtor's right to a counter-enforcement from Article 62, para. 1, item 2 of the Enforcement Act in the event of dual settlement, and the Article 1113, of the COA (dual payment of the debt) which prescribes that the person who repaid the same debt twice is entitled to request refund per the rules of concurrence without grounds.

4) In the specific case, the indemnification claim has not even been filed.⁴⁵⁶ In fact, the defendant bought a car from the injured party and handed him a portion of the stipulated sum. The rest of the sum was supposed to be paid by 1 February 2011.⁴⁵⁷ The injured party filed a criminal charge against the defendant and one day he saw his *own* car and, since he still had a spare key, he drove away with it. Hence, in this case the injured party did not file the indemnification claim (for the unpaid sum) and the court did not deliver a decision on the forfeiture of illicit material gain. With

of illicitly acquired material gain in the entire established amount of 204,936.64 HRK." Op. cit. Judgement Supreme Court of the Republic of Croatia, I Kž 972/2003-3 April 5, 2006, 4.

⁴⁵⁶ Judgement of the Municipal Court in Zagreb KO 2024/11 of 17 October 2011.

⁴⁵⁷ It was not, therefore the person was convicted of fraud (guilt was excellently elaborated in the judgement).

respect to the claim and the forfeiture of material gain, the court and the injured party presumed that there is no material damage (or gain), as the injured party has personally taken action to repossess the sold vehicle.

I will make several remarks with regard to material damage. In the event that more persons were convicted of fraud as co-perpetrators, they are obliged to compensate the damage to the injured party/parties as solidary debtors.⁴⁵⁸ However, what happens when one defendant is a perpetrator, and the other is an accomplice to the fraud? In that situation, in one particular case the Municipal Criminal Court in Zagreb⁴⁵⁹ ordered the defendants to compensate the damage in equal portions.⁴⁶⁰ If we observe this decision through the civil law prism, there are no objections to it. In fact, when there are several debtors in a dividable obligation, the debt is distributed in equal portions unless otherwise agreed, and each of them is responsible for his own share of the debt.⁴⁶¹ This is supported by the presumption of solidarity which applies only to the obligations occurred through a commercial contract which is not an issue here. However, if we take into account that the CC prescribes an optional mitigation of punishment for the accomplice, this decision can *de facto* place him into a less favourable position than if he were a co-perpetrator.⁴⁶²

2.4 Subjective Features

The subjective features of fraud include intent and the aim to acquire illicit material gain. Unfortunately, in many analysed judgements the courts dealt with guilt rather

⁴⁵⁸ Pursuant to Article 43 of the COA, every solidary debtor responds to the creditor for the entire debt and the creditor may request its fulfilment from whomever he pleases until the complete settlement, but when one debtor fulfils his debt, the obligation ceases and all debtors are released. In terms of several solidary debtors, each may have a debt with a different fulfilment deadline, under different conditions and with various deviations.

⁴⁵⁹ KO-474/11 from 28 March 2011.

⁴⁶⁰ “Pursuant to Article 132, para. 2 of the Criminal Procedure A, the prime defendant *Z.P.* and the second defendant *I.B.* are obliged to pay to the injured party *Z.B.* the equal portions of the amount of 133,020.74 HRK.”

⁴⁶¹ Pursuant to Article. 41, para. 2 of the COA. Such obligation is undoubtedly dividable, because the debt may be divided and fulfilled in parts with the same properties as the entire feasance, and if such distribution does not incur any loss of value.

⁴⁶² In fact, if we take into account the possibility that the debtor as creditor of the solidary obligation only requested from another defendant to fulfil the adjudicated indemnification claim. According to *Vedriš* and *Klarić*, the general rule of the COA is that the solidary liability for damages occurs when several persons jointly cause certain damage. Enablers and accomplices have a solidary liability with immediate perpetrators. See *Vedriš & Klarić* 2004, 582.

superficially, and they often omitted the aim to acquire illicit material gain.⁴⁶³ The rationales of the judgements usually stated that there is no doubt that X planned the perpetration of these criminal offences and with regard to his subjective relationship towards the criminal offences he was completely aware of his actions and thus intended the occurrence of the illicit act. Hence he acted with direct intent and fulfilled the elements of said criminal offences and was thus pronounced guilty.⁴⁶⁴ Of course, there are judgements with thorough elaborations of subjective features of the element but they will be discussed in successive chapters.

2.4.1 Intent

The question of intent in fraud has long been an issue in theory and court practice.⁴⁶⁵ Intent should refer to all of the objective features of the act and their respective causal links.⁴⁶⁶ Undoubtedly, fraud can be committed with direct and indirect intention.⁴⁶⁷ In German doctrine, only conditional intent (“*bedingter Vorsatz*”) directed towards causing error is sufficient. It should meet the following requirements: the perpetrator has to consider the factual claim to be false, he should be aware that error will result in the possession of the victim’s property and this will be seen as consequent direct material damage. The perpetrator has to be acquainted with the existing circumstances on which damage is grounded.⁴⁶⁸ According to Austrian doctrine, intent

⁴⁶³ There are certain cases (two) where the form of guilt was entirely omitted. E.g., “there are no circumstances which would exclude guilt and criminal prosecution of the defendant, therefore all essential elements of the criminal offence of fraud were achieved ...”

⁴⁶⁴ Judgement of the Municipal Court in Split K 1512/10 from 24 March 2011. Hence, aim to gain illicit material gain is not even mentioned in the judgement, other than in the part where the legal description of fraud is cited.

⁴⁶⁵ E.g. Derenčin attempted to single out the most important issues of intent with an example: “*A referred to B, a well-known lender who issues loans and asked him to lend him a certain amount of money with a lien on his (lessee’s) house. He even handed him a debenture note, which contained a clausula intabulandi. The lender gave him the money and submitted a request for the registration of title, but the court returned it as there was no real property made out to the lessee’s name and hence the creditor lost the lien and probably the entire claim. Can this offence be subsumed under the notion of punishable fraud? Similar cases were found in Austrian courts of original jurisdiction, which responded affirmatively to that question. Higher courts did not see any fraud in that offence as they believed that the error caused upon the lender was not deceitful because the lender could have easily discerned it if he had only been cautious enough to review the land registry.*” Derenčin 1879, 348.

⁴⁶⁶ Novoselec & Bojanić 2007, 239; Cvitanović 2013, 207; Janssen 2013, 564.

⁴⁶⁷ See Novoselec & Bojanić 2007, 239; Cvitanović 2013, 207; Garačić 2006, 339; Bačić & Pavlović 2004, 811-812; Pavlović 2012, 484; Šeparović & Kokić in Horvatić & Šeparović 1999, 279.

⁴⁶⁸ Janssen 2012, 565. See Lackner & Kühl 2007, 1175; Fischer 2012, 1829.

(“*Vorsatz*”) has to include all elements of the offence and the occurrence of damage.⁴⁶⁹ Indirect intent (“*Eventualvorsatz*”) is also sufficient.⁴⁷⁰ Swiss legal literature states that for the establishment of intent, one should rely on the realisation of all objective features of the offence and in that respect indirect intent (“*Eventualdolus*”) would suffice.⁴⁷¹

In all analysed judgements resulting in conviction the courts convicted the defendants of fraud with direct intent. What are the rationales with respect to the form of guilt? “The defendant’s conduct realised all essential features of the criminal offence of fraud from Article 224, para. 4 of the CC since the defendant by direct fraud and with the intent to acquire illicit gain concluded a loan contract with *D.M.* to the amount of EUR 37,000. The injured party handed him the amount during 2008 falsely claiming that he would return the loan no later than 31 December 2010 even though he had decided in advance not to return it which caused damage to *D.M.*”⁴⁷² “The court believes that the defendant generated fraudulent intent to loan money from the bank before the conclusion of the legal transaction with the legal representative of the bank but did not plan to return it. Therefore he made a misrepresentation of himself with a falsified identity card in order to deceive the representative of the injured party who would not have lent him the money otherwise. He counted on the fact that when his debt is due the representative of the bank would look for the persons who are entered in the contract as loan holders and that he would not be found since there is no written trace that he participated in the conclusion of this legal transaction or that he withdrew the money.”⁴⁷³ “With respect to the subjective relationship of the defendant towards the committed offence the court believes that the defendant acted with direct intent, i.e., that he was aware of his illicit behaviour and that he wanted to commit the act. In fact, at the conclusion of the contract for the purchase of the motor vehicle the defendant assumed the obligation to repay the loan and assign the vehicle to the creditor and by concealing his financial standing and debt, deceived the injured party. The loan has not been repaid to this day.”⁴⁷⁴ “With respect to the subjective element, it has been established that the defendant acted with a form of guilt referred to as direct intent in criminal law because he acted with

⁴⁶⁹ Bertel & Schwaighofer 2010, 248. Donatsch, in addition to all objective features states that intent should include the causal link between these two (and even the factual circumstances which represent trickery – “*Arglist*”). Donatsch 2010, 277.

⁴⁷⁰ Donatsch 2010, 277.

⁴⁷¹ Stratenwerth & Jenny & Bommer 2010, 407.

⁴⁷² Judgement of the Municipal Court in Split K 1363/11 of 28 November 2011.

⁴⁷³ Judgement of the Municipal Court in Split K 842/11 of 18 October 2011.

⁴⁷⁴ Judgement of the Municipal Court in Split K 751/11 of 17 August 2011.

the aim to deceive the injured parties and persuade them to cause harm to their own property, which would grant him access to illicit gain.”⁴⁷⁵

In German law the criminal offence of fraud with regard to a capital investment (*Anlagebetrug*) there is no intent with regard to damage when the alleged perpetrator is convinced that he would be able to return the invested capital.⁴⁷⁶ The governing issue here is whether the perpetrator took the social perspective into consideration and the scope of the event.⁴⁷⁷ Recently, the BGH has requested the re-examination of the intent to damage (“*Schädigungsvorsatz*”) in each individual case.⁴⁷⁸ To a certain extent, it applies to property endangerment. Only when the perpetrator takes into account the risks assumed beyond the contract, i.e., risky return of an investor’s capital, there is subjective acceptance of intent for material damage in the sense of § 263, para. 1 of StGB.⁴⁷⁹ With regard to damages resulting endangerment it is sufficient that the perpetrator is aware of the circumstances which provide grounds for property endangerment.⁴⁸⁰ The importance of assessing the defendant’s belief that endangerment would not result in final loss is questionable.⁴⁸¹ It should not be concluded that belief is irrelevant because it is difficult to establish on these grounds.⁴⁸² The bigger

⁴⁷⁵ Judgement of the Municipal Court in Zagreb KO 103/11 of 24 February 2011.

⁴⁷⁶ *Janssen* 2012, 565. Same as *Lackner & Kühl* 2007, 1175.

⁴⁷⁷ *Ibid.* This norm should also be applied to the claim “all will be fine” (“*ins Blaue hinein*”). *Idem.* *Cramer & Perron* state that it is more relevant if the perpetrator included the social perspective of the event “*in seiner eigenen Sprache*” – parallel assessment in layman’s domain (“*Parallelwertung in der Laiensphäre*”). *Cramer & Perron* 2006, 2234.

⁴⁷⁸ *Idem.* Same as *Cramer & Perron* 2006, 2234. See *Fischer* 2012, 1829.

⁴⁷⁹ *Idem.* See *Fischer* who states that in the cases of damages from endangerment (“*Gefährdungsschaden*”) the BGH several times has decided that awareness of the circumstances which present the risk of property loss is often sufficient, but not in all cases in order to constitute the element of will of the conditional intent. Due to this damages resulting from endangerment and the element of will cannot be observed exclusively from each other with regard to probability of damage. This court practice is on the one hand- specific endangerment and (final) damage, and on the other hand – holds that the awareness of risk is only circumstantial for the granting of loss. *Op. cit.* *Fischer* 2012, 1829.

⁴⁸⁰ *Janssen* 2012, 565. “Will for damage presumes that the perpetrator’s action at the moment of perception is directed towards specific property, whereby it is sufficient that the perpetrator is acquainted with the circumstances resulting in property endangerment equal to damage and that he consents to the risk even when he hopes that all shall eventually end well.? There is no wilful damage when the perpetrator wants to acquire from another person whatever belongs to him as a full (value) settlement for the amount after the concluded agreement.” *Cramer & Perron* 2006, 2234.

⁴⁸¹ *Idem.*

⁴⁸² *Idem.* Confidence in the non-occurrence of the consequence of the criminal offence is not insignificant in other intentional criminal offences either.

the risk for the perpetrator, the easier it is to establish damage in terms of property.⁴⁸³ The existence of gross violations of duty can point to the subjective aspect of material damages. If legal regulations which serve to protect the investors and of which the perpetrator is aware are violated, that constitutes regular circumstantial evidence that the perpetrator consents to property endangerment.⁴⁸⁴

2.4.2 Aim to Acquire Illicit Material Gain

Material gain is the increase of the total economic value of a property, and is contrary to the material damage of the injured party.⁴⁸⁵ Material gain is illicit when it is not justified on legal grounds.⁴⁸⁶ The aim to acquire illicit material gain should exist at the moment of deceiving another person but it does not necessarily have to exist at the moment of concluding a legal transaction.⁴⁸⁷ With respect to knowledge a certain perception about the acquisition of illicit material gain has to exist.⁴⁸⁸ With respect to will for penal and political reasons it should be sufficient that the perpetrator wishes for illicit material gain as a certain and desirable consequence of his actions.⁴⁸⁹ This aim should not be the only applicable or prevalent purpose for the perpetrator.⁴⁹⁰ The aim does not exist when the acquisition of gain is only a requisite, but undesirable additional consequence of the profit.⁴⁹¹ Illicit character vanishes when the perpetrator has credible and due claim for the desired gain.⁴⁹² When the perpetrator falsely believes that he has a claim towards the disponent, Novoselec holds that there is no element of the criminal offence of fraud, because it lacks the

⁴⁸³ Idem.

⁴⁸⁴ *Janssen* 2012, 566.

⁴⁸⁵ Ibid. See *Stratenwerth & Jenny & Bommer* 2010, 407–408. See *Fabrizy* 2010, 466.

⁴⁸⁶ Idem. According to *Janssen*, civil and public law are both applicable. There has to be proportionality between material damage and gain. The perpetrator needs to acquire gain immediately from the property of the injured party since gain is the opposite side of damage. Damage and gain have to be in congruity in the sense that they are achieved by the same possession of property, hence they cannot arise from different possessions of property.

⁴⁸⁷ *Cvitanović* 2013, 207. See *Novoselec & Bojanić* 2007, 239: “the perpetrator who, at the conclusion of the contract intended to regularly fulfil his obligation, may also decide to obtain illicit gain by delivering goods of lower quality (the so-called fraud at the fulfilment of the obligation, Germ. *Erfüllungsbetrug*).”

⁴⁸⁸ *Janssen* 2012, 566.

⁴⁸⁹ Idem. Same as *Donatsch* 2010, 277.

⁴⁹⁰ Idem.

⁴⁹¹ *Janssen* 2012, 566. Same as *Stratenwerth & Jenny & Bommer* 2010, 409.

⁴⁹² Idem. Same as *Stratenwerth & Jenny & Bommer* who state that fraud is excluded not only when the perpetrator has certain claims but also when he believes that he has them. *Stratenwerth & Jenny & Bommer* 2010, 408.

requisite subjective feature.⁴⁹³ In these cases *Janssen* believes that there is error about the element of the offence.⁴⁹⁴ Swiss theory considers the cases where the perpetrator is in doubt, i.e., not sure whether he has any claims towards the debtor (injured party). If the perpetrator is in doubt as to the existence of a claim and wants to acquire material gain even if there is no such claim, we can refer to it as “indirect aim” (“*eventuelle Absicht*”), which is sufficient for the existence of the offence.⁴⁹⁵ Also if the perpetrator misleads a debtor (*another person*) by persuading him to fulfil an obligation towards him as the creditor there is no fraud since there is no subjective feature – acquired material gain is not illicit.⁴⁹⁶ This kind of fraud in theory is usually referred to as self-help fraud.⁴⁹⁷

Derenčin explained that the application of the term “intent to acquire illicit material gain for himself or others” removes the ambiguity which in theory and practice derives from the term “usurious intent (*lucri faciendi causa*)”.⁴⁹⁸ In all analysed judgements ending in conviction the courts determined that the aim to acquire illicit gain existed at the moment of conclusion of the contract. In the rationales the courts generally used the term fraudulent intent, and not the aim to gain illicit material gain: “... it can be concluded that the defendant *M.M.* had the intention to deceive the

⁴⁹³ *Novoselec & Bojanić* 2007, 239. Same as *Bertel & Schwaighofer* 2010, 261; *Fabrizy* 2010, 467.

⁴⁹⁴ *Janssen* 2012, 566. Same as *Fischer* 2012, 1833. See *Cramer & Perron* 2006, 2236.

⁴⁹⁵ *Stratenwerth & Jenny & Bommer* 2010, 409–410. In fact, there is a difference between intent as a form of guilt (“*Vorsatz*”) where only indirect intent is sufficient (“*Eventualdolos*”) and the aim to acquire illicit material gain, which is defined as “*Absicht des Täters, sich oder einen anderen unrechtmässig zu bereichern*” in Swiss CC (literal translation would be: the aim of the perpetrator to procure illicit wealth for himself or another person). According to Swiss court practice it can be indirect, i.e., “*eventuelle Absicht*”. The same aim is required in the Austrian CC as well (*sich oder einen Dritten unrechtmässig zu bereichern*).

⁴⁹⁶ Same as *Novoselec & Bojanić* 2007, 239.

⁴⁹⁷ *Ibid.* See *Berte & Schwaighofer* 2010, 261: “Selbsthilfe”-Betrug, and *Fabrizy* 2010, 467. See *Lackner & Kühl*, 2007, 1177.

⁴⁹⁸ *Derenčin* 1879, 349: “For that offence to be committed, § 316 requires the perpetrator’s intent to acquire for himself or a third person illicit material gain, i.e., gain to which he is not entitled. The term ‘material gain’ in its generality does not only refer to the increase in property by acquiring property right, but every gain which improves the standing of the perpetrator, e.g., the perpetrator deceived A. into paying him a questionable claim he had against B. In terms of fraud, the law does not require that the intended gain is actually acquired. The law requires that said offence caused damage to the property of the injured party. This general term, “cause damage” includes not only the cases where the deceived person lost some property right but each aggravation of material standing of any person, hence, loss of profit to which he was entitled, loss of a conditional right (right of pre-purchase) etc. Even the provisional damage of property is sufficient for the perpetration of fraud, e.g., temporary loss of property, temporary lien on real property etc ...”

injured party because even though he borrowed from him an objectively larger amount and failed to repay the lesser amount of EUR 37,000 within two and a half years he stalled repaying the injured party the entire time and promised that he would return the debt and at one moment even agreed to conclude the loan contract in order to mislead the injured party into believing that he would indeed repay the debt. The defendant obviously relied on the fact that he knew the injured party well as they were from the same town and thus he made use of their mutual relationship of trust. Even though he was a seafarer with income he failed to settle the lesser portion of the debt within two and a half years. It all points to the fact that he had previously decided that he would not return the loan.”⁴⁹⁹ Or: “Examining all aforementioned motives which led the defendant to conclude the loan contract for the purchase of the motor vehicle, and his subsequent behaviour the court decided that at the moment of the conclusion he acted with a previous fraudulent intent that he would not repay the loan or assign the vehicle to the injured party as an insurance instrument.”⁵⁰⁰ “Observing the overall conduct of the defendant from the moment of the conclusion of the contract with the injured party the court is certain that he had a fraudulent intent at the conclusion of the contract. In fact, borrowing money from someone under the pretences that a certain transaction would be executed, and then keep avoiding said person for a long time without showing any intent for repayment after the injured party has filed criminal charges indicates the defendants’ actual intent. Therefore, the defendants’ defence that they had no fraudulent intent and that they failed to return the money as a result of altered circumstances which occurred after the conclusion of the contract was dismissed by the court as unfounded.”⁵⁰¹ “Fraudulent intent in the defendant’s conduct towards the injured parties derives from the fact that he concluded the contracts on loans on behalf of the company X d.o.o. as the creditor, and ‘HAAB’ d.d. certificate shows that this company has been continuously blocked since 3 January 2005. As a result the creditor could not pay the stipulated loans to the injured parties. The defendant knew or was aware of this fact but he concealed it from the injured parties by misleading them with regard to payment. He further persuaded them to pay him pecuniary amounts for a deposit and loan-related costs even though he never intended to repay the stipulated loans but only to keep the borrowed money for himself.”⁵⁰² Hence, it can be derived from the analysis of the collected judgements that the courts identify intent as a form of guilt with the aim to acquire illicit gain as a subjective feature of fraud. This practice is unacceptable – it indicates that the formal notion of the criminal offence is not understood, i.e., the legal presumptions of punishment which are characteristic to many criminal offences (action, element, illegality and guilt). Therefore, the principle of legality which functions as

⁴⁹⁹ Judgement of the Municipal Court in Split K 1363/11 of 28 November 2011.

⁵⁰⁰ Judgement of the Municipal Court in Split K 751/11 of 17 August 2011.

⁵⁰¹ Judgement of the Municipal Court in Split K 979/10 of 14 November 2011.

⁵⁰² Judgement of the Municipal Court in Zagreb KO 311/11 of 23 March 2011.

legal protection of the citizens (ensuring that the citizens are acquainted with the grounds for their conviction) cannot be realised.

There are three judgements denying the charge among those collected for the research. The analysis of the rationales of these judgements determined that these are “typical” rationales where the state attorney’s office withdrew from further prosecution because “no fraudulent intent was proved in the incriminated event”. This is a civil law relationship because the defendant who is an intermediary in a transaction did not receive compensation and the cession contract was offered to the injured party for the settlement of obligations. The injured party believes that the defendant did not have a fraudulent intent; the witness testifies that the defendant’s trade had not been paid for. Fraudulent intent has not been established in the case of the defendant who booked a room in a hotel but failed to pay for it as he gambled away the money.⁵⁰³ In one case the court delivered an order regarding the termination of criminal proceedings due to a motion for withdrawal filed by the state attorney’s office as the injured party delivered a memorandum that the defendant had settled the entire debt therefore there was no fraudulent intent.⁵⁰⁴ The fact that the defendant settled material damage, i.e., the debt, should not in itself affect the assessment of the fraudulent intent because *argumentum a contrario* the court should deliver acquitting judgements for all defendants who settle their respective debts during the criminal proceedings and before the conclusion of the trial, if the proceedings were not terminated by withdrawal.

2.5 The Aggravated Forms of Fraud

An aggravated form of the offence, as defined by Article 236, para. 2 of the CC, takes place when fraud results in the acquisition of substantial material gain and considerable damage. With respect to the aggravated form of fraud, the Criminal Department of the Supreme Court of the Republic of Croatia delivered decision Su-IV k-4/2012-57 on 27 December 2012, stating that there is “substantial material gain” when the value of material gain, i.e., damages, exceeds HRK 60,000 (item 28). With its amendments to the Criminal Code in 2015, the legislator prescribed in Article 87 No. 29 that the value of property gains and property damage is considerable if it exceeds HRK 60,000.⁵⁰⁵ With respect to the mitigated form of the same offence, under Article 236, para.3 of the CC, the legal feature of “petty material gain” exists

⁵⁰³ Acquitting judgement of the Municipal Court in Zagreb KO 2199/11 of 27 December 2011. If the defendant had been aware that he may meet the requirements of the criminal offence and still agreed to it he acted with indirect intent. Therefore, if the perpetrator books a room and is aware that gambling could result in the loss of money for the settlement of his bill and he still agrees to it he acts with indirect intent. In Germany, similar behaviours qualify as fraud at the conclusion of the contract.

⁵⁰⁴ Judgement of the Municipal Court in Zagreb KO 710/11 of 9 June 2011.

⁵⁰⁵ Act on Amendments to the Criminal Code, OG No. 56/15.

if the value of material gain is below HRK 1,000 (Art. 87 No. 30). The special aggravated form of fraud exists if fraud was committed within a joint criminal venture from Article 328 of the CC. According to CC97, in the cases where several people joined to commit fraud, there was no aggravated form of the offence within the Article 224 of the CC97, unlike in the compared legislation. In that case the indictment would usually include the concurrent offences of fraud and joint criminal venture under Article 333 of the CC97. With the new CC, we have an interesting nomotechnical solution at our disposal. In fact, in Chapter 30, under criminal offence against public order, Article 328, titled Joint criminal venture prescribed punishment for organising, managing and participating in a joint criminal venture. If the basic form of fraud has been realised within the joint criminal venture, and the perpetrator acted knowingly, he should be punished pursuant to the Article 329, para. 1 item 2 to a prison sentence of one to ten years. The same penalty is prescribed for solicitation to commit (fraud) within such a venture, as well as aiding and abetting.⁵⁰⁶ The aggravated form of fraud under Article 236, para. 2 is subject to the application of Article 329, para. 1, item 3 of the CC, since a maximum prison sentence of up to eight years has been prescribed. The German CC has two aggravated forms of the offence. It especially covers gross forms of fraud (*ein besonders schwerer Fall*) by § 263 para. 3 with prison sentences of six months to ten years: 1) when the perpetrator acts professionally (*gewerbsmäßig*) or as a member of a venture (*als Mitglied einer Bande*) associated for continuous perpetration of forging documents or fraud; 2) when there is substantial material gain or a large number of people have been exposed to the risk of losing property; 3) when the perpetrator pushes another person into the state of economic necessity; 4) when the perpetrator abuses his powers or position as an officer; 5) for insurance claims, when the perpetrator or another person incinerates an item of substantial value, or partially or entirely destroys it by arson, or intentionally sinks or strands a ship. Para. 5 prescribes a prison penalty of one to ten years, and for petty case of fraud (*in minder schweren Fällen*) a prison sentence of six months to five years for fraud professionally committed by the perpetrator within the joint venture under § 263 to 264 or 267 to 269.⁵⁰⁷ Hence, the German aggravated forms are regulated in more detail than the Croatian forms.

The Austrian CC distinguishes gross fraud in § 147 (*schwerer Betrug*) from professional fraud in § 148 (*gewerbsmäßiger Betrug*). Gross fraud is committed by the person who: 1) uses false or forged documents, false, counterfeit or stolen non-cash means of payment, false or forged data or similar evidentiary instrument or irregular measuring device; 2) irregularly places, relocates, removes or renders certain signs

⁵⁰⁶ For aiding and abetting the prescribed punishment is optional and mild (Article 320, para. 2 of the CC).

⁵⁰⁷ § 163 fraud, § 264 subsidy fraud, § 267 forgery of documents, § 268 forgery of technical recordings (*technischer Aufzeichnungen*), § 269 forgery of evidentiary data (*beweiserheblicher Daten*).

unidentifiable for the purpose of marking a boundary or water level; or 3) impersonates an officer. Equal punishment is prescribed by para. 1a for a person who commits fraud by using illicit substances or methods that result only in insignificant damages according to the “Anti-Doping Convention”, and a person who commits fraud with damages exceeding EUR 3,000. Another aggravated form is committed by the person who caused EUR 50,000 in damages (prescribed penalty is a prison sentence from one to ten years). Provision § 148 states: whoever commits professional fraud is to be sentenced to prison for six months to five years, whereas the prison sentence of one to ten years is prescribed for the person who commits gross fraud with the aim of acquiring continuous gain with recurring actions. Aggravated forms refer to *modus operandi*, sports (criminal) law and the amount of damage.

Under § 146, para. 2 of the Swiss CC, the aggravated form of the offence refers to the professional perpetration of fraud; a perpetrator who acts professionally is to be punished with a prison sentence of ten years or a pecuniary fine amounting to no less than the equivalent of their income for a period of 90 days.

Chapter 3

Fraud in Economic Transactions

“The Act (on Liability of Legal Persons for Criminal Offences) was delivered at the time the public was still under the substantial adverse impression of the process of conversion and privatisation of companies, where the corporations were on the both ends of the criminal spectrum – corporations as impoverished and devalued injured parties and corporations as criminal facade for the destruction of the entire national economy.”⁵⁰⁸

The axis of the current fight against economic crime refers to the criminal offences of fraud and abuse of trust (along with offering and receiving bribes) in economic transactions.⁵⁰⁹ Until the delivery of the new Criminal Code, the largest part of the so-called economic crimes referred to the abuse of position and power under Article 337 paras. 3 and 4 and the abuse of power in economic transactions under Article 292 of the CC97.⁵¹⁰ Article 89, para. 7 (notion of the responsible person), Article 337 (abuse of position and power) and Article 339 (occupational negligence) of the CC97 were subject to the proposal for instigating a procedure for the assessment of constitutionality, hence the Constitutional Court, in its decision U-I-1085/2000 of 30 April 2008, determined that the principle of legality had not been violated (*lex certa*). A dissenting opinion was presented by *Krapac* and *Babić* who stated that the concept of incrimination in Article 337 of the CC97 does not conform with the requirement of *lex certa*, whereas Article 339 is completely vague and represents a flagrant violation of the same principle. Since the mid-2000s, there has been an increase in scientific and professional interests aiming at modernising Croatian economic criminal law.⁵¹¹ In order to prosecute economic crimes more efficiently, on 11 September

⁵⁰⁸ *Derenčinović & Novosel* 2012, 586. Translation by *Lucija Sokanović*.

⁵⁰⁹ Considering the fact that the legal literature still has no general definition for the term of economic crime which would include all elements of this type of crime. *Eder-Rieder* 2011, 29. See *Krapac* 2007, V.

⁵¹⁰ Also by fraud in economic transactions from Article 293 of the CC97. See *Bojanić & Kuharić* 2007, 575–591.

⁵¹¹ Counselling of the Croatian Association of Penal Sciences and Practice 2007 was dedicated to economic crime (Economic crime: Challenges and Criminal Law Response in the Republic of Croatia). The papers were published in HLJKPP, vol.14, No. 2/2007. For the list of papers from this area until 2007, see *Svedrović* 2007, 571–574.

2003, the Act on Liability of Legal Persons for Criminal Offences was adopted. Within this Act the principle *societas delinquere non potest*⁵¹² was abandoned and the liability of legal persons for criminal offences in the Republic of Croatia introduced.⁵¹³ The special feature of the Croatian economic criminal law in comparison to the legislation and practice of Germany, Austria, and Switzerland is the transition period. The transition period was perceived in the nineties as “predatory capitalism”, and left an immense impact on Croatia’s economy and legal system, in general.⁵¹⁴ In that sense, economic crime in Croatia is often symbolically manifested.⁵¹⁵ A certain part of the criminal law literature actually uses symbols when referring to these criminal offences.⁵¹⁶

3.1 Historical Development

Fraud in economic transactions was first introduced into the criminal legislation of the Republic of Croatia in 1997.⁵¹⁷ Pursuant to Article 293, para. 1 of the CC97, the perpetrator in economic transactions is anyone who, as a representative or attorney of the legal person, misleads or deceives someone with the aim of acquiring illicit gain for this person or another legal person by using non-collectable acceptance orders, overdraft cheques or otherwise, thus persuading them to act or fail to act, to the detriment of their personal or another person’s property. The provision of para. 2 regulates the aggravated form of this criminal offence – if the perpetration from para. 1 resulted in substantial material gain or substantial damage, and the perpetrator acted with the aim of acquiring such gain or causing such damage.

⁵¹² The claim that this is a new concept in Croatian law is not entirely true since the Act on Crimes Against People and State from 1946 introduced the liability of legal persons for criminal offences. Op. cit. *Derenčinović & Novosel* 2012, 587. *Novoselec* and *Bojanić* also state that this is a principle of Roman law, which was never applied without exception. See *Novoselec & Bojanić* 2013, 491.

⁵¹³ For more details on the reasons of long *vacatio legis*, the fact that the law was subjected to three readings and other characteristics of “special treatment”, see *Derenčinović Novosel* 2012, 586. See *Derenčinović* 2003. Switzerland introduced criminal liability of legal persons in 2003, and Austria in 2004. See *Engelhart* 2012, 110. For more details on the legal development of criminal liability of legal persons in the USA, see *Gruner* 2012, §2.02–§2.03.

⁵¹⁴ The term was introduced by the American sociologist *Veblen*. See *Orlović* 2013, 223.

⁵¹⁵ For more details on the watchwords which replace cognitive gaps in the minds of the citizens and are “well-accepted” in public, see *Orlović* 2013, 5. For the symbols in the communication, model see *Eco* 1973, 21–37.

⁵¹⁶ See *Novoselec* 2009, 46; *Novoselec & Roksandić Vidlička* 2010, 703. See *Novoselec* 2007, 394–403, for “tyrannosaurus”, “relics of the past”. Or *Bačić & Pavlović* “rubber – paragraph”. *Bačić & Pavlović* 2004, 1009.

⁵¹⁷ Criminal Code, Official Gazette No. 110/97. See *Garačić* 2008, 159–162.

Para. 1 of the Act Amending the Criminal Code from 2000⁵¹⁸ was altered so that the perpetrator is a responsible person in the legal person who, with the aim of acquiring illicit material gain for this person or another legal person, misleads or deceives someone by using non-collectable payment insurance instruments or otherwise by persuades them to act or fail to act to the detriment of their personal property or another person's property.

After 2000, it seemed as if this criminal offence was forgotten.⁵¹⁹ Only the new CC11 introduced fraud in economic transactions as a special chapter (XXIV), Crime against the Economic Interests, some twenty years since the transition of the self-governing economy with the elements of market economy to a free market economy.⁵²⁰ The Ministry of Justice stated in the Criminal Code Proposal from June 2011 that the element of fraud in economic transactions has now been simplified, with certain descriptions and general clauses removed from the manner of perpetration. The perpetrator is defined as the anyone who, in economic transactions, with the aim of acquiring illicit material gain for the legal person he represents or other legal person, misleads or deceives someone into acting or failing to act to the detriment of their personal or another person's property by misrepresentation or concealment. According to para. 2, the aggravated form was also consolidated in the sense that the only requirement is that the criminal offence from para. 1 causes substantial damage. The notion of a mitigating form of fraud in economic transactions is also omitted.

I will now discuss the reasons behind the introduction of fraud in economic transaction in 1997 CC. The Final Proposal of the Criminal Code of the Republic of Croatia from June 1997 did not list the reasons for the introduction of this criminal offence, it only stated that the final form of incrimination was suggested by the representatives of the State Attorney's Office of the Republic of Croatia.⁵²¹

What distinguishes general fraud from fraud in economic transactions? The answer to this question can be found in these three key questions: Who is the perpetrator, what does perpetration entail and who is the beneficiary of material gain?⁵²²

⁵¹⁸ Official Gazette No. 129/00.

⁵¹⁹ Novel of 9 July 2003 abolished the criminal offence of fraud in economic transactions, since they believed that there is no justification for the separation of fraud in economic transactions from the general criminal offence of fraud.

⁵²⁰ *Novoselec* states that "Croatia has transitioned in the nineties from the self-governing economy (with the elements of market economy), based on social ownership, to a free market economy based on private ownership". *Novoselec* 2009, 4.

⁵²¹ Government of the Republic of Croatia, Final Proposal of the Criminal Code, Zagreb, June 1997, 213. Same as *Novoselec & Bojanić* 2009, 89. Since the introduction of the offence, *Novoselec* advocated its abolishment as he deemed it superfluous. See *Novoselec* 2004, 1130–1133.

⁵²² Fourth possible difference could be the difference in the protected value. In fraud, it is property, and in fraud in economic transactions it is economic transactions, with respect

1) From the first reading of the legal description of this criminal offence, one would assume that it is *delictum communium*, since the perpetrator is defined by law as “anyone” who carries out a certain action. The perpetrator in economic transactions was first the representative or attorney of the legal person, thus the responsible person in the legal person and potentially whoever acts with the aim of acquiring illicit material gain for the legal person he represents or another legal person. Hence this is *delictum proprium*.⁵²³ However, the question arises as to what the essential difference is between fraud committed by any person (e.g., a young man who misrepresents himself as a bill collector of Hrvatska elektroprivreda and collects HRK 3,000 of a non-existing debt from a frightened old lady in a remote village) or a representative of a legal person in economic transactions (director of a limited liability company, who, aware of his insolvency, orders goods from another company and fails to pay for them). The only plausible argument is that we (need to) expect greater responsibility from those who participate in the economic life, hence in that case we may point to justifiability and existence of separate incrimination of receiving and offering bribes in economic transactions, with respect to the general criminal offence of receiving and offering bribes. Another argument could be that the damages which result from fraud in economic transactions are far greater than those which result from “regular” fraud, and should therefore be subjected to harsher punishment. But having no exact data for such an argument (the amount of damages resulting from these offences should be analysed and compared; one may assume, with regard to the nature of the transaction, that the damages in cases of economic fraud are substantially larger).⁵²⁴ More importantly, that issue could be easily solved by the selection of the sanction within the wide legal framework of prescribed sanctions for fraud.

2) The act of perpetration in fraud consists of misleading (by misrepresentation or concealment) or deceiving. In fraud in economic transactions, the committed act first consisted of misleading or deceiving by using non-collectable acceptance orders, overdraft cheques or otherwise, then by using non-collectable payment insurance

to its placement in Chapter XXIV of the CC. That conclusion is not entirely incorrect, in fact, even regarding fraud in economic transactions, property is the indirect subject of protection stated in the legal description of the criminal offence: “and thus persuades him into action or failure to act to the detriment of his own or another person’s property”.

⁵²³ Same as *Derenčinović* in Horvatić & Šeparović 1999, 392; *Novoselec & Bojanić* 2007, 318; by contrast, *Maršavelski* who believes that it is in fact *delictum proprium sui generis*. *Maršavelski* 2005, 91.

⁵²⁴ This data is unavailable since the courts or the Ministry of Judiciary do not keep records of the amounts of damages.

instruments or otherwise, and the CC11 returned to the general description of the offence as with fraud.⁵²⁵

3) The recipient of acquired material gain from fraud is the perpetrator himself or another person, and hence could be anyone.⁵²⁶ In fraud in economic transactions, the legal person is represented by the perpetrator or another legal person; the perpetrator is considered the responsible person, or another legal person, and ultimately, as seen in the most recent legal amendment, the person represented by the perpetrator or another legal person. I believe that the fact that material gain is acquired for the benefit of the legal person should not justify the special incrimination of fraud as *lex specialis*, because in practice it is very difficult to determine if the perpetrator, as the representative of a legal person, kept material gain for himself or the legal person he represents.⁵²⁷ This is supported by the situations where the perpetrator kept part of the gain for himself, and the other part for the legal person he represents.

After the CC97 entered into force, an issue was raised in court practice regarding the legal continuity between the criminal offence of fraud from Article 137, i.e., 142 of the RCCC and fraud from Article 224, i.e., 293 of the CC97. The Supreme Court of the Republic of Croatia delivered a whole range of decisions concerning this issue, for instance, III Kr-78/07-3 of 25 October 2007: “In fact, the criminal offence from Article 293 of the CC is a special form of fraud, but since it did not exist as such at the time of perpetration, we can only discuss the legal continuity between the criminal offence of fraud from Article 137 of the RCCC and the criminal offence of fraud from Article 224 of the CC, as correctly evaluated by the courts of original and appellate jurisdiction. Fraud – for the benefit of a legal person – was undoubtedly prescribed as a criminal offence at the time of perpetration when the RCCC was applicable, but such a criminal offence is also prescribed in the currently applicable Criminal Code According to this, the defendant’s claim is unfounded where he claims that there is no illegality “...because the offence for which the defendant was found guilty is not a criminal offence ... If the criminal offence of fraud was committed after the Criminal Code from 1997 entered into force, then the deciding factor is

⁵²⁵ A general clause contained in the legal text in 1997 and 2000 stated that the manner of perpetration is equal to the basic form of fraud, because it referred to the application of the case-study method and listing various manners of misleading and deceiving. See *Novoselec* 2007, 402.

⁵²⁶ *Novoselec* states that the new criminal offence could be justified if we take into account that “the other” for whom material gain is acquired by fraud may only be a natural person, whereas in fraud in economic transactions material gain is always acquired for the legal person. This understanding derived from the socialist period when private and social sector were treated differently, and it was therefore abandoned. *Novoselec* 2009, 89.

⁵²⁷ This particularly applies to cases where the perpetrator is the director and the sole member of the company. A part of the court practice opts for fraud in those cases, and not fraud in economic transactions.

whether gain was acquired for a natural or a legal person, but not for the purpose of evaluating illegality, rather for establishing if that is the criminal offence of fraud from Article 224 of the CC or the criminal offence of fraud in economic transactions from Article 293 of the CC.”⁵²⁸

3.2 Criminological and Victimological Significance

With respect to fraud in economic transactions, the research was conducted in two phases. Firstly, I analysed the data from the relevant statistical reports of the State Bureau of Statistics between 2007 and 2011, then the judgements of the Municipal Court in Zagreb and the Municipal Court in Split (using the form in Annex 1). The data was analysed with respect to the basic and aggravated form of the offence.

*Table 8: Charges for adult perpetrators of fraud in economic transactions under Article 293 (1) according to the type of decision between 2007 and 2012*⁵²⁹

	Total charges	Un-known perpetrator %	Dismissed charges %	Bill of indictment %		Indictment %	
				Without criminal order	With criminal order	Immediately	After the conducted investigation
2007	273 (20.1%)	1	62.2	27.4	0.7	1.8	4.3
2008	278 (16.9%)	–	65.1	28	1	0.7	4.6
2009	260 (19.6%)	0.7	63.4	29.6	–	1.5	1.5
2010	348 (22.9%)	0.2	67.2	27	–	15.2	45.9
2011	441 (20.6%)	–	69.6	27.8	0.4	0.2	1.5
2012	258 (20.5%)	07	73.6	13.5	10	0.3	1.1

Analysing fraud-related charges from Article 293 (1), it is noted that since 2007 (except for 2009) there has been a continuous increase in the number of charges (especially between 2010 and 2011). In 2012, the number of cases of fraud was consider-

⁵²⁸ Op. cit. according to Pavlović 2013, 518.

⁵²⁹ Figures from tables 8–13 are based on the data obtained from the Statistical Reports No: 1366/2008, 1394/2009, 1421/2010, 1451/2011, 1478/2012 and 1504/13.

ably lower than in 2011. The number of dismissed charges increased exponentially with the increase in the number of cases of fraud. The percentage of dismissals was again very high (ranging from 62.2% to 73.6% in 2012).⁵³⁰

Table 9: Charges for adult perpetrators of fraud in economic transactions under Article 293 (2) according to the type of decision

	Total charges	Un-known perpetrator %	Dismissed charges %	Bill of indictment %		Indictment %	
				Without criminal order	With criminal order	Immediately	After the conducted investigation
2007	510 (15%)	0.5	60.1	0.7	–	9.4	24.7
2008	522 (17.6%)	0.1	61.3	0.3	–	9.5	21.8
2009	609 (17%)	0.1	55.5	0.6	–	7.5	33.1
2010	752 (16%)	0.1	66.7	0.9	–	7	21.2
2011	1,022 (16.6%)	0.2	71.3	0.9	0.1	6.5	17.1
2012	647 (17.1%)	0.1	65.5	23.18	0.4	0.4	11.5

With respect to the aggravated form, the number of charges has been continuously rising since 2007. In 2011, there was a sudden rise in the number of charges with respect to 2010, whereas in 2012 there was a sudden decrease. Dismissals of charges range between 55.5% and 71% (71% in 2011). There are also more charges for the aggravated form of the offence than its basic form.⁵³¹

⁵³⁰ Hence it was higher with respect to the number of dismissals for the basic form of fraud. See table 6 (42–47%).

⁵³¹ In 2009, police in Germany recorded 61,000 cases of suspected fraud of economic character (such cases amounted to 31% of the total number in 2008), and 90% of cases were prosecuted. The Federal Crime Bureau refers to it as an extremely hidden figure in the area of economic crime. More than half of all economic criminal offences in 2009 were committed in major cities. Approximately 78% of suspects were male, and over 97% older than 21. Per 100,000 citizens, the majority of suspects of economic crimes are reside Hamburg and the fewest in Hessen. Based on the presented data, it is believed that fraud represents a nucleus of economic criminal law. *Janssen* 2012, 527.

Table 10: Adults indicted for fraud in economic transactions under Article 294 (1) according to the type of decision

	Total	Attempts %	Convicted persons %	Dismissal %	Stay of criminal proceedings %	Acquittal %	Judgment denying the charge %	Unaccountability – involuntary placement
2007	149	1.3	45.6	—	22.1	18.1	14	—
2008	176	1.1	53.9	4.5	15.3	12.5	13.6	—
2009	175	1.7	44.5	6.8	20.5	15.4	12.5	—
2010	150	4	46.6	3.3	17.3	13.3	19.3	—
2011	132	22	53	5.3	18.9	13.6	8.3	1
2012	154	1.2	50.6	4.5	15.5	18.1	11	—

Table 11: Adults indicted for fraud in economic transactions under Article 294 (2) according to the type of decision

	Total	Attempts %	Convicted persons %	Dismissal %	Stay of criminal proceedings %	Acquittal %	Judgment denying the charge %	Unaccountability – involuntary placement
2007	162	0.6	45	—	28.3	10.4	16	—
2008	198	1.5	54.5	1	20.7	10.1	13.6	—
2009	214	0.9	46.7	1.4	22.8	15.4	13.5	—
2010	207	1.9	53.1	0.9	21.2	13	11.5	—
2011	246	2	50.4	3.2	17	19.1	13.1	—
2012	282	1.7	60.9	2.4	11.7	16.6	8.1	—

Following indictments, the largest number of court decisions resulted in convictions; courts adjudicated on the basic form of the offence in 44.5% to 53.9% of cases, and on the aggravated form in 45% to 60.9% of cases, which indicates the efficiency of prosecution. The number of dismissals is negligible (with respect to the dismissal of charges, in particular); it ranges between 0.9% and 6.8% (for both forms). The level of stays of prosecution range from 15.3% to 22.1% for the basic form of the offence, and from 11.7% to 28.3% for the aggravated form of the offence (with continuous decrease since 2007). Acquittals resulted in 12.5% to 18.1% of cases, and judgments denying the charge in 8.3% to 14% of cases (in 10.1% to 19.1% of cases for the aggravated form of the offence and between 8.1% of cases 16% for the basic form of the offence).

Table 12: Adults convicted of fraud in economic transactions under Article 293 (1) by punishment

		2007	2008	2009	2010	2011	2012
Total N		68	95	78	70	70	78
Women %		11.7	12.6	15.3	14.2	8.5	11.5
Attempt %		–	–	2,5	1,4	2,8	–
Duration of prison sentence	Total N	68	95	78	70	70	78
	Probation %	86.7	78.9	80.7	82.5	82.8	79.4
	3–5 years %	–	1	1.2	–	1.4	–
	2–3 years %	1.4	1	–	–	1.4	–
1–2 years %	Total	13.2	84	11.5	8.5	7.1	8.9
	Probation	55.5	62.5	66.6	83.3	60	57.1
6–12 months %	Total	47	56.8	47.4	60	48.5	55.1
	Probation	87.5	85.1	75.6	80.9	88.2	79
3–6 months %	Total	36.7	31.5	38.4	28.5	37.1	35.8
	Probation	100	76.6	93.3	85	88.4	85.7
2–3 months %	Total	1.4	1	1.2	2.8	2.8	–
	Probation	100	100	100	100	100	–
1–2 months %	Total	–	–	–	–	–	–
	Probation	–	–	–	–	–	–
30 days	Total	–	–	–	–	–	–
	Probation	–	–	–	–	–	–
Pecuniary fine	Total	–	–	–	–	–	–
	Probation	–	–	–	–	–	–
Court warning		–	–	–	–	–	–
Guilty conviction, but without a sentence		–	–	–	–	–	–
Corrective measures		–	–	–	–	–	–

The only sanctions that were handed down were prison sentences, with probation granted in the majority of cases (between 78% and 86% of cases), from six to twelve months (between 47% and 60% of cases) and three to six months (between 28% and 38% of cases). Prison sentences (probation) of one to two years were handed down in 7% to 13% of cases, while sentences of two to three years and three to five years were seen only in specific cases.

Table 13: Adults convicted of fraud in economic transactions under Article 293 (2) by the attempt and sanction

		2007	2008.	2009	2010	2011	2012
Total N		73	108	100	110	124	172
Women %		6.8	11.1	10	8.1	12.9	9.8
Attempt %		—	2.7	—	0.9	1.6	1.1
Duration of Prison sentence	Total N	73	108	100	110	124	172
	Probation %	60.2	59.2	51	48.1	54	41.2
	5–10 years %	1.3	—	—	1.8	—	2.3
	3–5 years %	2.7	2.7	2	1.8	—	1.7
	2–3 years %	8.2	3.7	4	3.3	3.2	3.4
1–2 years %	Total	28.7	22.2	22	29	25	26.1
	Probation	38	45.8	31.8	28.1	45.1	31.1
6–12 months %	Total	52	68.5	68	53.6	66.9	55.8
	Probation	81.5	68.9	63.23	66.1	62.6	52
3–6 months %	Total	6.8	2.7	4	9	4.8	12.2
	Probation	100	66.6	25	40	16.6	33.3
2–3 months	Total	—	—	—	—	—	—
	Probation	—	—	—	—	—	—
1–2 months	Total	—	—	—	—	—	—
	Probation	—	—	—	—	—	—
30 days %	Total	—	—	—	0.9	—	—
	Probation	—	—	—	100	—	—
Pecuniary fine	Total	—	—	—	—	—	—
	Probation	—	—	—	—	—	—
Court warning		—	—	—	—	—	—
Guilty conviction, but without a sentence		—	—	—	—	—	—

With respect to the aggravated form of fraud in economic transactions, probationary sentences of six to twelve months were most prevalent; they were handed down in 52% to 68.5% of cases. Probationary sentences alone were handed down in 48.1% to 60.2% of cases. Prison sentence of one to two years were delivered in 22% to 29% of cases, while prison sentences of two to three years were handed down in 3.2% to 8.2% of cases; sentence from three to six months were delivered in 2.7% to 12.2% of cases, and prison sentence from three to five year in 1.7% to 2.7% of cases. Prison sentences from five to ten years were delivered only four times between 2007 and 2012. For fraud in economic transactions under Article 293, para. 1, 334 legal persons

were charged between 2005 and 2009, which included 50.5% of dismissed charges (169) and only 1.1% or 4 cases in which the investigations were suspended.⁵³² The main reason for charges to be dismissed was that the elements of the criminal offence were not present (73 cases or 43.1%), there was reasonable doubt (71 cases or 42% of the time). Other circumstances (16 cases or 9.4%) were substantially less common – expediency (4 or 2.3%), statute of limitations (3 or 1.7%) and petty act (2 or 1.1%).⁵³³ For the aggravated form of the offence in the same period there were twice as many charges – 637 cases – equivalent to 45.5% of cases – with 290 dismissals. An indictment or bill of indictment was filed in 49.2% of cases and the investigation was suspended in 5% of cases (and interrupted in only one case). Unlike the basic form, the majority of reasons for the decision to dismiss the criminal charges refers to reasonable doubt (in 170 or 58.6% of cases), the evaluation that the elements of the criminal offence were not present (in 85 or 29.3% of cases), and other circumstances (27 or 9.3% of cases), and finally statute of limitation and expediency (4 cases or 1.3% each).

In the period between 2005 and 2009, 106 legal persons were indicted for fraud in economic transactions (paras. 1 and 2) and the majority were pronounced guilty (69 cases, equivalent to 65%). Judgement denying the charge was delivered in 18 cases (16.9%), judgement to acquittal in 5 cases (4.7%), whereas criminal proceedings were suspended in 14 cases (13.2%).⁵³⁴

In the same period, 38 legal persons were convicted for the basic form; 23 (60.5%) were given a pecuniary fine of HRK 5,000 to 10,000 (11 cases or 28.9%) from HRK 10,001 to 20,000 and 4 fined over HRK 20,000 (10.5% of cases). The fine was suspended in 30 cases (78.9% of the time). There were no cases in which the legal person was sentenced to the termination of activity, and forfeiture of material gain (7.8%) was adjudicated in only three cases.⁵³⁵ For the aggravated form of the offence, 31 legal persons were convicted, 28 of which were probational convictions (90.3%).⁵³⁶

There were no cases in which the sentence concerned the termination of business activity, and in terms of pecuniary fines, in the majority (17 cases) the legal person was fined from HRK 10,000 to 20,000 (54.8%), with 7 people (or 22.5%) fined between from HRK 5,000 to 10,000 and 7 fined over HRK 20,000. Material gain was forfeited in only one case.

⁵³² Data about charges, indictments and judgements for fraud in economic transactions was taken from *Novosel & Rogić-Hadžalić* 2010, 26.

⁵³³ *Ibid.* 33.

⁵³⁴ *Ibid.* 50.

⁵³⁵ *Ibid.* 55.

⁵³⁶ *Idem.*

In the conducted research, I collected and analysed 26 final judgements of the Municipal Court in Zagreb and the Municipal Court in Split, 19 of which were convictions, and 3 acquittals, while in 4 cases proceedings were rejected.

The perpetrators of fraud in economic transactions in all analysed judgements represented the limited liability company as directors (only in one case was it: "...a person who actually managed the business transaction of the company A-Ć d.o.o.").⁵³⁷ The perpetrators were mainly male (the share of women was only 10.5%), and in the ages of 20 to 30 (41%), 30 to 40 (41%) or 40 to 50 (17%).⁵³⁸ In 31.5% of cases, those convicted had previous convictions. The largest number of perpetrators had completed secondary education (57.8%) and were not working in a specific occupation.⁵³⁹ As many as 47.3% perpetrators stated that they have no property. For misleading or deceiving, a blank debenture (42.1%) and a voucher cheque (15.7%) were used as the main insurance instrument, and in as many as 31.5% cases the perpetrator did not use any special insurance instrument. On average, each court proceedings dealt with claims amounting to HRK 54,743.⁵⁴⁰

In 21% cases, the offence was committed concurrently with another offence, most commonly the basic and aggravated form of fraud in economic transactions (in three cases). In one case there fraud in economic transactions was committed concurrently with the forgery of documents (Article 311 of the CC97) and abuse of duty in the event of loss, overdraft or lack of creditworthiness (Article 626, para. 1, item 2 of the Companies Act). Complicity or co-perpetration was not been established in any cases.

In terms of extenuating circumstances, the court takes family circumstances into consideration ("father of a child"), sincere remorse, previous clean record and readiness and willingness to settle or reduce the debt, the perpetrator's proper conduct before the court, "circumstances which led to the perpetration of this criminal offence and in which the company B d.o.o. conducted its business operations", time passed from the perpetration, the fact that the defendant is "a Homeland War veteran and the holder of the Homeland War Memorial ..."

As aggravating circumstances, the court evaluated the amount of caused damage, previous convictions and social risk of the offence. In 17 cases those the injured party was a limited liability company (89.4%), while there was one natural person and one tradesman.

⁵³⁷ Judgement of the Municipal Court in Zagreb KO 3495/10 of 24 May 2011.

⁵³⁸ Except perpetrators between 66 and 59.

⁵³⁹ Electricians, economists, car mechanics, drivers, agricultural technicians.

⁵⁴⁰ Approx. EUR 30,000.

In the analysis of pronounced judgements, the prevailing judgements were mild probational sentences. In only 4 of 19 convictions were the defendants sentenced to a probational sentence, 31.5% were given probationary prison sentences of six months, 15.7% were sentenced 11 months of probation, 15.7% were sentenced 10 months' probation and only two or 10.5% were sentenced to one year of probation. Legal persons were punished with a pecuniary fine of HRK 10,000 in 60% of cases, HRK 15,000 in 20% of cases and HRK 20,000 in 20% of cases.

3.3 Objective Features

Since the manner of perpetration of the offence (according to the current legal text) is equal to the basic form of fraud,⁵⁴¹ in this chapter I will focus on the notion of the perpetrator, the concepts of “economic transactions”, “representation of a legal person or another legal person” and liability of legal persons for criminal offences.⁵⁴² After that, I will analyse some typical cases of fraud in economic transactions.

3.3.1 Economic Transactions

The notion of economic transactions is not defined by the CC. In criminal law literature, economic transactions refer to activities or services that certain economic operators perform in the private or public sector,⁵⁴³ or every activity within the market whereby some economic purpose is achieved, not necessarily realisation of profit (therefore economic transaction could also refer to the sale of goods at a damping price, if the purpose of such procedure is to break into the market).⁵⁴⁴ In order to define the term economic transactions, we should rely on the relevant norms of commercial law. The Companies Act states that the trader (unless otherwise determined by law) is a legal or a natural person who independently and permanently performs

⁵⁴¹ So far, the legal literature has sufficiently considered the manner of misleading or deceiving with a general clause, e.g., *Garačić* 2006, 487–490; *Bačić & Pavlović* 2004, 1012–1019.

⁵⁴² According to the opinion of the Criminal Department of the Supreme Court of the Republic of Croatia, of 2 October 2000, the “criminal offence of fraud in economic transactions under Article 293 of the CC is a aggravated form of the fraud stipulated under Article 224 because the contents of that offence has the same element of fraud as in Article 224 of the CC. However, harsher punishments are prescribed for this act than for regular and aggravated fraud under Article 224 of the CC”; op. cit. according to *Garačić* 2013, 520.

⁵⁴³ *Derenčinović* in *Horvatić* 2002, 165, e.g., since 1949 the so-called Economic Criminal Code (*Wirtschaftsstrafgesetz, WiStG*) has been a part of Germany's criminal legislation, with the legislator stipulating penalties and fines for non-compliance with certain norms established within the country for the governing and shaping of economic processes. *Zieschang* in *Achenbach & Ransiek* 2012, 394.

⁵⁴⁴ *Novoselec* 2009, 184. See *Garačić* who states that fraud in economic transactions usually occurs in the sale of various goods or services. *Garačić* 2013, 517.

economic activity for the realisation of profit by producing, trading and providing services on the market.⁵⁴⁵ A sole trader is a natural person who independently performs economic activities in conformity with the trading regulations; he is registered in the court registry as a sole trader (Article 3 of the Companies Act). Hence, these assumptions should be met according to the CA: that he is a natural or a legal person independently performing the economic activity, for and on behalf of himself; he permanently performs these activities for the realisation of profit, which may derive from production, trade or provision of services on the market.⁵⁴⁶ The notion of trade is similarly determined. Trade refers to independent and permanent performance of legal economic activities by natural persons with the aim of achieving revenue or profit from production, trade or provision of services on the market.⁵⁴⁷ Foreign legal literature states that the notion of “economy” refers to the totality of regulations and measures in the entrepreneurial form directed towards production, manufacture and distribution of goods or other transactions aimed at fulfilment of human needs.⁵⁴⁸ Since 1995, the term electronic business (e-Business) has been frequently mentioned and often identified with the notion of electronic commerce (or e-Commerce).⁵⁴⁹ E-commerce includes the exchange of goods and services between buyers, business partners and sellers, whereas e-business includes all operations performed within the company, e.g., production management, development management, corporation infrastructure and products.⁵⁵⁰ In the judgements analysed within this doctoral re-

⁵⁴⁵ Article 1 of the Companies Act, OG 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 25/11, 111/12, hereinafter the CA.

⁵⁴⁶ *Mlikotin Tomić & Horak* 2009, 21–22.

⁵⁴⁷ Article 2, para. 1 of the Sports Act, Official Gazette no. 143/03. Requirements for the functioning of a trade are prescribed by Article 8, and they refer to the fact that a natural person should not have a final judgement, misdemeanour decision or decision of the Court of Honour of the Croatian Chamber of Trades and Crafts with a pronounced safety or protective measure against the performance of the activity during the term of the measure, and that he is entitled to use the premises for the trade.

⁵⁴⁸ *Cramer & Perron* 2006, 2259. The authors state that economy particularly includes: agriculture, forestry, fishery, mining, industry, trades and crafts, commerce, publishing, energetics, transport, banking and insurance, film. However, science and research, including technology, art and literature, do not belong to economy. *Idem.* See *Fischer* 2010, 1862.

⁵⁴⁹ See *Panian* 2002, 70.

⁵⁵⁰ *Idem*, 71. We should also point out the distinction between commercial and civil law contracts because the practice established between the parties and the commercial customs applies to commercial contracts, and the COA applies to civil law and consumer contracts (furthermore, the COA offers different answers to certain issues about those types of contracts; there is a special degree of caution required from the trader (especially the professional). Commercial contracts are concluded between the traders while performing their activities or with respect to the activity of at least one of them. If either of these elements is missing, it is then a civil law contract. *Slakoper & Gorenc* 2009, 239.

search, the issue of economic transactions was not raised in the sense of unfounded limitation of the zone of punishment. However, in a decision from 2001, in the criminal offence of abuse of power in economic transactions under Article 292, para. 1 of the CC97, the Supreme Court stated that the fact that such an offence may be committed in economic transactions does not imply that it could not be committed by, e.g., an employee in a health centre (whose basic activity is to provide medical services) with respect to economic transactions (See RCSC Decision IV Kž 152/1999-3 of 16 May 2001), which indicates the extensive interpretation of this concept.

3.3.2 Legal Persons and Representation of Legal Persons

In the system of legal persons in Croatian positive law, we distinguish legal persons of public and private law, and legal persons such as corporations and foundations.⁵⁵¹ Until the accession of the Republic of Croatia into the European Union, the national law, pursuant to the CA, distinguished between proprietorship and partnership (general partnership, limited partnership and economic interest grouping) and corporation (joint-stock company and limited liability company).⁵⁵² The accession of the Republic of Croatia to a fully-fledged member of the European Union introduced the notion of *Societas Europaea* (SE) and European Economic Interest Grouping (EEIG).⁵⁵³ *Societas Europaea* (SE) may form joint-stock companies in the territory of the EU by mergers or consolidations, whose registered offices are on that territory, but in

⁵⁵¹ *Vedriš & Klarić* 2004, 59. Authors further state that we could include state, county, city, district, municipality, public institutions, public foundations, church et. al. among the legal persons of public law, and all forms of companies, private institutions, private foundations and funds, various associations et al. into the legal persons of *private law*. Corporation is defined as the organised community of persons which is an independent legal entity different from specific members of the corporation, e.g., joint-stock companies, whereas a foundation is certain intended for a specific purpose whose legal capacity is recognised by the legal order. *Idem*, 53. Political parties are legal persons as well. See Political Parties Act, OG No. 76/93, 111/96, 164/98, 36/01, 1/07, Articles 2 and 7. See *Eder-Rieder* 2011, 54. Entities which are not legal personalities are trades, businesses, subsidiaries, pre-companies. See *Slakoper & Gorenc* 2009, 92–93.

⁵⁵² Simple limited liability company is not a new type of the company, but a limited liability company to which the same regulations apply as to all other limited liability companies with the addition of those which particularly regulate only that company. *Op. cit.* *Barbić* 2013, 25.

⁵⁵³ It is based on the Act on the Introduction of *Societas Europaea* (SE) and European Economic Interest Grouping (EEIG), OG No. 107/07, but since Croatia became a full-fledged member of the EU, the Regulation of the Council of European Communities (EEC) No. 2137/85 of 25 July 1985 on European Economic Interest Grouping and the Regulation of the Council of the European Union (EC) No. 2157/2001 of 8 October 2001 on the Statute of the European Society directly apply. *Barbić* 2013, 735.

different member states.⁵⁵⁴ They may establish a holding company if at least one or two of them had a daughter-company or a subsidiary for the past two years in another member state.⁵⁵⁵ With respect to the European Economic Interest Grouping (EEIG), the Act on the Introduction of *Societas Europaea* (SE) and European Economic Interest Grouping (EEIG) prescribes that the provisions of the CA concerning the economic interest grouping apply to all issues which are not explicitly regulated by the Regulation.

The study has shown that the perpetrators and the fraud victims in economic transactions in Croatia are predominantly limited liability companies.⁵⁵⁶ We believe that the last amendments to the legal description of this criminal offence devalued the significance of the notion of a responsible person with respect to establishing the perpetrator of fraud in economic transactions. The emphasis is on the beneficiary of material gain (legal person represented by the perpetrator or *any* legal person), and then on establishing the potential representative of the legal person.⁵⁵⁷ In fact, if material gain is not acquired for the legal person, but for the natural person acting as the representative of the legal person, there is no criminal offence of fraud in economic transactions; this is only regular fraud. But the question arises as to whether this is the case in court practice? In the analysis of the collected judgements during the doctoral research, it has been established that the convicting judgements mutually differ. We can point out six types of (convicting) judgements:

- a) judgements where a natural person was convicted for the criminal offence of fraud in economic transactions (as a responsible person) and obliged to compensate damages (the majority of 12 judgements);
- b) natural person was convicted, and the injured party was referred to civil proceedings for the compensation of damages (1 judgement);
- c) natural person was convicted, whereas the legal person in which the natural person is a responsible person is obliged to compensate damages (2 judgements);
- d) natural and legal persons were convicted of fraud in economic transactions, and the natural person was obliged to compensate damages (1 judgement);

⁵⁵⁴ Barbić 2013, 737. The idea to make the statute of a unique joint-stock company at the EU level, the so-called *Societas Europaea* was first presented at the Congress of French Notaries Public in 1959, and the conceptual designer of such statute is Prof. *Pieter Sanders* from the University of Rotterdam. Ibid. 736.

⁵⁵⁵ Op. cit. Idem. The minimum equity of the company is EUR 120,000.

⁵⁵⁶ The most significant share in economic crimes in Germany refers to limited liability companies. See *Tiedemann* 2010, 6.

⁵⁵⁷ Without any special mystification of determining the representative of a legal person, because the court registry reveals that information (with respect to the statutory obligation of entering representatives into the court registry).

- e) natural and legal persons were convicted of fraud in economic transactions, and the legal person was obliged to compensate damages (2 judgements);
- f) natural and legal persons were convicted, and the injured party is referred to civil proceedings for the compensation of damages (2 judgements);

What does this diversity of court practice entail and is it even allowed? Does this mean that it is entirely arbitrary if certain natural persons (as responsible persons in legal persons) are indicted and then convicted of fraud or fraud in economic transactions? Does this mean that only certain judges apply the Act on Liability of Legal Persons for Criminal Offences (ALLPCO), whereas others do not, and why? In fact, if the motion for prosecution has been filed only against the responsible person, the state attorney's office *may* instigate criminal proceedings for the same criminal offence and against the legal person.⁵⁵⁸ We should also mention here that the decision of the criminal prosecution against the legal persons is performed according to the principle of expediency. In fact, the state attorney may dismiss criminal charges with an order or relinquish prosecution if the legal person has no property or the property is so negligible that it would not even cover procedural expenses or if there is an ongoing insolvency proceeding against the legal person (Article 24 of the ALLPCO). Since in the judgements where only natural persons were convicted of fraud in economic transactions it is not discernible if the principle of expediency resulted in the criminal proceeding being withdrawn against the legal person, we can only speculate about the real reasons behind the convictions of natural persons.⁵⁵⁹ I, therefore, believe that it would be useful to conduct special research to determine the number of cases and the reasons for withdrawal from criminal proceedings against legal persons for fraud in economic transactions, because only then we could answer the initial question about the arbitrariness of the application of the ALLPCO.

Persons specified by the CA have the legal authorisation to represent companies and they are thus entered as representatives of the company in the court registry.⁵⁶⁰ The legal representative may, within the limits of powers of the representative entered in the court registry, assign the power of attorney to another person pursuant to the provisions of the regulations which regulate civil obligations, unless otherwise determined by the CA.⁵⁶¹ The person whose obligation is to perform the duties as the

⁵⁵⁸ See Article 27 of the ALLPCO!

⁵⁵⁹ Speculation is not permissible in a scholarly paper unless in the form of an assumption which could be confirmed or denied in the future research. In the Report of the State Attorney's Office of the Republic of Croatia for 2012, it is determined that "percentile share of charges with respect to charges against adults provides grounds for the claim that in some cases the legal person is not prosecuted." <http://www.dorh.hr/IzvjesceORaduDrzavnihOdyjetnistavaU>, p. 28 [18/07/2018]. It is also stated that the majority of judgements are delivered for economy fraud.

⁵⁶⁰ See Article 41 of the CA.

⁵⁶¹ Article 42 of the CA.

company employee, which regularly include the conclusion of certain contracts, i.e., undertaking of certain legal actions, is authorised to conclude contracts and undertake legal actions as the attorney of the company within the limits of his duties (attorney by employment).⁵⁶²

Letter of proxy is a special commercial power of attorney. It can only be provided in writing by a legal and natural person acting as traders in the sense of the CA; this letter may be granted to any adult person in full legal capacity, regardless of the duties and the task they perform, unless otherwise provided by the declaration of memorandum of association, i.e., the company statute.⁵⁶³ The proxy may conclude contracts and undertake all legal actions for and on behalf of the company, and represent it in procedures before administrative and other state entities, institutions with public authorisations, and state and selected courts. Limitations the CA prescribes for the proxy refer to the fact that he may not, without special authorisation, appropriate or encumber the real properties of the company, issue statements or undertake legal actions instigating an insolvency proceeding, or any other proceeding which may lead to the termination of the company, and he may not grant the power of attorney for the conclusion of transactions to other persons.⁵⁶⁴ One of the forms of representation of the companies is through a commercial proxy, an employee of the company or other person authorised by the trader to entirely or partially manage his business.⁵⁶⁵ The trader may grant the power of attorney to his employee or another person in the capacity of a commercial proxy, who is thus authorised to, for and on

⁵⁶² Article 43 of the CA.

⁵⁶³ Articles 44 and 45 of the CA. Pursuant to Article 46, the letter of proxy may be granted to one or more persons. If it is granted to two or more persons without indication that it is a joint letter of proxy, each of those persons is deemed a proxy who independently represents the company within the power determined by the CA. Joint letter of proxy is granted to two or more persons if it is explicitly indicated in the letter of proxy. The expression of will or legal actions performed by joint proxies have legal effects only if performed by all proxies together (expressions of will or legal actions performed by one of them shall be valid only with previous consent or explicit subsequent consent of other joint proxies). Also, the expression of will or legal action executed towards one proxy has the legal effect as if it had been executed towards all proxies.

⁵⁶⁴ Article 47 of the CA. The provisions of Articles 48 to 51 prescribe that the limitation of the letter of proxy beyond the CA has no effect towards the third persons regardless of the fact if the third person knew or had to have known of them; the limitation of the letter of proxy on the business transactions of one or more subsidiaries has effect towards the third persons only if entered in the court registry. The proxy himself may not act as the other contractual party without a special authorisation or conclude contracts with the company for and on behalf of himself, but for and on behalf of other persons.

⁵⁶⁵ Commercial power of attorney is granted in written form and is regulated with provisions of Articles 55–57 of the CA. The commercial proxy is authorised to conclude all contracts and undertake all legal actions common in business management included in his power of attorney or which are requisite for such operations.

behalf of the grantor, conclude contracts on the sale of the grantor's goods, deliver goods, collect the amounts from those contracts and accept statements from the buyers concerning the goods subject to the contract.⁵⁶⁶ Regardless of the small number of cases where legal persons were indicted for this offence, the legal person should, for the purpose of presenting its defence, be allowed to plead in the criminal proceeding through a natural person which represents said legal person in the trial (right to a fair trial from Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms). According to the Article 27, para. 1 of the ALLPCO, the legal representative, who is authorised to undertake all legal actions undertaken by the defendant, acts on behalf of the indicted legal person in the criminal proceedings. Representative may be any person with legal capacity and knowledge of Croatian language. The Article 27 para. 5 represents an exclusion clause which prescribes that the representative of the legal person may not be the person who was summoned in the same proceedings as a witness or the person subjected to criminal proceedings for the same offence, or his attorney at law.⁵⁶⁷ *Ratio legis* of the exclusion clause was to avoid situations with potential conflict of interests of the indicted responsible person's and indicted legal person's defence.⁵⁶⁸ We believe that in cases where the natural person, as the responsible person, is the only authorised representative and the employee of the legal person, and often the perpetrator of the criminal offence of fraud in economic transactions, there is no need to additionally burden the state budget by appointing a new representative of the legal person. In cases when such solution would represent or could represent a conflict of interests of the responsible person's and the legal person's defence, the court should be able to issue an order on appointing a representative.⁵⁶⁹ *Derenčinović* justly emphasises that such solution is more economically favourable than the one provided by the ALLPCO, and it is also provided by the Misdemeanour Act and comparative law.⁵⁷⁰

The research has shown that there were no cases where statutory default interests were adjudicated with the indemnification claim. Since these are economic transactions, the contracts which provide special contractual interests or different penalties for payment delays, evidently the criminal court should not deal with such accessory claims. However, with respect to the basic form of fraud, I believe that the courts should adjudicate requested statutory interests in addition to the principal, since no other circumstances are required for their adjudication.⁵⁷¹ Furthermore, the research

⁵⁶⁶ Article 57 and 58, para. 1 of the CA.

⁵⁶⁷ This issue was examined by *Derenčinović & Novosel* 2012, 601; *Đurđević* 2005, 750–756.

⁵⁶⁸ *Idem*.

⁵⁶⁹ *Ibid*.

⁵⁷⁰ *Op. cit. Derenčinović & Novosel* 2012, 604. The representatives of indicted legal persons were exclusively attorneys-at-law in the analysed sample.

⁵⁷¹ See earlier 2.3.5.4.

has shown that in some cases the natural person was convicted of fraud in economic transactions (as the legal representative), whereas the legal person was ordered to settle the indemnification claim. Those are the cases where the legal person did not *de facto* participate, i.e., was not the party in the proceeding (its representative had not been appointed and the minimum of the Article 27 of the ALLPCO had not been met). Although the Article 77 para. 1 prescribes the manner in which illicitly acquired material gain should be confiscated from the person to whom it was transferred, I believe that this provision should be interpreted in a way that the legal person should be allowed to testify about the circumstances of acquiring material gain. Presumption that the convicted natural person is also the representative of the legal person (which could be acceptable if the convicted person is the only representative and employee of the legal person) is unacceptable according to the present Article 27 of the ALLPCO without amendments *de lege ferenda* (conflict of interests).

The Criminal Department of the Supreme Court of the Republic of Croatia, delivered a decision No. Su-IV k-4/2012-57 on 27 December 2012 regarding the aggravated form of fraud in economic transactions according to the Article 247, para. 2, in which it established the legal feature of “large state grant” (item 33) in cases where the value of the obtained or used state grant exceeds HRK 60,000. Does this legal understanding with the increased amount of “substantial damage” represent a new milder law which should be applied as a compulsory act, as stated by the Supreme Court of the Republic of Croatia in some recent judgements (VSRH, I Kž-226/11 and I Kž-65/13 of 13 February 2013)? In his comments on court practice, *Novoselec* confirms that such an interpretation helps establish the element of criminal offence, but he justly denies it any legal effect by referring to Article 40, para. 2 of the Courts Act (according to which the legal understanding of the Criminal Department of the Supreme Court obligates only the appellate courts of that entity, and the legal understanding which does not universally bind all courts cannot have legal effect).⁵⁷² He concludes that the legal features to which this legal understanding refers remained the same, but only their interpretation changed: “it is not the act that is milder, but the court practice”.⁵⁷³

3.4 Subjective Features

Subjective features of fraud in economic transactions include intent, as a special form of guilt and aim to acquire illicit material gain for the legal person.

Fraud in economic transactions may be only committed with direct or indirect intent.⁵⁷⁴ In the analysed judgements, the courts determined in all judgements that the

⁵⁷² *Novoselec* 2013, 269.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Novoselec* 2009, 116; different in *Bačić & Pavlović* 2004, 1013.

offence was committed with direct intent, followed by a superficial rationale: “Since the defendant’s accountability was not disputable during the perpetration, and he was aware of illegality of his action, he thus acted with direct intent because he knowingly committed the crime, hence his conduct fulfilled all subjective elements of penal liability. In that manner, all objective and subjective elements of the defendant’s criminal liability have been met, and he was thus pronounced guilty for the perpetration of this criminal offence”.⁵⁷⁵ “The court believes that the defendant committed all four offences with intent since he was aware of his actions and wanted their perpetration, and since he committed them deliberately, he is held accountable for the perpetration of all offences (accountability during the proceeding was not questioned), hence the defendant is guilty of committing all said criminal offences.”⁵⁷⁶ Distinction between intent and the aim to acquire illicit material gain (referred to as fraudulent intent) is made by the Municipal Court in Split in the judgement IK-231/04 of 22 April 2010: “Therefore, the defendant committed two criminal offences of fraud in economic transactions in a short period of time, first in 2000, then in 2001, and in both cases the company for which he intended to acquire illicit material gain had financial problems, and the injured parties in both cases were his new business partners. These deliveries were their only successful business cooperation, which points to the fact that the defendant in both cases acted with the intent to acquire illicit material gain for the legal persons in which he was the responsible person and to persuade said partners to act to their own detriment by misleading and deceiving them. Consequently, in this specific case, they suffered damage in said amounts, which has not been settled to this day. With regard to subjective aspects, this court believes that the defendant acted with intent in both cases as the responsible person, i.e., he was aware of his illicit conduct”. The court did not attempt to establish the consequences of fraud for the injured party in any of the cases. In fact, if it resulted in endangerment or termination of the injured party, it is certainly a circumstance which should be evaluated in the criminal proceeding. In establishing the perpetrator’s guilt, the court focussed on establishing the fact that the perpetrator was not solvent at the conclusion of the legal transaction.

Guilt is indicated by the following facts:

- insolvency at the conclusion of the transaction;
- cooperation concerned is usually the only cooperation between the perpetrator and the injured party;
- goods have not been paid even partially on the due date;
- claim cannot be settled even partially by activating the insurance instruments;

⁵⁷⁵ Judgement of the Municipal Court in Zagreb KO-1776/10 from 10 November 2011.

⁵⁷⁶ Judgement of the Municipal Court in Split K 939/05 from 9 February 2010.

- the injured party is unable to reach the perpetrator upon the maturity of the claim.

The fact that the perpetrator was not solvent at the conclusion of the legal transaction, should not per se prove the existence of intent. In fact, economic operators often conclude transactions or plan them bearing in mind their undue claims. Drawing a conclusion on the existence of guilt (intent) from the defendant's insolvency would be contrary to the Constitutional principle of entrepreneurial and market freedom. We can consider the perpetrator's intent only if we establish this fact with respect to aforementioned facts. In terms of acquiring material gain for the legal person, it is not usually stated that the perpetrator acted with the aim of acquiring illicit material gain for the legal person he represents or another legal person. Of course, there is consequently no explanation of the grounds for such establishment. In these cases, the state attorney's office and the courts derive the assumption that illicit material gain was acquired for the legal person, since the specific legal transaction was stipulated by legal persons. We believe that such superficial presumption should not be part of the criminal proceeding.

3.5 Typical Cases of Fraud in Economic Transactions

Croatian criminal law literature has not dealt with the assessments of the types of fraud in economic transactions or typical cases of this criminal offence. *Bačić* and *Pavlović* in 2004 pointed to the basic issue of fraud in international commerce, business, corporate activity and marketing.⁵⁷⁷ German theory and practice lists the typical forms of economic fraud as follows: credit fraud, churning, market cornering, scalping, kick-back payment, prospectus fraud and online fraud. In this chapter, we will provide the basic meaning of each of these concepts.

3.5.1 Credit Fraud⁵⁷⁸

German legislation includes the criminal offence of credit fraud ("*Kreditbetrug*", § 265b). It is an offence of abstract endangerment committed by the person who presents false or incomplete data to companies or plants regarding the request for allocation, approval or alteration of loan terms for the business or plant or alleged business or alleged plant about economic relations (balance sheets, gain and loss accounts, assets or expert opinions) or presents false or incomplete data in writing advantageous for the loan holder and which affects the decision on the loan application, or by the person who fails to report aggravated economic relations in materials and

⁵⁷⁷ *Bačić & Pavlović* 2004, 1014–1017.

⁵⁷⁸ Credit fraud is presented in Chapter 2.3.5.2 in the part referring to material damage and its scope. In this chapter, the emphasis is on the consideration of the element of the offence.

data which are relevant for the decision on such application.⁵⁷⁹ The BGH and some theorists believe that this provision protects only individual material interests of the creditor, and the element of the offence refers to fraudulent actions directed towards obtaining the loan.⁵⁸⁰ *Janssen* deems questionable the penal and political use of this provision due to its vague meaning in practice, since the cases of credit fraud are evaluated as attempted or completed fraud.⁵⁸¹ In Croatia, the notion of “credit fraud” is generally accepted, and usually perceived as fraud committed during hire purchase or acquisition of loans.⁵⁸² As early as in 1968, the Supreme Court of Yugoslavia dealt with credit fraud; it stated in one conclusion that the criminal offence of “fraud from Article 258–259 of the CC” is not committed by the person who uses a forged document with the intent to obtain a loan and who thus misleads the creditor about his status of employment, size of his personal income or other facts necessary for the loan, if that person at the time of applying for and obtaining the loan intended to regularly repay the loan, also, if the loan requirements, which the loan holder misrepresented, were requested by the creditor to prove the applicant’s creditworthiness and ensure the regular repayment of the debt.⁵⁸³ It is furthermore stated that the criminal offence of fraud occurs in the event of a favourable loan, i.e., special purpose loan intended for a limited circle of people and for a special purpose (e.g., victims of earthquakes, floods or disabled persons, etc.) and the applicant does not meet the required criteria.⁵⁸⁴ In the event of favourable loans, there is a legitimate question: if they are used/obtained contrary to their purpose and the applicant/holder of the loan does not meet the requirements, does that constitute the criminal offence of fraud, fraud in economic transactions or subsidy fraud?

3.5.2 Churning

Churning represents the form of fraud at the conclusion of the contract. It includes the nonsensical transfer of assets for the sole purpose of obtaining commission or concealment of very high commissions upon transfer of assets (“excessive trading”).⁵⁸⁵ Investment goals of the investor are not taken into account at such transfer

⁵⁷⁹ Prescribed punishment is a pecuniary fine or a prison sentence of up to three years. It is an offence of abstract endangerment.

⁵⁸⁰ *Janssen* 2012, 578. Different in *Kudlich & Oglakcioglu* 2011, 107 (credit and state economy as a whole).

⁵⁸¹ *Ibid.*

⁵⁸² *Novoselec* 2009, 87.

⁵⁸³ *Garačić* 2008, 76–83.

⁵⁸⁴ *Ibid.* See Article 10. of the Act on the Croatian Bank for Reconstruction and Development 138/06, 25/13.

⁵⁸⁵ *Mansdörfer* 2013, 103. As a result, some theorists describe such conduct of the perpetrator as conduct between the abuse of trust and fraud. See *Kudlich & Oglakcioglu* 2011, 120.

or property. In contesting each specific transaction between the investor and property manager, fraud may be committed by active feausance (action),⁵⁸⁶ whereas within the property management contract, fraud may be committed by omission. Guarantee obligation of protecting the investor's assets derives from the contractual or institutional obligation of loyalty. In the first type of perpetration, the subject of fraud is an internal fact (the perpetrator claims, contrary to the truth, that higher income is possible through the transfer of the investor's capital, whereas he only wants to gain commission based on the transfer). The investor is thus deceived about the actual reasons for the transaction; the consent for the transfer of the investor's assets represents relevant property management. The property manager's commission represents a useless burden to the investor which causes him damage (corresponding to the property manager's gain). Whether the perpetrator acts in the interest of the investor or with the intent to gain commission, from the quantitative aspect, is evident from the size of the investment, amount of the commission or share of the short-term transactions.⁵⁸⁷ In terms of quality, recommendations should be in the interest of the investor. Accordingly, in churning it does not only suffice to investigate individual transactions, but the overall process as well. With respect to churning, sufficient legal protection is ensured by abuse of trust from Article 240, i.e., abuse of trust in economic transactions from Article 246 of the CC.

3.5.3 Market Corner

The term market corner refers to the monopoly position of the participants attempting to influence the exchange rate of the securities.⁵⁸⁸ By purchasing a large amount of securities, the perpetrator intends to reduce the floating supply of these assets in order to control demand and gain a strong position on the market.⁵⁸⁹ Cornering has a subordinate meaning in economic transactions, because when the individual attempts to accumulate assets, other participants on the market try to oppose it.⁵⁹⁰ It is not easy to find grounds for fraudulent criminal liability in these cases (possibly fraud with respect to the motive for trading; however, there is no evident motive with the purchase of securities). It is also difficult to establish and prove material damages. In fact, it is difficult to prove any influence on the exchange rate due to many factors which may affect the formation of prices. This also applies to the establishment of damage.

⁵⁸⁶ Pursuant to § 32 para. 1, item. 1 of the Act on Securities Market (*WpHG*).

⁵⁸⁷ *Janssen* 2012, 579.

⁵⁸⁸ *Janssen* 2012, 580.

⁵⁸⁹ *Ibid.* See Articles 131–152 of the Capital Market Act, Official Gazette No. 88/08, 146/08, 74/09, 54/13, 159/13.

⁵⁹⁰ *Ibid.* Because of that, only isolated cases appear in practice and there are seldom any cases where such monopolistic position is actually achieved.

3.5.4 Scalping

Scalping refers to the acquisition of stocks with the intent to increase their price and then sell them at a higher price, thus acquiring gain.⁵⁹¹ With his deceiving recommendation, the perpetrator only creates a situation which would result in the increase of stock prices.⁵⁹² In German theory, scalping is usually defined as manipulation of public or non-public recommendations in securities trade with the aim of participating with one's own business in the fluctuations of the exchange rate as a result of recommended purchases and redemption.⁵⁹³ The stock price is not only determined by the development of the exchange rate, but it also reflects the safety of investment and, primarily, the price of the dividend which is independent from the initial stock price. It is difficult to prove the actual influence on the exchange rate. In any case, according to the opinion of BGH, we should not set excessively high requirements for proving the influence on the exchange rate. Comparison of the exchange rate flow and trading until a specific event, development of the exchange rate and the trading of securities on a specific day, and the size of orders, should sufficiently prove the influence on the exchange rate.⁵⁹⁴

This type of conduct is included in the criminal offence of abuse of the capital market under Article 260, para. 1, item 1 of the CC (anyone who, contrary to the regulations concerning the capital market, performs a transaction or issues an order for trading which may contain false or deceitful messages about the offer or the price of financial instruments, or keeps the price of one or more financial instruments abnormally or artificially high in cooperation with one or more persons). In online securities fraud, it suffices that the perpetrator merely has a website offering false or worthless stocks. In 1999, this led to the overall damage of 10 billion US dollars because the investors could not trade stocks any more, or they traded them for a minimum percentage. The payment of stocks in the USA was executed mostly through a cheque, after the buyers were swamped with said newsletters. The FBI attempted to solve the problem with "Operation Investnet", a type of constant monitoring of the internet. In German legal theory, there issue arises as to whether false claims of the stock value or pumping of prices on the unregulated market can in fact cause damage, because the purchase price represents a business risk on the unregulated market. In economic theory

⁵⁹¹ *Novoselec* 2009, 217.

⁵⁹² *Ibid.*

⁵⁹³ *Janssen* 2012, 581. Criminal liability for "scalping" is usually based on the provisions § 38, paras. 2, 39, 20a of the Securities Market Act. The scope of the Securities Market Act is much wider than that covered by § 263 of the CC because it encompasses, within the protection of legal assets, "the reliability and truthfulness of determining the price on the stock markets and the market", presentation of true facts with clear fraud about the motives and the useful announcement about "self-fulfilling predictions", hence everyday forms of conduct which are common in economy.

⁵⁹⁴ *Ibid.*

on manipulation methods on financial markets, it is more common to use the terms pump & dump and trash & cash. The first method is performed when the stock brokers first acquire a larger number of stocks on the shallow financial market, after which they pump prices by promotional campaigns and positive rumours (particularly, online).⁵⁹⁵ Then after they pump the prices, they sell or dump stocks at higher prices and thus the brokers, i.e., investors on whose behalf they operate, gain extra profit.⁵⁹⁶ Trash & cash refers to reverse manipulation when negative stories and rumours spreading through newspapers, advertisements and online decrease the price of those stocks which the stock brokers desire (trash), and right after they acquire them, the rumours disappear; positive information about the acquired stocks begins spreading through media propaganda and this results in the sale of stocks and profit (cash).⁵⁹⁷

3.5.5 Kick-backs

In the so-called kick-back payment, the broker transfers an excessive amount of commission (expenses) into the investor's account, and then, according to the previous agreement, pays a part of it to the provider of financial services (intermediary).⁵⁹⁸ This kind of conduct usually conceals the intermediary's high expenses. Court practice and theory in the cases of kick-backs usually rely on the fact that other elements of fraud have been met. The damage consists in paying excessive expenses. With brokers and providers of financial services, in some cases even complicity is considered.⁵⁹⁹

3.5.6 Prospectus Fraud

Prospectus fraud consists in presenting false information in a prospectus and illicitly distributing it.⁶⁰⁰ Prospectus in commercial law, i.e., company law represents a public invitation of the founder of the company to the interested parties to subscribe and pay for the company stocks (the company cannot be founded until all the stocks are allocated).⁶⁰¹ Public invitation may be executed pursuant to the Capital Market Act

⁵⁹⁵ Gulin 2012, 6; <http://web.efzg.hr/dok/RAC/Manipulacije%20fin%20%20izvje%C5%A1tajima.pdf> [19/02/2014].

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ Janssen 2012, 582.

⁵⁹⁹ Idem.

⁶⁰⁰ Novoselec 2009, 209.

⁶⁰¹ Barbić 2013, 290. In fact, the founders determine the number of stocks they would assume from the total number the company issues at its establishment. The number of all company stocks, including stocks with nominal value and pertaining classes are also determined by the statute adopted by the founders with a notarised and executed

(which refers to it as a public offer) and the CA.⁶⁰² In the German StGB, prospectus fraud is regulated by a special provision, § 264a which covers “*Kapitalanlagebetrug*”. This offence is committed by anyone who provides false positive information or conceals adverse facts to a wide circle of people via prospectuses or reviews or balance sheets about the key element for the sale of securities, stocks (“*Bezugsrechte*”) or shares to gain participation in a company or increase share contribution. From the adoption of the *new* CC, this kind of conduct is incriminated by the abuse of the capital market under Article 260 para. 1 item 3 (anyone who, contrary to the capital market regulations, spreads information through media, online or any other form of communication which provides or may provide false or deceitful messages regarding financial instruments, including spreading of rumours or false and deceitful news, being aware that the information is false).

3.5.7 Online Orders

Today, a large portion of economic transactions are executed through the internet as a special communication medium and form of interaction. The anonymity of transactions offered by the internet is greater than through telephone communication. Very often, people purchase and sell goods without any personal contact or interaction.⁶⁰³ Nevertheless, criminal law issues occur just as often in catalogue and prospectus purchases. Basically, this boils down to the lack of readiness of the client to pay and the lack of readiness for delivery. Web auctions also represent a special issue, in addition to regular sale through web advertisements.⁶⁰⁴

declaration. For the subscription of the remaining shares, they refer to the public through a prospectus. Ibid. See Articles 342–395 of the Capital Market Act.

⁶⁰² For more details, see *Barbić* 2013, 290–310.

⁶⁰³ In that sense, Tudman states that, in the era of globalisation, man has lost his immediate experience of events and occurrences and has become addicted to their presentation in public information and communication systems. As a result, he cannot experience immediate reality, hence the illustration of reality becomes his own reality which he perceives as more accurate and reliable than the reality itself. *Tudman* 2008, 40.

⁶⁰⁴ This shall be elaborated upon in a separate paper.

Chapter 4

Subsidy Fraud

*Fraus omnia corrumpit*⁶⁰⁵

During each of the past three years, fraud in member states caused losses to the EU budget of about EUR 500 million.⁶⁰⁶ To improve efficiency, transparency, credibility and predictability of the state grant system in accordance with the EC Treaty, the European Commission adopted a state grant reform plan as early as 2005, entitled “State Grants Action Plan”.⁶⁰⁷ In 2016, a large number of measures were taken to improve the legal and administrative framework for protecting the EU’s financial interests: the Council, the European Parliament and the Commission reached political agreement on a proposal for a Directive on the fight against fraud to the Union’s financial interests by means of criminal law; in the absence of unanimity on setting up a European Public Prosecutor’s Office, a large number of member states decided at the beginning of 2017 to proceed with it in the form of enhanced cooperation; the Commission launched an evaluation on the application of Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF.⁶⁰⁸ In the same year

⁶⁰⁵ *Ulpian Digesta*, 49, 14, § 4.

⁶⁰⁶ IP/13/709, 2; European Commission, Press Release; http://europa.eu/rapid/press-release_IP-13-709_en.htm [17/07/2013].

⁶⁰⁷ Decision on publishing rules on implementation of state grant rights by national courts, Official Gazette 89/10, Introduction, item 1, later states that following the principle of “smaller and high-quality state grants”, the Action Plan’s fundamental objective is to reduce the total amount of state grants. At the same time, it directs the grant funds towards horizontal goals of mutual interest. In that context, the Commission once again confirmed its obligation of a strict approach towards unlawful grants and grants which are not harmonised with the EC Treaty provisions. The Action Plan highlights the need for a better, targeted implementation and monitoring of state grants granted by member states. It highlights that court processes by a private action could contribute to that target by ensuring strict discipline in the area of state grants.

⁶⁰⁸ Report from the Commission to the European Parliament and the Council, Protection of the European Union’s financial interests – Fight against fraud, 2016 Annual Report, 5; https://ec.europa.eu/anti-fraud/sites/antifraud/files/1_act_part1_v2_en.pdf [18/07/2018]. It is further stated that the European Partners Against Corruption/the European Contact-Point Network against corruption adopted the Riga Declaration, aiming at strengthening the fight against corruption; sixteen Commission departments updated their Anti-Fraud Strategy; OLAF successfully negotiated anti-fraud provisions in EU international agreements; the Hercule III financing programme helps to boost the operational and administrative capacity of member states’ customs and other authorities.

1,410 irregularities were reported as fraudulent involving 391 million EUR.⁶⁰⁹ 2017 was a year of great achievements in the protection of financial interests for the EU because of the final adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law and Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the established of the European Public Prosecutor's Office (the EPPO).⁶¹⁰

Criminal offences against the EU's financial interests are often quite complex, and include several interested parties, complicated and elaborate fraud systems, and several countries and jurisdictions.⁶¹¹ Apart from that, a successful fraud investigation requires a thorough knowledge of the applicable legal and administrative framework.⁶¹² Effective cooperation between member states due to different criminal law systems, jurisdictions, complex and lengthy legal aid processes, language problems, lack of funds and different priorities make efficient cooperation among member states difficult. Therefore, investigations of fraud against the EU budget on a national level are considered time-consuming and too demanding for the available human resources, so many institutions do not deal with fraud at all or cases are dismissed as soon as obstacles occur.⁶¹³ In some cases, national authorities decided to investigate only "their" part of the crime, disregarding the broader implications of the international fraud schemes.⁶¹⁴ All these reasons supported the establishment of the European Public Prosecutor's Office.

⁶⁰⁹ Ibid, 7.

⁶¹⁰ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud affecting the Union's financial interests by means of criminal law, OJ L 198/29 and Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation of the European Public Prosecutor's Office (the EPPO), OJ L 283/1.

⁶¹¹ Op. cit. note (604).

⁶¹² Idem.

⁶¹³ Ibid.

⁶¹⁴ Idem, 3. For example, in one case OLAF transferred data to German and Bulgarian authorities concerning German and Bulgarian nationals who (allegedly) took part in a fraud concerning EU funds for agriculture and rural development. While the German trials resulted in a conviction, the trials in Bulgaria resulted in the acquittal of the suspects. The existing system, therefore, led to different results in the same cross-border case (investigations differed between the countries). The second example refers to smuggling cigarettes from the Czech Republic to Germany. The German Criminal Court used telephone call records received by the Czech police as evidence to convict the suspect. Although evidence was obtained legally according to Czech law, the defence stated that, without a court order for monitoring and recording calls, the evidence should be unacceptable in the German court. Idem.

The European Commission's studies show that different countries have different degrees of success in detecting fraud; the Czech Republic, Denmark, Germany, Italy, Poland and Romania are the leading countries when it comes to detecting fraud, while Greece, France and Spain show a limited capability in that field.⁶¹⁵ In 2011 and 2012, the Italian financial police (*Guardia di Finanza*) carried out a total of 23 investigations of beneficiaries whose projects in the Calabria region were funded by the structural funds in the 2000–2006 programme as a result of thorough analyses started by OLAF in 2010.⁶¹⁶ The “*Magna Grecia*” operation found irregularities in 18 cases, i.e., from projects valued at over EUR 23.5 million, with almost 16 million worth of projects irregular. In addition, 30 persons, including 4 state officials, were subject to criminal prosecution due to fraud, forgery of public and private documents, misuse of public funds, use of false accounts or destroying accounting documents and money laundering.⁶¹⁷

What is the situation in Croatia? The unusual route the criminal justice grant protection has taken there is shown below. In fact, the first to be protected were the EU subventions, and it was only with the most recent amendments of the Criminal Code that the national grants were protected in the same way.⁶¹⁸ Many people deal with numerous state grants and various subsidies almost on a daily basis. For instance, subsidies in scientific research and higher education participate in the costs of full-time students' education at public universities in the Republic of Croatia;⁶¹⁹ they financially support the printing of scientific books or higher education textbooks.⁶²⁰ According to some information, the Ministry of Science, Education and Sport pays about 150 million HRK annually for scientific research projects; that amount is estimated to increase by at least 10% annually.⁶²¹ The jurisdiction of the Ministry of Science, Education and Sport also refers to the distribution of financial resources for co-financing sports programmes of amateur sports and sports recreation incent-

⁶¹⁵ The Report to the European Parliament and the Council: The Protection of the European Union's Financial Interests – Fight against Fraud, 2012 Annual Report, 30; https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/pif_report_2012_en.pdf [18/07/2018].

⁶¹⁶ *Idem*, 28.

⁶¹⁷ *Idem*.

⁶¹⁸ Domestic state grants were to a certain extent protected until then as well, by other criminal offences, especially by fraud per Article 224 of the CC97.

⁶¹⁹ Article 86, para. 4 of the Scientific Activity and Higher Education Act, Official Gazette No. 123/03, 105/04, 174/04, 2/07 – Decision of the Constitutional Court of the Republic of Croatia, 46/07, 45/09, 63/11, 94/13.

⁶²⁰ Article 108, para. 4 of the Scientific Activity and Higher Education Act.

⁶²¹ Action Plan to Foster Investments, p. 11, Ministry of Science, Education and Sport, 13/11/2013.

ives.⁶²² Subsidising solar power plants is often an object of contradicting data. They range from decidedly positive (some positive effects include: “encouraging construction of production plants, new employment, directing 0.01 HRK/kWh into local communities, contributing to the energy balance . . . , implementing an environmental project, direct capital short-term investments, helping economic recovery”)⁶²³ to the view that “solar field subsidies are a great prank”.⁶²⁴ Changes in the subsidy determining policies may have a huge impact on the existence of certain entrepreneurs.⁶²⁵ The awareness of the importance of subsidies, however, does not seem to be (sufficiently) developed yet, although the subsidies are, in the broadest (economic) sense of the word, a significant item of every state budget,⁶²⁶ and of the EU budget. They are thus powerful tools of not only economic, but political influence as well.⁶²⁷

4.1 Historical Development

Article 224b of the Act on Amendments of the Criminal Code of 3rd October 2007⁶²⁸ for special cases of fraud causing damage to the European Union's financial interests and Article 292a on the abuse of power related to the European Union's funds has provided first-time protection of the EU's financial interests in the Republic of Cro-

⁶²² Article 75, para. 1.1 of the Sports Act, Official Gazette No. 71/06, 124/10, 124/11, 86/12, and 94/13.

⁶²³ Jerkić 2012.

⁶²⁴ Idem.

⁶²⁵ “Due to the low purchase price of milk, in the past 6 months as many as 2,800 Croatian milk producers with about 30 thousand cow were ruined! Igor Rešetar, the president of the Croatian Milk Producers’ Association Union, claims that the state in this unfavourable situation, despite the promises by the respective minister Tihomir Jakovina, does nothing to stop that negative trend. He is also not very optimistic about the other half of the year, because the purchase model of EU5 is “set in stone” at least until September – and the price of HRK 2.43, negotiated in February, is lowered by HRK 0.06. Rešetar says that trouble is brewing in the country, but not because, as Jakovina claims, the farmers are incompetent. He asks the Minister about the grants he promised by late June, and cheaper production material, fuel and seeds, and farm legalisation, and cheaper loans ...?” *Rak Šajn* 2012.

⁶²⁶ Can someone who received foster compensation in accordance with Article 37 of the Foster Care Act, (Official Gazette No. 90/11, 78/12), knowing that the *beneficiary compensation* is the compensation for room and board and other needs of the fostered beneficiary (Article 2 item 9) and who spent said compensation on alcohol and gambling, be prosecuted for the criminal offence of subsidy fraud (of course, if all requirements for a criminal offence are met as *condicio sine qua non*)?

⁶²⁷ If it does not refer to social subsidies as a source of mere existence.

⁶²⁸ Official Gazette No. 110/07. For more details on the critique of implementation novel see *Durđević* 2007, 962.

atia.⁶²⁹ As early as in 1976, the Act on Preventing Economic Crimes, proposed by Tiedemann, introduced subsidy fraud (§ 264; *Subventionsbetrug*),⁶³⁰ as a special form of fraud in Germany.⁶³¹ Protecting the Union's financial interests has been the focus of interest in Austria since the mid-1990s.⁶³² With the Act on Amendments of the Criminal Code of 15 October 2008, Article 292a was deleted, while Article 224b, as well as the title above it, were completely amended and the title was changed to Fraud causing damage to the European communities.⁶³³ Article 224b, paras. 1 and 2, defines criminal law protection of the EU budget expenditures in such a way that the perpetrator of that crime is anyone who uses or presents untruthful, false or incomplete statements or documents; or fails to meet a special requirement on providing data in order to unlawfully obtain or maintain the funds from the EC's general budget, the budgets managed by the EC or from those managed on their behalf; or anyone who uses such funds contrary to their originally approved purpose. Para. 3 defines the criminal justice system treatment of the EU budget's revenue in such a way that the same punishment (from 6 months to 5 years) applies to those who use or present untruthful, false or incomplete statements or documents; or fail to meet a special requirement on providing data; or misuse lawfully acquired profit in order to unlawfully reduce the funds from the EC's general budget, the budgets managed by the EC or from those managed on their behalf.

The *new* Criminal Code places the subsidy fraud among the criminal offences against economy. Due to frequent criticisms claiming that criminal law treatment of the European Union's financial interests is favoured over national financial interests,⁶³⁴

⁶²⁹ For more details on the so-called sugar affair, see *Novoselec* 2009, 124. See *Novoselec* in *Durđević* 2006, 20.

⁶³⁰ *Wattenberg* in *Achenbach & Ransiek* 2013, 412. The paper was expanded in 1998 (*EG-FinanzschutzG*) with respect to subsidies that are not required for economic needs and for all forms of the offence (excluding no. 4) light-mindedness was introduced, whereby punishability was substantially broadened. *Idem*.

⁶³¹ The reason was the awareness that the incrimination of classic fraud was not enough to combat subsidy fraud, which refers to deceiving competent bodies in order to get a subsidy to which the perpetrator is not entitled, but also when there is no error on the part of the subsidy grantor (when the grantor and beneficiary act per arrangement). For more details: *Novoselec* 2009, 120.

⁶³² *Kert* in *Durđević* 2006, 24.

⁶³³ Official Gazette No. 152/08. For the novel critique, see *Durđević* 2010, 772-773. However, the Report on Meeting Obligations, Chapter 32 Financial Monitoring, Zagreb, June 2009, states that Article 224b of the CC is completely harmonised with Article 1 of the PIF Convention, regarding both expenditures and revenue of the EC's budget.

⁶³⁴ For example, *Turković et al.* 2013, 331. However, are there grounds for equalising fraud against national budgets with those causing damage to the EU financial interests? Especially when the following is taken into account: A fraud causing damage to the EU financial interests is not exactly a criminal offence against economy, rather a crime

i.e., that the EU budget has more protection than the national budget, the perpetrator, in accordance with Article 258, paras. 1 and 2 is a person who, in order to obtain state grant for himself or other person, provides to the grantor of state grant false or incomplete data about the facts relevant to obtaining grant, or fails to notify the grantor of state grant of the changes relevant to obtaining grant, or who uses the state grant funds contrary to their intended use. Para. 5 equalises subsidies and aid granted from the European Union funds to state grants. The aggravated form of the offence is prescribed by para. 3 and is considered to have been committed if the perpetrator acted to obtain a substantial state grant or if substantial state grants have been used. Para. 4 prescribes, modelled after the German § 264, para. 5, the case of voluntary withdrawal for which optional acquittal is possible.⁶³⁵

The beginnings of criminal law treatment of the European Community's financial interest date back to the 1960s and were two-fold from the very beginning: in the justice systems of the member states and the justice system of the European Community.⁶³⁶ Namely, in 1964 a task force was founded consisting of member states' government representatives to harmonise criminal law in certain areas focussed on preventing fraud caused by the EEC's legislation gaps, and especially by fraud causing damage to the EEC's budget.⁶³⁷ The research carried out during the 1990s (one by the Commission at its own initiative, the other known as the Delmas-Marty Report) confirmed claims on the transnational and organised crime activities in that area. Organised crime took advantage not only of the gaps in law in the EC legislation, but also of those caused by the differences among the national legislations.⁶³⁸

against a specially protected interest which is the source for building a supranational entity's repressive system.

⁶³⁵ See *Durđević* 2010, 780; *Novoselec* 2007, 325.

⁶³⁶ The protection of financial interests first entered into the Community's primary law with the 1992 Treaty on European Union from Maastricht, when Article 209a regulated the assimilation principle postulated by the European Court of Justice in the case *Commission v. Greece*. *Durđević* 2007, 925. In fact, in the 21 September 1999 judgement, the Court established, for the first time, the obligation by member states to protect the financial funds of the Community in the same way and under the same conditions as their own financial funds. It requested from the member states to extend their internal criminal justice to the European Community Finance Protection, implement the assimilation principle and establish a legal standard according to which sanctions protecting the Community's finances must be efficient, proportional and deterring, and criminal prosecution must be equally efficient as for the criminal offences causing damage to national interests. *Idem*. See *Killmann & Schröder* in Sieber et al. 2011, 284.

⁶³⁷ *Op. cit.* *Durđević* 2007, 926. Its operations were stopped in 1966 due to France's objecting criminal prosecution and penal sanctions in another member state. The new task force worked in 1972 on a project concerning the Euro crimes. *Idem*.

⁶³⁸ *Idem*, 927. The first comprehensive comparative study about criminal law protection of the EU's financial interests was carried out within the *Corpus iuris* project, a European criminal code model for the of the EU financial interests. *Op. cit.* *Idem*, 938.

In December 1994, the Council adopted a decision on drafting a legal instrument to protect the EU's financial interests through national criminal law pursuant to the joint action of the United Kingdom from March 1994 and the Convention Draft made by the Commission in June 1994.⁶³⁹ On 27 July 1995, all member states of the Union signed the Convention on the protection of the EC's financial interests that entered into force on 17 October 2002.⁶⁴⁰ The Convention is known under its abbreviated French name *La Convention relative à la protection des intérêts financiers des Communautés européennes: PIF*.⁶⁴¹ Since numerous misuses were discovered causing damage to the Union's budget, committed by both corrupted officers of the organisation and member states' public officials with financial powers regarding the EU budget, work on adopting two normative anti-corruption instruments began. The first was the protocol to the Convention on the protection of the European Union financial interests, followed by the Convention on combating corruption, which included European Union's officers or the officers of the European Union member states.⁶⁴²

In 2012, the Commission submitted to the European Parliament and the Council a proposal for a directive on criminal law protection of the EU's financial interests.⁶⁴³ The proposal included initiatives for further harmonisation of criminal offences and sanction levels within substantive criminal law for the protection of the EU's finan-

⁶³⁹ Op. cit. *idem*.

⁶⁴⁰ Convention on the protection of the EC's financial interests (PIF Convention), OJ C 316 of 27 November 1995, p. 49–57.

⁶⁴¹ The subject of the PIF Convention includes the member states' obligations regarding fraud protection, while other criminal activities, such as corruption, money laundering or crimes of legal entities, which also damage or endanger the Community's budget funds, are covered by two protocols: the Protocol on Corruption Among National and European Officials from 1996 and the Protocol on Criminal Liability of Legal Persons, Asset Confiscation and Money Laundering from 1997. In 1996, a third additional Protocol about Interpreting the Convention on the Protection of the EC's Financial Interests via Previous Decisions by the EC's European Court of Justice was adopted. *Durđević* 2007, 928–929.

⁶⁴² Op. cit. *Derenčinović* 2001, 150–151.

⁶⁴³ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363 final, 2012/0193 (COD). The Report on the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM(2012)0363-C7-0192/2012-2012/0193 (COD)) of the Budget Monitoring Board and Civil Liberties, Judicial System and Internal Affairs Board, states that in order to protect the Union's financial interests, a mutual definition of fraud is required which covers dishonest behaviour regarding expenditures, revenue, assets and liabilities causing damage to the Union's budget, including debt-incurring and loan-providing activities.

cial interests.⁶⁴⁴ As previously noted, in July 2017 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law was finally adopted.

In the Treaty on European Union and the Treaty on the Functioning of the European Union 2010/C 83/01, Chapter 6 is entitled "Fight against Fraud" and Article 325 defines the duty of the Union and all member states regarding the fight against fraud and all other unlawful activities directed against the Union's financial interests by implementing measures from this Article, which provides efficient protection in member states and in all institutions, bodies, offices and agencies of the Union. In order to combat fraud that impacts upon the Union's financial interests, member states should implement the same measures they take to prevent fraud directed against their own financial interests. Without prejudice to the other provisions of the Treaty, the Article 325 prescribes that member states should coordinate their activities directed towards the protection of the Union's financial interests against fraud. With the help of the Commission, they organise close and regular cooperation among competent bodies. In order to achieve efficient and equal protection in member states and in all institutions, bodies, offices and agencies of the Union, the European Parliament and the Council, deciding pursuant to regular legislative procedure and consulting with the Court of Auditors, adopt the required measures to combat and fight fraud directed against the Union's financial interests. In cooperation with member states, the Commission submits an annual report on the executed measures against fraud to the European Parliament and the Council.

The concept of EU fraud in scientific literature includes all criminal conduct which causes damage to the EU budget. There are two principal types of EU fraud, depending on whether the affected value is the budget's revenue or expenditure: evasion of customs duties, taxes and other charges, on the one hand, and subsidy fraud, which stands for unlawful appropriation of expenditures, i.e., unlawful appropriation of various types of subsidies, subventions, incentives, grants, premiums and other types of the EU budget expenditures, on other.⁶⁴⁵ The definition of fraud falling within the

⁶⁴⁴ Report to the European Parliament and the Council: The Protection of the European Union's Financial Interests – Fight against Fraud, 2012 Annual Report, 19. Those initiatives include: a broad definition of criminal offences – fraud, corruption, money laundering – based on the PIF Convention and the accompanying protocols; harmonising definitions of additional criminal offences (dishonest conduct of public procurement tenders, forbidden use of funds contrary to the approved purpose); setting up rules on the minimum prison sentence for particularly severe criminal offences, based on thresholds that will ensure the proportionality of the measure; harmonising deadlines within which investigations and criminal prosecution must be conducted and court decisions reached; defining accompanying measures for the protection of the EU financial interest by means of criminal justice, including rules on competence and liability of legal persons. *Idem*.

⁶⁴⁵ *Durđević* 2003, 266–267.

scope of Directive from 2017 covers fraudulent conduct with respect to revenues, expenditure and assets at the expense of the general budget of the European Union, including financial operations such as borrowing and lending activities.⁶⁴⁶ Due to Art 3 para. 2 of the Directive, fraud affecting the Union's financial interests (a) in respect of non-procurement-related expenditure shall be any act or omission relating to: (1) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (2) non-disclosure of information in violation of a specific obligation, with the same effect; or (3) the misapplication of such funds or assets for purposes other than those for which they were originally granted. In addition, in respect of procurement-related expenditure, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, fraud shall be any act or omission relating to: (1) the use or presentation of false, incorrect or incomplete statements or documents, the effect of which is the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (2) non-disclosure of information in violation of a specific obligation, with the same effect; or (3) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests. Furthermore, fraud affecting the Union's financial interests in respect of revenue other than revenue arising from VAT own resources referred to in point (d) shall be any act or omission relating to (1) the use or presentation of false, incorrect or incomplete statements or documents, the effect of which is the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf; (2) non-disclosure of information in violation of a specific obligation, with the same effect; or (3) misapplication of a legally obtained benefit, with the same effect. Finally, in respect of revenue arising from VAT's own resources, fraud shall be any act or omission in cross-border fraudulent schemes in relation to: (1) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; (2) non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; or (3) the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or

⁶⁴⁶ OJ L 198/29. The notion of serious offences against the common system of value added tax as established by Council Directive 2006/112/EC refers to the most serious forms of VAT fraud, in particular carousel fraud, VAT fraud through missing traders, and VAT fraud committed within a criminal organisation, which create serious threats to the common VAT system and thus to the Union budget. Offences against the common VAT system should be considered to be serious where they are connected with the territory of two or more member states, result from a fraudulent scheme whereby those offences are committed in a structured way with the aim of taking undue advantage of the common VAT system and the total damage caused by the offences is at least EUR 10,000,000. *Ibid.*

wrongful creation of rights to VAT refunds. Other criminal offences affecting the Union's financial interests are money laundering,⁶⁴⁷ passive and active corruption and misappropriation. For the purposes of the Directive, passive corruption is the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. A special notion of active corruption, prescribed by Article 4 Para. 2(b) provides the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. Misappropriation, for the purposes of the Directive means the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests.

4.2 Criminological Significance

Review and analysis of the statistical reports of the Croatian Bureau of Statistics have shown an absolute absence of data on this criminal offence from 2007 to 2012.⁶⁴⁸ County courts in Zagreb, Split, Rijeka and Osijek, which have original jurisdiction for prosecution, pursuant to Article 19c of the Criminal Procedure Code,⁶⁴⁹ stated that they do not have any completed procedures with a binding judgement for the criminal offence listed in Article 224b of the CC. What preliminary conclusion could be reached based on this data (or the absence thereof)? This is an offence that has not taken hold in the Croatian court practice, while the police and state prosecutors are not sufficiently trained to prosecute this offence. Thus in the event of subsidy misuse, administrative procedures are preferred over criminal prosecution.⁶⁵⁰

It must be noted that it has to date been common to punish behaviour that can be subsumed within subsidy fraud; such behaviours were classified as fraud (attempted

⁶⁴⁷ As described in Art. 1(3) of Directive (EU) 2015/849 involving property derived from the criminal offences covered by this Directive.

⁶⁴⁸ For example, Police crime statistics of Germany for 2009 reveal 625 criminal offences of subsidy fraud with a total loss of EUR 37,765,895, and Wattenberg comments that the dark figure is much higher. *Wattenberg* in Achenbach & Ransiek 2012, 414.

⁶⁴⁹ Criminal Procedure Code, Official Gazette No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13.

⁶⁵⁰ Whether these assumptions are correct remains to be seen at the end of this chapter.

fraud). For instance, according to the judgement of the Municipal Criminal Court in Zagreb KO – 19/2011 of 13 May 2011, Ž.Č. was convicted for attempted fraud per Article 224, para. 1 (and falsifying documents listed in Article 311/1 and 50/2). The accused obtained (in an unspecified manner) a false certificate from the Zagreb Tax Administration, suggesting that he had paid the tax liability of his small enterprise “S”, in full, although he knew his tax debt amounted to HRK 30,997.87. That certificate, along with other documents and requests for approving grants for his small enterprise amounting to HRK 20,000, were delivered to the City Office for Economy, Labour and Entrepreneurship of the Department for Fostering Development of Trades and Crafts, and Small and Medium Enterprises. Since the officers doubted the authenticity of the certificate and forwarded it to the Tax Administration for assessment, which in turn determined it was a falsification, the grant was not approved.⁶⁵¹

In 2013, only 6 adults were reported for subsidy fraud in Croatia, one accused and none convicted. In 2014, only 10 adult persons were reported for subsidy fraud, 4 were accused and 3 were convicted for imprisonment of 6–12 months (one suspended). In 2015, 11 adult persons were reported, one accused and one convicted. Finally, in 2016 the number of reported person increased significantly with five adults accused and convicted for subsidy fraud.⁶⁵²

The commission’s annual report to the European Parliament and the Council from 2012 listed an entire set of phenomenological data regarding EU budget-related fraud: the number of irregularities reported as fraud (slightly) increased; on average, 2 years and 7 months passed from fraudulent activity until its discovery (on average, 7 or 8 months passed until the irregularities were reported to the Commission). Most fraud was related to cohesion policy: 50% of the total offences and 63% of the amount involved. The discovered *modus operandi* did not significantly differ from that of previous years; the most frequent schemes included the use of false or falsified documents or statements and misuse of funds. Only a few irregularities reported as fraud were related to corruption cases, specifically in cohesion policy (a total of 9 in Italy, Cyprus, Estonia and Spain), but they are on the rise, and half of the irregularities were discovered either by anti-fraud bodies or during criminal investigations or other external controls. The other half were discovered *via* the administrative control

⁶⁵¹ In this decision, the court explains (which is normally rare) why it believes the defendant actually committed two criminal offences: “Since this is a situation in which the defendant fulfilled the elements of two special criminal offences, namely, falsifying a document and attempted fraud, this cannot be deemed as fictitious gain based on consumption, because such a situation is present when one criminal offence is contained in the other, which is not the case here. Here we have two criminal offences that do not make up for one consequence in a legal sense, i.e., they are not a natural and legal unity, hence the legal element of one criminal offence does not include the other legal element in its totality.”

⁶⁵² Statistical Reports No. 1528/2013, 1551/2014, 1576/2015, 1605/2016.

system established by the rules governing the private sector.⁶⁵³ A total of 2% of the reported cases in 2012 can be considered complex (a criminal offence lasting for a longer period and committed by at least three subjects), 40% simple (one criminal offence committed by one person), while 58% can be considered moderately complex (one offence committed by more persons, or lasting longer but committed by 1 subject). The rates of fraud discovery continue to differ among the member states. Italy, Poland, Romania, Denmark and Germany discovered and reported the highest number of fraud (between 109 and 51). In relation to the amounts involved, Italy, Romania and the Czech Republic reported the largest cases of fraud (between EUR 119 and 54 million). Greece, Luxembourg, Malta and Finland did not discover or report any cases of fraud. Belgium, France, Cyprus, the Netherlands and Austria reported very few cases (less than three for all expenditure areas). For the year 2016, it was noted that public procurement, which remains the largest channel of public spending, is an attractive marketplace for fraudsters, who use corruption and offshore accounts to facilitate fraud.⁶⁵⁴ Many procurement fraud cases are transnational, as the new fraud scenarios often involve a contracting authority from one Member State and bidders from several other member states who subcontract their works to companies in different countries.⁶⁵⁵

4.3 Objective Features

Within the objective elements, we will first explain the notion of state grants, subsidies and aid granted from the European Union funds, and then the forms of perpetration of this criminal offence.

The previous question that needs to be answered is: which legal asset is protected by this criminal offence i.e., what is the protective purpose of this rule?⁶⁵⁶ The prevailing opinion is that these are public assets and economic-political goals, therefore

⁶⁵³ It indicates the importance of external controls and the need for strict coordination with the governing and auditing bodies and leads to the conclusion that cooperation has improved significantly. Within fraud investigations or criminal justice investigations, cases of potential fraud regarding much higher amounts are discovered, which indicates the capability of the respective bodies to direct their efforts to their activities, but also their greater investigation authorisations. *Ibid.* 10.

⁶⁵⁴ Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests – Fight against fraud 2016 Annual Report, 32; https://ec.europa.eu/anti-fraud/sites/antifraud/files/1_act_part1_v2_en.pdf [18/07/2018].

⁶⁵⁵ *Idem.*

⁶⁵⁶ This was a major issue in German criminal law theory.

subsidy fraud is most frequently classified as a criminal offence of abstract endangerment (*abstraktes Gefährdungsdelikt*).⁶⁵⁷ Since this criminal offence is not characterised by damage and does not need to be proved, subsidy fraud is a crime of abstract endangerment. If material damage should nevertheless occur, since concurrence of subsidy fraud with fraud or fraud in economic business is fictitious, it will only be a case of subsidy fraud.⁶⁵⁸

The Criminal Code does not define state grants, or subsidies and aid granted from the European Union funds. Before determining them, we need to analyse the concepts of the state budget⁶⁵⁹ and the European Union budget, because without understanding those concepts, there can be no clear insight into the criminal offence of subsidy fraud.

4.3.1 State Budget, European Union Budget and European Union Funds

The state budget estimates revenue and income and establishes the expenditure and expenses of a country for one year in conformity with the law. It is adopted by the Croatian parliament.⁶⁶⁰ The state budget has a number of functions that can be grouped as follows: political functions (the result of the government's political

⁶⁵⁷ *Wattenberg* in Achenbach & Ransiek 2012, 417. See *Turković et al.* who state that subsidy fraud does not affect only the assets (budget), but the very institution of subsidy as an instrument of impact on the economy (whether national or EU). *Turković et al.* 2013, 331. See *Novoselec* who claims that injustice is not exhausted in damage or in the endangerment of state assets. This misuse affects the institution of subsidy as an instrument of state impact on the economy, or the freedom of planning and disposition of the subsidy grantor, thus subsidy fraud is an economic crime with a broader concept of legal asset. *Novoselec* 2009, 120.

⁶⁵⁸ *Turković et al.* 2013, 331.

⁶⁵⁹ The Constitution of the Republic of Croatia defines in Article 90 that state revenue and expenditure is determined by the state budget and that the Croatian parliament adopts the state budget by the majority of votes of all representatives. The budget and the final account are proposed by the Government of the Republic of Croatia (Article 112 of the Constitution of the Republic of Croatia).

⁶⁶⁰ Budget Act, Official Gazette 87/08, 136/12, 15/15, Article 3 item 5. Adoption of the state budget is considered one of the most important financial and political events of the year. See <http://www.mfin.hr/hr/proracun> [19/04/2017]. Legal literature does not provide a unique budget definition; some authors highlight law features of the budget in their definitions, while others opt for a financial or some other feature. However, there are common budget features in modern countries: the budget is a public act; it consists of numerical comparing of public revenue and expenditures; it is oriented towards a future period and has a plan, meaning it must be balanced in the short-term and in accordance with the financial plan. Finally, the budget is a numerically-expressed programme of state activities and measures for their implementation. Op. cit. according to *Jelčić et al.* 2008, 699. See *Šimović* in *Jelčić et al.* 2004, 298.

programme), legal functions, financial functions, economic and social functions.⁶⁶¹ The budget consists of general and special parts,⁶⁶² while it also has a development programme plan at the local and regional self-government unit level.⁶⁶³ The general part of the budget comprises the profit and loss account and financing account. The special part of the budget consists of the expenditure and expense plan of the budget beneficiaries, presented by types, and classified into programmes consisting of activities and projects. Pursuant to Article 18 of the Budget Act, within the gain and loss account, revenue comprises: tax revenue, contributions for compulsory insurance, aids, asset revenue, tariff and fee revenue, other revenue and revenue from selling non-financial assets. Expenditure includes: expenditures for employees, material expenditures, financial expenditures, subsidies, aid, fees for the citizens and households based on insurance and other fees, other expenditures and expenditures for purchasing non-financial assets. The principles pursuant to which the budget is adopted and implemented are: the principle of unity and accuracy of the budget, duration of one year, balance, unit of calculation, universality, specification, good financial management and transparency (Article 4).⁶⁶⁴ The principle of unity means that all revenue and expenditures of a country must be contained within one budget. The principle of completeness, in a formal sense, means that all public revenue and expenses are entered into the state budget, while, in the material sense, it means that public revenue and expenses may be presented in the budget in two ways, namely, as net amount (net budget) or as gross amount (gross budget).⁶⁶⁵ The principle of clarity refers to a strict order of classification (systematic and in detail) and the clarity of budget revenue and expenses.⁶⁶⁶ The principle of accuracy requires that revenue and expenditures in the budget as the country's economic-financial plan should be determined as accurately as possible.⁶⁶⁷ The principle of preliminary approval means

⁶⁶¹ *Šimović* 2008, 700–701.

⁶⁶² Article 16 of the Budget Act. The development programme plan is a document of the local and regional self-government unit prepared for a 3-year period, containing objectives and priorities of the local and regional self-government unit connected with the programme and organisational budget classification. *Idem*.

⁶⁶³ The local and regional self-government unit budget is defined by Article 46 as an act which estimates revenue and income and establishes expenditures and expenses of the local and regional self-government unit for one year, in accordance with the law and the decision based on the law. It is adopted by its representative body.

⁶⁶⁴ *Šimović* distinguishes between two types of classic budget principles: formal-static and material-dynamic. The formal-static principles refer to the content and form of the budget: the principles of unity, completeness and clarity. Dynamic-material principles relate to the drawing up and execution of the budget: the principles of accuracy, prior approval, specialisation, publicity, balance and periodicity. *Šimović* 2008, 686–702.

⁶⁶⁵ *Ibid.* 703.

⁶⁶⁶ *Idem*.

⁶⁶⁷ *Idem*, 704.

that the budget must be adopted before the beginning of the fiscal year to which it pertains. The principle of balance means that the final amounts of revenue and expenditure of the budget plan must be balanced.⁶⁶⁸ The principle of specialisation means that the budget funds may be spent only in the defined amount, for the defined purposes and within the defined period of time (quantitative, qualitative and temporal budget specialisation).⁶⁶⁹

The principle of being public means that the budget discussions in the parliament must be public and that the budget and all the accompanying documents must be published and presented to the general public.⁶⁷⁰ The last principle, that of periodicity, means that the budget is adopted for a certain period (one year).

The EU budget is a financial instrument in which all revenue and expenditures of the Union are presented,⁶⁷¹ it is part of a long-term spending plan called a “financial framework” which covers a seven-year period.⁶⁷² The Council, making decisions based on a special legislative procedure, adopts a regulation which defines a multi-annual financial framework. The Council decides unilaterally following a previous agreement by the European Parliament, which is obtained by the majority of its members’ votes.⁶⁷³ The financial framework defines the annual caps of the approved budget funds for liabilities per the expense categories and annual caps of the approved budget funds for payments.⁶⁷⁴ The current framework refers to the period

⁶⁶⁸ Idem.

⁶⁶⁹ Idem, 706.

⁶⁷⁰ Idem.

⁶⁷¹ *Šimović* 2008, 722. The European Union budget resulted from the 1965 Merger Treaty which was stipulated by all three European communities: the European Economic Community, the European Community for Coal and Steel and the European Community for Atomic Energy. It entered into force on 1 July 1967. Idem. The issue of protection of the EU financial interests is conditioned by the so-called own revenue system, according to which the EU, in order to establish financial anatomy, finances itself completely from its own funds (agricultural fees, import duty, part of value added tax and revenue based on member states’ GDP), and not from the member states’ funds. *Durđević* 2007, 922. For more details on EU the budget, *Durđević* 2003, 241–260.

⁶⁷² The multi-annual financial framework is regulated by Article 312 of the Treaty on European Union. It ensures that the Union’s expenses are developed in a neat way and within its own funds. It is determined for a period of at least 5 years.

⁶⁷³ Article 312, para. 2.

⁶⁷⁴ Idem. Para. 3 Expenses categories, whose number is limited, mostly correspond to the Union’s main areas of activity. If, until the end of the previous financial framework, the Council’s regulation on establishing the new financial framework is not adopted, upper limits and other provisions regarding the previous year of that framework shall continue to apply until that act is not adopted.

between 2014 and 2020.⁶⁷⁵ Compared to the member states' budgets, the European Union budget has the following characteristics: the revenue and expenditure parts of the European Union budget differ from the states' national budgets, it is relatively small compared to the size of the economy it covers, it is more strictly and soundly regulated and it excludes indebteding and crediting of the budget beneficiaries.⁶⁷⁶ The fundamental principles of the European Union budget refer to an annual period, budget balance, unity, universality, budget specification, budget unit, budget accuracy, transparency and reasonable financial management.⁶⁷⁷ The European Parliament and the Council determine the annual Union budget as follows: Each institution (except the European Central Bank) prepares estimates of its expenses by 1 July for the following financial year, and then the Commission consolidates those estimates in the budget draft.⁶⁷⁸ The Commission delivers to the European Parliament and the Council a proposal containing the budget draft no later than 1 September of the year preceding the year for that budget,⁶⁷⁹ and the Council adopts its own opinion on the budget draft and forwards it to the European Parliament no later than 1 October of the year preceding the year for that budget. The Council also notifies the European Parliament of adoption grounds (Article 314 of the Treaty on European Union). The

⁶⁷⁵ The first financial perspective was introduced in 1988 for the period until 1992 (Delors I Package), the new agreement was concluded for the 1993–1999 period (Delors II Package), an inter-institutional agreement covered the 2000–2006 period (Agenda 2000), *Šimović* 2008, 727. Followed by the 2007–2013 financial framework.

⁶⁷⁶ *Šimović* 2008, 722. On division of budget expenditures in compulsory and non-compulsory expenditures and administrative and operative, see *Durđević* 2003, 252–254.

⁶⁷⁷ *Šimović* 2008, 723. The principle of annual periodicity means that the budget refers to one budget year, lasting from 1st January to 31st December. The principle of budget balance requires a balance between budget revenue and budget expenditure. Incurring of debts to cover budget deficit is not permitted. Budget surplus is carried on into the next year as revenue, and budget deficit as expenditure. The principle of unity requires that all revenue and expenditure are consolidated within a single budget document. The principle of universality contains two rules: according to one – all revenue is untied and cannot be used to finance a determined expenditure type; according to the other – all revenue and expenditures are entered into the budget without mutual offset. The principle of budget specification requires that all budget funds must have a determined purpose and intended use, which must be indicated by budget nomenclature. The principle of calculation unit establishes that the monetary unit for presenting budget revenue and expenditures shall be in euros. The principle of budget accuracy requires revenue and expenditure for a particular year to be entered into the budget as accurately as possible. The principle of transparency requires that revenue is grouped by sources and expenditures by intended use for certain activities. The principle of sound financial management requires the use of budget funds pursuant to the principles of cost-effectiveness, usefulness and efficiency. *Idem*.

⁶⁷⁸ The budget draft contains revenue estimate and expenditure estimate.

⁶⁷⁹ The Commission may, until the summoning of the Conciliation Board, amend the budget draft.

European Parliament can proceed in 3 ways 42 days after such notification: if it approves the Council's opinion, the budget is adopted; if it reaches no decision, the budget is considered adopted, and if it adopts amendments by the majority of its members, the amended draft is forwarded to the Council and the Commission. The president of the European Parliament, in agreement with the president of the Council, convenes the Conciliation Board without delay. However, if the Council notifies the European Parliament within 10 days of forwarding the draft that it approved all its amendments, the Conciliation Board shall not convene.⁶⁸⁰ If within 21 days the Conciliation Board agrees on the mutual text, the European Parliament and the Council each have 14 days from the day of reaching that agreement to approve the mutual text.⁶⁸¹ If in that 14-day timeframe both the European Parliament and the Council approve the mutual text or fail to reach a decision, or if one of the institutions approves the mutual text, and the other does not reach any decision, the budget is deemed finally adopted pursuant to the mutual text. The Commission is to deliver the new budget draft if both the European Parliament (deciding by the majority of its members) and the Council reject the mutual text, or if one institution rejects the mutual text and the other does not reach any decision.

In the same way, the Commission shall deliver the new budget draft if the European Parliament, deciding by the majority of its members, rejects the mutual text, and the Council approves it (again, within the same 14-day timeframe). If the European Parliament approves the mutual text and the Council rejects it, the European Parliament may, within 14 days of the day the Council rejected it, and on the basis of a majority of its members and with the three fifths of the cast votes, decide to approve all or some amendments. If the amendment by the European Parliament is not confirmed, the opinion agreed upon by the Conciliation Board regarding the amending budget item is applied. On these grounds, the president of the European Parliament declares the budget finally adopted (Article 314, para. 9). The Commission is entrusted with budget execution, in cooperation with the member states and in accordance with the provisions adopted pursuant to Article 322 within the limits of the approved budget funds, whilst taking into account the principles of healthy financial management. Every year, the Commission submits to the European Parliament and the Council reports for the previous financial year regarding the budget execution, the financial report on the Union's assets and liabilities and the report on the Union's finances

⁶⁸⁰ Article 314, para. 4. The Conciliation Board consists of the members of the Council or their representatives and of an equal number of the European Parliament representatives. Its task is, by the qualified majority of the members of the Council or their representatives, and by the qualified majority of an equal number of the European Parliament representatives and by the majority of the European Parliament representatives, to reach an agreement on the text within 21 days from the day it was convened, pursuant to the European Parliament and the Council opinion.

⁶⁸¹ Article 314, para. 6. If the Conciliation Board does not reach an agreement on the mutual text within 21 days, the Commission shall send a new budget draft.

assessment based on the results achieved.⁶⁸² The European Parliament, deciding on the basis of the Council's recommendation, gives the Commission quittance regarding budget execution.⁶⁸³

The European Union budget is spent both inside and outside of the European Union.⁶⁸⁴ The European Union budget finances policies and activities in areas where all member states act jointly at the Union level, via funds (structural and investment). Structural funds are funds that finance projects corresponding to the priorities of cohesion policy, convergence (fostering economic development and employment in the least-developed member states through various forms of investments with the goal of raising them to the most-developed member states' level), regional competitiveness (economic and social changes, fostering innovations and entrepreneurship, investments) and the European international cooperation.⁶⁸⁵ Structural funds, which are also cohesion policy instruments, include: European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF), European Maritime and Fisheries Fund (EMFF) and European Agriculture Fund for Rural Development (EAFRD).⁶⁸⁶

⁶⁸² Article 318.

⁶⁸³ Article 319. Before giving quittance, the Council and the European Parliament take turns in examining accounts, the financial report and the Union's finances assessment report; the Court of Auditors' annual report, along with the responses of the institutions covered by the audit to the Court of Auditors' recommendations; declaration on guarantee and all required reports of the Court of Auditors.

⁶⁸⁴ The EU's policies and activities are: audio-visual policy; fight against fraud; customs policy; economic and monetary union; energy; information society; cultural policy; human rights; education; training and youth; entrepreneurship; agricultural policy; judicial system and internal affairs; traffic policy; budget; expansion of the EU; development; regional policy; fishery and nautical issues; food safety; trade policy; market competition; internal market; external relations; joint tax policy; joint external and security policy; employment and social issues; environmental protection; consumer protection; healthcare; science and research. <http://www.entereurope.hr/page.aspx?PageID=78>. [07/10/2013].

⁶⁸⁵ *Vela et al.* 2013, 1.

⁶⁸⁶ *Idem.* See <http://www.eu-projekti.info> [07/10/2013]. Within the joint agricultural policy and joint fishery policy, projects of investments in fishery and agriculture are financed from EMFF and EAFRD. The National Strategy on Combating Fraud to protect the European Union's financial interests in the Republic of Croatia for 2010–2012 states that structural funds in the 2000–2006 Financial Perspective are 4 funds whose intention is to ensure financial funds for the EU's poor regions, to better respond to the challenges of the EU single market. Structural funds include: guidance component of AGGF, ERDF, ESF and FIG. THE 2007–2013 FINANCIAL PERSPECTIVE considers only ERDF and ESF structural funds. Their objectives are: 1) convergence, 2) regional competition and employment and 3) European territorial cooperation. See *Killmann & Schröder* in Sieber et al. 2011, 285.

In the second half of 2013, Croatia had EUR 449.5 million available from the structural funds, and the 2014–2020 period envisages 8 billion EUR for Croatia, which is about 68.5% of the total national envelope value, whose total estimated value is EUR 11.7 billion.⁶⁸⁷ The Instrument for Pre-Accession Assistance (IPA) – a uniform pre-accession fund for 2007–2013 was particularly important for Croatia. It was adopted by Council Regulation No. 1085/2006, in the amount of EUR11,468 billion. It replaced the CARDS programme and the pre-accession programmes PHARE, ISPA and SAPARD. Its objective was to help the candidate-states and potential candidate states in their gradual harmonisation with the EU *acquis communautaire*, in preparation for the accession. It contained five components: 1) assistance in transition and building of institutions (IPA TAIB), 2) cross-border cooperation (IPA CBC), 3) regional development, 4) human resources development (IPA HRD) and 5) rural development (IPARD).⁶⁸⁸

Within the European Union, the following areas are the most funded: improving new skills and fostering companies to innovate and create new jobs; helping environmental protection and enhancing the quality of life by means of rural and regional development; building sound infrastructure such as roads, railways, bridges, electric and gas portable networks connecting the furthest parts of the EU; maintaining cultural diversity and pupil and student exchange; and providing emergency help during floods and earthquakes.⁶⁸⁹ The EU budget for 2013 amounted to EUR 150.9 billion (it comprises 1% of the total revenue generated by the member states annually).⁶⁹⁰ In 2013, the EU's budget was spent mostly for increasing the EU's competitiveness and enhancing the development of poor countries and regions (46.8%), 29.1% for market-related expenditures and direct grants which were no longer related to excess production, but ensured supply with uncontaminated food at reasonable prices and enabled the farmers to gain sufficient income from protecting the environment, and 10.7% for rural development, environment and fishery.⁶⁹¹

⁶⁸⁷ Idem.

⁶⁸⁸ National Strategy, 5.

⁶⁸⁹ Outside of the European Union, the Union has obligations towards third world countries, which includes fostering economic and social development, keeping peace and providing assistance to victims of disasters and conflicts. The Union is particularly active in three groups of countries: developing countries which have strong historical ties with the EU, especially the countries of Africa and of the Caribbean and Pacific area; growing economies along the eastern borders and the Mediterranean; and potential EU member states. http://europa.eu/pol/financ/index_hr.htm [24/09/2013].

⁶⁹⁰ http://europa.eu/pol/financ/index_hr.htm [24/09/2013].

⁶⁹¹ Idem.

Chart 5: How is EU money spent? Data for 2017⁶⁹²

4.3.2 Act of Perpetration

There are 3 forms of committing this offence: providing false and incomplete information concerning the facts on which the decision on a state grant depends, failing to notify the grantor of the state grant about the changes important for the decision on state grant, and using funds from the approved state grant contrary to their intended use. Thus two forms refer to an action and one to an omission.⁶⁹³

4.3.2.1 Providing False or Incomplete Information Concerning the Facts on which the Decision on State Grant Depends

It has already been said that the Criminal Code does not define the concept of state grants or subsidies. Therefore, to define those concepts, it was necessary to refer to

⁶⁹² The chart is taken from https://europa.eu/european-union/about-eu/money/expenditure_en [14/03/2018].

⁶⁹³ The PIF Convention in Article 1 para. 1 distinguishes fraud with respect to budget revenue and expenditures (however, the forms of criminal behaviour are the same). Fraud regarding budget revenue and expenditures refers to every intentional action or omission concerning the following: using or presenting false, inaccurate or incomplete statements or documents resulting in illicit gain; keeping funds from the EC's general budget or budget managed by the European Communities or on their behalf; not disclosing data contrary to special obligation; misuse of those funds, i.e., use contrary to their intended use. It was up to the member states to incorporate these deceitful behaviours into general criminal offence of fraud or introduce a new, special criminal offence to protect the EU's financial interests.

other acts, particularly the Budget Act and the State Grants Act.⁶⁹⁴ State grants are actual and potential expenditures or reduced revenue of the state granted by the grantor to the beneficiaries, which distort or could distort competition by giving preferential treatment to the state grant beneficiary, regardless of the state grant form, insofar as it can impact responsibilities taken internationally by the Republic of Croatia.⁶⁹⁵ State grant in agriculture and rural development is defined by Article 15 of the Agriculture Act.⁶⁹⁶ It is granted pursuant to the EU rules.⁶⁹⁷ Pursuant to the new Sea Fishery Act,⁶⁹⁸ fishery grants include: grants enabled within the structural policy pursuant to the adopted documents per Article 8 of the same act, state grants in accordance with Commission Regulation (EU) No. 1388/2014, Commission Regulation (EU) No. 717/2014 and the Guidelines for State aid in the fisheries and aquaculture sector (2015 / C 217/01).

The grantor of state grants/grants of a law value can be the central body of the state administration, local self-government units, regional self-government units, and any legal person granting or managing state grants.⁶⁹⁹

State grant beneficiaries are legal and natural persons who participate in the trade of goods and services and use some of the forms of state grant (Article 2, para. 2 of the State Grants Act).⁷⁰⁰ The PIF Convention has obliged the member states in Article

⁶⁹⁴ State Grants Act, Official Gazette No. 72/13, 141/13, 15/15. Pursuant to the State Grants Act Proposal, the final February 2014 Proposal defines a state grant as actual and potential expenditure or reduced revenue of the state granted by the grantor, which distorts or could distort competition by giving preferential treatment to a certain entrepreneur or certain good and/or service which impacts the trade between member states of the European Union, pursuant to Article 107 of the Treaty on the Functioning of the European Union.

⁶⁹⁵ Article 3 item 9 of the Budget Act. See Article 2 of the State Grants Act. Subventions are also a form of the state grant. Subventions are the most frequent form of supplementary financing of local units which do not have enough funds in their budgets. The aim of these subventions is to make the terms of local unit level financing consistent. They can be appropriations (conditioned, always granted for a specific use) and unallocated (non-conditioned or general – budget transfers given by one authority to another at its discretion). *Šimović* 2008, 721.

⁶⁹⁶ Agriculture Act, Official Gazette No. 30/15.

⁶⁹⁷ Agriculture was one of the key elements of the foundation of the EU, and today it represents an area where the majority of national sovereignty of member states has been transferred to the European level – member states have transferred all powers in the agricultural sector to the EU. That explains the fact that around half of the Union's annual budget is spent on agriculture. *Op. cit. Đurđević* 2003, 256.

⁶⁹⁸ Sea Fishery Act, Official Gazette No. 62/17, 130/17.

⁶⁹⁹ Article 2 of the State Grants Act.

⁷⁰⁰ With the broader concept of fund beneficiaries per Article 3 item 39 of the Budget Act, defined as legal and natural persons who are beneficiaries of budget funds pursuant to special rules, court decisions and contracts.

3 to define the criminal liability of the head of business (*Unternehmensleiter*), i.e., every person who is authorised to make decisions and control within the business activities and operations of subordinated persons who commit fraud causing damage to the EU's financial interests. Hence, criminal liability of the heads of business based on their personal involvement and based on their failure to perform monitoring or control (*culpa in vigilando*).⁷⁰¹ Liability of legal persons is provided in Article 6 of Directive from 2017 as well. Namely, it is prescribed that member states shall take the necessary measures to ensure that legal persons can be held liable for criminal offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on a power of representation of the legal person; an authority to take decisions on behalf of the legal person; or an authority to exercise control within the legal person.

State grants are also the object of regulation of the Treaty on the Functioning of the EU.⁷⁰² Pursuant to Article 107 (former Art. 87 of the TEC), each grant provided by a member state or via state funds in any form, which distorts or threatens to distort competition by providing preferential treatment to entrepreneurs or certain goods, is incompatible with the internal market insofar as it impacts the trade among the member states.⁷⁰³

⁷⁰¹ Op. cit. *Durđević* 2007, 935. The obligation of criminalising the responsibilities of the head of business differs from the obligation of establishing legal persons' responsibility, which is the object of the second Protocol of this Convention. Op. cit. *Idem*.

⁷⁰² The Decision on publishing rules on implementing state grants' rights, item 11, explicitly states that the concept of grants is not limited to subsidies, but also includes tax relief and public fund investments when a private investor is denied such privileges. Furthermore, it is irrelevant if the grant is granted by the state directly or a public administration body or a private entity which is founded or authorised by a state to manage grants. However, to deem a public grant a state grant, it has to provide preferential treatment to certain entrepreneurs or certain goods (the principle of selectivity), unlike general measures to which Article 87, para. 4 of the EC Treaty does not apply. Moreover, the grant must distort or threaten to distort the competition and must impact upon the trade among the member states.

⁷⁰³ *Liszt* 2012; <http://www.konkurencnopravo.eu/uploads/files/Liszt,%20Privatno-pravna%20provedba.pdf> [11/11/2013]. It is a "deliberately" abstract definition built on administrative and case law, and it comprises grants to entrepreneurs, but not to households, disabled persons, hospitals, schools and infrastructure. It does not include general measures (tax measures, social insurance, trade quotas, public procurement, technical standards), grants that meet Market Economy Investment Principle (MEIP), direct funding from the EU funds and grants approved by the supranational and multinational organisations, intended for defence and public works.

Table 14: Grants that are compatible or that can be considered compatible with the internal market pursuant to Article 107, paras. 2 and 3 of the TFEU

Grants compatible with the internal market	Grants considered compatible with the internal market
Aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned	Aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation
Aid to make good the damage caused by natural disasters or exceptional occurrences	Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State
Aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division	Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest
	Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest
	Any other categories of aid as may be specified by a decision of the Council on a proposal from the Commission

Monopoly over the control of the state grants is held by the European Commission, pursuant to the Article 108 of the TFEU. The issue whether a certain measure is a state grant or not was tackled by the case law of the Community's courts⁷⁰⁴ and the Commission (decisions).⁷⁰⁵ The Budget Act defines subsidies as current transfer of

⁷⁰⁴ For example, the EC Court's Decision in *Altmark* C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747, C-142/87, *Belgium v. Commission* (Tubemeuse), [1990] ECR I-959; case C-305/89, *Italy v. Commission* (Alfa Romeo), [1991] ECR I-1603, Case C-342/96, *Spain v. Commission*, [1999] ECR I-2459. *Idem*.

⁷⁰⁵ The Commission's notification concerning the application of Articles 87 and 88 of the EC Treaty in the sector of state grants in the form of guarantees (OJ C 155, 20/06/2008, p. 10) deals with circumstances under which state guarantees must be considered a state grant. It is important here to point out Article 108 (3) TFEU, i.e., the standstill clause

funds given to producers to foster production of certain products and the provision of services, and can be determined on the basis of the production level and/or the quantity of produced, sold or imported goods and services.⁷⁰⁶ In financial law and science, subsidies are broadly defined as state aid to entrepreneurs or natural persons (producers or consumers) for which the state does not receive any compensation in return. They can be direct (direct fiscal expense) or indirect (no direct fiscal expense, e.g., if one wants to expedite development of a business activity or development of a producer, and receives a low-interest rate loan).⁷⁰⁷ As for the reasons for introducing and granting subsidies, those of economic nature are primary.⁷⁰⁸ The total expenditure of the Republic of Croatia for 2013 is planned in the amount of HRK 123.6 billion, from which HRK 5.9 billion should have gone to subsidies. However, in the first 6 months, subsidy execution amounted to HRK 3.7 billion.⁷⁰⁹

Can relief, pursuant to the Employment Fostering Act,⁷¹⁰ be considered a state grant per Article 258? The answer to this is affirmative, even though it is an exemption from contribution obligation, obligation of calculation and payment of contributions onto the base pay according to the salary, i.e., according to the base pay for a month's work pursuant to special rules on contributions with two-year duration (Article 3, para. 1), whereby the notion of contribution refers to the contribution for compulsory insurance for the base pay i.e., salary for health insurance, health protection at work, employment and special contribution for employing persons with disabilities, if the employers pay such contribution.⁷¹¹ In fact, the very definition of the concept of state

which means a member state must not implement a measure which contains state grant without prior approval from the Commission. *Idem*.

⁷⁰⁶ Article 3 item 57 of the Budget Act.

⁷⁰⁷ *Op. cit.* Šimović 2008, 720–721. The producer who is the subsidy beneficiary lowers his production costs and increases competitiveness, while the consumer who is the subsidy beneficiary increases his disposable income. *Idem*.

⁷⁰⁸ Faster economic growth, higher employment rate, more efficient use of resources during market failures, increasing exports. Other reasons are of social nature: re-distribution of income to families with lower income. Šimović 2008, 721.

⁷⁰⁹ *Ministry of Finance* 2013, 3. The largest planned and executed expenditures are compensation to individuals and households based on insurance and other compensation (HRK 63.9 billion planned, 35.5 billion executed), expenditures for the employed (HRK 20.7 planned, 10.8 billion executed), financial expenditures (HRK 10 billion planned, 4.7 billion executed), material expenditures (HRK 8.7 billion planned, 3.8 billion executed), aid for abroad and within the general budget (HRK 6.7 billion planned, 2.3 billion executed), which places subsidies close to last.

⁷¹⁰ OG No. 57/12, 120/12, 16/17.

⁷¹¹ See *Liszt* who states that when defining the concept of a state grant, it is not the form of the grant that matters, but the effect it produces. Possible forms are: subsidies, favourable-term loans, state guarantees, tax relief, debt write-off, purchasing goods or services (special terms, selling real estate below market price, having shares in an

grant per Article 2 of the State Grants Act states that the state's reduced revenue can also be considered a state grant.

What about concessions? Can concessions also be considered state grants per Article 258? A concession, pursuant to Article 3 of the Concession Act, is the right acquired by a contract. There are several types of concession: concession for the economic use of common or public property, concession for works and services. Concessions that enable the hiring of private investors and their financial resources to achieve public benefits, and thus fostering big infrastructure projects which the state or the self-government units could not finance by themselves using the state budget funds. They are also a great way of entrusting public works to private natural and legal persons.⁷¹² Concession agreement regulates to mutual rights and responsibilities arising from the granted concession of the concession grantor, on the one hand, and the economic operator as the selected most favourable tenderer, i.e., economic operator to which the concession was granted based on a direct request, on the other.⁷¹³ There is a universal electronic recording of contracts as a central information source for all concessions stipulated in the Republic of Croatia – Concession Register, maintained by the Ministry of Finance, while FINA (Financial Agency) conducts all tasks of maintaining the Register.⁷¹⁴ The concession fee is a type of fee paid by the concession holder pursuant to the concession agreement (Article 3, item 5). Its amount and payment method are determined depending on the object of concession, estimated concession value, duration of concession, risks and expenses undertaken by the concession holder and expected profit, scope of concession, general facilities and

entrepreneur's equity ...). *Liszt* 2012; <http://www.konkurencnopravo.eu/uploads/files/Liszt,%20Privatno-pravna%20provedba.pdf> [11/11/2013].

⁷¹² *Derda* 2006, 86. As concession advantages, the author states that by entrusting public works to private investors, the state and regional self-government units are free from activities which are, *a priori*, part of the private, and not the public initiative. The budget is disencumbered of expenses and is less exposed to financial risks, while keeping the right of monitoring cases of public interest. Furthermore, the concessions, as a market institute, indirectly enable a better balance in the goods and services exchange, they raise labour productiveness using new technologies, they contribute to a higher export of finished goods and strengthen the overall economic development of the country.

⁷¹³ Article 3 item 4 of the Concession Act, Official Gazette No. 143/12. The following entities can be concession grantors: Croatian Parliament, the Government of the Republic of Croatia, state administration bodies – on behalf of the Republic of Croatia, the competent bodies of local and regional self-government units – on behalf of the local and regional self-government units and legal persons which are authorised to grant concession by special rules. The object of concession can be research and/or exploitation of minerals, use of waters, the right to hunt in state hunting zones and game-farming sites, marine property, communal activities, waste management activities (Article 5). *Derda* 2006, 89–101. For the new Concession Act, OG No. 69/17.

⁷¹⁴ The Register is public, and anyone can have access to the public data from the Register without proving legal interest. The Register is kept pursuant to the Concession Act and the Register of Concessions Regulation, Official Gazette No. 26/2013.

value of assets, i.e., general facilities and value of the common, public or other property of interest for the Republic of Croatia. Article 34, para. 5 of the Concession Act also regulates evaluation of the concession value; therefore, Article 11, para. 2 determines that the estimated concession value for the management of common or other property counts as estimated revenue which the concession holder, acting as a diligent and prudent businessman, would achieve pursuant to the concession agreement for the term of concession, decreased by the estimated amount of the concession fee, and discounted to current net value at the discounted rate determined by the grantor of concession. It reflects current market estimates of the time value of money and of risks typical of investments related to the subject of concession. It is important to note that in calculating the estimated concession values, one counts market prices at the moment of calculation or the potential price of service which will be applied on granting the concession or the price of service defined by a special law.⁷¹⁵ Taking into account the aforementioned and the existing state grant regulation system, we believe that concessions can also be considered state grants, since they represent reduced state revenue, if such activity provides preferential treatment to a certain entrepreneur or certain goods and/or services.

The German legislator defines the concept of subsidies in § 264 para. 7, by opting for the substantive law concept of subsidies.⁷¹⁶ Subsidies are public fund contributions, pursuant to federal or state law, to companies or operative facilities, granted at least partly without market service counter-favours and used at least partly for economic purposes, as well as public fund contributions according to the European Community law, granted at least partly without market service counter-favours, where companies are operative facilities and public companies.⁷¹⁷

The German legislator thus distinguishes between national subsidies, which must fulfil a certain economic purpose, i.e., serve the needs of economy, and EU subsidies, which do not have to meet this requirement. Economic requirements include production, creation and distribution of goods, as well as the provision of services, not

⁷¹⁵ Article 11, para. 8 of the Concession Act.

⁷¹⁶ By applying the substantive law concept of subsidy, the universal application of law must be realised, while at the same time attempting to avoid unclear elements of the offence from the constitutional perspective. *Wattenberg* in Achenbach & Ransiek 2012, 418. Same as *Lenckner & Perron* in Schönke & Schröder 2006, 2257; see *Martens* 2001, 66–74. See *Kudlich & Oglakcioglu* 2011, 102.

⁷¹⁷ “*Subvention im Sinne dieser Vorschrift ist: 1. eine Leistung aus öffentlichen Mitteln nach Bundes- oder Landesrecht an Betriebe oder Unternehmen, die wenigstens zum Teil a) ohne marktmäßige Gegenleistung gewährt wird und b) der Förderung der Wirtschaft dienen soll; 2. eine Leistung aus öffentlichen Mitteln nach dem Recht der Europäischen Gemeinschaften, die wenigstens zum Teil ohne marktmäßige Gegenleistung gewährt wird.*” This definition indicates two different types of subsidy fraud that should also be separately regulated.

including high-level individualised services.⁷¹⁸ In this way scientific research, research in culture and education, as well as higher-level freelance professions (*die höheren freien Berufe*) are excluded.⁷¹⁹ The German theory raises the question as to why public donations in sport are excluded from the criminal law concept of subsidies in general, although active organisations are partly considered business companies in that area, as are certain higher-level research areas or services (*höherer Art*).⁷²⁰ The European Community contributions are funds granted from the European Community budget or from the budget whose management derives from the Community's request.⁷²¹ The concept also includes contributions which do not derive directly from the European Community regulations, but rather pursuant to the rules of the Community via German services.⁷²² However, contract subsidies are not covered because the prerequisites of § 264 para. 8 are not met (facts important for granting subsidies by law or based on law are described by the subsidy grantor as subsidy-relevant facts).⁷²³ Fischer says this term, subsidy, covers subsidies and aids social protection, culture and environmental protection.⁷²⁴ In this way, § 264 "an almost unlimited number of EU social subsidies (labour-based contributions, contributions for migrant integration, culture, sports and science) to be applied for, which significantly increases the number of potential perpetrators".⁷²⁵

The Austrian Criminal Code, in its new criminal offence of subsidy abuse (§ 153b *Förderungsmisbrauch*), defines the concept of funds in para. 5 (as being committed by a person who misuses the granted funds, contrary to their intended use). Thus funds are grants granted to achieve public interests from public budgets and there is no corresponding financial equivalent to those grants. The exception is social grants and decisions pursuant to § 12 of the 1948 Constitutional Law on Trust Funds.⁷²⁶

⁷¹⁸ *Wattenberg* in Achenbach & Ransiek 2012, 420. See *Fischer* 2012, 1861–1863; *Lenckner & Perron* in Schönke & Schröder 2006, 2258.

⁷¹⁹ Funds pursuant to the Act on Film Requirements were classified as subventions per § 264 by BGH; *Wattenberg* in Achenbach & Ransiek 2012, 421.

⁷²⁰ *Wattenberg* in Achenbach & Ransiek 2012, 421. It is also disputable whether export expenses from the European guarantee funds for state economy can be considered subsidies granted on the basis of Community law. There are arguments against such a view: export expenses of the exporter are a "game with no profit" since the exporter has previously paid too high a price (according to the world's market criteria) of the agricultural internal market. *Idem*, 421–422. *Fischer* 2012, 1862.

⁷²¹ *Wattenberg* in Achenbach & Ransiek 2012, 421.

⁷²² *Idem*.

⁷²³ *Idem*.

⁷²⁴ *Fischer* 2012, 1863.

⁷²⁵ *Idem*.

⁷²⁶ *Fabrizy* specifies that the concept does not include aid granted to individuals on the basis of their social status. *Fabrizy* 2010, 492.

The concept of public budgets comprises public law companies' budgets (*Ge-
bietskörperschaften*), other public law entities' budgets, excluding churches and re-
ligious societies, as well as the total EU budget and budgets managed by, or at the
request of, the EU. The EU budget funds include the agriculture fund and structural
funds, development aid funds and funds for research and technology.⁷²⁷ The national
budget funds include federal states' financial funds granted for construction and
management of thermal pumps or solar devices.⁷²⁸

The Swiss Criminal Code does not regulate the concept of subsidies.⁷²⁹ The Federal
Act on Financial Aid and Grants or Subsidy Act (*Bundesgesetz über Finanzhilfen
und Abgeltungen, Subventionengesetz*)⁷³⁰ in Article 3 para. 1 defines financial aid (*Fi-
nanzhilfen*) as financial funds granted to beneficiaries outside the federal administra-
tion in order to support the realisation of approved activities. Financial funds include,
in particular, non-refundable financial funds, loan and guarantee privileges, as well
as non-operative or more favourable business or actual funds. Grants are funds for
beneficiaries outside the federal administration system, intended to alleviate or settle
financial burdens arising from the fulfilment of: a) activities prescribed by the federal
law; and b) public law activities transferred to a beneficiary by the Union (Article 3,
para. 2). It was in 2010 that *Durđević* urged not only to equalise domestic subsidies
with the EU subsidies, but she also stated, in relation to the then-current subsidy
fraud draft from para. 5, which defined state grants as non-refundable funds for the
economy, that grants in the European Union and Croatia “are not granted only to the
economy, but to other joint policies of the Union, i.e., to such areas in Croatia as
education, science, culture, social welfare, etc., due to which criminal law protection
of the subsidies outside the economy must be equalled with those within the econ-
omy.”⁷³¹ Would such subsidy regulation eliminate the ultima ratio of criminal jus-
tice? The answer to that question depends on how one interprets the purpose of the
criminal offence of subsidy fraud and defines the legal property protected by this
offence (see final considerations).

Providing false or incomplete information concerning the facts on which the decision
on state grant depends is in line with the perpetration of subsidy fraud per § 264 para.
1, item 1 of the German CC: anyone who, for the purpose of subsidy allocation,
provides false or incomplete information to a body or other service or to a person
involved in the subsidy procedure (subsidy grantor), shall be sentenced to a prison

⁷²⁷ *Birklbauer et al.* 2011, 413. See *Fabrizy* 2010, 492.

⁷²⁸ *Idem.* Funds of social nature include social welfare, family aid, etc.

⁷²⁹ It can be expected since the Swiss Criminal Code does not even prescribe a special
criminal offence of subsidy fraud.

⁷³⁰ SuG, of 5 October 1990; <http://www.admin.ch/opc/de/classified-compilation/19900241/index.html> [13/12/2013].

⁷³¹ *Op. cit.* *Durđević* 2010, 780–781.

sentence of up to 5 years or a pecuniary fine.⁷³² However, unlike the Croatian Criminal Code, the German Criminal Code defines, subsidy-relevant facts in § 264 para. 8. Subsidy-relevant facts are described by law as those relevant to the subsidy grantor and upon which approval, guarantee, return request, further guarantee or subsidy or subsidy benefit granting legally depend. The State Grants Act also does not define facts on which decision on state grant depends. With regard to data and documents in Article 9 of the former State Grants Act,⁷³³ it was only prescribed that the Croatian Competition Agency is authorised to request from the grantor and/or beneficiary in writing all data and documents it deems necessary for the state grant approval process.⁷³⁴ In the same way, Article 14 of the State Grants Act stated that unlawful state grants are granted without the Croatian Competition Agency's approval (the Agency orders the return of the amount of the used state grant plus the basic reference rate

⁷³² Wer einer für die Bewilligung einer Subvention zuständigen Behörde oder einer anderen in das Subventionsverfahren eingeschalteten Stelle oder Person (*Subventiongeber*) über subventionserhebliche Tatsachen für sich oder einen anderen unrichtige oder unvollständige Angaben macht, die für ihn oder den anderen vorteilhaft sind.

⁷³³ OG No. 72/13, 141/13. The grantor and/or beneficiary must deliver all requested data and documents to the Agency in writing within the time period determined by the Agency. Such time period cannot be shorter than 8 days or longer than 30 days. If even after the repeated request the grantor and/or beneficiary do not deliver the requested data, the proposal for approval of state grant is deemed withdrawn and the Agency issues a decision on the suspension of the procedure. However, if after the repeated request the state grant grantor does not deliver the requested data and documents with a written explanation in which he deems the proposal for approval of state grant complete, since the requested data and documents either do not exist or have already been delivered to the Agency, the Agency shall act pursuant to deadline per Article 13 para. 1 of the Budget Act (90 days), which begins on the day such explanation was received. Article 9/13, paras. 2–4.

⁷³⁴ The Croatian Competition Agency approves and monitors the implementation of state grants and orders the return of state grants that were granted or used contrary to rules. The scope of the Agency's activities with respect to state grants is (Article 6, para. 1): a) the Agency considers and assesses the state grant proposals and state grant programmes within annual and multiple-year plans for approval of state grants; b) monitors the implementation and the effects of the granted state grants and orders the return of state grants that were granted or used contrary to rules; c) collects, processes and records data on state grants; d) collects data on the use and effects of the granted state grants; e) maintains records of state grants; f) cooperates with the body competent for state grants in agriculture and fishery during preparation of the state grant annual report; g) cooperates with bodies competent for the budget preparation, pursuant to a special law, state, regional self-government units and local self-government units during budget preparation; h) submits the state grant annual report to the Croatian Parliament; i) cooperates with international bodies, pursuant to the internationally undertaken obligations of the Republic of Croatia; j) participates in the preparation of bill drafts and other regulations regarding state grants and provides incentives and issues proposals to improve the state grant system and performs other tasks regarding the implementation of the State Grants Act.

amount; the rate is defined and published pursuant to rules on state grants, increased by 100 base points starting from the day the beneficiary began using the state grant).⁷³⁵ German criminal law offered certain definitions on false and incomplete information. False information is untrue information.⁷³⁶ Incomplete information is information that causes an overall misconception of subsidy-relevant facts.⁷³⁷ Thus it includes the cases in which: commission or the possibility of lowering prices are not notified to the grant beneficiary; a reduction of the purchase price of the economic property takes place; the proof of the actual payment indicates the issuance of a cheque and the possibility of deferral is not notified to the contracting partner; the information on the alleged free capital is incomplete; the existing loan insurances are not revealed; or the previously stipulated contracts are not communicated.⁷³⁸ Nominally, any person, even a tax advisor, may commit this form of offence. German case law questions whether a perpetrator can also be the person who, as an official person, participates in the subsidy procedure. The BGH decided that any person who, as an official person or officer, deals with submitting and processing of subsidy requests, may be a perpetrator, if he confirmed false information of the applicant contrary to good faith and forwarded the request to the appropriate granting department.⁷³⁹

The offence is committed by illicit submission of a subsidy request,⁷⁴⁰ i.e., the offence is completed by the very act of providing false or incomplete information on which subsidy granting depends.⁷⁴¹ Both Croatian and international legal literature

⁷³⁵ Exceptionally, the Agency may, in a particularly justified case, make a subsequent approval of the state grant, if it establishes that the state grant in question is in line with the state grant regulations. The Agency can make the subsequent approval along with stating special terms and deadlines for the implementation of the state grant (Article 14, para. 2 of the State Grants Act). For example, the Act on Subsidising and Residential Loans State Guarantee, e.g., defines subsidy-relevant fact in great detail (Article 7–11) Official Gazette No. 31/11.

⁷³⁶ *Wattenberg* in Achenbach & Ransiek 2012, 427. *Lenckner & Perron* in Schönke & Schröder 2006, 2265; Fischer 2012, 1186.

⁷³⁷ *Idem*. Same as *Kudlich & Oglakcioglu* 2011, 106.

⁷³⁸ *Idem*. Fictitious transactions as well, for example when a subsidised agricultural product is exported, modified and then, free from EU contributions, re-imported. More in *Wattenberg* in Achenbach & Ransiek 2012, 427–428.

⁷³⁹ *Wattenberg* in Achenbach & Ransiek 2012, 429.

⁷⁴⁰ *Durđević* 2007, 931. Article 59, para. 5 of the Sea Fishery Act prescribes that a fishery grant beneficiary should not provide false information for a fisher grant.

⁷⁴¹ *Novoselec* 2009, 120. Should the subsidy be approved and used, it is only an aggravating circumstance, so, it is a formal offence. *Idem*. From this perspective, one should also consider the provisions of the State Grants Act regarding the monitoring of implementation and the return of state grant. In fact, the Croatian Competition Agency *ex officio* or upon the proposal of the beneficiary, grantor or a legal or natural person with a legal interest performs the monitoring of implementation of the approved state grant. If, during monitoring, the Agency finds irregularities, it issues a decision by which the

agree that this form of offence is a general offence, i.e., anyone can commit it.⁷⁴² Austria does not have a specific criminal offence of subsidy fraud, so when there is a suspicion of subsidy fraud committed by this type of activity, general offence – fraud, per § 147 applies.⁷⁴³ Switzerland also applies the general offence of fraud per § 146. A special offence “*Leistungs- und Abgabebetrug*” is regulated by § 14 of the Federal Administrative Criminal Justice Act.

4.3.2.2 Failure to Notify the Grantor of State Aid, i.e., of Subsidies and Grants from the European Union funds about the Changes Necessary for Making the State Aid Decision⁷⁴⁴

This form of perpetration corresponds to the German § 264 para. 1 item 3.⁷⁴⁵ In German legal textbooks, the offence is categorised as an offence by omission and this provision is closely connected to § 3 para. 1 of the German Subsidy Act, because it obliges the subsidy beneficiary to promptly notify the subsidy grantor of all facts that are necessary to approve, grant, guarantee, further guarantee, take or give up subsidies.⁷⁴⁶ This provision has practical meaning in cases when the subsidy grantor has a right to return guarantee due to subsequent removal of one of the subsidy prerequisites.⁷⁴⁷ The perpetrator can only be a subsidy beneficiary – the obligation of notifying defined in the § 3 para. 1 of the German Subsidy Act specifies only the subsidy beneficiary as the recipient, therefore this form of the offence is a specific criminal offence.⁷⁴⁸ The scope of the notifying obligation should be completely

grantor and/or beneficiary are given a time period of no more than 3 months to remedy the irregularities. If the grantor and/or beneficiary do not remedy irregularities in this time period, the Agency orders the grantor and/or beneficiary to return that part of the state grant where irregularities were found, plus the amount of basic reference rate, which is defined and published pursuant to rules on state grants, plus 100 base points starting from the day defined as the day the irregularity commenced.

⁷⁴² Kudlich & Oglakcioglu 2011, 105.

⁷⁴³ The *Finanzstrafgesetz* defines a separate offence, namely, *Abgabebetrug*, § 39.

⁷⁴⁴ Durdević criticised the Draft of the criminal offence of subsidy fraud with respect to this form of perpetration by stating that “one should set a deadline for “changes” important in making a decision on the state grant in para. 1, which regards failure to notify relevant information for granting the state grant, although there is a legal obligation to notify the grantor.” Durdević 2010, 780.

⁷⁴⁵ “... den Subventionsgeber entgegen den Rechtsvorschriften über die Subventionsvergabe über subventionserhebliche Tatsachen in Unkenntnis läßt.”

⁷⁴⁶ Wattenberg in Achenbach & Ransiek 2012, 430. Same as Fischer 2012, 1868; Lenckner & Perron in Schönke & Schröder 2006, 2268.

⁷⁴⁷ Wattenberg in Achenbach & Ransiek 2012, 621.

⁷⁴⁸ Idem. § 264 is not met if the subsidy grantor was already aware of the fact that could prevent the granting of subsidies. If more services are included in the subsidy procedure, the awareness of one service competent for the subsidy procedure suffices. The subsidy grantor is ignorant as to whether the actual circumstances are known to an

defined and based on legal regulations referring to subsidy grants.⁷⁴⁹ The legal provisions on which the notifying obligation is based may be the following: special legal provisions which define detailed subsidy beneficiary's data, if the notifying task nevertheless arises only out of contracts, administration guidelines or official decisions, there is no breach of criminality according to § 264 para. 1 item 3.⁷⁵⁰ It has already been noted that neither the Austrian nor the Swiss Criminal Code define a specific criminal offence of subsidy fraud; in these cases they apply the general criminal offence of fraud. However, some authors raise the issue of the extent to which fraud by omission can be committed ("non-disclosure of information as a breach of a specific duty").⁷⁵¹ Court practice is not uniform on this issue either. This form of offence is considered a true criminal offence by omission, both in Croatian and German Criminal Code, because the perpetrator does not undertake action prescribed by law, i.e., breaches the ordering or imperative norm (the person who fails to notify the state grant grantor of changes that are important for making a decision on state grant).⁷⁵²

4.3.2.3 Using Granted Funds Contrary to their Intended Use⁷⁵³

This form of subsidy fraud refers to the abuse of funds, i.e., use contrary to purposes for which the funds were originally granted within the PIF Convention (Article 1, para. 1 item a (3)). Subsidy fraud committed in this form differs from all other forms of fraud defined by the Convention in that it does not cause damage to EU budget funds – using funds contrary to their intended use does not have to cause damage to the EU budget, and the protected property of this form of fraud are not the Union's

officer involved in the subsidy procedure, and he still acts in collusion with the subsidy beneficiary. Punishability is not excluded, because the subsidy grantor already presumes the actual state of things or at least doubts if the grant beneficiary data is appropriate. Same as *Kudlich & Oglakcioglu* 2011, 106; *Lenckner & Perron* in Schönke & Schröder 2006, 2268–2269.

⁷⁴⁹ *Wattenberg* in Achenbach & Ransiek 2012, 431. Same as *Lenckner & Perron* in Schönke & Schröder 2006, 2269

⁷⁵⁰ *Wattenberg* in Achenbach & Ransiek 2012, 431.

⁷⁵¹ *Kert* in Đurđević 2006, 29. *Kert* asks the following: if, basically, committing fraud by omission is possible, is fraud by omission equal to fraud by action (equal value clause! L.S.). According to *Kert*, most Austrian criminal justice theorists do not consider not clarifying an inaccurate impression contrary to duty equal to active fraud.

⁷⁵² For criminal offences of action and omission, see *Kurtović Mišić & Krstulović Dragičević* 2014, 102–103. See *Novoselec & Bojanić* 2013, 139–140.

⁷⁵³ Thus far, court practice has "covered" this form of fraud by criminal offence of abuse of power in business transactions pursuant to Article 292, para. 1, item 5 of the CC97. However, in cases in which budget funds were spent elsewhere, and subsequently made up by other income sources, it was deemed that the offence was not committed because a legal person did not gain undue profit and the defendant did not act to obtain substantial profit. *Đurđević* 2007, 950.

budget funds, rather its freedom to dispose of its funds by itself.⁷⁵⁴ If the perpetrator has, while submitting the subsidy or aid request, provided false information on intended use of the funds, it would be a case of providing false or incomplete information rather than subsidy fraud.⁷⁵⁵

Use of granted funds contrary to their intended use corresponds to the offence regulated by § 264 para. 1 item 2 of the German CC, which prescribes up to 5 years or a pecuniary fine for any person who uses a facility or monetary funds whose intended use is limited by legal rules or by the subsidy grantor regarding the subsidies, contrary to their intended use.⁷⁵⁶ The Austrian Criminal Code regulates the use of granted funds contrary to their intended use by a new criminal offence: § 153b “*Förderungsmissbrauch*”, committed by the person who uses granted funds contrary to their intended use.⁷⁵⁷ It particularly prescribes punishment of the manager (*leitender Angestellter*) of a legal entity or a company without legal personality who was granted the funds or who truly committed the criminal offence without consent of the fund grantee. The aggravated forms are prescribed in paras. 3 and 4 in cases where the amount exceeds EUR 3,000 or EUR 50,000.⁷⁵⁸

4.3.3 The aggravated Forms of the Offence

The aggravated forms of the offence refer to an act of aiming to obtain a large state grant (if the offence was committed by providing false or incomplete information about relevant facts or by failing to notify the state grantor of relevant changes) or in the case of using large state grants contrary to their intended use. Regarding the aggravated form of subsidy fraud, according to the Article 258, para. 3 of the CC, the Criminal Department of the Supreme Court of the Republic presented its legal point of view in Su-IV k-4/2012-57 on 27 December 2012, determining that a “large state grant” (item 9) exceeds HRK 600,000. Amending the Criminal Code in 2015, the legislator prescribed in Article 87 No. 27 that the value of property, property damage,

⁷⁵⁴ *Durđević* 2007, 931–932.

⁷⁵⁵ *Idem*. “The perpetrator does not decide on unlawful use of the Union’s funds at the moment of submitting the subsidy grant, he subsequently decided to use the granted funds contrary to their intended use.” *Op. cit.* *Durđević* 2010, 779. Same as *Birklbauer et al.* 2011, 414.

⁷⁵⁶ “... einen Gegenstand oder eine Geldleistung, deren Verwendung durch Rechtsvorschriften oder durch den Subventionsgeber im Hinblick auf eine Subvention beschränkt ist, entgegen der Verwendungsbeschränkung verwendet.”

⁷⁵⁷ Abuse of funds. The prescribed penalty is a prison sentence of up to 6 months or a monetary fine of up to the income equivalent to 360 days of work. *Fabrizy* 2010, 491.

⁷⁵⁸ The prescribed penalties are increased up to 2 years in prison, or to a pecuniary fine of up to the income equivalent to 360 days of work, or a prison sentence from 6 months to 5 years.

property gains, tax liabilities and state aid is large if it exceeds HRK 600,000.⁷⁵⁹ The Code prescribes a prison sentence of 1 to 10 years for the aggravated form of the offence.

The German Criminal Code prescribes a sentence of 6 months to 10 years for the aggravated form of the offence. The aggravated form of the offence pursuant to § 264 para. 2 occurs when the perpetrator: (1) obtains substantial benefits or, by using subsequently compiled or falsified certificates, obtains an unlawful, large subsidy for himself or others; (2) abuses his powers or official position (*Amtsträger*); or (3) uses the help of an official person who abuses his powers or position. It also prescribes the relevant application of § 263 para. 5 which concerns grave and less grave fraud, when the fraud is committed by a member of a criminal organisation who joined for the purpose of committing fraud, computer fraud or falsifying documents, engineering drawings and evidence data.

4.4 Subjective Features

The PIF Convention requires only the incrimination of deliberate action and omission to the detriment of the EU budget.⁷⁶⁰ Therefore, if a person unknowingly presents a falsified document, even if he was obliged to do so and could have been aware of that possibility, there is no fraud according to the Convention.⁷⁶¹ Also, the Directive from 2017 calls for the punishment of intentional actions only.⁷⁶² Subsidy fraud is committed with a direct intent when the perpetrator is aware of all the offence features and is willing to commit it or is certain about its realisation.⁷⁶³ He acts with indirect intent when he is aware that he can realise the elements of the criminal offence and consents to it. If the perpetrator deems the information provided accurate or complete, he acts in error of the element of the offence. § 264, para. 1 items 1, 3 and 4 of the German Criminal Code describe intentional alternatives of the element of the offence, whereby indirect intent suffices (item 1 requires the perpetrator's

⁷⁵⁹ Act on Amendments to the Criminal Code, OG No. 56/15.

⁷⁶⁰ Article 1, para. 4, permits the existence of the intention of committing a criminal offence to be deduced from objective, factual circumstances. *Durđević* 2007, 933.

⁷⁶¹ *Idem*.

⁷⁶² Art. 3: Member states shall take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally.

⁷⁶³ So far, Croatian court practice has been dominated by the Supreme Court's opinion that the criminal offence of abuse of power in business transactions per Article 292, para. 1, item 5 of the CC97 can be committed only with direct intent. Likewise, where budget funds were spent for other purposes, and subsequently recovered from other income sources, there was no offence because no undue profit was gained nor did the defendant act in order to gain undue profit. *Durđević* 2010, 777.

awareness about the subsidy-relevant facts, item 3 assumes its scope and the awareness of the notification obligation content, item 2 requires knowledge of the existing application limitations, as well as applications contrary to its purpose).⁷⁶⁴ The particularity of the German legislature with regard to the subjective component of subsidy fraud is in § 264 para. 4. In fact, this criminal offence may also be committed improvidently (*leichtfertig*), which is a special form of (gross) negligence, and is justified by the need for increasing the liability of entrepreneurs when requesting subsidies.⁷⁶⁵ The concept of improvidence corresponds to the legal type of gross negligence, the difference being that here we have a case of personal competences and relationships of the perpetrators.⁷⁶⁶ Court practice defines improvidence as a form of guilt close to intent which requires further explanation: If a person predicts the possibility of a consequence with particular improvidence or particular indifference, then he acts improvidently.⁷⁶⁷ Improvidence is considered when the applicant relies on other persons, an associate of another company or an external collaborator without any verification by himself.⁷⁶⁸ Therefore, the legal literature presents opinions that penalising improvident infringements of contractual responsibilities with EU subsidies leads to the final broadening of the offence element. The opinions also call for a restrictive interpretation of the concept of improvidence.⁷⁶⁹ With respect to the criminal offence according to § 153b of the Austrian Criminal Code, it suffices that the perpetrator believes that he can use funds for a purpose different from its intended use (*dolus eventualis*). The objective of gaining undue profit is not relevant for the fulfilment of the offence.⁷⁷⁰

The objective of obtaining the state grant represents the objective of gaining undue profit, because the state grant obtained by an unauthorised individual represents un-

⁷⁶⁴ Wattenberg in Achenbach & Ransiek 2012, 432.

⁷⁶⁵ Op. cit. Novoselec 2009, 121. See Wattenberg in Achenbach & Ransiek 2012, 433.

⁷⁶⁶ Wattenberg in Achenbach & Ransiek 2012, 432.

⁷⁶⁷ Idem, 433.

⁷⁶⁸ Idem. Within the horizontal distribution in business activities, there is no general obligation of the non-competent managers to verify data of the competent head of business. If the subsidy beneficiary authorises an outside collaborator and, without verification, encloses his data to the granting request, improvidence can exist if this is a generally reliable collaborator. The same applies to situations when the inaccuracy of data originating from a third party with no personal verification is visible “at first glance”. Improvidence is excluded when the applicant relies on the assumption that the subsidy grantor indicated the subsidy-relevant facts. If the description by the subsidy grantor is materially and legally inadequate, and the subsidy beneficiary believes in the accuracy of the verifications and directs his request to an inadequate description, he is not punishable for improvidence. Idem.

⁷⁶⁹ Wattenberg in Achenbach & Ransiek 2012, 433.

⁷⁷⁰ Birklbauer et al. 2011, 414. With respect to the aggravated form of the offence, the intention should refer to the overriding of the value limit.

due profit.⁷⁷¹ The perpetrator may act with the objective of obtaining the state grant for himself or another person.

4.5 Cooperation of National and International Authorities in the Protection of the Financial Interests of the EU

The PIF Convention, per provision of the Article 6, para. 1, defined the responsibility of member states to efficiently cooperate in the investigation, prosecution and execution of sentences through mutual legal aid, extradition, assignment of a criminal process and execution of judgements pronounced in another country when multiple states are involved in the fraud. If more countries were competent and capable of carrying out prosecution, they were required to cooperate in deciding which of the competent countries should undertake criminal prosecution. The Directive from 2017 has special provisions on the jurisdiction of member states over fraud affecting the Union's financial interests, other criminal offences affecting the Union's financial interests (Article 11) and provisions concerning cooperation between the member states and the Commission (OLAF) and other Union institutions, bodies, offices and agencies (Article 15).

The following is a summary of systems and bodies that participate in the protection of the EU financial interests with regard to the importance of their cooperation in discovery and prosecution of criminal offences against the EU financial interests.⁷⁷²

4.5.1 AFCOS Network

AFCOS is a system by which legislative, administrative and operative activities are coordinated with the aim of protecting the EU financial interests and with the close cooperation with the European Anti-fraud Office (OLAF).⁷⁷³ The AFCOS network is founded by the Decision of the Government of the Republic of Croatia⁷⁷⁴ and it comprises the representatives of the Ministry of Justice, the Ministry of Interior, the

⁷⁷¹ Article 87 item 22. Material gain from a criminal offence refers to direct profit from the criminal offence which comprises every increase or prevention of reduction of assets resulting from criminal offence, assets into which the profit from a criminal offence was modified or converted, as well as every other gain from direct profit by a criminal offence in the territory of the Republic of Croatia or outside of it.

⁷⁷² The National strategy for combating fraud to protect the European Union's financial interests in the Republic of Croatia for the 2010–2012 period was adopted in the Republic of Croatia, as well as the Action Plan with the Strategy; www.mfin.hr/hr/zastita-financijskih-interesa-eu [07/10/2013].

⁷⁷³ Article 3 item 1 of the Budget Act.

⁷⁷⁴ OG No. 92/08. Currently OG No. 151/13.

Ministry of Economy, Labour and Entrepreneurship – Directorate for Public Procurement System, the Ministry of Finance – Tax Administration, Customs Administration, Sector for Budget Supervision, the Central State Administration Office, the State Audit Office, and the Public Prosecution of the Republic of Croatia.⁷⁷⁵ The elements of the AFCOS system in the Republic of Croatia include: the system of reporting irregularities (bodies that manage and use the EU pre-accession aid programmes and report irregularities), the AFCOS network (the network of bodies for combating fraud, corruption and any other form of system irregularities) and the Independent Department for Combating Irregularities and Fraud (it has a coordinating role and is OLAF's contact point).⁷⁷⁶

4.5.2 Independent Service for Combating Irregularities and Fraud

The regulation on the internal organisation of the Ministry of Finances⁷⁷⁷ established the Independent Service for Combating Irregularities and Fraud. Its competences include: coordinating legislative, administrative and operative activities among bodies in the AFCOS system, with the objective of protecting EU financial interests, and close cooperation with the European Anti-Fraud Office (OLAF); exchange of information about irregularities and fraud with the AFCOS system bodies and OLAF; ensuring immediate inspections and investigations in the territory of the Republic of Croatia by the OLAF experts; developing programmes for specialised training of the AFCOS system employees in cooperation with OLAF, and providing organisational support in realising them; giving instructions to the competent bodies of the AFCOS Network to act for the purpose of gathering evidence; determining facts and com-

⁷⁷⁵ The Decision lists the tasks of the AFCOS Network as follows: cooperation with the Ministry of Finance – Independent Department for Combating Irregularities and Fraud and the European Commission's Office for the Fight against Fraud for the protection of EU financial interests; participation in the implementation of the Action Plan for strengthening of the AFCOS system and monitoring and improving the efficiency of the implementation measures of the Action Plan for strengthening of the AFCOS system; participation in the drafting of the Strategy for combating fraud in order to protect the EU financial interests and the Action Plan to implement it; proposing legislative and other measures with the purpose of efficient protection of EU financial interests; strengthening inter-institutional cooperation and exchange of data with the bodies included in the Irregularity Reporting System (bodies that govern and use EU aid funds) if a suspicion of fraud and/or corruption or any other form of irregularity is reported in the system, with the purpose of the protection of EU financial interests; developing educational programmes and proposing new education measures in line with the needs of the bodies in the AFCOS Network; collecting, monitoring and analysing data on the measures taken in the AFCOS system; reporting to the Ministry of Finance – Independent Department for Combating Irregularities and Fraud within the scope of its activities.

⁷⁷⁶ Pursuant to the National Strategy for Combating Fraud to protect European Union financial interests in the Republic of Croatia for the 2010–2012 period, 3.

⁷⁷⁷ OG No. 32/12.

mening sanctioning procedures; commencing appropriate procedures based on tips collected via the email address, especially established for reporting irregularities; exchanging information with other public authorities' bodies in case of suspicion or report of suspicion of fraud, corruption or any other form of irregularity in the system, and submitting appropriate reports to the competent AFCOS Network bodies; observing the course of investigating procedures regarding unlawful use of European Union aid funds; notifying the National Validation Officer about measures taken and results of sanctioning the irregularities discovered; receiving, controlling and consolidating reports on irregularities in managing and using EU aid funds and delivering them to the National Validation Officer; observing returns of unlawfully issued EU aid funds; keeping a register on detected irregularities. The Independent Service responds to the National Validation Officer. There are three departments within the Service: the department for collection and analysis of data and reporting of irregularities, the department for observing action following reported irregularities and coordination with competent bodies and the department for training and risk management.⁷⁷⁸ Here we should particularly point out the duties of the Department for observing action following reported irregularities and coordination with competent bodies. In fact, those duties comprise coordinating legislative, administrative and operative activities between the AFCOS system bodies and close cooperation with OLAF; coordination of OLAF administrative investigations in the Republic of Croatia; generating strategic documents and other appropriate acts related to the functioning of the AFCOS system and the protection of EU financial interests; observing and reporting to the competent bodies about the implementation of objectives and measures from the Strategy and the Action Plan; controlling the harmonisation of national rules with the EU rules regarding the protection of EU financial interests; preparing expert opinions and proposals for the improvement of administrative action following the irregularities reported; preparing proposals for the improvement of the existing legal basis for initiating administrative procedures in the cases of irregularities; convening and conducting meetings with the representatives of the AFCOS Network bodies to determine competence to act, observe the course of investigation procedures concerning unlawful management and/or use of EU aid funds; analysis of working process quality and activities of the AFCOS Network bodies regarding actions following the irregularities and/or fraud reported; cooperation with OLAF regarding training for the AFCOS Network bodies; keeping a register of processes before competent courts regarding the protection of EU financial interests; observing the course and final outcome of the processes before competent courts regarding the protection of EU financial interests.⁷⁷⁹

⁷⁷⁸ The tasks of these departments are defined by Article 26, item 7.1–3 of the Regulation.

⁷⁷⁹ Among the tasks of the Department for collecting and analysing data and reporting about irregularities, the development of the Information Management System (IMS) should be particularly highlighted.

4.5.3 European Anti-Fraud Office – OLAF

The European Anti-Fraud Office was founded to protect the EC's financial interests by combating fraud, corruption and any other unlawful activities, including misuse of official duties in European institutions. In order to fulfil these activities, OLAF is conducting internal and external administrative investigations pursuant to the Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999.⁷⁸⁰ The Decision has been amended on three occasions: by Commission Decision 2013/478/EU of 27 September 2013; Commission Decision (EU) 2015/512 of 25 March 2015; and Commission Decision 2015/2418 of 18 December 2015. The most important regulation concerning administrative investigations of OLAF is Regulation (EU, EURATOM) No. 883/2013 of the European Parliament and the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing of the Regulation (EC) No. 1073/1999 of the European Parliament and the Council and the Council Regulation (Euratom) No. 1074/1999 amended by Regulation (EU, EURATOM) 2016/2030.⁷⁸¹

The Regulation entered into force on 1 October 2013. OLAF's tasks are: ensuring the Commission helps member states in organising close and regular cooperation between their competent bodies to harmonise activities, the objective of which is the protection of the Union's financial interests from fraud; contributing to the shaping and developing of methods for the prevention of, and fight against, fraud, corruption and all other unlawful activities which cause damage to the Union's financial interests; fostering and harmonising with the member states and among them; exchanging operative experience and the best procedural practices regarding protection of the Union's financial interests; supporting measures for combating fraud undertaken voluntarily by the member states.⁷⁸² Within institutions, bodies, offices and agencies founded by or pursuant to a treaty, the Office conducts administrative investigations to fight fraud, corruption and all other unlawful activities which cause damage to the

⁷⁸⁰ Thereby succeeding the Task Force for Coordination of Fraud Prevention. Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136/20, 31.5.1999. The tasks of the Office are regulated by Article 2. On establishing OLAF, see *Brüner & Spitzer* in Sieber et al. 2011, 682–687.

⁷⁸¹ Regulation (EU, Euratom) No 883/2013 of the European Parliament and the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing of Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999, OJ L 248/56 of 18.9.2013, hereinafter: the Regulation. Pursuant to Article 19, the Commission shall submit by 2 October 2017 to the European Parliament and the Council the evaluation report on the implementation of the Regulation. The Supervisory Board's opinion evaluating whether the Regulation should be changed or not shall be enclosed with the Report.

⁷⁸² Article 1, para. 2. See also: *Brüner & Spitzer* in Sieber et al. (2011), 688–689. OLAF's budget is about 74 million EUR. OLAF has about 475 collaborators. *Idem*.

Union's financial interests.⁷⁸³ The concept of the Union's financial interests comprises revenue, expenditures and funds covered by the European Union's budget and revenue, expenditure and funds covered by the budgets of institutions, bodies, offices and agencies and budgets managed or monitored by them (Article 2, para. 1 of the Regulation). OLAF is undeniably responsible for administrative investigations (external or internal). However, the Regulation itself highlights (Article 2, para. 4) the facts that such investigations do not influence the powers of the member states' competent bodies to instigate criminal proceedings. This makes sense, because information obtained during these investigations can provide grounds for criminal procedures.⁷⁸⁴

The Office is managed by a director nominated by the Commission for a non-renewable seven-year term.⁷⁸⁵ The chief director may begin a procedure if there is reasonable doubt that fraud, corruption or any other unlawful activity causing damage to the Union's financial interest occurred.⁷⁸⁶ The suspicion may be based on information provided by a third party or anonymous information. The chief director takes into consideration the following: a) the investigation policy priorities and the annual plan for Office management; b) the need to use the Office's funds efficiently and with proportionality; and c) careful selection of the most appropriate institution, body, office or agency for conducting investigations, taking into account the type of facts, actual or potential financial consequences of the case and the probability of further court-imposed measures.⁷⁸⁷ The Office decides on initiating the investigation

⁷⁸³ Article 1, para. 4. For that purpose, serious issues concerning the execution of professional duties are explored, such as neglecting duties of officials and officers of the Union that can result in disciplinary or, depending on the case, criminal procedures, or identical shortcoming in performing duties by members, if institutions and bodies, heads of offices and agencies or employees of institutions and bodies, heads of office and agencies or employees are not subject to the Staff Regulations for officials. *Idem*.

⁷⁸⁴ On OLAF as the institution of European criminal prosecution (*Institution der europäischen Strafverfolgung*), see *Brüner & Spitzer* in Sieber et al. 2011, 678.

⁷⁸⁵ Article 17 of the Regulation. For the purpose of appointing a new chief director, the Commission publishes a call for submissions in the official journal of the European Union. The competition is published no later than 6 months before the current chief director's term expires. After the supervisory board gives a positive opinion on the election procedure applied by the Commission, the Commission draws up a list of appropriately qualified candidates. The Commission appoints the chief director after consulting with the European Parliament and the Council.

⁷⁸⁶ Article 5, para. 1 of the Regulation. According to Article 2, para. 3 of the Criminal Procedure Act, unless otherwise prescribed by law, the state attorney must initiate a procedure if there is reasonable doubt that a certain person has committed a criminal offence, and if there are no legal impediments for the prosecution of that person.

⁷⁸⁷ *Idem*. The decision on initiating an external investigation is made by the chief director at his own initiative or upon the request of the member state in question or institution, body, office or agency of the Union, while the decision on initiating an internal

within two months of receiving the request to conduct the investigation and promptly notifies the member state, institution, body, office or agency which submitted the request.⁷⁸⁸ The decision on not conducting an investigation must be explained, and, if after two months, the Office does not reach a decision, the Office decides not to conduct investigation.⁷⁸⁹ The chief director manages the investigations based on written instructions, and under his management, the Office staff appointed by him conducts the investigation.⁷⁹⁰ The Office staff executes their tasks on the basis of a written authorisation which clearly states their identity and function.⁷⁹¹ Article 9 contains meticulously elaborated procedural guarantees. It states that investigations are conducted in an objective and impartial manner, and in accordance with the presumption of innocence. The Office gathers evidence in favour and against the persons concerned. The concept of persons concerned comes from English (German: *der Betroffene* or *die Betroffenen*), and the Croatian Criminal Procedure Act and the Summary Jurisdiction Act do not use it (the closest is the concept of an accused person). The office may interrogate the person concerned or a witness at any point during the course of the investigation. All persons which are subjected to interrogation have the right to avoid self-incrimination. There is a difference in the regulation between a summons for the person concerned and a summons for the witness (and verifications and ad hoc inspections). The summons to an interview must be sent to the person concerned at least 10 working days in advance (at least 24 hours in advance to the witness), accompanied by the person's rights, especially the rights to be assisted by a person of his own choosing.⁷⁹² If, during the interview, it is determined that the witness could be the person concerned, the interview is interrupted. The witness is promptly notified of his rights as a person concerned and, if requested, a copy of the record of his prior statements is handed to him. The Office should not use prior statements of that person against him, without enabling him to provide his deposi-

investigation is made by the chief director at his own initiative or upon the request of the institution, body, office or agency within which that investigation is to be conducted or upon the request by a member state.

⁷⁸⁸ Article 5, para. 4.

⁷⁸⁹ *Idem*.

⁷⁹⁰ Article 7, para. 1.

⁷⁹¹ Article 7, para. 2 The chief director issues approval in which the following are listed: the object and the purpose of the investigation, legal premises for conducting the investigation and investigative powers deriving from those premises.

⁷⁹² The deadline may be shortened if the person concerned explicitly consents to it or due to justified reasons of urgency of the investigation (in that case, the deadline must not be shorter than 24 hours). On establishing OLAF, see *Brüner & Spitzer* in Sieber et al. 2011, 224.

tion.⁷⁹³ One of the procedural guarantees is the right of the person to be notified that he is a potential person concerned, provided that it does not prejudice the conducting of the investigation or any other investigation procedure within the competence of the national judicial body (Article 9 para. 3 of the Regulation). Furthermore, the person concerned is guaranteed the right to issue a deposition concerning the facts pertaining to him (Article 9, para. 4)⁷⁹⁴ and the right to use every official language of the Union institutions (Article 9, para. 5).⁷⁹⁵ At the end of the investigation, a report is drawn up under management of the chief director. The report lists the legal premise of the investigation, procedural phases, established facts and their preliminary legal assessment, the estimate of financial effects of established facts, compliance with the procedural guarantees, and the conclusions of the investigation.⁷⁹⁶ Enclosures include the chief director's recommendations on whether measures should be taken or not (all disciplinary, administrative, financial and/or legal measures from the institutions, bodies, offices and agencies, as well as from the competent bodies of the member states in question; particularly the return estimate and the preliminary legal assessment of established facts).⁷⁹⁷ The cooperation with Eurojust and Europol is prescribed by Article 13, as well as the possibility of negotiating administrative agreements regarding the exchange of operative, strategic or technical information, including personal data and confidential information.⁷⁹⁸

The conducting of the Office's investigative role is regularly monitored by a supervisory board consisting of 5 independent members experienced in executing high judicial or investigative or similar functions related to the area of activity of the

⁷⁹³ Article 9, para. 2. The Office draws up a record of the interview and enables the interrogated persons the access to that record so that he could approve it or add objections. The Office gives the copy of the record of the interview to the person concerned.

⁷⁹⁴ It is prescribed as an exception (Article 9, para. 4, item 3) that, in justified cases, when it is necessary to keep the confidentiality of the investigation, or in investigation procedures which fall under the competence of the national judicial body, the chief director may decide to postpone fulfilment of the obligation regarding the summoning of the person concerned to issue a deposition.

⁷⁹⁵ However, officials or other officers of the Union may be asked to use the official language of the Union in which they are particularly fluent.

⁷⁹⁶ Article 11, para. 1 of the Regulation.

⁷⁹⁷ *Idem*.

⁷⁹⁸ If it could contribute to the harmonisation and cooperation between the national investigation bodies and the prosecution, or if the Office has forwarded to the member states' competent bodies the information which results in suspected fraud, corruption or any other unlawful activity which causes damage to financial interests of the Union in the form of a serious criminal offence, the Office sends the relevant information to Eurojust within its term. The office promptly notifies the competent bodies of the member states in question on the cases in which the Office forwards the information to Eurojust or Europol.

Office.⁷⁹⁹ The controlling mechanism of OLAF comprises is responsible for: 1) general internal administrative control; 2) political control; 3) external financial control by the European Court of Auditors; 4) OLAF's supervisory board; and 5) law control.⁸⁰⁰ The members are appointed by mutual consent of the European Parliament, the Council and the Commission.

Once a year, the European Parliament, the Council and the Commission convene with the chief director and, at the political level, exchange opinions on the Office's policy regarding the methods for prevention of fraud, corruption and all other unlawful activities which cause damage to the Union's financial interests, as well as methods to fight them.⁸⁰¹ The supervisory board participates in the exchange of opinions. The European Parliament, the Council, the Commission, the chief director or the supervisory board may request that the representatives of the Court of Auditors, Eurojust or Europol be invited, *ad hoc*, to the exchange of opinions.⁸⁰²

Every year, OLAF investigates several hundred cases in which fraud was committed against the EU's revenue or its funds were misused. In 2012, OLAF opened 431 investigations and 287 coordination cases and closed 465 (100 of which with recommendations). National authorities were sent 54 recommendations to initiate court proceedings. The return of around EUR 284 million was recommended, 165.8 million of which referred to revenue and 118.2 million to expenditures.⁸⁰³ One of the most important of OLAF's initiatives is the strategy of informing and communi-

⁷⁹⁹ For more details about the supervisory board, see Article 15 of the Regulation. The supervisory board appoints its president. It adopts its Rules of Procedure, which must be previously submitted to the European Parliament, the Council, the Commission and the European data protection supervisor. The meeting of the supervisory board is convened at the initiative of its president or the chief director and held at least 10 times a year. The Board makes its decisions by the majority of its members' votes.

⁸⁰⁰ *Brüner & Spitzer* in Sieber et al. 2011, 691–695. The general administrative internal control derives from the fact that the director of OLAF is appointed by the Commission, the political consists of OLAF's submitting the annual report to the Parliament and the Council. *Idem*.

⁸⁰¹ Article 16 of the Regulation. On the role of the European Parliament as the EU budget "controller", *Brüner & Spitzer* in Sieber et al. 2011, 687.

⁸⁰² *Idem*. The exchange of opinions may refer to: strategic priority of the Office's investigative policies, opinions and reports on the activities delivered by the supervisory boards, the reports by the chief director and all other reports of the institutions that concern the Office's term, framework for the relations between the Office and the institutions, bodies, offices and agencies, framework for relations between the Office and the member states' competent bodies, relations between the Office and the competent bodies in third countries and international organisations within the Regulation agreement, the efficiency of the Office's tasks regarding the execution of its term.

⁸⁰³ Commission Report, p. 13. According to 2013 data, OLAF initiated 253 investigations which was compared to 2009 (an increase of 58%); almost 50% fewer investigations than 2012.

cating with the public to prevent fraud, with the following objectives: improvement of fraud prevention with better flow of information, satisfying the right of nationals to know what has been done to protect their interests, and supporting OLAF's independent action.⁸⁰⁴ In 2016, OLAF opened 219 investigations after a detailed process of analysing incoming information in 1157 selections. It concluded 272 investigations pursuant to which it issued 346 recommendations to the competent authorities at EU and national level. As a result of its investigations concluded in the year, OLAF recommended the recovery of EUR 631 million to the EU budget.⁸⁰⁵

4.5.4 Eurojust

The European Union's Judicial Cooperation Unit – Eurojust is one of the European Union's bodies founded by Council Decision 2002/187/JHA aimed at strengthening the fight against serious forms of cross-border and organised crime.⁸⁰⁶ Since its establishment, Eurojust has facilitated coordination and cooperation between the national investigation bodies and criminal prosecution bodies in cases that included different member states.⁸⁰⁷ The Treaty of Lisbon defined new possibilities of strengthening the efficiency of Eurojust in combating cross-border crime. Article 85 of the Treaty on the Functioning of the European Union highlights the responsibility of Eurojust in supporting and strengthening harmonisation and cooperation between national bodies competent for investigation and criminal prosecution regarding serious crimes which affect two or more member states or require joint criminal prosecution. The same provision defines the organisation of Eurojust,⁸⁰⁸ its way of func-

⁸⁰⁴ National strategy 2009, 4; <https://udruga.gov.hr/UserDocsImages//UserFiles/File//Nacionalna%20strategija%20suzbijanja%20prijevara%20za%20za%C5%A1titu%20financijskih%20interesa%20EU%20u%20RH%20u%20razdoblju%202010%20-%202012.pdf> [07/10/2013]. In 2001, OLAF Anti-Fraud Communicators Network (OAFCN) was established.

⁸⁰⁵ *The OLAF Report 2016* 2017, 12; https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2016_en.pdf [18/07/2018].

⁸⁰⁶ Council Decision of 28 February 2002, which established Eurojust in order to strengthen the fight against serious criminal offences amended by Council Decision 2003/659/JHA and Council Decision 2009/426/JHA of 16 December 2008 concerning the strengthening of Eurojust. OJ L 063/1, OJ L 138/14.

⁸⁰⁷ On establishing OLAF, see *Brüner & Spitzer* in Sieber et al. 2011, 717–718.

⁸⁰⁸ The explanation of the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final, 2013/0256 (COD), p. 1. Furthermore, it is stated that Eurojust helped in building mutual trust and bridging differing legal systems and traditions across the EU. Today, it is the main subject in judicial cooperation in criminal cases.

tioning, operative scope and tasks to be determined by provisions laid down in accordance with the regular legislative procedure.⁸⁰⁹

According to the proposal of the new Regulation (Article 1), it established the European Union's Judicial Cooperation Unit – Eurojust, which is the legal successor of the Eurojust established by the Council Decision 2002/187/JHA.⁸¹⁰ Eurojust's responsibilities include supporting and strengthening the harmonisation and cooperation between national bodies competent for investigation and criminal prosecution regarding serious criminal offences which affect two or more member states or require joint criminal prosecution, on the basis of operations conducted and information provided by the competent member states' bodies and Europol.⁸¹¹ Eurojust's competence covers the forms of criminal offences listed in Annex 1 of the Regulation as well as associated criminal offences.⁸¹² Associated criminal offences are defined as the offences committed in order to ensure funds for the perpetration of the criminal offences listed in Annex 1, to facilitate or commit same criminal offences, and to ensure those offences would not be punished. Eurojust's operative functions are defined by Article 4: informing the competent bodies of member states about investigations and criminal prosecution which have Union-level impact or which may affect other member states, except those which directly concern them; helping the competent bodies of member states ensure the best possible coordination of investigations and criminal prosecution; providing support to improve cooperation between competent bodies of member states, especially on the basis of Europol's analyses; cooperating and consulting with the European judicial network in criminal cases, including using the European judicial network's documentary databases and contributing to its improvement; providing member states with operative, technical and financial

⁸⁰⁹ The same provision requires that regulations establish the solutions for the inclusion of the European Parliament and national parliaments in the activity assessment of Eurojust.

⁸¹⁰ Two further steps referred to Commission's Communication "European agencies: the way forward" (COM (2008)135) and the consent of the European Parliament, the Council and the Commission concerning the initiation of inter-institutional dialogue to improve consistency, efficiency and functioning of the decentralised agencies, which resulted in establishing the inter-institutional task forces (IIWG) in March 2009.

⁸¹¹ The Regulation Repealing Decisions 2002/187/JHA, 2003/659/JHA and 2009/426/JHA.

⁸¹² Article 2. In fulfilling its tasks, Eurojust takes into consideration the member state's competent body or data delivered by any competent body pursuant to the terms within the Contract or gathered by Eurojust itself. It facilitates the execution of requests for judicial cooperation and decisions on judicial cooperation, including those based on instruments by which the mutual recognition principle is implemented (upon the request of competent bodies or personal initiative). *Idem*. See *Grotz* in Achenbach & Ransiek 2012, 718.

support of cross-border operations and investigations, including joint investigation teams.⁸¹³

In order to fulfil its tasks in urgent cases, Eurojust has set up an On-Call Coordination (OCC) which can receive and process requests sent at any moment.⁸¹⁴ The office has one representative per member state who can be a national member, his deputy or assistant who can replace the national member. Each member state establishes Eurojust's national coordination system in order to ensure coordination of tasks performed by national correspondents for Eurojust, national correspondent for Eurojust regarding terrorism, national correspondent for the European judicial network in criminal cases and up to 3 other contact points of the said European judicial network, national members or contact points of the Joint Investigation Team Network.⁸¹⁵ Eurojust submits the annual report to the national parliaments as well.

⁸¹³ Organised crime; terrorism; drug trafficking; money laundering; corruption; **criminal offences against EU financial interests**; murder; serious bodily injuries; kidnapping; unlawful detention and taking hostages; sexual abuse and sexual exploiting of women and children; child pornography and soliciting children for sexual purposes; racism and xenophobia; organised robbery; criminal offences concerning motor vehicles; **fraud and deceit**; racketeering and extortion; counterfeiting and product piracy; counterfeiting and trading of administrative documents; counterfeiting money and means of payment; **cybercrime**; trading on the basis of privileged information and manipulating the financial market; smuggling illegal immigrants; human trafficking; illegal trade in human organs and tissue; illegal trade in hormone substances and other growth stimulants; illegal trade in cultural goods, including antiquities and works of art; illegal trade in arms, munitions and explosives; illegal trade in endangered animal species; illegal trade in endangered plant species and types; crimes against the environment; contamination from ships; criminal offences regarding nuclear and radioactive substances; genocide; crimes against humanity and war crimes. (Highlighted by L.S.) The same provision (Article 1) prescribes that criminal offences, which are under the competence of the European Public Prosecutor's Office, are outside of Eurojust's competence, which is contradictory since the Annex lists criminal offences which cause damage to the Union's financial interests, and they are under the competence of the European Public Prosecutor's Office.

⁸¹⁴ While performing those tasks, it can, with explanation, request the competent bodies of concerned member states: to conduct investigation or criminal prosecution of certain offences; to accept that one of them may be in better position to conduct investigation or criminal prosecution of certain offences; to establish coordination among the competent bodies of the member states in question; to set up a joint investigation team; to provide all information necessary for performing its duties, take special investigation measures and take all other measures which are justifiable for investigation or criminal prosecution.

⁸¹⁵ By agreement with the competent body, the national members order investigation measures and approve and coordinate controlled deliveries in a member state pursuant to national legislature.

4.5.5 Europol

The European Police Office – Europol was established by the Europol Convention in 1995 as an independent international organisation with legal personality in order to provide support to member states' police administrations by exchanging data.⁸¹⁶ The Convention and three protocols were replaced in 2008 by the Decision on the establishing of the European Police Office.⁸¹⁷ The latest regulation is Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.⁸¹⁸

According to current Art. 1, Europol is established with a view to supporting cooperation among law enforcement authorities in the Union. The competence of Europol has been extended pursuant to the Constitutional Treaty outside of the organised crime offences (Articles 3 and 4).⁸¹⁹ Europol's fundamental tasks are: to collect, store, process, analyse and exchange information, including criminal intelligence; to notify member states of any information and connections between criminal offences concerning them; to coordinate, organise and implement investigative and operative actions to support and strengthen actions by the competent authorities of the member states.⁸²⁰

4.5.6 European Prosecutor

In the EU's primary law, legal grounds for the establishment of the institution of the European Public Prosecutor were realised by Article 86 of the Treaty on European Union of Lisbon. This provision regulates its competence, legal framework and rules of procedure. The competence of the European Public Prosecutor's Office is limited to investigation, criminal prosecution and filing of an indictment before national courts for criminal offences causing damage to the European Union's financial interests. Para. 4 prescribes the possibility of extending competence to other grave

⁸¹⁶ Article 41, para. 1. For this purpose, the European Public Prosecutor and Eurojust President regularly meet to discuss the issues of common interest.

⁸¹⁷ Any other use of data is allowed only within the term of the data-receiving body and with prior consent of the data-sending body. Article 41, para. 4.

⁸¹⁸ OJ L 135/53.

⁸¹⁹ Europol shall support and strengthen action by the competent authorities of the member states and their mutual cooperation in preventing and combating serious crimes affecting two or more member states, terrorism and forms of crime which affect a common interest covered by a Union policy (Annex I), but Europol's objectives shall also cover related criminal offences.

⁸²⁰ For the other, see Art. 4.

criminal offences with a cross-border element, by a unilateral decision of the Council with the Parliament's consent and the Commission's opinion.

An important step towards Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office was the European Model Rules for the Procedure of the future European Public Prosecutor's Office.⁸²¹ The Model Rules were the result of a research project of the University of Luxembourg, led by Prof. Katalin Ligeti, with the purpose of creating criminal justice rules to be applied by European Public Prosecutor before the indicting stage.⁸²² They comprise 3 groups of rules: 1) General part, 2) Investigation phase and 3) Indictment and referral to trial phase.⁸²³ On 17 July 2013, the Commission adopted a proposal for a Council Regulation on the establishment of the EPPO, but until 2017 nothing happened. Finally, at its meeting of 7 February 2017, the Council registered the absence of unanimity on the draft Regulation. After a discussion on a disagreement within the meaning of the third subparagraph of Article 86(1) TFEU, on 3 April 2017, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain notified the European Parliament, the Council and the Commission that they wished to establish enhanced cooperation on the establishment of the EPPO. By letters of 19 April 2017, and 1, 9 and 22 June 2017, Latvia, Estonia, Austria and Italy indicated their wish to participate. Council Regulation (EU) 2017/1939 entered into force on 20 November 2017. From this time, EPPO has been authorised to act with regards to any offence within its competence committed after this date, but according to Article 120 para. 2, it has assumed the investigative and prosecutorial tasks conferred on it by this Regulation on a date to

⁸²¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO), OJ L 283, 31.10.2017, p. 1–71. The first provisions about the future European Public Prosecutor were incorporated in "Corpus Juris" in 2000, then in the "Green Paper on criminal-law protection of the financial interests of the Community" (2000), non-ratified "Treaty establishing a Constitution for Europe" (2004), said provision of Article 86 of the Treaty of Lisbon (in order to combat the criminal offences that impact the Union's financial interests, the Council can, by means of provisions adopted pursuant to a special legislative procedure, establish the European Public Prosecutor's Office from Eurojust ...) and "Commission's communication on the protection of the EU's financial interests by criminal law and by administrative investigations (2011); http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.html [28/10/2013].

⁸²² The project was co-financed by the European Commission within the Hercule II programme and the University of Luxembourg. For more on the project, Introduction to the Model Rules, see *Ligeti* 2013.

⁸²³ *Ibid.*

be determined by a decision of the Commission on a proposal of the European Chief Prosecutor.⁸²⁴

Council Regulation (EU) 2017/1939 has eleven chapters. The first chapter addresses the subject matter and definitions. Chapter II provides provisions on establishment, tasks and basic principles of the EPPO. It should be noted that the EPPO is established as a body of the Union with legal personality. It is tasked with investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371. In that respect, the EPPO undertakes investigations, carries out acts of prosecution and exercises the functions of the prosecutor in the competent courts of the member states, until the case has been finally disposed of. Independence of the EPPO is strongly pointed. Namely, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any persons external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under the Regulation.⁸²⁵

The status, structure and organisation of the EPPO are regulated in Chapter III. The EPPO is an inadvisable Union body operating as one single Office with decentralised structure. It is organised at a central and decentralised level. The central level consists of a Central Office at the seat of the EPPO. The Central Office consists of the College, the Permanent Chambers, the European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director. The decentralised level shall consist of European Delegated Prosecutors who shall be located in the member states. The College of the EPPO shall consist of the European Chief Prosecutor and one European Prosecutor per Member State. The Permanent Chambers shall be chaired by the European Chief Prosecutor or one of the Deputy European Chief Prosecutors, or a European Prosecutor appointed as Chair in accordance with the internal rules of procedure of the EPPO. In addition to the Chair, the Permanent Chambers shall have two permanent Members. The European Chief Prosecutor shall be the Head of the EPPO and organise the work of the EPPO, direct its activities, take decisions in accordance with the Regulation and the internal rules of procedure of the EPPO. The European Prosecutors shall supervise the investigations and prosecutions for which the European Delegated Prosecutors handling the case in their Member State of origin are responsible. They shall present summaries

⁸²⁴ The date to be set by the Commission shall not be earlier than 3 years after the date of entry into force of the Regulation.

⁸²⁵ On the other side, the member states, institutions, bodies, offices and agencies of the Union should respect the independence of the EPPO and should not seek to influence it in the exercise of its tasks.

of the cases under their supervision and, where applicable, proposals for decisions to be taken by the Permanent Chamber, on the basis of draft decisions prepared by the European Delegated Prosecutors. The European Delegated Prosecutors shall act on behalf of the EPPO in their respective Member State and shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition and subject to the specific powers and status conferred on them, and under the conditions set out in the Regulation. They shall be responsible for the investigations and prosecutions that they have initiated, and those that have been allocated to them or that they have taken over using their right of evocation. They shall follow the direction and instructions of the Permanent Chamber in charge of a case as well as the instructions from the supervising European Prosecutor. They shall also be responsible for bringing a case to judgment and, in particular, have the power to present trial pleas and participate in taking evidence and exercising the available remedies in accordance with national law.⁸²⁶ For administrative and budgetary purposes, the EPPO shall be managed by its Administrative Director.

The competence of the EPPO is regulated in Chapter IV. Material competence of the EPPO includes the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law.⁸²⁷ In addition, the EPPO shall be competent for offences regarding participation in a criminal organisation as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organisation is to commit any of the offences referred to previously. Another issue of material competence of the EPPO covers any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of criminal offences affecting the financial interests of the Union.⁸²⁸ As regards the territorial and personal competence of the EPPO, it shall be competent where previously mentioned offences were committed in whole or in part within the territory of one or several member states, or by a national of a Member State, provided that a Member State has jurisdiction for such offences when committed outside its territory, or where committed outside the territories referred to in point (a) by a person who was subject

⁸²⁶ There shall be two or more European Delegated Prosecutors in each Member State. The European Chief Prosecutor shall, after consulting and reaching an agreement with the relevant authorities of the member states, approve the number of the Delegated Prosecutors, as well as the functional and territorial division of competences between the European Delegated Prosecutors within each Member State (Art. 13, para. 2).

⁸²⁷ As regards offences referred to in point (d) of Article 3(2) of Directive (EU) 2017/1371, as implemented by national law, the EPPO shall only be competent when the intentional acts or omissions defined in that provision are connected with the territory of two or more member states and involve total damage of at least EUR 10 million.

⁸²⁸ But the EPPO shall not be competent for criminal offences in respect of national direct taxes, including offences inextricably linked thereto. The structure and functioning of the tax administration of the member states shall not be affected by the Regulation.

to the Staff Regulations or to the Conditions of Employment, at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.

Chapter V deals with rules of procedure on investigations, investigation measures, prosecution and alternatives to prosecution, chapter VI with procedural safeguards and chapter VII with the processing of information. Chapter VIII, a special chapter, is dedicated to data protection. Financial and staff provisions are regulated in Chapter IX, provisions on the relations of the EPPO with its partners are regulated in Chapter X and, finally, general provisions are placed in Chapter XI.

4.5.7 Protection of Data Confidentiality

Previous State Grants Act prescribed in Article 19 that the President and the members of the Committee on Competition Protection, members of expert and consulting bodies, and employees of the Croatian Competition Agency must not disclose official or business secrets, regardless of how they encountered them, and that the obligation continues even after their term ends, or after they terminate their employment in the Agency. Trade or business secrets include, in particular: a) everything defined as a trade secret by law or other regulations; b) everything defined as a trade or business secret by a general act of state grant beneficiaries and as such indicated in the state grant approval proposal, c) everything reasonably indicated by state grant beneficiaries as trade or official secrets in accordance with special regulations; and d) all documents received from the European Commission and other EC bodies. An exception to this is data and documents that were publicly available in any way, i.e., publicly disclosed pursuant to special regulations or decisions by managing or operative bodies of state grant beneficiaries.⁸²⁹ The current State Grants Act does not contain such a provision. Confidentiality and data protection are also specifically defined by Regulation No. 883/2013 concerning investigations conducted by the European Anti-Fraud Office. Pursuant to Article 10, information transmitted or obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions. Information transmitted or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection afforded by the rules applicable to the Union institutions. The institutions, bodies, offices or agencies concerned shall ensure that the confidentiality of the investigations conducted by the Office is respected, together with the legitimate rights of the persons concerned and, where judicial proceedings have been initiated, that all national rules applicable to such proceedings have been adhered to. The Office may designate a Data Protection Officer in accordance with Article 24 of Regulation (EC) No 45/2001. The Data Protection Officer shall be competent for the processing of data by the Office and by the secretariat of the Supervisory Committee.

⁸²⁹ Art. 19, para 3.

In accordance with the Staff Regulations, the staff of the Office and the staff of the secretariat of the Supervisory Committee shall refrain from any unauthorised disclosure of information received in the exercise of their functions, unless that information has already been lawfully made public or is accessible to the public, and shall continue to be bound by that obligation after leaving the service. The members of the Supervisory Committee shall be bound by the same obligation of professional secrecy in the exercise of their functions, and shall continue to be bound by that obligation after the end of their mandate. Principles relating to processing of personal data are regulated in Article 47 of Council Regulation (EU) 2017/1939. Personal data shall be (a) processed lawfully and fairly; (b) collected for specified, explicit and legitimate purposes and not further processed in a manner incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall not be considered to be incompatible with the initial purposes provided that the EPPO provides appropriate safeguards for the rights and freedoms of data subjects; (c) adequate, relevant, and not excessive in relation to the purposes for which they are processed; (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay; (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which personal data is processed; personal data may be stored for longer periods insofar as the personal data is processed solely for achieving purposes in the public interest, scientific or historical research purposes or statistical purposes provided that the EPPO provides appropriate safeguards for the rights and freedoms of data subjects, in particular by the implementation of the appropriate technical and organisational measures required by the Regulation; (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing against accidental loss, destruction or damage, using appropriate technical or organisational measures.

4.5.8 The *ne bis in idem* Principle in Light of the ECHR Judgement in the Case of *Maresti v. Croatia* and Subsidy Fraud

In the light of the last amendments of the Misdemeanour Act,⁸³⁰ according to which the concept of misdemeanour is redefined and re-conceptualised,⁸³¹ and with regard to the judgement “*Maresti*”,⁸³² we analysed special acts which regulate state grants and subsidies.

⁸³⁰ Misdemeanour Act OG No. 107/07, 39/13, 157/13, 110/15, 70/17.

⁸³¹ *Derenčinović et al.* 2013, 756. On hypertrophy of misdemeanour punishing and its disproportionate use to punishments in a criminal procedure, see *Derenčinović* 2001, 1.

⁸³² Case of *Maresti versus Croatia* of 25 June 2009, Application no. 55759/07.

First, specific special acts which regulate subsidies do not define the misdemeanour provisions; e.g., the State Grant Act, the Home Loan Subsidising and State Guarantee Act, the Education and Training Grant Act.

Second, some acts, such as the Rural Development and Agriculture Grant Act, contain misdemeanour provisions, however, misdemeanour here is not identical to subsidy fraud.⁸³³

Third, a person can commit both a misdemeanour and subsidy fraud by the same action, according to Article 58, para. 1 of the Maternity and Parental Grants Act,⁸³⁴ which calls for a fine ranging from HRK 3,000 to 10,000 for a beneficiary who, on the basis of false or incomplete information submitted to a competent department of the Institute, obtains any of the rights of that act with the corresponding monetary grant or fails, within the prescribed period of time, to report any change that results in a loss or change of basis for the use of any rights from that act. Article 15, para. 1 item 1 of the Employment Fostering Act⁸³⁵ also calls for a misdemeanour fine ranging from HRK 50,000 to 100,000 for an employer – a legal person – if right to relief is terminated after the requirements are no longer met, and the employer does not calculate and pay the compulsory contribution onto the base pay in the amount of the used amount of the relief. Finally, Article 14, para. 1, item 2 of the Employment Preservation Grant Act⁸³⁶ calls for a misdemeanour fine ranging from HRK 100,000 to 200,000 for an employer – a legal person – if he, after signing a contract, sends to the Croatian Employment Service an incorrect list of workers or an inaccurate calculation of the requested grant amount for each worker or an incorrect salary due date.

The European Court of Human Rights judgement in *Maresti versus Croatia* established that when the criminal offence also comprises facts that refer to misdemeanour, a criminal trial conducted after the misdemeanour procedure represents breach of Article 4 of Protocol 7 along with the European Convention for the Protection of

⁸³³ Rural Development and Agriculture Grant Act, Official Gazette No. 80/13. Article 48 prescribes a fine ranging from HRK 10,000 to 30,000 for a legal person which: does not keep documents on the basis of which the grant was granted; prevents or hinders an agriculture inspector from conducting an inspection; does not allow the inspector access to accounting books and other documentation; fails to provide, at the agriculture inspector's request, within a certain time period, business documentation or data needed to conduct inspection; prevents provisional seizure of accounting books and other documentation, as well as seizure of objects that can serve as evidence in a court procedure; fails to act pursuant to an executive order by the competent agriculture inspector. The act also prescribes punishment for the responsible person within the legal person, as well as the natural person.

⁸³⁴ Maternity and Parental Grants Act, Official Gazette, No. 85/08, 110/08, 34/11.

⁸³⁵ Employment Fostering Act, OG No. 57/12, 110/120, 34/12.

⁸³⁶ Employment Preservation Grant Act, OG No. 94/09, 88/10, which is a true temporal act, valid until 31 December 2010.

Human Rights and Fundamental Freedoms.⁸³⁷ As a result, the courts started passing rejecting judgements due to the already existing misdemeanour conviction with (even only partially) the same facts.⁸³⁸

Regarding subsidy fraud, and considering the previous analysis of special legislature, the following must be highlighted:

- 1) in the special legislature which regulates subsidies, misdemeanours and criminal offences of subsidy, fraud should not overlap in any way.⁸³⁹
- 2) Misdemeanour Courts need to make sure, during a misdemeanour trial, not to comprise the substrate fact of subsidy fraud which can fit into a legal description of a certain misdemeanour.
- 3) When applying the *ne bis in idem* principle, the Courts must take all circumstances of

the actual case into consideration.

If there is reasonable doubt that a criminal offence with misdemeanour elements was also committed, which resulted in investigation (when it is obligatory pursuant to the Criminal Procedure Act), Derenčinović justifiably says that if a misdemeanour procedure was instigated, it should be suspended until the potential indictment stage or suspension of investigation.⁸⁴⁰ Of course, it would not be fair that a person should be tried only for a misdemeanour, and another person for a criminal offence (with all the consequences of a criminal offence) in the event of the same offence. Reasons of legal security and equality of all before the law also prohibit this (any skilled lawyer would try to initiate a misdemeanour procedure against his client, rather than a criminal procedure).

⁸³⁷ The Court was of the same opinion in *Tomasović versus Croatia*, 18 October 2011. See *Derenčinović et al.* 2013, 768.

⁸³⁸ *Novoselec & Bojanić* 2013, 61. See also *Ivičević Karas* 2009, 2–9. For more details, see *Ivičević Karas & Kos* 2012, 555–584.

⁸³⁹ In the two most important special acts, the Rural Development and Agriculture Grant Act and the Sea Fishery Act, misdemeanours do not overlap with the criminal offence of subsidy fraud.

⁸⁴⁰ *Op. cit. Derenčinović et al.* 2013, 768.

Chapter 5

Computer Fraud

*“On each landing, opposite the lift shaft, the poster with the enormous face gazed from the wall. It was one of those pictures which are so contrived that the eyes follow you about when you move. BIG BROTHER IS WATCHING YOU, the caption beneath it said ...”*⁸⁴¹

Finding new modes of committing an offence, new victims and the globalisation of crime sites are all characteristics of previously mentioned types of fraud. However, they are particularly pronounced in computer fraud. In the past 20 years or so, society underwent substantial changes due to digitalisation, convergence and continuous globalisation of computer networks. Improvements in business, increasing productivity, market expansion, and reducing cost and making more profit at the same time resulted in the electronic business characteristic of our time.⁸⁴² Computer networks and electronic information are frequently used for criminal offences.⁸⁴³ Accordingly, the Convention on Cybercrime preamble states, among other things, that member states of the Council of Europe and other Convention signatories are convinced of the need for joint criminal policy directed to protect society from cybercrime, as a policy of primary importance (through appropriate legislature and fostering international cooperation).⁸⁴⁴ Attacks on information systems, especially attacks connected with organised crime, are considered a growing threat and there is increasing concern about potential terrorist or politically-motivated attacks on information systems which are part of a key infrastructure of member states and the Union (representing

⁸⁴¹ *Orwell* 2001, 9.

⁸⁴² The origins of electronic business lie in electronic money transfers in the US in the late 19th century. *Dragičević & Dragičević* 2003, 358. In the age of globalisation, man lost a direct experience of events and occurrences and became dependent on their display in public information and communication systems. See *Tudman* 2008, 40.

⁸⁴³ The Convention preamble, p. 1. In relation to it, *Vojković & Štambuk-Šunjić* state that modern world, historically, is in the post-modern era whose important specific feature is that all serious problems become global, unlike modern society, whose important feature was a national one. *Vojković & Štambuk-Šunjić* 2006, 123.

⁸⁴⁴ Act on Confirming the Convention on Cybercrime, Official Gazette International Treaties no. 9/02, the Law on Confirming the Additional Protocol to the Convention on Cybercrime concerning incriminating acts of racist and xenophobic nature committed by means of computer systems, Official Gazette International Treaties no. 4/08, hereinafter: the Convention. Critically on the translation of the term “cyber” see *Vojković & Štambuk-Šunjić* 2006, 124–125. See *Derenčinović & Getoš* 2008, 138.

a threat to achieving a safer information society and freedom, security and justice).⁸⁴⁵ Computer fraud covers as many as 3 large criminal sectors: it is primarily part of computer crime, but is very significant in economic and property crime.⁸⁴⁶ Computer crime refers to all criminal offences that affect computer data.⁸⁴⁷ Today, computers are an instrument of economic traffic just as much as bookkeeping and balance sheets (they took over the documentational function of traditional bookkeeping).⁸⁴⁸ Studying and understanding computer fraud is inseparable from the personal data protection sector.⁸⁴⁹

⁸⁴⁵ See the preamble of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 regarding attacks on information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218/8, hereinafter: Directive 2013/40/EU.

⁸⁴⁶ The Ministry of the Interior warned on Monday of a new method of fraud via email, stressing that anybody affected by impostors should contact the police. It seems that impostors, as the police reports, infiltrated the email correspondence of certain companies and their customers. The suspects followed, in an unspecified way, the email correspondence between companies conducting certain business activity and when the payment of goods ensues, the suspects join the correspondence and send to the victims similar messages, imposing as executors of delivery on behalf of that company. They claim the account number via which the payment is to be made has changed and provide information about another account opened for the purpose of fraud, and lead the victims to pay money to that account. The police called for caution and stressed that if the person is contacted by the company he does business with and is told of an account or bank change, said person should verify such change by phone with the company. Our interlocutor, an IT expert, explained that this is probably a case of a hacked email password of the seller of goods. It is probably one of the web-shop owners. In similar situations reported worldwide, internet users in a large number of cases use trivial, easily-predictable passwords. For example, after the theft of 33 million passwords from the Rockyou Internet service, the analysis showed that the most frequent password was "123456", while the next 20 passwords were equally predictable, such as "12345678", then "password", "iloveyou", "princess" and "rockyou". The online security experts figured out that the hacker needed a maximum of 111 attempts per account to break into "creative" users' passwords, if the tool he worked with used a language base of 5,000 of the most common passwords. At that pace, the hacker broke into a new account every second, which means the he needed slightly less than 17 minutes to break into 1000 accounts. In the Rockyou attack, all passwords were soon offered for sale online. A similar situation occurred in other cases of breaking into databases of large card companies, banks, etc. *Kavain* 2013.

⁸⁴⁷ *Sieber* 2011, 394. The author further clarifies "internet crime" and "cybercrime" and states that it was as early as 2009 that Germany had 206,909 criminal cases or 3.8% of the registered crimes committed via the internet.

⁸⁴⁸ *Tiedemann* 2008, 189.

⁸⁴⁹ For more, see *Boban* 2012, 325. For a comparative display of development of personal data protection, see *Brezak* 1998, 82–105.

5.1 Historical Development

Computer fraud was introduced into the Criminal Code in 2004 with Article 30 of the Act on Amendments to the Criminal Code⁸⁵⁰ due to insufficient legal protection in cases where the perpetrator impacts electronic data processing to obtain for himself or for other person undue profit. Previously such cases could not be brought under the criminal offence of fraud, as there was no misleading and/or deceit. A computer system cannot be misled, only a human being can be misled.⁸⁵¹

Para. 1 of Article 224a defines that computer fraud occurs when: for the purpose of obtaining undue profit for oneself or another, a person enters, uses, changes or deletes computer data or programmes or renders them unusable in another way, or disables or hinders performance or use of a computer system or programme and thus causes damage to another person. Even if the criminal offence per para. 1 is committed for the sole purpose of causing damage to others, the provision still prescribes punishment. Para. 3 prescribes punishment for the person who, without authorisation, creates, obtains, sells, possesses or makes special devices available to others, or intends for computer data or programmes to be made or adapted to execute computer fraud per paras. 1 and 2. Article 4 prescribes seizure of special devices, means, computer data or programmes created, used or adapted for committing fraud, which were used to commit computer fraud per paras. 1 and 2, while para. 5 prescribes punishment for attempted computer fraud per paras. 2 and 3.

According to the 2011 Criminal Code, computer fraud is part of a special chapter, Chapter XXV – Criminal Offences against Computer Systems, Programmes and Data. The 2011 Criminal Code simplified this criminal offence, prescribing in Article 271 that computer fraud is committed by a person who, for the purpose of obtaining undue profit for oneself or other, enters, changes, deletes or damages computer data or renders it unusable or unavailable, or disturbs performance of a computer system and thus causes damage to another person. There is an aggravated form of the offence in para. 2, if computer fraud resulted in substantial material gain or considerable damage. Destroying data generated by committing this criminal offence is prescribed by para. 3.⁸⁵² We should particularly mention the object of protec-

⁸⁵⁰ Official Gazette 105/04 (Article 224a Computer fraud). In 2004 *Derenčinović* stated that computer fraud comprises a number of specific procedures which cannot be incriminated as traditional fraud. The element of prohibited action lies in forbidden computer data manipulation, i.e., in disturbing the normal functioning of a computer system or programme, to ensure protection from the offence with an increasing risk of occurrence due to a developing technology. *Derenčinović* 2004, 35.

⁸⁵¹ *Derenčinović* 2004, 35; *Turković et al.* 2013, 345.

⁸⁵² Punishable behaviours of Article 224a paras. 3 and 4 were put into a separate criminal offence: Article 272. Misuse of devices, Criminal Code 11. This Article was harmonised with Article 8 of the Convention on Cybercrime, and para. 3 with Article 19 of the Convention. See *Turković et al.* 2013, 345. See *Dragičević* 2001, 123.

tion of this criminal offence with respect to its intended objective. Although this offence is part of a special chapter directed primarily towards the protection of computer systems, programmes and data, and the Criminal Code puts criminal offences against economy into a separate chapter, computer fraud is today one of the fundamental offences against economy.⁸⁵³ On 15 May 1986, the Second Act on Fight against Economic Crime (2. WiKG)⁸⁵⁴ introduced computer fraud in Germany – § 263a.

5.2 Criminological Significance

In order to determine the criminological significance of computer fraud, we analysed the data of the State Bureau of Statistics (from 2007 to 2012) and twelve final judgements of the Municipal Court in Zagreb and the Municipal Court in Split.

Table 15: Charges against adult perpetrators of computer fraud under Article 224a (1), (3) according to the type of decision⁸⁵⁵

	Total charges	Unknown perpetrator %	Dismissed charges %	Bill of indictment %		Indictment %	
				Without criminal order	With criminal order	Immediately	After conducted investigation
2007	32 (18.7%)	15.6	12.5	71.8	—	—	—
2008	42 (16.6%)	30.9	14.2	54.7	—	—	—
2009	113 (15.9%)	28.3	14.1	57.5	—	—	—
2010	178 (16.2%)	49.4	3.9	46	0.5	—	—
2011	178 (17.9%)	36.5	8.9	51.6	2.8	—	—
2012	193 (16%)	—	9.8	18.6	23.3	—	8.8

Based on the data from the previous table, it is evident that the number of charges against adult perpetrators has decreased since 2007. From 2008 to 2009, the number

⁸⁵³ See Pavlović 2012, 504, who states that economic crime, in its classic form, almost no longer exists; today's focus is on the neuralgic points; accounting, company staff and, the most dangerous, computer crime.

⁸⁵⁴ BGBl. I, 1986, Janssen 2012, 529. In addition to computer fraud, § 263b prescribed fraud regarding capital investment or *Kapitalanlagebetrug*.

⁸⁵⁵ Data from tables 17–20 is based on data obtained from the Statistical Reports No.: 1366/2008, 1394/2009, 1421/2010, 1451/2011, 1478/2012 and 1504/13.

of charges almost tripled. The percentage of dismissals is considerably lower with respect to fraud and fraud in economic transactions, ranging between 3.9% (in 2010) to the maximum of 14.2% (in 2008), and continuously decreased from 2009.

The number of charges for computer fraud executed with the aim of causing damage to another person is minor. There were no charges in 2007 and 2008, and only a few cases in 2010, as evident from the following table.

Table 16: Charges against adult perpetrators of computer fraud under Article 224a (2) according to the type of decision

	Total charges	Unknown perpetrator %	Dismissed charges %	Bill of indictment %		Indictment	
				Without criminal order	With criminal order	Immediately	After conducted investigation
2007	—	—	—	—	—	—	—
2008	—	—	—	—	—	—	—
2009	1	100	—	—	—	—	—
2010	3 —	66.6	—	33.3	—	—	—
2011	4 (25%)	25	25	50	—	—	—
2012	2 (50%)	—	100	—	—	—	—

Table 17: Adults indicted for computer fraud under Article 224a (1), (3) according to attempt and the type of decision

	Total	Attempt %	Convicted persons %	Dismissal	Stay of the criminal proceedings %	Acquittal %	Judgement denying the charges %
2007	17	11.7	11.7	—	—	—	—
2008	12	16.6	91.6	—	8.3	—	—
2009	31	6.4	93.5	—	6.4	—	—
2010	57	1.7	87.7	—	8.7	—	3.5
2011	97	7.2	88.6	—	1	3	7.2
2012	96	6.2	93.7	—	3.1	—	3.1

After the indictment, the largest number of decisions were guilty convictions. The percentage of convictions ranged from 87.7% to 93.7% (except for 2007, when it was merely 11.7%). Stays, acquittals and judgements of abandonment refer to individual cases (except for 2011, when there were 7.2% judgements of abandonment).

Table 18: Adults convicted of computer fraud under Article 224a (1), (3) according to attempt and pronounced sanctions

		2007	2008	2009	2010	2011	2012
Total N		15	11	29	50	86	90
Women %		2.6	9	27.5	24	32.5	27.7
Attempt %		—	18.1	6.8	2	6.9	6.6
Duration of prison sentence	Total N	15	11	29	50	85	90
	Probation %	66.6	54.5	75.8	84	82.3	86.6
	3–5 years %	—	—	—	—	1	—
	2–3 years %	—	—	—	—	—	1.1
1–2 years %	Total	13.3	9	10.3	14	9.4	12.2
	Probation	100	—	—	42.8	50	72.7
6–12 months %	Total	40	72.7	65.5	46	61.1	50
	Probation	66.6	62.5	84.2	91.3	90.3	86.6
3–6 months %	Total	46.6	18.1	24.1	40	27	33.3
	Probation	57.1	50	85.7	90	82.6	63.3
2–3 months %	Total	—	—	—	—	1.1	2.2
	Probation	—	—	—	—	—	50
1–2 months %	Total	—	—	—	—	—	1.1
	Probation	—	—	—	—	—	—
30 days	Total	—	—	—	—	—	—
	Probation	—	—	—	—	—	—
Pecuniary fine %	Total	—	—	—	—	1.1	—
	Probation	—	—	—	—	—	—
Court warning		—	—	—	—	—	—
Pronounced guilty, but released from punishment		—	—	—	—	—	—
Educational measures		—	—	—	—	—	—

For computer fraud, as for previous criminal offences, the courts most often hand down a probational conviction (between 54.5% and 86.6% cases). The most frequent are prison sentences from six to twelve months (between 40% and 72.7% of cases), then three to six months (between 18.1% and 46.6% of cases) and one to two years in prison between 9% and 14% of cases.⁸⁵⁶

Data about computer fraud perpetrators collected through the analysis of judgements indicates that 57.1% of perpetrators were female; 78.5% of them had received secondary education, 64.2% stated that they had no material possessions. With respect to the age, persons of 20–30 were represented in 42.8 % of cases, 30–40 in 28.5% of cases, and 50–60 in 21.4% of cases.⁸⁵⁷ In three cases (or 21.4%) the illicit acquisition of someone else's card occurred on hospital premises. In 57.1% of cases, computer fraud was committed concurrently with another offence, usually the forgery of documents, and in one case with theft and grand larceny.

The injured parties are usually natural persons whose bank cards or account data were accessed in “an undetermined way”, as stated in the judgements. The acquired material gain per case amounted to HRK 7,089 on average.

With respect to the pronounced sanctions, in all cases probational judgements were delivered and, in one case, the probational sentence was exchanged for community service. In another case, a female defendant was subjected to the protective measure of compulsory psychiatric treatment.

Regarding extenuating circumstances for the perpetrators, the court usually considered their family situation, such as parenthood, if they had no previous criminal record, whether they had made an honest confession and expressed remorse, if they had behaved suitably in court and had been indemnified by the injured party. With respect to aggravating circumstances, the most common were previous convictions and the abuse of narcotics.

5.3 Objective Features

Within the objective elements of the offence, we will first define the concept of computer data and computer system, followed by the form of perpetration.

⁸⁵⁶ In some future research, it would be interesting to compare the number of adult perpetrators of computer fraud with the number of juvenile perpetrators; we assume that this criminal offence is extremely represented among young perpetrators.

⁸⁵⁷ According to *Derenčinović*, the profile of the average female perpetrator shows that these are usually young persons (25–29 years of age), with poor economic standing and: unmarried or single mother, who ran away from home at a young age, self-destructive behaviour though attempted suicide, victim of physical (and sexual) abuse, problems at school, unemployed, primary offender convicted of theft or abuse of narcotics. *Derenčinović* 2004, 182.

5.3.1 Computer Data and Computer System

Pursuant to Article 87, para. 19 of the CC, computer data refers to every presentation of facts, information or idea in the form which is adequate for computer analysis.⁸⁵⁸ German legal theory similarly perceives the notion of data from § 263a. In fact, this notion does not include every item of “information”, only the coded or scripted information available for computer analysis.⁸⁵⁹ A computer programme is a set of computer data which can cause the computer system to perform a certain function (para. 20). A computer system is any device or group of interconnected or associated devices, one or more of which automatically analyses data based on a programme, as well as computer data stored, analysed, loaded or transferred therein for the purpose of its operation, use, protection or maintenance (para. 18).⁸⁶⁰

5.3.2 Act of Perpetration

The action of this criminal offence consists in manipulating computer data or programmes, whereby the perpetrator acts with the intent to acquire illicit material gain.⁸⁶¹ The act of perpetrating criminal fraud is regulated in para. 1 of Article 271 of the CC and it differs with respect to the object. In fact, the act comprises entering, alteration, deletion, damage and rendering of computer data unusable or inaccessible. The obstruction of a computer system is also incriminated. Foreign literature states that the acts of perpetration, different ways of manipulation oriented towards empirical occurrences and computer manipulations focussed on damage of property are difficult to demarcate.⁸⁶²

⁸⁵⁸ See Article 1b of the Convention on Cybercrime: the term “computer data” refers to any presentation of facts, information or concepts in the form suitable for computer analysis, including the programme which is able to cause the computer system to perform a certain function. Same as Article 2b of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 regarding attacks on information systems and replacing Council Framework Decision 2005/222/JHA.

⁸⁵⁹ See *Fischer* 2012, 1844. The notion of data processing refers to all technical processes of data processing and their connection onto other programmes. Because of that, the object of this criminal offence does not refer to devices for data processing, but specific procedures which, pursuant to the structure of fraud from § 263, replace disposal of property. *Ibid.*

⁸⁶⁰ In the Stricter sense of Article 1a of the Convention, the term “computer system” refers to any device or group of interconnected or associated devices, one or more of which automatically analyses data based on a programme.

⁸⁶¹ *Turković et al.* 2013, 345. See *Škrtić*: “criminalisation of all manipulations during data processing with the intent to achieve illicit transfer of proprietorship ...”. *Škrtić* 2011, 311.

⁸⁶² *Fischer* 2012, 1845.

Entering of computer data implies the entering of data from the computer data storage medium through a suitable reader of computer data into the computer system.⁸⁶³ In the majority of cases, the perpetrator enters computer data from the computer data storage medium through a reader into the computer system and subsequently authorises data by entering PIN, TAN or mTAN number or password.⁸⁶⁴ Škrtić distinguishes computer fraud by entering computer data, and then by combining computer and ordinary visible data. In fact, the former occurs when the computer data is read from the magnet strip of the card with a skimmer, after which the perpetrator signs the slip in order to realise the transaction and acquire illicit material gain.⁸⁶⁵ In such cases, the perpetrator commits both computer fraud and forgery of a document as concurrent offences. The latter occurs when the perpetrator enters the PIN code to use the credit card at the ATM or POS device, in addition to reading computer data. The PIN code is entered by typing the said number on the ATM or POS device keyboard. One of the methods for obtaining users' passwords, PIN codes, credit card numbers or other confidential data which allow the unauthorised user to access the information system of financial institutions is phishing or phishing attacks. Phishing attacks entail activities by which unauthorised users, through the use of spam email and fake websites of financial organisations attempt to persuade the user to reveal personal data which would enable them to acquire material gain.⁸⁶⁶ These attacks use more advanced specially devised techniques of social engineering and fake emails persuading the user to voluntarily and unknowingly reveals confidential data to the unauthorised user.⁸⁶⁷ The concept first appeared on "alt.2600" hacker newsgroup on 28 January 1996, and it was originally used to access online accounts for free surfing, i.e., surfing at someone else's expense.⁸⁶⁸ The magnitude of the risk of phishing attack is supported by the fact that, in 2004, they caused 2.4 billion dollars damage in the USA alone.⁸⁶⁹ From October 2013 to December 2016, the FBI investigated just over 22,000 of these incidents involving American businesses. In total, they saw losses approaching 1.6 billion dollars (about \$500 million every year being

⁸⁶³ Škrtić 2011, 320.

⁸⁶⁴ Škrtić 2011, 321; PIN is a personal identification number, TAN is a transaction authentication number, mTAN is mobile transaction authentication number.

⁸⁶⁵ Idem. This refers to the use of the credit card on older POS devices which do not require insertion.

⁸⁶⁶ CARNet 2005, 4; <https://www.cis.hr/www.edicija/LinkedDocuments/CCERT-PUB-DOC-2005-01-106.pdf> [18/07/2018]. The term derives from the English word "fishing", metaphorically describing the procedure by which unauthorised users tempt online users to voluntarily reveal their confidential data. Idem. Such messages tempt the user to click on a certain link which further leads him to malicious websites (it is usually misrepresented as a website of a bank, electronic payment service, etc.).

⁸⁶⁷ Ibid. Hence, they particularly use the inexperience and ignorance of online users.

⁸⁶⁸ Schuh 2012, 230.

⁸⁶⁹ See Popp 2011, 387.

scammed).⁸⁷⁰ In Germany, such attacks are punishable based on § 202a StGB, in Austria § 126c para. 1, item 2 and 118a of the CC, and in Switzerland § 143 of the CC.⁸⁷¹ The most frequently used phishing methods include: simple requests to the user to send his confidential data by email; fake links in emails (leading the user to a hazardous site to enter his user name and password and other confidential data); fake web domains; fake popup window on legitimate web domains of the banks; tabnabbing which consists in taking advantage of the user's inattention since he usually has several tabs opened at the same time, and one of the inactive tabs is refreshed with a malware imitating a legitimate website).⁸⁷²

A special form of computer fraud known as "Card not Present" is common with telephone or online purchases. The transaction is executed by entering data or typing data on the keyboard, telephone or order form. Since the person authorised for card and user verification cannot personally identify the user, he has to rely on the presented data.⁸⁷³

Alteration refers to every influence on computer data which results in the obstruction of data processing as defined by the original programme.⁸⁷⁴ Alterations of data may be executed immediately, by direct access to data, whereby one of the commercial programmes is used,⁸⁷⁵ or by some other programmes, e.g., Trojan horse. Input data may be directly altered, by adding new or deleting existing data during entry or processing.⁸⁷⁶ A common example of computer fraud consists in changing the settings of the programme which connected the computer to the internet, not through the selected data provider, but through the much more expensive dialer programmes.⁸⁷⁷

⁸⁷⁰ Mathews 2017.

⁸⁷¹ Schuh 2012, 233–237. In our system, unauthorised access from Article 266 of the CC.

⁸⁷² <http://www.cert.hr/phishing> [03/03/2014].

⁸⁷³ Škrtić 2011, 321

⁸⁷⁴ Ibid, 329.

⁸⁷⁵ Dragičević 1999, 139. The author further states that it is most commonly the programme for database operations, i.e., database management system. Alterations can be executed on the system itself, by accessing it from a work station inside the computer network, or remote access via telephone, satellite or other communication channels. Ibid.

⁸⁷⁶ Idem. It is similar with output data; the manipulation is executed after the processing, and before printing or distribution of data and information. A Trojan horse is a form of malicious software which misrepresents itself to the user as useful software so that the user would execute it, i.e., allow installation. A Trojan horse can alter the operational system on the infected computer so that it displays advertisements (pop-up windows) for the purpose of acquiring material gain or allow the hacker full control over the infected computer (and thus, inter alia, steal confidential data). http://www.cert.hr/mal-ver/trojanski_konji [03/03/2014].

⁸⁷⁷ Škrtić 2011, 329.

Malicious software or malware is intended to infiltrate the computer without the knowledge of its owner, i.e., user, and it can cause financial damage even to large companies (some research has shown that the frequency of issuing malware programmes exceeds the frequency of issuing legitimate software).⁸⁷⁸ For illicit obtaining of credit card numbers and passwords, they frequently use spyware, whose purpose is to collect information and take control over computer operations without knowledge or permission.⁸⁷⁹ The most common case of infection occurs when the person visits websites with illicit or pornographic content, which contain a malicious code which uses safety passes in search engines, and thus performs automatic download and installation of the spyware onto the computer without the user's knowledge.⁸⁸⁰ The most harmful type of malicious code today is crimeware which is generally defined as any form of malicious code which helps perform the criminal acts of identity theft, blackmail, personal data theft or sending email via computers.⁸⁸¹ For obtaining confidential information (passwords for accessing different payment services, credit card numbers, PIN codes, etc.) the perpetrators often use keyloggers, software intended for secret monitoring and recording of pressed keys on the computer.⁸⁸²

Deletion of computer data as a form of computer fraud is most common in the event of unpaid goods in the store computer system.⁸⁸³ According to Škrtić, data integrity has been compromised when it cannot be used for processing in a computer system.⁸⁸⁴ Its integrity cannot be jeopardised only partially; by affecting only a certain group of computer data, one jeopardises the integrity of the programme and its functioning.⁸⁸⁵

Obstruction of work of the computer programme is a special criminal offence regulated Article 267 of the CC, committed by whoever incapacitates or obstructs operation or use of a computer system, computer data or programme or computer communication. Hence, obstruction consists in disabling the normal use of the resources

⁸⁷⁸ <http://www.cert.hr/malver> [03/03/2014]. Possible types include: viruses, worms, Trojan horses, spyware, malicious adware, crimeware, scareware, keyloggers, rootkits.

⁸⁷⁹ <http://www.cert.hr/malver/adware> [03/03/2014].

⁸⁸⁰ Ibid.

⁸⁸¹ <http://www.cert.malver/crimeware> [03/03/2014]. On the same website where business organisations and private users lose millions of dollars a year to fraud, theft and black-mails are committed with the help of crimeware, which is often used for money laundering.

⁸⁸² <http://www.cert.hr/malver/keyloggeri> [03/03/2014].

⁸⁸³ See Pajčić & Leclair, op. cit. due to Škrtić 2011, 328.

⁸⁸⁴ Škrtić 2012, 10; http://www.fvv.uni-mb.si/DV2012/zbornik/informacijska_varnost/skr_tic.pdf [20/03/2014].

⁸⁸⁵ Ibid.

(computer system, data or programme) or disabling normal mutual communication.⁸⁸⁶ This form of the offence is presented in more detail in Article 5 of the Convention and it consists of entering, transferring, damaging, deleting, corrupting, altering or rendering unusable computer data. Obstruction of the system in the same provision entails the deliberate act of gross illicit obstruction of computer system functioning.⁸⁸⁷ Obstruction of computer system operation most frequently consists of the simultaneous sending of the data from a larger group of computers: e.g., distributed attacks to withhold services (DOS attacks).⁸⁸⁸ Obstruction may be executed by sending spam or committing a hoax.⁸⁸⁹ Spam is unwanted email sent for promotional advertising, or a phishing attack, or as means of distributing malware links.⁸⁹⁰ Obstruction of the system is bilateral; it is manifested with direct users who frequently receive a large number of such messages, which prevents the receipt of other (legitimate) messages, and in internet providers because they need to increase their capacity. Hoaxes deceive the users, jeopardise the reputation of certain organisations or overburden the network and the recipient's mailbox and thus increase internet use expenses.⁸⁹¹ They appear as: warnings about harmful programmes, pyramidal and profit schemes, fake aid requests, intimidating and threatening hoaxes, false petitions, compromising and harmless hoaxes.⁸⁹²

The aggravated form of the offence – as defined by Article 271, para. 2 – is realised when fraud results in the acquisition of substantial material gain or considerable damage. According to Article 87 No. 27 CC, the value of property, property damage,

⁸⁸⁶ *Turković et al.* 2013, 343. This does not have to jeopardise the integrity or confidentiality of data within the system. *Ibid.*

⁸⁸⁷ Illicit obstruction of the system is regulated in Directive 2013/40/EU, Article 4 as gross obstruction or termination of information system functioning by entering, transferring, damaging, deleting, destroying, altering or concealing computer data, or disabling access to such data, if it is committed intentionally and illicitly, as a punishable act (at least when these are not petty cases). The Directive distinguishes illicit obstruction of the system from illicit interception. See Articles 4, 5 and 6.

⁸⁸⁸ *Ibid.* *Pavlović* defines them as a known type of network attacks where the network is overburdened by large and useless traffic, leading to network incapacitation and inability to provide requested services. The risk is manifested by the fact that the attack is often directed towards specific servers. *Pavlović* 2013, 579.

⁸⁸⁹ Hoax is an email message with false content, sent with the aim of intimidating or misinforming the recipient, and though it cannot cause damage to computer systems and operational systems, its content and skilful psychology may cause the users to harm their own programmes and systems, <http://www.cert.hr/hoax> [03/03/2014].

⁸⁹⁰ <http://www.cert.hr/spam> [03/03/2014]. It is usually sent via email, but also through other electronic forums, blogs, social networks, direct communication services and other systems for the exchange of messages or other data.

⁸⁹¹ <http://www.cert.hr/spam> [03/03/2014].

⁸⁹² *Ibid.*

property gains, tax liabilities and state aid is of large scale if it exceeds HRK 600,000. The additional aggravated form is realised when the offence is committed within a joint criminal venture (Article 329 of the CC). Interestingly, the legislator omitted to include computer fraud among the grave forms of criminal offences against the computer systems, programmes and data in Article 273. Since the objects of this form refer to the computer system or data of the government authority, units of local or regional self-government, public institutions or companies of special public interest, I believe that aggravated form of computer fraud should also be regulated.

In Germany, computer fraud is regulated by § 263 as “*Computerbetrug*”, in Austria § 148a as fraudulent abuse of data processing devices (“*Betrügerischer Missbrauch einer Datenverarbeitungsanlage*”) and in Switzerland by § 147 as fraudulent abuse of data processing (“*Betrügerischer Datenverarbeitungsmissbrauch*”).

According to § 263a StGB, computer fraud is committed by the person who, with the aim of acquiring illicit material gain for himself or others, influences the result data processing by irregularly operating the programme, using false or incomplete data, unauthorised use of data or other unauthorised influence on data processing and thus causes damage to another person’s property. The prescribed penalty is a pecuniary fine or a prison sentence of up to five years.⁸⁹³ Para. 3 extends punishment onto preliminary actions, by prescribing that whoever prepares the perpetration of the criminal offence from para. 1 by writing a computer programme aimed at committing such an offence, or obtains, sells or keeps (owns) a computer programme for himself or others, or assigns the computer programme to others, shall be punished (prescribed punishment is a pecuniary fine or a prison sentence of up to three years).⁸⁹⁴ Computer fraud consists of four basic types of action according to *Tiedemann*: programme manipulation, input manipulation, abuse of ATMs and output abuse.⁸⁹⁵

Fraudulent abuse of data processing is committed by the person who, according to § 148a para. 1, causes damage to another person’s property with the intent of acquiring illicit material gain for himself or others, by influencing automatic data processing through programming, entering, altering, deleting or suspending data, or other acts which affect the course of data processing. The prescribed penalty is a prison sentence of up to 6 months or a monetary fine of up to the income equivalent to 360 days of work. The aggravated form refers to the professional perpetration of the offence or causing damage over EUR 3,000 (prison sentence of three years) or over EUR 50,000, in which case the prescribed penalty is one to ten years in prison.

⁸⁹³ For para. 2, the relevant application of § 263, paras. 2 to 7 is prescribed.

⁸⁹⁴ For para. 3, the relevant application of § 149 paras. 2 and 3 is prescribed (punishment of preliminary actions for the perpetration of criminal offences of counterfeit of money and value designations).

⁸⁹⁵ *Tiedemann* 2008, 191–195.

Fraudulent abuse of data processing devices from § 147 is committed by the person who, with the aim of acquiring illicit material gain for himself or others, uses false, incomplete or unauthorised data or in a similar way affects electronic or similar data processing or data transfer, thus causing property disposal to the detriment of another person or concealing immediate property disposal. The prescribed punishment is a pecuniary fine or a prison sentence of up to five years. The aggravated form refers to professional perpetration of the offence (prison sentence of up to ten years or a pecuniary fine no less than the income equivalent to 90 days of work). Para. 3 prescribes that the offence committed to the detriment of a family member shall be prosecuted upon proposal. The adoption of the Convention on Cybercrime does not imply that the international activity in the area of copyright criminal law and criminal law regarding fraud has been completed.⁸⁹⁶ The following legal documents are relevant:

- UN Economic and Social Council Resolution on international cooperation in the prevention, investigation, prosecution and punishment of economic fraud and identity-related crime⁸⁹⁷
- Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment of 2001
- Council Framework Decision 2005/222/JHA on attacks against information systems
- Directive 2013/40/EU of the European Parliament and the Council of 12 August 2013 on attacks against information systems, replacing Council Framework Decision 2005/222/PUP⁸⁹⁸
- European Parliament Resolution of 12 September 2013 on the cybersecurity strategy of the European Union: an open, safe and secure cyberspace (2013/2606(RSP))
- Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, Brussels, 13/9/2017, COM (2017) 489 final 2017/0226(COD).

⁸⁹⁶ *Sieber et al.* 2011, 400.

⁸⁹⁷ United Nations Economic and Social Council – Commission on Crime Prevention and Criminal Justice, Resolution of the Economic and Social Council of the United Nations on international cooperation in the prevention, investigation, prosecution and punishment of economic fraud and identity-related crime, Doc. E/2007/30 – E/CN.15/2007/17. Op. cit. according to *Sieber et al.* 2011, 400.

⁸⁹⁸ See Report from 19 June 2013 on the proposal of the Directive of the European Parliament and Council on the attacks against information systems replacing Council Framework Decision 2005/222/JHA (COM(2010)0517-C7-0293/2010-2010/0273(COD)), [http://www.europarl.europa.eu \[03/03/2014\]](http://www.europarl.europa.eu [03/03/2014]).

5.4 Subjective Features

Computer fraud may be committed with direct or indirect intent. The perpetrator acts with indirect intent when he is unsure if he would be able to enter, alter, delete, damage, render unusable or inaccessible the computer data or obstruct the operation of the computer system, but nevertheless agrees to that possibility.⁸⁹⁹ In the analysed comparative systems, we found uniform views that the offence can be committed only with intent.⁹⁰⁰

In the Convention on Cybercrime, the aim of acquiring illicit gain is referred to as “fraudulent or unfair intention of unauthorised acquisition of material gain for oneself or others”. In the German StGB, the aim (*Absicht*) of acquiring illicit material gain for oneself or others is a special subjective feature of computer fraud.⁹⁰¹

The subjective feature of computer fraud in the Austrian CC is the intent (*Vorsatz*) to acquire illicit material gain for oneself or others. In fact, the legal literature states that intention should encompass the totality of objective features of the offence, and that the perpetrator should act with additional intent (*erweiterter Vorsatz*) that he would acquire illicit material gain by manipulation.⁹⁰² In the Swiss CC, the subjective feature consists of the aim (*Absicht*) to acquire illicit material gain for oneself or others.

⁸⁹⁹ Pavlović 2012, 583.

⁹⁰⁰ Donatsch 2010, 279.

⁹⁰¹ Lackner & Kühl 2007, 1190.

⁹⁰² Birklbauer et al. 2011, 393.

Chapter 6

Electoral Fraud

*“– I believe that our country is perfectly fine,
if properly founded.
– Indeed.
– It is obviously wise, courageous, sober and fair.”*⁹⁰³

Fundamental principles of freedom and the realisation of one's voting rights in the contemporary Croatian democracy are guarantees of the voters' freedom of choice and secrecy of their votes. The voter can vote only once at the election, no one can vote on behalf of another person, and no one can demand the voter to reveal his vote. The voter is free to reveal his vote and no one should be held liable for voting or omitting to vote.⁹⁰⁴ Electoral fraud has, in the broader sense, had a significant (and occasionally dire) effect on the history of mankind. The ten-year civil war in Algeria started primarily as a result of the annulment of election results. In fact, in 1989 the Islamic Salvation Front (FIS) was legalised after constitutional changes; its objective was to establish the Fundamentalist Islamic Republic. The first free elections were conducted in 1991, and FIS won in the first round, but the military intervened and annulled the elections.⁹⁰⁵ FIS was prohibited, and its leaders incarcerated. Soon, Algeria was flooded in blood, and FIS fought back with terrorism and a guerrilla army. Years of civil war led to the death of 100,000 people.⁹⁰⁶ At the presidential elections in 1999, the people elected *Bouteflika*. He presented the programme of national reconciliation and the support of military circles. He offered amnesty for terrorists who put down their weapons. In 2011, the government abolished the state of emergency, but maintained the prohibition of public gatherings and demonstrations. They allowed more political parties to register, but withheld registration to those based on religious, especially Islamic principles. FIS and the political operation of its leaders are still prohibited. The “Orange Revolution” in Ukraine occurred as a consequence

⁹⁰³ From the conversation between *Adeimantes* and *Socrates* in the fourth book of Plato's Republic. *Plato* 2004, 175–176.

⁹⁰⁴ Article 4 of the Local Elections Act, OG 144/12, Article 3 of the Act on the Election of Representatives into the Croatian Parliament, OG 116/99, 109/00, 53/03, 69/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 120/11, hereinafter the AERCP. See Constitution of the Republic of Croatia, Article 45.

⁹⁰⁵ *Slackman* 2005.

⁹⁰⁶ *Idem*.

of electoral fraud in 2004.⁹⁰⁷ At the moment of completion of this doctoral thesis, the situation in Ukraine is described as the beginning of warfare.

Electoral fraud, as well as other criminal offences against the voting right, are seldom the focus of the domestic professional public. Certain issues are actualised during election times in the daily media, but their scope is limited to a uniform circle of questions - usually to the manipulation of demographic data in border areas, i.e., “import” voters or “voting of the deceased”.⁹⁰⁸ The subject of controversy among the domestic public was the electoral fraud at the internal elections of HDZ (Croatian Democratic Union) in 2002.⁹⁰⁹ The fact that every vote counts is supported by the recent local elections in the Republic of Croatia.⁹¹⁰ Does the transfer of representatives between parties after the election or leaving a party to become an independent representative constitute electoral fraud?⁹¹¹ Is manipulation of pre-election polls also electoral fraud?⁹¹² And what about the intentional candidacy of a “weaker” candidate

⁹⁰⁷ “Electoral fraud has not been unusual in Ukrainian politics to date; in the political literature, the Ukrainian political regime was referred to as an authoritarian electoral system. The transition from the rigged Soviet elections to competitive and free elections should have been a key step in the democratic transformation of the Ukrainian political system. The voting of citizens under pressure, subsequent insertion of ballots in the ballot boxes, murdering of independent journalists and entanglement of crime and politics disabled the development of democratic political institutions. Only the 2004 elections marked a turning point in the political practice.” *Boban* 2010, 36–37.

⁹⁰⁸ *Vuković* 2013, where he states that there are slightly over 5,000 citizens in Vrgorac, and there are 7,100 registered voters; those are mostly people who live and work in Herzegovina, but are registered in the Republic of Croatia where they enjoy certain benefits. Or *Ponoš* 2013.

⁹⁰⁹ “DORH: If someone files charges, we will investigate the alleged electoral fraud in HDZ” from 23 November 2006. In fact, the former parliamentary representative *Branimir Glavaš* was first to say that, at the internal elections of HDZ in 2002, he enabled *Ivo Sanader* to become the party president by stealing 300 votes.

⁹¹⁰ For instance, at the elections for the mayor of Split, *I. Baldasar* got 33,365 votes, and *V. Ivaniševića* 32,750 votes; <http://www.izbori.hr> [11/07/2013]. Or in Korčula, *V. Kapelin* 1,596 votes, and *F. Stenek* 1,520 votes. In Belišće, *D. Burić* got 2,550 votes, and *D. Huiš* 2,510 votes.

⁹¹¹ The mayor of Vukovar, *Ž.S.*, was indicted at the end of 2013 for bribing a representative. He is charged for attempting to bribe a council woman with HRK 50,000 to change sides, i.e., to transfer to SDP (Social Democratic Party) so that he could win the majority of votes. *I.La.* 2013.

⁹¹² Along with persuading citizens to vote for someone other than their first choice. These charges were presented by the mayor of Split, *Ž. Kerum*, in *Kovačić* in 2013; stating that Ipsos Puls agency deliberately placed false poll results before the elections; i.e.: “... You lied to people convincing them not to vote for me!”. Parliamentary representative of HNS (Croatian National Party), *B. Blažeković*, indicated that the polls are to blame for his loss at the elections. *Bradarić* 2013.

for the purpose of *trading influence and power*? Ignoring and trivialising electoral fraud is dangerous for a democracy.

6.1 Historical Development

In the Criminal Code of the Republic of Croatia,⁹¹³ Article 65 prescribes the criminal offence of electoral fraud: anyone who falsifies election or voting results by adding, removing, deleting votes or signatures, miscalculating votes or entering false results in electoral documents or otherwise, shall be punished with a prison sentence of up to three years. Para. 2 prescribes the penalty for attempted electoral fraud.

In the commentary of the CC97, it is only briefly mentioned that electoral criminal offences include; violation of the voter's freedom of choice, abuse of electoral rights, violation of voting secrecy, destruction of electoral documents, electoral fraud assumed from the existing act (Articles 60 to 65) with necessary interventions of harmonising with the new terminology and organisation of elected entities.⁹¹⁴ The Criminal Code of 1997 included electoral fraud among the criminal offences against citizen's and human freedoms and rights from Chapter 11. Article 121 prescribes that electoral fraud is committed by anyone who adds, removes, deletes votes or otherwise manipulates the outcome of elections or voting. Provision of para. 2 prescribes penalties for attempted electoral fraud.

This criminal offence traditionally belongs to electoral criminal offences (including violation of the voter's freedom of choice, withholding voting rights, abuse of electoral rights, violation of voting secrecy, destruction of electoral documents), whereas in the broader sense, it belongs to the offences against political freedoms and rights.

The Criminal Code has a separate chapter which refers to electoral fraud: XXXI – Criminal Offences against Voting Rights, which includes violation of the voter's freedom of choice, withholding voting rights, abuse of electoral rights, violation of voting secrecy, destruction of electoral documents (Articles 333-336), destruction and forgery of electoral documents (Article 337), electoral fraud (Article 338) and bribing of representatives (Article 339). The element of electoral fraud with respect to the earlier legal text remained the same, but due to harsher punishment (prison sentence from six months to five years), a special provision on punishment of attempt became superfluous.

⁹¹³ Criminal Code of the Republic of Croatia, consolidated text Official Gazette No. 32/93, correction 38/93.

⁹¹⁴ *Turković et al.* 2013, 181.

6.2 Criminological Significance

Analysis of the statistical data on charges, indictments and judgements for the criminal offence of electoral fraud from Article 121, para. 1 of the CC97 encompassed the period between 2007 and 2012.

Table 19: Charges for electoral fraud under Article 121 (1) of the CC97 in relation to adults according to the type of decision⁹¹⁵

	Total charges	Unknown perpetrator %	Dismissed charges %	Bill of indictment %		Indictment	
				Without criminal order	With criminal order	Immediately	After conducted investigation
2007	18 (38.8%)	—	94.4	5.5	—	—	—
2008	2 —	50	50	—	—	—	—
2009	12 —	—	66.6	33.3	—	—	—
2010	3 —	33.3	66.6	—	—	—	—
2011	1 —	—	—	—	—	—	—
2012	1 (100%)	—	100	—	—	—	—

The number of charges in the analysed period varies, which is expected with respect to the legally determined periodic nature of specific elections:⁹¹⁶ 2007 and 2009 show the largest number of charges (18 and 12), whereas that number is substantially lower in other years (from 1 to 3). Here, we also detected an exceptionally large number of dismissals, ranging from 50% (2008) to 94.4% (2007).

⁹¹⁵ Data from the tables 21–23 are based on the data obtained from the Statistical Reports No.: 1366/2008, 1394/2009, 1421/2010, 1451/2011, 1478/2012 and 1504/13.

⁹¹⁶ E.g., regular elections for the members of representative bodies of the units and the elections for municipal commissioner, mayor and prefect and their deputies are all held at the same time, on the third Sunday in May every four years.

Table 20: Adults indicted for electoral fraud under Article 121 (1) of the CC according to attempt and type of decision

	Total	Attempt %	Convicted persons %	Dismissal	Stay of the criminal proceedings	Acquittal	Judgement denying the charges
2007	—	—	—	—	—	—	—
2008	1	100	100	—	—	—	—
2009	2	—	100	—	—	—	—
2010	—	—	—	—	—	—	—
2011	1	—	100	—	—	—	—
2012	—	—	—	—	—	—	—

The analysis of the data from the table points to the conclusion about the hundred-percent efficiency of the judiciary in these kinds of cases, because the number of adults who were pronounced guilty equals the number of charges.

Table 21: Adults convicted of electoral fraud under Article 121 (1) of the CC97 according to attempt and pronounced sanctions between 2007 and 2012

	Total	Attempt %	Probation %	3–6 months %	2–3 months %
2007	—	—	—	—	—
2008	1	100	100	100	—
2009	2	—	100	—	100
2010	—	—	—	—	—
2011	1	—	100	100	—
2012	—	—	—	—	—

It is evident from the previous table that the number of convicted persons is rather low and proportionate; only one or two people were convicted of electoral fraud in the period of the six analysed years with probational sentences of two to three months in prison and a maximum three to six months.

Judgements reviewed for this doctoral research point to a proportionate factual state of these offences. In fact, they are usually defendants who vote on behalf of another person (and hence commit the criminal offence of abuse of the voting right) and one or more defendants who committed electoral fraud as members of the election board and allowed voters to vote on behalf of other registered voters. The criminal offence of fraud is performed in three stages:

- a) the perpetrator, as a member of the election board, circles the name from the voter registry
- b) he allows certain people to circle a name on the ballots, and
- c) he allows the perpetrators to abuse the voting right and insert the ballots in the ballot boxes.

Furthermore, in one of the cases, one of the defendants, who was the member of the election board, was charged with allowing his co-defendants to vote on behalf of other persons from the voter registry (predominantly the defendant's close relatives) and for voting on behalf of two persons himself. The bill of indictment was filed only for the criminal offence of electoral fraud. He was thus only convicted for the criminal offence of electoral fraud. Does this mean that the state attorney's office, in the cases where the member of the election board votes on behalf of another person, assumes that the criminal offence of abuse of the voting right is consumed by electoral fraud? Or is it simply an oversight? Although the general clause from Article 121, para. 1 of the CC97 (and 338 of the CC) allows the interpretation that electoral fraud, i.e., forgery of electoral outcome, can be committed by voting on behalf of someone else, I believe that the two criminal offences of abuse of the voting rights and electoral fraud are actually being committed concurrently due to the different legal assets protected by these two criminal offences. In fact, the abuse of the voting right primarily protects the active voting right (and indirectly the election results), and electoral fraud protects the election results. Is electoral fraud a *delictum proprium*? In the majority of cases, the criminal offence is committed by the members of the election board. Therefore, their special capacity should be taken as an aggravating circumstance. However, we can imagine cases where adding, removing or deleting of votes (or otherwise forging them) is committed by another person (who takes advantage of the absence of the members of the election board at the polling station or after the polls have been closed). In this last case, the persons who added, removed or deleted votes or otherwise forged the election results are liable for electoral fraud (by action), and the members of the election boards for the same offence by omission (non-genuine legally unregulated criminal offence by omission).⁹¹⁷

6.3 Objective Features

Within the objective features, we will examine the notion of elections and the act of perpetration.

⁹¹⁷ Legal obligation of the election board to ensure regularity and secrecy of voting is prescribed by Article 69 AERCP (Election boards directly conduct voting of the voters at the polling stations).

6.3.1 Elections

According to the legal definition of the CC, elections refer to elections for the Croatian Parliament, President of the Republic, European Parliament, representative entities in the units of local and regional self-government, municipal commissioners, mayors, prefects, mayor of the City of Zagreb, and the decision process at the state referendum.⁹¹⁸

The German CC similarly determines the scope of electoral criminal offences. In fact, § 108d (at the end of the provisions regulating electoral criminal offences) prescribes that § 107 and 108 refer to the elections for the representatives of the European Parliament, for other elections and voting at the federal level, in federal regions, municipalities and communities of municipalities, and the election of social insurance delegates. Unlike the German CC, in the Austrian CC the provision on the applicability of electoral criminal offences is at the beginning of Chapter 18. In fact, § 261 para. 1 prescribes that the provisions of this chapter apply to elections for the federal president, elections for general representative entities and statutory bodies of legal representations, to general and direct elections of the municipal bodies which may deliver acts, to elections for the European Parliament and referendum. In the Swiss CC, the concept of elections is not specifically defined in the general part,⁹¹⁹ or in the special part on electoral criminal offences.

The President of the Republic of Croatia is elected by the Croatian citizens over 18 years of age at direct elections by secret votes for a period of 5 years.

Local elections, pursuant to the Article 1, para. 1 of the Local Elections Act, refer to elections for the members of representative entities of the units of local and regional self-government and elections for municipal commissioners, mayors, prefects and their deputies.⁹²⁰ Members of the representative entities are elected at direct elections by secret voting, and municipal commissioners, while mayors and prefects are elected by the majority electoral system in which the entire area – be it the municipality, city, county or City of Zagreb – constitutes a single electoral unit.⁹²¹

⁹¹⁸ Article 87, para. 14.

⁹¹⁹ Third part of the Swiss CC – Article 110 contains legal definitions (notions), but there is no notion of elections.

⁹²⁰ Local Elections Act (OG 144/12), regular elections for the members of the representative entities of the units and elections for municipal commissioner, mayor and prefect and their deputies are all held at the same time, on the third Sunday in May, every four years.

⁹²¹ Articles 75 and 88 of the Local Elections Act. Pursuant to Article 94, para. 1, municipal commissioner, mayor and prefect and their deputies are elected by the majority of all voters who voted according to the records in the excerpt from the voters' registry and enclosed voting certificates.

The national referendum is a form of voters' direct decision-making about the performance of state government on constitutional issues, whereas the local referendum is a form of voters' direct decision-making about the performance of state government regarding the issues from the self-government domain of the units of local and regional self-government, as determined by the law and the statute.⁹²²

The members of the European Parliament are elected at direct elections, based on general, free and equal voting rights by secret voting for the term of five years.⁹²³ In terms of the election of members of the European Parliament, there are certain particularities, namely, they are elected by proportional distribution and preferential voting. Voting is performed on a ballot with candidates' lists – the voters can only cast one vote and only on one list. The voter can opt for only one candidate on the ballot who is preferred to other candidates on the list, hence the preferential vote.⁹²⁴

6.3.2 Act of Perpetration

Prior to the analysis of the act of perpetration, we first need to focus on the voting process itself, the notion of valid and invalid ballots, and the obligations of election boards. In fact, according to Article 29 of the Act on the Election of the President of the Republic of Croatia, voters only vote for the candidates listed on the ballot. The ballot is filled out by circling the ordinal number in front of the selected candidate's name. The same provision defines the notion of the invalid ballot, and the one from which the voter's choice is undoubtedly visible.⁹²⁵ The Referendum Act prescribes

⁹²² Article 2 of the Referendum Act and other forms of personal participation in the performance of state government, and local and regional self-government. Other forms of voters' direct decision-making and expression of will about the performance of state government, and local and regional self-government include: counselling referendum, citizens' assembly and representations of citizens. Counselling referendum for the territory of one or more units of local self-government, i.e., units of regional self-government can be proclaimed by the Government of the Republic of Croatia, for the purpose of obtaining the preliminary opinion of the citizens on that territory regarding the regional organisation of the units of local and regional self-government. *Idem*.

⁹²³ Act on the Election of Members to the European Parliament from the Republic of Croatia, Article 2, para. 1.

⁹²⁴ *Idem*. Articles 23 and 24. The voter performs such voting by circling the ordinal number in front of the name of the candidate for whom he casts a preferential vote. In the elections for the members of the European Parliament, the voters only vote for the lists on the ballot.

⁹²⁵ Act on the Election of the President of the Republic of Croatia (NN 22/92, 42/92, 71/97, 69/04, 99/04, 44/06, 24/11). Also Article 43 of the Act on the Election of Members of the European Parliament from the Republic of Croatia and Article 78 of the AERCP. Article 30 prescribes that the invalid ballot is a non-completed ballot or a completed ballot from which it is not clearly discernible which candidate was selected by the voter and, finally, where the voter circled two or more candidates. See Articles 44 and 45 of

that the voting at the referendum is performed on ballots which contain a question, i.e., one or more proposals on which the voter should decide. When an issue is decided at the referendum, the voter circles the word “FOR” or “AGAINST”, and when he is presented with a multiple-choice proposal, the voter circles the ordinal number of the proposal he desires.⁹²⁶

The members of election boards and their deputies should be present at all times at the polling station.⁹²⁷ Upon the completion of voting, the board counts the unused ballots and puts them in a separate envelope and seals it. After that, the board determines the total number of voters who voted according to the voters’ registry and proceeds with the opening of the ballot box and counting of ballots. The board is obliged to fill out the record about their work: it enters the date and place of elections (referendum and the subject of referendum), personal name of the members of the election board, voters who voted based on the certificate issued by the competent authority, number of unused ballots, total number of valid ballots, total number of invalid ballots, number of “FOR” and “AGAINST” ballots for a referendum, number of votes for each of the offered proposals and all other facts which are relevant for voting and the work of the election board (Articles 36 and 37 of the Referendum Act).⁹²⁸

The act of perpetration consists in forging the election results by adding, removing, deleting or otherwise forging votes (general clause). If we compare the element of this criminal offence to fraud or fraud in economic transactions, we can draw a conclusion that electoral fraud does not imply misleading or deceiving, but in Croatian CC electoral fraud refers to the criminal offence of forging (without the aim of acquiring illicit material gain).⁹²⁹

In the German StGB, electoral fraud is covered by Article 108a as *Wählertäuschung*. The elements of the offence are entirely different from the Croatian CC. In fact, that offence is committed by anyone who deceives another person during voting about the content of his expression or causes him to cast a vote against his will or to produce an invalid ballot.⁹³⁰ The penalty for this offence is a pecuniary fine or a prison

the Act on the Election of Members of the European Parliament from the Republic of Croatia and Articles 72 and 73 of the Local Elections Act, Article 79 of the AERCP.

⁹²⁶ Referendum Act, Art. 33.

⁹²⁷ Article 32 para. 1 of the Act on the Election of the President. The president of the election board or his authorised member is also obliged to verify for each voter who arrives to the polling station whether he is entered in the voters’ registry.

⁹²⁸ See Articles 50 and 52 of the Act on the Election of Members of the European Parliament from the Republic of Croatia and Articles 62 and 64 of the Local Elections Act.

⁹²⁹ See with the beginnings of the criminal offence of fraud in littoral and Dalmatian statutes.

⁹³⁰ *Eser* in Schönte/Schröder 2006, 1190. This provision is in Chapter 4; Criminal offences against constitutional entities, elections and voting.

sentence of up to two years. Attempt is also punishable. The act of perpetration consists of fraudulent influence on the voter which results in the voter's error regarding the content of his expression during voting or the fact that the voter is not aware of his voting or casts an invalid vote against his will by handing in an invalid ballot or failing to vote.⁹³¹ The perpetrator hence has to disable the personal will of the voter. False electoral propaganda which influences the voter's will is not included in Article 108a.⁹³² This criminal offence is directed towards protecting the voter's freedom of choice against forgery through fraud, and indirectly towards protecting electoral results against forgery.⁹³³ The perpetrator misleads the voter by misrepresenting or concealing facts (as in the basic form of fraud).

The element of Croatian electoral fraud corresponds more to the German criminal offence of forging elections (*Wahlfälschung*, § 107a), committed by the person who casts an unauthorised vote or otherwise produces false election result or forges the result, and who publishes false election result or allows their publication.⁹³⁴ The interest of society in regular elections is the object of protection of this provision, especially in terms of producing false election results, which can be executed in various ways: by illicit influence on voting, by forging ballots, by taking into account the invalid ballots, by falsely publishing results, etc.⁹³⁵ The fact that election results, as an expression of a certain formation of the voter's opinion, are rendered false by perpetration is common to all parts of the offence. There are four variants of perpetration. The first is unauthorised voting, committed by the person who votes without the voting right, either under his own or someone else's name (our system recognises it as an act of perpetration of the criminal offence of abuse of the voting right from Article 335). Unauthorised voting is only a special case of general realisation of the false election result, because the false election result already exists, an unauthorised

⁹³¹ Fischer 2012, 849. See Eser in Schönte/Schröder 2006, 1190; there are three variants of the offence: when the voter is unaware of the fact that he is casting a vote, when he fails to vote or produces an invalid vote.

⁹³² Idem. See Trüg 2010, 847. This criminal offence protects the voter's freedom of choice (freedom of expression), and not the freedom of forming an opinion (error about the motive based on false electoral propaganda).

⁹³³ Eser in Schönte/Schröder 2006, 1190. With respect to the criminal offence of falsifying elections from § 107a, both Eser and Fischer state that this criminal offence is *lex specialis*.

⁹³⁴ Electoral criminal offences that pertain to the relevant provision under the StGB include: § 107: interference with elections (*Wahlbehinderung*), § 107a: Falsification of elections (*Wahlfälschung*), § 107b: Forgery of electoral documents (*Fälschung von Wahlunterlagen*), § 107c: Violation of electoral secret (*Verletzung des Wahlgeheimnisses*), § 108 Electoral coercion (*Wählernötigung*), § 108a: Electoral fraud (*Wählertäuschung*), § 108b: Electoral bribery (*Wählerbestechung*), § 108e: Bribery of representatives (*Abgeordnetenbestechung*).

⁹³⁵ Criminal law theory considers the falsification of elections as the basic element of this group of criminal offences. Eser in Schönte/Schröder 2006, 1187.

vote is counted as valid, even though it is invalid. It is, therefore, irrelevant if the person on whose behalf the perpetrator voted, actually casted the same vote or not. The second is voting based on false registration in the voters' registry (compare to the criminal offence of withholding the voting right from Article 334, when the person who performs the appointed election-related duty fails to register another person in the voter registry or deletes the person from that registry or otherwise denies him of his voting right). The third is realisation of false election results by handing in the already marked ballots, adding additional ballots or removing regular ballots as well as granting the voting right without the passive electoral legitimation (both voters and non-voters may be perpetrators).⁹³⁶ The final type refers to forging election results after the closing of polling stations – the election result does not depend on the recount of votes. For instance, removing ballots during recount, false recount of votes (even the non-voters may be perpetrators). If the election result has been properly established by the recount, manipulation can occur after the false announcement of election results. Only persons with official authorisation to publish the results, whose expression thus represents the risk of false formation of political will, can be perpetrators here.⁹³⁷ Falsification of elections is a general (basic) element with respect to other offences by which election results are protected against illicit influences. Electoral fraud under provision 108a is, therefore, *lex specialis* with respect to the falsification of elections, whereas it is a subsidiary offence with respect to the forgery of electoral documents (107b).⁹³⁸

In Austrian CC, electoral fraud is found in Chapter 18 of the special part which deals with punishable actions in elections and referenda – § 263: *Täuschung bei einer Wahl oder Volksabstimmung* (Fraud in elections and referenda).⁹³⁹ This criminal offence is committed by a person who misrepresents or conceals facts and thus attempts to deceitfully influence another person about the content of his expressions, or persuade such a person to cast an invalid vote against his will. It is also committed by a person who attempts to influence another person to vote by misrepresenting or concealing facts concerning the execution of the elections or referenda. The perpetrator

⁹³⁶ Eser in Schönte/Schröder 2006, 1188.

⁹³⁷ Eser in Schönte/Schröder 2006, 1188. This does not include publishing on the part of journalists.

⁹³⁸ Ibid.

⁹³⁹ Criminal offences provided in this chapter, after the definition of the scope in provisions in § 261, include § 262: Interference with of elections (*Wahlbehinderung*); § 264: Spreading false news in elections or referenda (*Verbreitung falscher Nachrichten bei einer Wahl oder Volksabstimmung*); § 265: Bribery in elections or referenda (*Bestechung bei einer Wahl oder Volksabstimmung*); § 266: Forgery in elections or referenda (*Fälschung bei einer Wahl oder Volksabstimmung*); § 267: Impeding of elections or referenda (*Verhinderung einer Wahl oder Volksabstimmung*); § 268: Violation of electoral secrecy or referendum secrecy (*Verletzung des Wahl- oder Volksabstimmungsgeheimnisses*).

is, therefore, a person who misleads on the execution of elections or referenda and persuades another person to act contrary to what this person wants: a) by making the deceived vote contrary to what he believes; b) by making the victim cast an invalid vote against his will; or c) by causing the victim to miss the elections.⁹⁴⁰ The perpetrator defrauds the victim about the type and manner of completing the ballot. Hence the victim hands in an invalid ballot believing it to be valid or the perpetrator defrauds the victim about the time of the elections, thus causing the victim to miss the elections.⁹⁴¹ The prescribed penalty is a prison sentence of six months or a pecuniary fine of up to the income equivalent of 360 days of work. Similar to the provisions of the German StGB, our electoral fraud is more consistent with § 266. In fact, the criminal offence of falsifying elections or referenda is committed by the person who votes without the voting right or the right to participate at the referendum; or who votes on behalf of another person without authorisation, or contrary to the request; or who forges election or referendum results.

In the Swiss Criminal Code, Chapter 14 deals with “Actions against the will of people”. It distinguishes between obstruction and prevention of elections, invasion of voting and electoral right, electoral bribery, falsification of elections, “fishing” for votes, violation of voting secrecy.⁹⁴² Swiss CC hence does not contain electoral fraud. The element of Croatian electoral fraud is most consistent with the falsification of elections and vote canvassing. Vote canvassing or *Stimmenfang* is committed by a person who intentionally collects, completes or alters electoral or voting ballots or distributes them (*verteilt*) in such a manner. The prescribed penalty is a fine. The element of the offence is achieved when the person intentionally collects, completes or alters or distributes (a large number of) electoral or voting ballots; they do not have to be inserted in the ballot box or influence election results.⁹⁴³ Falsification of elections is committed by a person who falsifies the voters’ registry, fails to enter the voter or excludes the voter from the registry; by the person who participates in the elections, voting, referendum or referendum request without authorisation; by the person who forges the results of the elections, voting or collection of signatures for the execution of the referendum or referendum request, especially by adding, altering, omitting or deleting voting ballots or signatures; by falsely recounting or announcing results. The prescribed punishment is a pecuniary fine or a prison sentence

⁹⁴⁰ Bertel & Schwaighofer 2010, 201.

⁹⁴¹ Idem. Liability of politicians who, in their campaigns, persuade the voters to vote for them by providing false electoral promises, is also excluded in Austria.

⁹⁴² Art. 279: *Störung und Hinderung von Wahlen und Abstimmungen*; Art. 280: *Eingriffe in das Stimm- und Wahlrecht*; Art. 281: *Wahlbestechung*; Art. 282: *Wahlfälschung*; Art. 22^{bis}: *Stimmenfang*; Art. 283: *Verletzung des Abstimmungs- und Wahlheimnisses*.

⁹⁴³ Flachsman in Donatsch 2010, 486. In terms of subjective features, intent is required. Since the law requires premeditated action, the issue of whether indirect intent suffices is superfluous. Idem.

of up to three years. The aggravated form of the offence is defined by para. 2, if the perpetrator acts in the official capacity.

Numerous acts dealing with elections or introductory provisions, which define the manner of voting or calculating results, prescribe that voting is performed personally, with ballots and that no one can vote on behalf of another person.⁹⁴⁴ Article 33, para. 2 of the Act on the Election of the President of the Republic of Croatia, which states that the voter can be accompanied to the polling station by another literate person authorised to complete his ballot, in the event that the voter is disabled or illiterate, is an exception from this principle.⁹⁴⁵ According to Article 49, para. 1, such a voter can arrive to the polling station with another person who would help him circle the number in front of the name of a list or a candidate selected by the voter.⁹⁴⁶

In fact, this is where voting contrary to the instruction, i.e., fraud, occurs. But how can one prove the criminal offence since the ballot is inserted in the ballot box unmarked and unsigned? It appears that, with the exception of the perpetrator's confession, there is no other way of establishing perpetration.

6.4 Subjective Features

Intent is the requisite form of guilt, whereby indirect intent suffices. The courts superficially deals with the perpetrator's guilt, and the judgements usually state that: "The accused, according to the court's opinion, has acted with direct intent and was aware of his actions and wanted to perpetrate, because he knew that he falsified the elections as a member of the election board, which resulted in the annulment of the elections".⁹⁴⁷ The court does not elaborate on what constitutes awareness and willingness. In German falsification of elections (by producing false election results), intent requires awareness that the election result is false. Therefore, the relevant error

⁹⁴⁴ Act on the Election of Members in the European Parliament from the Republic of Croatia, Article 40, Article 74 of the AERCP.

⁹⁴⁵ In the Referendum Act, Article 35, para. 3 prescribes that the voter who is not able to vote in the legally prescribed manner due to his disability or illiteracy, can be accompanied to the polling station by another literate person who would complete the ballot per his instruction.

⁹⁴⁶ The same provision prescribes the manner of voting of blind persons who can submit the request to vote in Braille script with the town or municipal election committee no later than 30 days before the elections. Such committees then notify the National Election Committee on the number of submitted requests for the preparation of the ballots in Braille script.

⁹⁴⁷ Judgement of the Municipal Court in Split K 2207/09 of 26 April 2010.

here is the error about the element of the offence.⁹⁴⁸ According to the Swiss CC, the falsification of elections requires intent, whereby indirect intent suffices.⁹⁴⁹

⁹⁴⁸ Hence the authorisation error represents the error about the element of the offence. *Eser* in Schönke/Schröder 2006, 1188; *Fischer* 2012, 846.

⁹⁴⁹ *Flachsmann* in Donatsch 2010, 486.

Chapter 7

Fraud in Other Criminal Offences

“... Not every act which is deemed fraud in everyday life is punishable ... or any lie, deceit, concealment of truth, or any error or use thereof even immorally, even if it causes damage or consistently founds the right of private law compensation. The legislator can detect the moment of punishment in fraud only from the specific manner of perpetration, the manner in which the error was caused or used, and finally the manner from which the person can deter himself only with particular caution. This moment is referred to as “Vorspiegelung”, or “Täuschung” in German law... In Roman law that moment is referred to as: “magna et evidens calliditas”, in our legal foundations as “deceitful” used by the existing criminal code which has not led to misinterpretation in practice.”⁹⁵⁰

Every employee in the Republic of Croatia who does not receive pay for his work will justly describe it as fraud.⁹⁵¹ Every law student who attended lectures in constitutional law knows that the constitution guarantees the right to work (in addition to other rights), so when they cannot find a job after graduation, they also feel deceived. When good business operations or the good market standing of a state-owned company is destroyed by consistently bad unprofessional decisions, all taxpayers feel deceived. An athlete who was administered drugs with illicit substances instead of an adequate flu medicine and was thus suspended from competition is deemed to have been deceived (of course, only if he had not been aware of, or did not intend to use such drugs). A disabled elderly person left without proper care and supervision also feels betrayed and deceived (abandonment of a disabled person, Article 124). The distinction should be made between the subjective feeling or experience of fraud, and legal assets protected by criminal law against fraudulent conduct. In legal literature, subsidy fraud is referred to as “a type of fraud in a broader sense, because it does not require error on the part of the persons who granted the subsidy or the resulting damage to the budget”.⁹⁵² Hence, there is no objective feature – material dam-

⁹⁵⁰ Derenčin 1879, 347–348.

⁹⁵¹ In the event that all elements of the criminal offence have indeed been met, it is a special criminal offence of non-payment of salary from Article 132 of the CC.

⁹⁵² Novoselec 2009, 125.

age, or subjective effect – “misleading of another person”.⁹⁵³ In the explanation of the CC97 for the criminal offence of deceiving a buyer as per Article 284, it is stated that the legal description of this criminal offence as a special form of fraud is taken from the former Article 107 of the RCCC with mandatory corrections.⁹⁵⁴ This raised the question as to which criminal offences can be considered fraudulent criminal offences.

The Criminal Code, as already earlier, denominates five offences as fraud: fraud under Article 236; fraud in economic transactions (Article 247); subsidy fraud (Article 258); computer fraud (Article 271); and electoral fraud (Article 338). Subsidy fraud, as we have mentioned earlier, has no objective feature of fraud or subjective effect; computer fraud has no subjective effect, and electoral fraud has no objective feature of fraud or subjective effect. In establishing the element of fraud in other criminal offences, we first listed offences whose descriptions contain the term fraud and/or its synonym deceit.

Chapter IX primarily deals with crimes against humanity and human dignity, with human trafficking under Article 106, para. 1 committed by a person who uses force or coercion, deceit, fraud, abduction, abuse of power, aggravated circumstances or dependency relationships, gives or receives financial compensation or other benefit for the purpose of obtaining consent from the person who supervises another person. It is also committed by the person who solicits, transports, transfers, hides or accepts the person or exchanges or assigns control over said person for forced labour or slavery or other associated relation; for prostitution or other forms of sexual abuse including pornography; for the purpose of concluding an illicit or forced marriage; for the purpose of harvesting the person’s body parts; for using the person in armed conflicts or perpetration of an illicit act.⁹⁵⁵ This criminal offence is harmonised with the definition of human trafficking under the Council of Europe Convention on Action against Trafficking in Human Beings, Framework Decision EU 2002/629/JHA on human trafficking of 19 July 2002 and the Additional Protocol to the Council Convention on human rights and biomedicine, which refers to organ transplant and

⁹⁵³ Idem. This applies in the event that the person who grants subsidies acted based on the previous agreement with the applicant.

⁹⁵⁴ Explanation of the CC97, p. 212.

⁹⁵⁵ See § 232 of the German CC, there is no specific description of the manner of perpetration.

human tissue.⁹⁵⁶ In the attempt to establish the difference between deceit and fraud, the literature states that deceit does not necessarily have to have a material objective.⁹⁵⁷ I believe this argument is not plausible since, in the context of human trafficking, the final objective of every modality of action is to take advantage of another person for profit. The second and the last offence in this chapter concerns the trafficking of human organs and human embryos under Article 107, para. 2. This offence is committed by a person who uses force or coercion, deceit, fraud, abduction, abuse of power, aggravated circumstances or dependency relationships to obtain, transport, transfer, keep or receive human organs, tissues, cells, embryos, foetuses or a dead body for harvesting body parts.

This group of criminal offences includes non-consensual sexual intercourse under Article 152, para. 1 committed by the person who performs sexual intercourse with another person without the other person's consent, and forces another person to perform non-consensual sexual intercourse or equal sexual acts with a third person or a sexual act equal to sexual intercourse on themselves. In fact, the provision of para. 3 of that Article prescribes that there is no such consent if the sexual intercourse of equal sexual act is performed under coercion, fraud, abuse of position towards the perpetrator's subordinate, by taking advantage of the person who is unable to express refusal or of the person in unlawful captivity. The aggravated form of fraud from Article 157, para. 2 is committed by the person who persuades or forces another person to provide sexual services by force or coercion, deceit, fraud, abuse of power, aggravated circumstances or dependency relation, or whoever knowingly uses sexual services of such a person with financial compensation.

Chapter XVII states: Criminal offences of sexual abuse and exploitation of children contained deceit and fraud in four cases.⁹⁵⁸ The aggravated form of sexual abuse of children under fifteen years of age (Article 158, para. 5) consists of the perpetration of the basic form with the use of force or coercion, deceit, fraud, or abuse of power,

⁹⁵⁶ *Turković et al.* 2013, 155. In German § 232 human trafficking for sexual exploitation does not apply to these terms, nor does the Swiss or Austrian CC. Directive 2011/36/EU of the European Parliament and Council of 5 April 2011 on the prevention and fight against human trafficking and the protection of victims of human trafficking replaces the Framework Council Decision 2002/629/JHA. This Directive provides, inter alia, a harsher sanctioning of the criminal offence of human trafficking and forfeiture of illicitly acquired material gain of the perpetrators with final convictions.

⁹⁵⁷ *Turković et al.* 2013, 156.

⁹⁵⁸ Chapter 13 of the German CC contains criminal offences against sexual freedom, including sexual abuse of children. However, they only mention abuse of power or a relationship of trust as aggravating circumstances (or the very element of the offence), but not fraud or deceit, e.g., § 174: Sexual abuse of persons entrusted for protection (*Schutzbefohlene*); § 174c: Sexual abuse and exploitation of trust, counselling or treatment relationship; § 176: Sexual abuse of children; § 176: Aggravated sexual abuse of children.

aggravated circumstances or dependency relation of the child towards the perpetrator. The aggravated form of child solicitation (Article 162, para. 3) is committed by a person who, for personal profit, forces or coerces another person, for which he knows or should have known to be a child, to provide sexual services by deceit, fraud, abuse of power, aggravated circumstances or dependency relation, or whoever knowingly uses sexual services of a child with financial compensation. The aggravated form of exploitation of children for pornography (Article 163, para. 3) is committed by a person who forces or coerces, by deceit, fraud, abuse of power, aggravated circumstances or dependency relation, a child into making child pornography. The last offence is equal in the manner of perpetration to the previous aggravated form – exploitation of children for pornographic shows (Article 164, para. 3). It is committed by a person who forces or coerces, by deceit, fraud, abuse of power, aggravated circumstances or dependency relation, a child into partaking in a pornographic show.

In Chapter XXIV (criminal offences against economy), fraud or deceit are explicitly mentioned only in the criminal offence of abuse of the capital market (Article 260, para. 1 items 1, 2 and 3). The act is committed by the person who: 1) executes a transaction or issues a trading order providing or possibly providing deceitful information about supply, demand or the price of financial instruments, acting in collusion with one or more persons to keep the price of one or more financial instruments abnormally or artificially high; 2) uses fictitious procedures or other forms of deceit or fraud at the conclusion of the transaction or issuing of a trading order; 3) knowingly spreads information through the media, online or via any other form or means of communication providing or possibly providing false or deceitful news.

Criminal offences of forgery under Chapter XXVI are associated with fraud by nature and are often committed in concurrently with frauds. However, the abuse of personal documents under Article 280 is punishable if a person, in a legal transaction, deceitfully uses a personal document issued in someone else's name or relinquishes the personal document to another person who is not the holder of the document for the purpose of committing fraud in legal transactions. Forgery is usually the means of committing fraud; therefore, the person who forged the identity card and concluded a loan contract based on such document, will be punished for forgery of personal documents and fraud.⁹⁵⁹ However, in some cases there is an apparent concurrence of forgery and fraud. For instance, if the perpetrator counterfeits a medication and sells it to another person by misrepresenting it as genuine, he will be punished only for counterfeiting medication or medical products (Article, 185 para. 2) due to it seemingly being committed concurrently (subsidiarity).⁹⁶⁰

⁹⁵⁹ Cf. *Munivrana Vajda* in Derenčinović 2013, 220.

⁹⁶⁰ Apparent concurrence with fraud exists in the production and distribution of goods harmful to human health (Article 188).

The last offence whose legal description directly uses the notion of fraud is the avoidance of military obligation by incapacitation, or fraud under Chapter XXXIV – Criminal offences against the armed forces of the Republic of Croatia. In fact, Article 368, para. 2 prescribes that the person who feigns illness, uses a falsified document for himself or others or otherwise acts fraudulently with the aim of avoiding his own military obligations, enabling another person to avoid theirs, or of being allocated a simpler duty, will be punished with a prison sentence of up to three years.

By analysing these cases we can conclude that deceit, i.e., fraud, represents one manner of perpetration of the offence which justifies (constitutes) its aggravated form. Mere lexical analysis has not yielded any results which would be sufficient to prove that aforementioned incriminations closed the circle of fraudulent criminal offences.⁹⁶¹ Otherwise it would exclude tax evasion which is denominated as tax fraud in some legal systems, or abuse of insurance (insurance fraud), or homicide for concealment or fraud.⁹⁶²

Fraud in the broader sense include criminal offences, where the fraud entails a motive for perpetration. For instance, aggravated homicide 111, item 5 (homicide for perpetration or concealment of fraud).

I will now consider the criteria for the evaluation of whether a criminal offence is considered fraudulent. Since misleading or deceiving by misrepresentation or concealment constitute the essence of fraud resulting in the disposal of property to the detriment of the injured party (i.e., subjective effect and objective feature), the following criteria have been applied.

The third category refers to those material criminal offences where a special trust relationship (based on law or a legal transaction) is breached.⁹⁶³

These include evasion (Article 232), embezzlement (Article 233), insurance abuse (Article 238), cheque and credit card abuse (Article 239) and abuse of trust (Article 240). With respect to a usurious contract (Article 242), there is no misleading or

⁹⁶¹ “Lexical rules and lexical interpretation can provide only one aspect of possible meanings and potentially establish the most frequently used meanings and common meanings; however, that does not suffice for deciding on the optimum meaning of a word in a legal norm and with respect to a legal relationship. Linguistic interpretation is a requisite assumption for the understanding of the legal norm, but not substantial enough for its understanding. The meaning of specific norms in normative provisions is construed only by applying other rules of interpretation and finally by providing target interpretation as a deciding factor.” *Visković* 1995, 235.

⁹⁶² The very criminal offence of fraud does not use the terms fraud or deceit, but only misleading or deceiving and material damage.

⁹⁶³ It is similar for offences where there is a breach of trust based on the natural relationship, e.g., child abandonment (Article 176) and abandoning a close relative in a grave situation (Article 171). However, the material feature of fraud or any misleading or deceiving are not realised there.

deceiving when it comes to taking advantage of an emergency situation; however, it may be considered to have taken place when taking advantage of inexperience, gullibility, reduced judgement or substantial defect of will. Such elements are found in criminal offences against intellectual property, official duty or judiciary (e.g., filing false charges under Article 304, providing false testimony under Article 305, obstructing evidence and providing unlicensed legal services).

Fraud or deceit is not mentioned in criminal offences of illicit production and drug trafficking (Article 190), enabling drug abuse (Article 191) and illicit production and trafficking of prohibited sports-related substances (Article 191a). Court practice presumably considers aggravating circumstances where the perpetrators provide the victims with drugs or prohibited sports-related substances by misrepresenting them as permitted drugs.

The element of misleading or deceiving indirectly exists with, for example, a change of family status under Article 175 (anyone who plants, alters or provides false data or otherwise changes the family status of a child). The law does not prescribe that the child or a third person are thus misled or deceived (this can constitute the element of the criminal offence; it exists if the child or a third person are not deceived with regard to the family status).

In the German CC, Chapter 22 of the special part is entitled “Fraud and abuse of trust” (*Betrug und Untreue*) and it includes the following criminal offences: fraud (*Betrug*, § 263); computer fraud (*Computerbetrug*, § 263a); subsidy fraud (*Subventionsbetrug*, § 264); fraud with capital investments (*Kapitalanlagebetrug*, § 264a); insurance abuse (*Versicherungsmißbrauch*, § 265); fraudulent acquisition (*Erschleichen von Leistungen*, § 265a); credit fraud (*Kreditbetrug*, § 265b); abuse of trust (*Untreue*, § 266); withholding and embezzling salary (*Vorenthalten und Veruntreuen von Arbeitsentgelt*, § 266a); cheque and credit card fraud (*Mißbrauch von Scheck- und Kreditkarten*, § 266b).⁹⁶⁴ Therefore, the legislator constituted a special group of offences including substantive criminal offences, which contain the subjective element of misleading or deceiving or abuse of trust. In addition to aforementioned offences, there is a whole range of criminal offences where fraud (*Täuschung*) is the manner of perpetration, i.e., its aim: fraudulent avoidance of military obligations (§ 109a, *Wehrpflichtentziehung durch Täuschung*), deceitful presentation of the criminal offence (§ 145d, *Vortäuschen einer Straftat*), forgery of documents (§ 267, *Urkundenfälschung*),⁹⁶⁵ forgery of credit cards, cheques and promissory notes

⁹⁶⁴ German theory recognises a special form of fraud (punishable under § 263 StGB) – “marital fraud” (*Heiratsschwindel*), whereby the perpetrator feigns the intent to conclude the marriage in order to procure from the other person gifts, loan or other material rights. Cramer & Perron 2006, 2232; Fischer 2012, 1807.

⁹⁶⁵ Whoever commits fraud in legal transactions and presents a false document as genuine or forges a genuine document will be punished with a pecuniary fine or a prison sentence of up to five years.

(§ 152a, *Fälschung von Zahlungskarten, Schecks und Wechseln*), forgery of technical signs (§ 268, *Fälschung technischer Aufzeichnungen*), forgery of evidentiary data (§ 269, *Fälschung beweisheblicher Daten*), fraud in legal transactions during data processing (§ 270, *Täuschung im Rechtsverkehr bei Datenverarbeitung*), immediate falsification of certificates (§ 271, para. 2, *Mittelbare Falschbeurkundung*), alteration of official documents (§ 273, *Verändern von amtlichen Ausweisen*), obtaining falsified official documents (§ 276, para. 1, item 1, *Verschaffen von falschen amtlichen Ausweisen*), use of false health assessments (§ 279, *Gebrauch unrichtiger Gesundheitszeugnisse*), and abuse of personal documents (§ 281, *Mißbrauch von Ausweispapieren*). In Germany, tax evasion (*Steuerhinterziehung*) is not regulated by the CC, but by § 370 of the Taxes Act (*Abgabenordnung*).

In the Austrian CC, the majority of fraudulent criminal offences are included in Chapter 6 under criminal offences against other people's property. Before we deal with them, we should point out several peculiarities of this criminal legislation. Fraud is included in § 108 (*Täuschung*) under criminal offences against freedom (III) and committed by a person who, with the aim to causing damage, deceives another person into acting, omitting or failing to act to his own or other person's detriment.⁹⁶⁶ The Austrian CC distinguishes between fraud under § 108 (*Täuschung*), as an offence against freedom, and fraud under § 146 (*Betrug*) as a substantive criminal offence. In Chapter 9, criminal offences against marriage and family, there are two special criminal offences: marital fraud (§ 193 *Ehetäuschung*) and partnership fraud (§ 193a *Partnerschaftstäuschung*). The former offence is committed by anyone who, at the conclusion of the marriage, conceals a fact from the other person which renders the marriage null, or the person who persuades the other person into marriage by fraudulent facts which could lead to annulment (prescribed penalty is a prison sentence of up to one year). The perpetrator shall be only punished if the marriage was declared null or annulled as a result of concealed facts or fraud. The procedure shall be instigated only upon the injured party's request.⁹⁶⁷ Furthermore, pursuant to § 298, deceit (*Vortäuschung*) is committed by the person who knowingly (*wissentlich*) misleads the state authorities or an authorised officer with a punishable act.

Criminal offences against property include: perfidy or abuse of trust (§ 133, *Veruntreuung*), fraud (§ 146, *Betrug*), aggravated fraud (§ 147, *Schwerer Betrug*), profes-

⁹⁶⁶ Wer einem anderen in seinen Rechten dadurch absichtlich einen Schaden zufügt, daß er ihn oder einen Dritten durch Täuschung über Tatsachen zu einer Handlung, Duldung oder Unterlassung verleitet, die den Schaden herbeiführt, ist mit Freiheitsstrafe bis zu einem Jahr zu bestrafen.

⁹⁶⁷ Wer einen anderen durch Täuschung über Tatsachen, derentwegen die Auflösung der eingetragenen Partnerschaft begehrt werden kann, verleitet, mit ihm eine eingetragene Partnerschaft zu begründen, ist mit Freiheitsstrafe bis zu einem Jahr zu bestrafen. (2) Der Täter ist nur dann zu bestrafen, wenn die eingetragene Partnerschaft wegen der Täuschung erfolgreich aufgelöst worden ist. Auch ist er nur auf Verlangen des Verletzten zu verfolgen.

sional fraud (§ 148, *Gewerbsmäßiger Betrug*), fraudulent abuse of data processing (§ 148a, *Betrügerischer Datenverarbeitungsmissbrauch*), fraudulent acquisition of a claim (§ 149, *Erschleichung einer Leistung*), fraud of necessity (§ 150, *Notbetrug*), insurance abuse (§ 151, *Versicherungsmissbrauch*), credit damages (§ 152, *Kreditschädigung*), abuse of trust (§ 153, *Untreue*), receiving gifts from officials (§ 153a, *Geschenkannahme durch Machthaber*), claim abuse (§ 153b, *Förderungsmissbrauch*), fraudulent withholding of social security contributions and allowances according to the Act on Civil Work, Annual Leave and Severance Pay (§ 153d, *Betrügerisches Vorenthalten von Sozialversicherungsbeiträgen und Zuschlägen nach dem Bauarbeiter-Urlaubs- und Abfertigungsgesetz*),⁹⁶⁸ usury with respect to money and property (§§ 154 and 155, *Geld- und Sachwucher*), fraudulent insolvency (§ 156, *Betrügerische Krida*),⁹⁶⁹ games of chance (§ 168, *Glücksspiel*), pyramid schemes (§ 168a, *Ketten- oder Pyramidenspiele*), agreements on limiting competition in public procurement (§ 168b, *Wettbewerbsbeschränkende Absprachen bei Vergabeverfahren*). A special provision prescribes criminal offences committed within the family circle (§ 166, *Begehung im Familienkreis*) and voluntary abandonment (§ 167, *Tätige Reue*).

Fraud is included in Chapter 2 of the Swiss CC among the criminal offences against property. In criminal offences of money and value counterfeit (§§ 240, 241), the term “for the purpose of fraud” (*zum Zwecke der Täuschung*) is used to describe a set of criminal offences (§ 248, § 251, § 252, § 253). The legal literature distinguishes between fraud and fraud-related offences (*Betrug und betrugsähnliche Delikte*).⁹⁷⁰ Fraud-related offences include: the fraudulent abuse of data processing devices (§ 147, *Betrügerischer Missbrauch einer Datenverarbeitungsanlage*), cheque and credit card abuse (§ 148, *Check und Kreditkartenmissbrauch*), failure to pay for a meal (“dine and dash”) (§ 149, *Zechprellerei*),⁹⁷¹ fraudulent acquisition of a claim (§ 150, *Erschleichen einer Leistung*), malicious damage of goods (§ 151, *Arglistige Vermögensschädigung*), counterfeit of goods (§ 155, *Warenfälschung*).

Hence the analysis of criminal offences prescribed by the CC provided the following:

⁹⁶⁸ See organised undeclared employment § 153e (*Organisierte Schwarzarbeit*).

⁹⁶⁹ Followed by: Causing damage to creditors (§ 157, *Schädigung fremder Gläubiger*), preferential treatment of creditors (§ 158, *Begünstigung eines Gläubigers*), tax evasion (§ 164, *Hehlerei*), money laundering and voluntary abandonment (§ 165, § 165a *Geldwäscherei, Tätige Reue*).

⁹⁷⁰ *Stratenwerth & Jenny & Bommer* 2010, 413. Or in Austria: fraud and similar criminal offences: “Betrug und gleichartige Delikte”, *Eder-Rieder* 2011, 64. In Anglo-Saxon legal literature, the notion of fraud is a synonym for all *white-collar* crimes, e.g., *Levi* primarily deals with the content and reasons behind “White-Collar Crime”. *Levi* 1999.

⁹⁷¹ Offence refers to situations where the perpetrator vanishes (from the hotel, restaurant, etc.) without paying the bill.

1. Fraud *ex lege*⁹⁷² (fraud, fraud in economic transactions, subsidy fraud, computer and electoral fraud);
2. Fraudulent criminal offences in the narrow sense: Criminal offences which imply misleading or deceiving of the injured party and/or material damage or breach of trust based on law or a legal transaction (e.g., abuse of trust, insurance abuse, cheque and credit card abuse, abuse of privileged information, abuse of capital market, evasion of taxes or customs, preferential treatment of creditors, causing insolvency, abuse in the public procurement procedure, deceitful advertising),
3. Fraudulent criminal offences in the broader sense; all criminal offences where fraud or deceit constitute the manner of perpetration or motive for perpetration (e.g., trafficking of human beings, body parts and embryos, non-consensual sexual intercourse, aggravated forms of prostitution).

⁹⁷² Only fraud and fraud in economic transactions nominally meet both criteria of fraud.

Chapter 8

Implications for the Balkan Region

The second hypotheses of the study, confirmed by the research, provided that the provisions of the Croatian CC with respect to fraud were, to a great extent, in line with relevant provisions of German, Austrian and Swiss penal legislation due to historical affiliation with the continental European legal tradition or the more precise Roman-German legal family. Our next challenge was to gain insights into implications for the Balkan region. The research was directed to the legislation of the border states in order to maintain the diligence of the work.

8.1 Bosnia and Herzegovina

According to the Criminal Code of the Federation of Bosnia and Herzegovina,⁹⁷³ the same fundamental criminal offence of fraud, as an offence against property as per Art. 294, has become the focus of our research. The definition of the offence is the same as in Croatian CC, and provides that anyone who, with an aim of acquiring unlawful material gain for himself or for someone else, by false representation or concealment of facts, deceives another or keeps such a person in deception, inducing him thereby to do or not to do something to the detriment of his own or someone else's property. But the prescribed penalty is lower than in Croatia, namely, imprisonment for a term not exceeding three years. The aggravated form of the offence concerns situations in which the damage exceeds KM 30,000 and the perpetrator acts with the aim of acquiring the material gain of such value. In this case, the prescribed penalty is imprisonment for a term of between six months and five years. Two mitigating forms of the offence are prescribed in paragraphs 3 and 4. If the damage is of small value and the perpetrator acts with an aim of acquiring the material gain of such value, he shall be punished by a fine or imprisonment for a term not exceeding six months. If the offence referred to in paragraph 1 is committed solely with the aim of causing damage to another and without the aim of acquiring unlawful material gain for himself or someone else, the prescribed penalty is a fine or imprisonment for a term not exceeding one year.

A special form of fraud – as an offence against property – is the so-called fraud in law under Art. 299. The perpetrator is anyone who, with an aim of frustrating the

⁹⁷³ Criminal Code of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina No. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16.

satisfaction of a claim on objects, conveys, destroys or removes an object of his property to which another person has a lien or the right of usufruct, and thereby causes damage to such a person. This offence can be committed by anyone who destroys, fictitiously sells or renders unusable his entire property or a part of it, or accepts a false claim, creates a false contract or, by some other fraudulent act, fictitiously or actually impairs his financial situation and, thereby, reduces the possibility of, or prevents the settlement with, at least one of his creditors. In both cases, the prescribed penalty is a fine or imprisonment for a term not exceeding one year.

In the criminal offences against economy, business and safety of payment transactions, fraudulent offences include fraud in economic operations, deceiving buyers and deception in getting loans (credits) or other grants. Fraud in economic operations in Art. 251 is committed by anyone who, as an agent or representative of a legal person, with an aim of acquiring unlawful material gain for that or another legal person, by use of uncollectible payment orders, uncovered cheques or in some other way, misleads another or keeps him in mistaken belief, thus inducing him to do or not to do something to the detriment of his own property or the property of another. The prescribed penalty is imprisonment for a term between six months and five years. So the definition is similar to the Croatian definition prior to the considerable changes in substantive criminal law in 2011. Two aggravated forms of the offence are designed in cases of acquired material gain or damage caused exceeding KM 10,000 and KM 50,000. In those cases, the perpetrator shall be punished by imprisonment for a term between one and eight years or one and ten years accordingly. Deceiving buyers under Art. 265 is committed by whoever, with an aim of deceiving buyers, brings into circulation products bearing a mark containing data that does not correspond to the content, kind, origin or quality of the product, or brings into circulation products which, by their weight or quality, do not correspond to what is normally assumed for such products, or brings into circulation products bearing no indication as to their content, kind, origin or quality when such an indication is prescribed. The prescribed penalty is imprisonment for a term not exceeding three years, as well as a fine. Another form of this offence is committed when someone, with an aim of deceiving buyers, falsely announces reductions in the prices of products, the sale of goods at reduced prices or otherwise by false advertising deceives buyers regarding the prices of the products he sells. The prescribed penalty in this case is a fine or imprisonment for a term not exceeding one year. Deception in getting loans (credits) or other grants under Art. 268 is committed by anyone who, with an aim of obtaining a loan (credit), investment funds, subvention or some other grant for himself or another, gives false or incomplete data about his financial situation or other data to the lender or person competent to give the grant that is important for getting a loan or other grant. The prescribed penalty is imprisonment for a term between six months and three years. If, in contravention of the criminal offence referred to in paragraph 1, a loan (credit) or other grant referred to in paragraph 1, to a value exceeding KM 10,000 is obtained, the perpetrator shall be punished by imprisonment

for a term between one and five years. If, in contravention of the criminal offence referred to in paragraph 1, a loan (credit) or other grant referred to in paragraph 1, to a value exceeding KM 50,000 is obtained, the perpetrator shall be punished by imprisonment for a term between two and ten years. Anyone who uses the obtained loan (credit), investment funds, subvention or other grant for purposes than those for which the resources were granted, shall be punished by a fine and imprisonment for a term not exceeding two years. This criminal offence is in line with Croatian subsidy fraud as well as German credit fraud.

The Criminal Code of the Federation contains the offence of computer fraud in Art. 395, as an offence against the system of electronic data processing. It is committed by anyone who, without authorisation, enters damages, alters or conceals computer data or programs or otherwise influences the result of the electronic data processing with an aim of acquiring unlawful material gain for himself or for another, and thus causes material damage to somebody else. The prescribed penalty is imprisonment for a term between six months and five years. As in previous offences, aggravated forms require the acquired material gain to exceed KM 10,000 and KM 50,000, with a prescribed penalty of imprisonment for two to ten years, or two to twelve years. The mitigated form of the offence exists when the criminal offence referred to in paragraph 1 is committed only with the aim of causing damage to another. In this case, the perpetrator can be punished by a fine or imprisonment for a term not exceeding three years.

In Chapter 17, criminal offences against the freedoms and rights of individuals and citizens, there are only two fraudulent criminal offences, namely, voting fraud and electoral fraud. Voting fraud under Art. 196 is committed by whomever at an election for the institutions in the Federation or for the recalling of the representatives in the institutions in the Federation or at a referendum held in the Federation, votes under the name and in lieu of another person, or votes or tries to vote again after having voted once. The prescribed penalty is a fine or imprisonment for a term not exceeding three years. But whoever falsifies the results of an election or voting for the institutions in the Federation by adding, subtracting or taking out votes or signatures, by an inaccurate counting of votes, by making false records of the result in election documents or in any other way, or discloses election or vote results which do not correspond to the voting which has been carried out, has committed an electoral fraud and can be punished by imprisonment for a term between six months and five years.

The special forms of fraud, as relicts of the Yugoslavian criminal codes are fraud in office and evasion of military service by mutilation or deception. Fraud in office under Art. 385 is committed by an official or responsible person in the Federation who, with an aim of acquiring unlawful material gain for himself or for another, by submitting false accounts or in some other way, deceives an authorised person into making an illegal disbursement. The prescribed penalty is imprisonment for a term between six months and five years. Two aggravated forms of the offence are committed if a material gain exceeding KM 10,000 or KM 50,000 is acquired. Evasion

of military service by mutilation or deception under Art. 410 is committed by anyone who, with an aim of evading military service or of being assigned to an easier duty, injures himself or otherwise temporarily disables himself for military service, or simulates an illness or uses a false document or acts in some other deceptive way. It can also be committed anyone who, with or without the consent of another, inflicts a bodily injury on another or otherwise disables him with an aim of evading military service or another military obligation or, with the same aim, uses a false document on behalf of another or acts in some other deceptive way.

8.2 Serbia

Fraud is regulated in criminal offences against property (Art. 208) in the Serbian Criminal Codification.⁹⁷⁴ The basic form of the offence is the same as in Croatia: “anyone who, with the intent of acquiring unlawful material gain for himself or another by false presentation or concealment of facts, deceives another or maintains such deception and thus induces such person to act to the prejudice of his or another’s property”. But the penalty provides for a fine, along with imprisonment of six months to five years. The offence has one mitigating and two aggravated forms. The mitigating form exists when perpetrator acts only with intent to cause damage to another. The aggravated form consists of material gain or damages exceeding RSD 450,000 and RSD 1,500,000, respectively.

The next specific fraudulent offence is “agreeing on the outcome of a competition” under Article 208b. It is committed by anyone who agrees to the outcome of a sporting or other competition with the intent of obtaining material gain for himself or another. The prescribed penalty is imprisonment of six months to three years and a fine. The aggravated form consists of material gain exceeding RSD 450,000 and RSD 1,500,000, respectively. Because of the significance of the offence, the attempt of the fraud is punishable.

Instead of deception in getting loans (credits) or other grants in BiH, or subsidy fraud in Croatia, Serbia prescribes obtaining and using credit and other benefits under false pretences in Art. 209. This crime is committed by whoever, by false presentation of facts or concealment thereof, obtains for himself or another a credit, subvention or other benefit although not meeting the relevant requirements. The prescribed penalty is a fine or imprisonment of up to two years. The second way in which this crime may be committed is the use of the obtained credit, subvention or other benefit for purposes other than those for which they were granted. The obvious attitude that it is a less serious form of the offence is revealed by the prescribed penalty of a fine or imprisonment of up to one year. The third and last act of commission concerns criminal liability of the responsible officer in an enterprise or other business entity, who

⁹⁷⁴ Criminal Codification, Official Gazette of the Republic of Serbia No. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16.

shall also be punished for the offence specified in paragraphs 1 and 2 if the credit, subvention or other benefit are obtained for the enterprise or business entity or if used by these entities for purposes other than those for which they were granted. Petty fraud is regulated in Art. 210 (petty theft, embezzlement and fraud), which provides for a penalty of a fine or imprisonment of up to six months. Theft, embezzlement or fraud are considered petty if the value of the appropriated or embezzled object, or damages caused by fraud do not exceed the amount of five thousand dinars, and the perpetrator's intent was to acquire a small property gain or cause small damage. If committed against private property, prosecution is instituted here by private action.

Chapter 22, Offences against economic interests reveals very interesting fraudulent actions. Fraud in obtaining economic operations in Art. 223 regulates the offence in a similar way to Croatian Art. 247: whoever, in obtaining economic operations, with an aim of acquiring unlawful material gain for himself or some other person, by false representation, or by the suppression of facts, leads another person into error or keeps him in error, thereby inducing him to perform an act or to omit to perform an act to the detriment of the property of the subject of economic operations for which or where he works or another's legal entity. The prescribed penalty is imprisonment of six months to five years and a fine. The aggravated form consists of material gain or damages exceeding RSD 450,000 in the first case and RSD 1.500,000 in the second case. Security fraud in Art. 223a is committed by a perpetrator who, with the intent of charging a contracted sum from the insurance company, destroys, damages or conceals the secured item and then reports the damage. The prescribed penalty is imprisonment from three months to three years. The same offence is committed by a person, who for the purpose of charging the insurance company to pay the agreed amount in the event of bodily injury or impairment of health, causes such damage, injury or disruption of health and then fills a claim with an insurance society. Other offences containing fraudulent actions are not named fraud, but abuse. For example, abuse related to public procurement (Art. 228), abuse in the privatization process (Art. 228a). In addition, instead of the former wording of "deceiving buyers", the actual offence prohibits unauthorised use of another business name and other special marks of goods or services under Art. 238: anyone who with intent to deceive the buyer or service customer, uses another business name, another geographic designation of origin, a foreign trademark or another special mark of goods or services, or enters specific characters of these marks on his business name, his geographical designation of origin, his trademark or another special mark of goods or services, shall be punished with a fine or imprisonment up to three years.

Computer fraud (Art. 301) is placed in the criminal offences against security of the computer data. It is committed by whoever enters incorrect data, fails to enter correct data or otherwise conceals or falsely represents data and thereby affects the results of electronic processing and transfer of data with intent to acquire unlawful material gain for himself or another and thus causes material damage to another person. The

prescribed penalty is a fine or imprisonment up to three years. The aggravated form consists of material gain or damages exceeding RSD 450,000, and RSD 1.5 million, respectively, with a prescribed penalty of imprisonment of one to eight years, and two to ten years accordingly. But an aggravated form of the offence with a prescribed penalty of fine or imprisonment up to six months is regulated in para. 4 when the perpetrator acts with malicious mischief.

The offence of spending funds from the budget for a purpose other than designated (Art. 362a) in the Chapter 33 is specific to the Serbian Criminal Code and is covered by criminal offences against official duties. A liable person is a budget beneficiary or a mandatory social security organization who incurs obligations or approves the payment from the budget expenditure and expenses by more than one million dinars the sum designated in the budget, a financial plan, or a Government issued document allocating the amount of a loan shall be punished with a fine or imprisonment of up to one year. As in the CC of the Serbian Federation, fraud in service (Art. 363) is committed when an official or responsible person who in discharge of duty, with intent to acquire unlawful material gain for himself or another by submitting false accounts or otherwise, misleads an authorised official to effect unlawful payment

In Chapter 15, Criminal Offences against Electoral Rights, counterfeiting of voting results is forbidden in Art. 161.⁹⁷⁵ This offence is committed when a member of an election or referendum administration body or other person acting in official capacity in respect of voting, who by adding or removing ballot papers or votes during counting or otherwise alters the number of ballot papers or votes or publishes false voting results. The prescribed penalty is imprisonment of six months to five years.

Evasion of military service by self-disablement or deceit (Art. 397), as one of the offences against the Serbian Army (Chapter 35) provides that, anyone who with intent to evade military service or to be assigned to easier duty injures himself or otherwise temporarily incapacitates himself for military service, or allows another to temporarily incapacitate him, as well as anyone who temporarily incapacitates another with or without that person's permission with same intent, shall be punished by imprisonment of three months to five years. If the offence results in permanent disability for military service, the offender shall be punished by imprisonment of one to eight years. Anyone who with intent specified in paragraph 1 simulates an illness or uses false documents for himself or another or otherwise acts fraudulently, shall be punished by imprisonment of three months to five years.

⁹⁷⁵ Previously it was "ballot and election fraud".

8.3 Slovenia

In the Slovenian Criminal Code,⁹⁷⁶ fraud is regulated by Art. 211: anyone who, with the intention of acquiring an unlawful property benefit for himself or a third person by false representation, or by the suppression of facts leads another person into error or keeps him in error, thereby inducing him to perform an act or to omit to perform an act to the detriment of his or another's property, shall be sentenced to imprisonment for not more than three years. The second act of commission consists of concluding an insurance contract by stating false information, or suppressing any important information, concluding prohibited double insurance, or concluding an insurance contract after the insurance or loss event had already taken place, or misrepresenting a harmful event. The same special intent of acquiring unlawful property benefit is needed and the prescribed penalty is imprisonment for not more than one year. If the fraud was committed by at least two persons, who colluded with the intention of fraud, or if the perpetrator committing the offence referred to in paragraph 1 caused large-scale property damage, the perpetrator shall be sentenced to imprisonment for not less than one, and not more than eight years. If the offence referred to in paragraphs 1 or 3 was committed within a criminal association, the perpetrator shall be sentenced to imprisonment for not less than one and not more than ten years. Petty fraud is regulated in paragraph 5, meaning a minor loss of property and the perpetrator's intention to acquire a minor property benefit. In this case, the prescribed penalty is a fine or imprisonment for not more than one year. When the perpetrators intention is directed at causing damage to another person by false representation or the suppression of facts, thereby inducing him to perform an act or to omit to perform an act to the detriment of his or another's property, he shall be punished by a fine or sentenced to imprisonment for not more than one year. The prosecution for the offences under paragraphs 5 and 6 shall be initiated upon a complaint. The next offence against property is organising money chains and illegal gambling in Art. 212. It is committed when someone organises, participates in, or helps organise or perform money chains, where participants pay certain amounts of money to organisers or other participants who are already included in the game or activity, and expect certain amounts of money to be paid by the participants who are to join such a game or activity after them. The prescribed penalty is imprisonment up to three years. The same punishment shall be imposed on anyone who, with the intention of acquiring unlawful proceeds for himself or a third person, organises, participates or helps in organising games of chance which were not issued an authorisation or concession by a competent authority. If a major property benefit has been gained by himself or by a third person by committing the offences referred to in the previous paragraphs, or major damage to property has been caused to a third person, the perpetrator shall be

⁹⁷⁶ Criminal Code, Official Gazette of the Republic of Slovenia No. 50/12, 6/16, 54/15, 38/16, 27/17.

sentenced to imprisonment of up to five years. If substantial proceeds of crime have been gained by himself or by a third person by committing the offences referred to in paragraph 1 or 2, or significant damage to property has been caused to a third person, the perpetrator shall be sentenced to imprisonment between one and eight years.

Chapter 24; criminal offences against economy is made up of as many as seven fraudulent offences. Causing bankruptcy by fraud or careless operations in Art. 226 is committed by anyone who, with the intention of not paying what he is obliged to pay, apparently or actually worsens his own or a third person's financial circumstances, thus causing bankruptcy, or whoever, with the same intention, causes the fulfilment of conditions for the deletion of a company from the court register, *ex officio* without liquidation, by: (1) the apparent sale, disposal without charge or at extremely low price, or destruction of the property or a part thereof which belongs to the bankrupt estate; (2) the conclusion of a false agreement on debt or the concession of a false claim; (3) concealing, destroying or falsifying business books and documents or keeping them in such a manner which renders the identification of the actual financial position or solvency impossible; (4) causing the initiation of the bankruptcy procedure or the procedure for the deletion of the company from the court register, *ex officio* without liquidation, in a fraudulent way.⁹⁷⁷ The prescribed penalty is imprisonment between six months and five years. If the offence has resulted in significant damage to property, the prescribed penalty is imprisonment between one and eight years. Defrauding Creditors from Article 227 is committed when someone, while engaging in economic activities, is aware of himself or a third person being insolvent and who, by payment of a debt or otherwise, intentionally puts a certain creditor in a preferential position, thereby causing a large property loss to other creditors. The prescribed penalty is imprisonment for not more than five years. Whoever, knowing that he or a third person is insolvent, and with the intention of defrauding or causing damage to creditors, concedes a false claim, drafts a false contract or otherwise causes a large property loss to creditors, shall be punished to the same extent.

Business fraud (Art. 228), like in Croatia, Bosnia and Herzegovina and Serbia involves the perpetrator, in the performance of an economic activity, when concluding or implementing a contract or a service, defrauding another by representing the

⁹⁷⁷ Careless operations are provided in paragraph 2: Anyone who knows that himself or any other person as payer is unable to pay, but irrationally spends funds, becomes over-indebted, concludes detrimental contracts, performs the free, fictitious or discounted transfer of property to other persons, or reduces in some other way the value of his property, or the property or the company he manages, or omits the timely insurance or the enforcement of claims, or otherwise evidently violates his duties in the governing of an economic activity or financial operations, thus causing long-term financial insolvency or over-indebtedness, which results in a bankruptcy or the fulfilment of conditions for the deletion of the company from the court register, *ex officio* without liquidation, and a major damage to property, shall be sentenced to up to five years in prison.

obligations as though they will be fulfilled, or by concealment of the fact that the obligations will not be or will not be able to be fulfilled and gains a property benefit or causes loss of property to a client or a third person on account of such partial or complete non-fulfilment of obligations. The prescribed penalty is imprisonment for not more than five years. If the offence has resulted in a large property benefit acquired or a large loss of property, the perpetrator shall be sentenced to imprisonment for not less than one and not more than ten years. If the act resulted in a small property benefit acquired or a small loss of property, the perpetrator shall be punished by a fine or sentenced to imprisonment for not more than one year. Fraud to the detriment of the European Union (Art. 229), similar to Croatian subsidy fraud, is committed when someone avoids expenses by way of using or submitting false, incorrect, or incomplete statements or documents, or does not reveal data and thus misappropriates or unlawfully withholds or uses inappropriately funds of the general budget of European Union or of the budgets managed by European Union or managed on their behalf. The prescribed penalty is imprisonment for not less than three months and not more than three years. The second act of commission consists of acquiring funds by means of offences and from the budgets referred to in the previous paragraph. If the offence has resulted in a large property benefit acquired or a large loss of property, the perpetrator shall be sentenced to imprisonment for not less than one and not more than eight years. These punishments shall apply to the managers of companies or other persons authorised to take decisions or carry out control in enterprises, if they render possible or do not prevent the criminal offences of perpetrators referred to in the above paragraphs that are subordinated and act on behalf of the company. Loan and benefit fraud (Art. 231) is committed when someone, without having complied with the conditions required for obtaining a loan, investment assets, a subsidy or any other benefit intended for the performance of an economic activity, obtains such a loan or other benefit for himself or for any third person by presenting to the lender or other person whose job it is to approve or grant such a loan or benefit, false or incomplete data concerning the balance of assets, balance sheets, profits, losses or any other fact relevant to the approval of the above mentioned loan or other benefit, or suppresses any fact. The prescribed penalty is a fine or imprisonment for not more than three years. Anyone who deceives the person who has approved or granted the loan or benefit about the purpose of its use or conceals to this person that the loan or benefit has been used for purposes other than those approved for or agreed upon, shall be punished by a fine or a prison sentence of up to two years. Fraud in securities trading (Art. 231) exists when someone, because of trading stocks, other securities or other financial instruments, falsely represents the balance of assets, data on profits or losses, or any other data in the prospectus, when publishing an annual report, or in any other way which has considerable influence on the value of the above mentioned securities, thereby inducing one or more persons to make a purchase or sale of, or makes any other transaction with such securities. The prescribed penalty is a fine or imprisonment for not more than two years. If the offence concerns

securities or other financial instruments of high value, the perpetrator shall be sentenced to imprisonment for not less than five years.

Deception of purchasers under Art. 232 is committed when someone, with the intention of deceiving purchasers, puts into circulation to a considerable extent, products labelled with false information about their content, type, origin or quality; or products whose weight or quality does not correspond to the required standards applying to such products' weight or quality; or products which are not duly labelled so as to point out their content, type, origin, quality or use-by date. The prescribed penalty is a fine or imprisonment for not more than two years. Whoever makes contracts that contain false declarations regarding the terms of supply or the mode of fulfilment of obligations, where any such declaration is an essential component of the contract, shall be punished to the same extent. Anyone who, with the intention of deceiving purchasers or consumers of services, falsely declares a reduction in prices, sales of merchandise, or announces an impending price increase, or uses any other deceptive advertising, shall be punished by a fine.

In Chapter 17, offences against voting rights and elections, obstruction of freedom of choice (Art. 151) and abuse of voting rights (Art. 152) fall within the area of consideration for this thesis. Obstruction of freedom of choice is committed when someone at an election or ballot, compels another person to vote, or not to vote, or to cast a void vote, or to vote in favour of or against a particular proposal by means of force, serious threat, bribery, deception or in any other unlawful manner. The prescribed penalty is a fine or imprisonment for not more than one year. If the offence is committed by an official through the abuse of his function relating to the election or ballot, this official shall be sentenced to imprisonment for not more than two years. The bribe which was been given shall be seized. Abuse of voting rights exists when someone at an election or ballot casts a vote in place of, or under the name of, another person or votes more than once. Such a person shall be punished by a fine or sentenced to imprisonment for not more than one year.

As in other ex-Yugoslavian states, Slovenia has the offence of evasion of defence obligations by deception (Art. 362) in Chapter 34, criminal offences against defence of Slovenia. It is committed by anyone who, when war or a state of emergency is declared, with the intention of evading military service or any other defence obligation, simulates an illness, uses a forged document or deceives a competent authority in any other way, inducing it to declare himself unfit for military service or duty. The prescribed penalty is imprisonment for not more than three years. The same punishment shall be imposed on anyone who, with the intent of either evading services or obligations under the preceding paragraph or of being assigned to a less demanding service or duty, inflicts injury upon himself or otherwise incapacitates himself for military service or allows another person to do so. Another form of the offence exists when someone, with the intent of making another person incapable of participating in military service or military duties, inflicts bodily harm upon him, with or without his permission, or otherwise incapacitates him for military service.

8.4 Montenegro

The fraud as an offence against property is regulated in the Criminal Code of Montenegro⁹⁷⁸ in Art. 244: Anyone who deceives another person or keeps him in deception by false representation or concealment of facts, inducing him thereby to act or refrain from acting to the detriment of his property or property of another person with the intention of obtaining for himself or another person illicit pecuniary gain, shall be punished by a fine or a prison term of up to three years. The mitigating form of the offence is committed when offender acted with the sole intention to cause damage to another person; the prescribed penalty here is a fine or imprisonment of up to six months. Two aggravated forms of the offence are regulated in paragraphs 3 and 4. When the pecuniary gain or damage exceeds EUR 3,000, the perpetrator can be punished for a prison term of one to eight years; when the pecuniary gain or damage exceeds EUR 30,000, the perpetrator can be punished by a prison term of two to ten years. As in the Serbian CC, the special offence is referred to as agreeing to the outcome of competition and regulated in Article 244a. It is committed by anyone who agrees to the outcome of a sports or other competition with intent of obtaining material gain for himself or another. The prescribed penalty is imprisonment of up to three years. The thresholds of the aggravated forms are reached on the basis of the level of acquired material gain (more than EUR 10,000 can be punished by imprisonment of six months to five years; while more than EUR 40,000 can be punished by imprisonment of one to ten years). Because of the significance of the offence, attempts are also punishable. Ill-founded grant and use of loans and other benefits under Art. 245 is committed by anyone who falsely represents or conceals facts to obtain for himself or another a loan, subsidy or other benefit even though he does not meet the eligibility requirements. The prescribed penalty is a fine or imprisonment of up to three years. The second act of commission is provided in paragraph 2 concerning the use of the loan, subsidy or other benefit obtained for purposes other than those for which the loan, subsidy or other benefit was granted, with punishment of a fine or imprisonment of up to two years applicable. The third act of commission provides the same punishments as paragraph 1 and 2 for the responsible officer in a business organisation or other business entity where the loan, subsidy or other benefit were obtained for the business organisation or other business entity or where they were not used by these entities for the intended purposes. Petty larceny, embezzlement and fraud (Art. 246) result in punishment by fine or imprisonment of up to six months. The punishment is meted out on the basis of the level of damage inflicted by fraud, with a limit of EUR 150 and intent of the perpetrator to acquire only a small

⁹⁷⁸ Criminal Code, Official Gazette of the Republic of Montenegro No. 70/03, 13/04, 47/06, Official Gazette of Montenegro No. 40/08, 25/10, 32/11, 40/13, 56/13, 14/15, 42/15, 58/15, 44/17, 49/18.

pecuniary gain or cause small damage. If the offence was committed against privately owned property, prosecution shall be initiated on the basis of a private charge.

Chapter 23 regulates criminal offences against transactions of payment and economic operations. Surprisingly, the offence of fraud in economic transaction is missing. But it does regulate bankruptcy fraud or causing false bankruptcy in Art. 274. The crime can be committed by a responsible officer in a business entity or other business enterprise who, with the intention that the entity evades payment of liabilities, files a false bankruptcy claim by fair value or fraudulent depreciation of its assets by: (1) concealing, fictitiously selling, selling below its market value or ceding free of charge the assets of the business entity in whole or in part; (2) concluding fictitious contracts on debt or acknowledge fictitious claims; (3) concealing, destroying or altering records that the business enterprise is under duty to keep to the extent that they are not a proper representation of business performance or its assets and liabilities, or counterfeits financial records or otherwise misrepresents assets and liabilities to make the entity eligible for bankruptcy. The prescribed penalty is imprisonment of six months to five years. A very interesting offence is regulated by Art. 281a, para. 1(3), namely, manipulation of the securities market or other financial instruments can be committed when someone, with intent of acquiring property gain or causing damage to himself or herself acts in breach of securities market regulations, in a way that he spreads or transmits inaccurate or misleading information through the media, the internet or otherwise, that may cause misleading of securities or other financial instruments, with the knowledge that this information was incorrect or misleading and could mislead the users of such information. The prescribed penalty is imprisonment of six month to five years and a fine. The last offence is deception of buyers under Art. 285, which stipulates that anyone who, with the intent of deceiving buyers, releases into circulation products whose label includes data which does not match the content, type, origin or quality of the product or who releases into circulation products whose quantity and quality do not match what is normally expected of such products or who releases into circulation products without a label specifying the content, type, origin or quality of the product, where such label is required or who uses manifestly fraudulent advertisement when putting the products into circulation, shall be punished by a prison term up to three years and by a fine.

Computer fraud under Art. 352, as an offence against the security of a computer programme, is committed by anyone who enters, alters, erases, omits to enter correct data or otherwise conceals or misrepresents a piece of computer data or otherwise interferes with the functioning of a computer system and thereby influences the result of electronic processing, transfer of data and functioning of a computer system with the intention of obtaining illicit pecuniary gain for himself or for another person and thereby causes property damage to another person. The prescribed penalty is imprisonment from six months to five years. If the offence resulted in pecuniary gain exceeding EUR 3,000, the perpetrator shall be punished by a prison term of two to ten years. If the offence resulted in pecuniary gain exceeding EUR 30,000, the perpetra-

tor shall be punished by a prison term of two to twelve years. Where the offence was committed with the sole purpose of causing damage to another person, the perpetrator shall be punished by a fine or a prison term of up to two years.

There is no offence of electoral fraud *per se*, but the counterfeiting of voting results is prohibited in Chapter 16 (Art. 192) as an offence against electoral rights. A member of an election or referendum administration authority, or another person involved in an election in his official capacity, who by adding or taking away ballot papers or votes during the count, or who takes other unlawful acts to alter the number of ballot papers or votes, or who declares fraudulent results of voting, shall be punished by a fine or a prison term of up to three years. On the other hand, abuse of voting rights under Art. 187 is committed when a person votes in an election or referendum in place of another, using his or her name, or votes more than once, or uses more than one ballot.

Special forms of fraud as offences against official duty (Chapter 34) are fraud in the conduct of official duty (Art. 419) and fraud in the conduct of official duty, embezzlement and temporary diversion of property as a petty offence (Art. 421a). Fraud in the conduct of official duty is committed by a public official who, while acting in his official capacity, with the intention of obtaining for himself or another person illicit pecuniary gain by submitting false statements of account or who otherwise misleads an authorised person to make an unlawful payment. The prescribed penalty is imprisonment from six months to five years. Two aggravated forms of the offence are designed due to the pecuniary gain. Where the pecuniary gain obtained exceeds EUR 3,000, the perpetrator shall be punished by a prison term from one to eight years. Where the offence results in pecuniary gain exceeding EUR 30,000, the perpetrator shall be punished by a prison term of two to ten years. Fraud in the conduct of official duty, embezzlement and diversion of property are considered petty offences, where the amount of unlawful payment, the value of obtained pecuniary gain, the value of embezzled things, or of the property that the perpetrator temporarily diverted without authorization does not exceed EUR 150, where the perpetrator's intent was to obtain a small pecuniary gain. In these cases, the prescribed penalty is a fine or imprisonment of up to one year.

Among criminal offences against public order and peace in Chapter 32 (after offences of criminal association and creating a criminal organization), the Art. 407 para. 3 prescribes a special form of unauthorised organization of games of chance; namely, a person who organises games of chance or participates in a game without an approval issued by a competent authority using deception, shall be punished by a prison term from three months to five years.

8.5 Hungary

The scope of the Criminal Code of Hungary is significant with respect to fraudulent actions.⁹⁷⁹ Fraud is defined in Section 373. According to this section, fraud involves a person using deceit, deception or trickery for unlawful financial gain, thereby causing damage. Thus it differs from misdemeanours and felonies. The penalty for a misdemeanour can be imprisonment not exceeding one year if:

- a) the fraud results in minor damage; or
- b) the fraud results in damage under the petty offence limit and it is committed
 - ba) in criminal association with accomplices;
 - bb) at a place of emergency;
 - bc) on a commercial scale;
 - bd) under the false pretences of soliciting donations for charitable purposes.

The penalty for a felony can be imprisonment not exceeding three years if:

- a) the fraud results in damage of considerable value; or
- b) the fraud involves a minor value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2).

The penalty can be imprisonment between one to five years if:

- a) the fraud results in damage of substantial value;
- b) the fraud involves a considerable value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2); or
- c) the fraud is committed against a person whose ability to defend himself is diminished due to his old age or disability.

The penalty can be imprisonment between two to eight years if:

- a) the fraud results in damage of particularly considerable value; or
- b) the fraud involves a substantial value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2).

The penalty can be imprisonment between five to ten years if:

- a) the fraud results in damage of particularly substantial value; or
- b) the fraud involves a particularly considerable value and it is committed by either of the means referred to in Subparagraphs ba)-bc) of Subsection (2).

⁹⁷⁹ Act C of 2012 on the Criminal Code, available at: <http://www.refworld.org/docid/4c358dd2.html> [21 July 2017].

Economic fraud (Section 374) refers to when a person is involved in bogus economic activities for unlawful financial gain. There is again a difference between misdemeanours and felonies. The penalty for a misdemeanour can be imprisonment not exceeding two years if the economic fraud results in damage of minor value. The penalty for a felony can be imprisonment not exceeding three years if:

- a) the economic fraud results in considerable financial loss; or
- b) the economic fraud involves a minor loss and it is committed
 - ba) in criminal association with accomplices; or
 - bb) on a commercial scale.

The penalty can be imprisonment between one to five years if:

- a) the economic fraud results in substantial financial loss; or
- b) the economic fraud involves a considerable financial loss and it is committed by either of the means referred to in Subparagraph ba) or bb) of Subsection (3).

The penalty can be imprisonment between two to eight years if:

- a) the economic fraud results in considerable financial loss; or
- b) the economic fraud involves a substantial financial loss and it is committed by either of the means referred to in Subparagraph ba) or bb) of Subsection (3).

The penalty shall be imprisonment between five to ten years if:

- a) the economic fraud results in considerable financial loss; or
- b) the economic fraud results in particularly considerable financial loss and is committed in the manner defined in Subparagraph ba) or bb) of Subsection (3).

Cash-substitute payment instrument fraud in Section 393 is committed by any person who:

- a) unlawfully obtains or commandeers from another person, without the consent of such person, one or more cash-substitute payment instrument which does not belong to him or which is not exclusively his own, or which he is not entitled to use, or such entitlement is not exclusive;
- b) supplies, obtains, exports or imports, or transports in transit through the territory of Hungary any counterfeit or falsified cash-substitute payment instrument or a cash-substitute payment instrument that has been commandeered or obtained in the manner specified in Paragraph a), or data stored on electronic payment instruments or the related security features.

These actions present a misdemeanour punishable by imprisonment not exceeding one year. The penalty for a felony can be imprisonment not exceeding three years if

cash-substitute payment instrument fraud is committed in criminal association with accomplices or on a commercial scale. Cash-substitute payment instruments issued in other States receive the same protection as those issued in Hungary.

Fraud Relating to social security, social and other welfare benefits under *Section 395* exists when any person who induces a person to hold or continue to hold a false belief, or suppresses known facts for the purpose of obtaining or eliciting social security benefits, or pecuniary benefits or benefits by means other than money provided from any sub-system of the central budget to natural persons under the relevant legislation, and thereby causes damage. It is misdemeanour punishable by imprisonment not exceeding two years. The penalty may be reduced without limitation if the perpetrator provides compensation for the damage caused by fraud relating to social security, social and other welfare benefits before the indictment is filed.

Budget fraud in Section 396 is committed by any person who:

- a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent;
- b) unlawfully claims any advantage made available in connection with budget payment obligations; or
- c) uses funds paid or payable from the budget for purposes other than those authorised, and thereby causes financial loss to one or more budgets.

It is misdemeanour punishable by imprisonment not exceeding two years. The penalty can be imprisonment not exceeding three years for a felony if:

- a) the budget fraud results in considerable financial loss; or
- b) the budget fraud defined in Subsection (1) is committed in criminal association with accomplices or on a commercial scale.

The penalty can be imprisonment between one to five years if:

- a) the budget fraud results in substantial financial loss; or
- b) the budget fraud results in considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

The penalty can be imprisonment between two to eight years if:

- a) the budget fraud results in particularly considerable financial loss; or
- b) the budget fraud results in substantial financial loss and is committed in criminal association with accomplices or on a commercial scale.

The penalty can be imprisonment between five to ten years if:

- a) the budget fraud results in particularly substantial financial loss; or
- b) the budget fraud results in particularly considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

Any person who manufactures, obtains, stores, sells or trades any excise goods in the absence of the criteria specified in the Act on Excise Taxes and Special Regulations on the Marketing of Excise Goods or in other legislation enacted by authorisation of this Act, or without an official permit, and thereby causes financial loss to the central budget, shall be punishable in accordance with Subsections (1)-(5).

Any person who either does not comply or inadequately complies with the settlement, accounting or notification obligations relating to funds paid or payable from the budget, or makes a false statement to this extent, or uses a false, counterfeit or forged document or instrument, is guilty of a felony punishable by imprisonment not exceeding three years. The penalty may be reduced without limitation if the perpetrator provides compensation for the financial loss caused by the budget fraud referred to in Subsections (1)-(6) before the indictment is filed. This provision shall not apply if the criminal offence is committed in criminal association with accomplices or on a commercial scale.⁹⁸⁰

The next offence to be considered is omission of oversight or supervisory responsibilities in connection with budget fraud under Section 397. The director of an economic operator, or a member or employee with authority to exercise control or supervision, if the member or employee fails to discharge the obligation of exercising control or supervision, and thus makes it possible for the member or employee of the economic operator to commit the budget fraud within the framework of their respective functions, is guilty of a felony punishable by imprisonment not exceeding three years.

Fraudulent bankruptcy from Section 404 is a felony committed by any person who, in connection with the imminent insolvency of an economic operator covered by the

⁹⁸⁰ For the purposes of this Section:

- a) “budget” shall mean the sub-systems of the central budget – including the budgets of social security funds and extra-budgetary funds, budgets and/or funds managed by or on behalf of international organisations and budgets and/or funds managed by or on behalf of the European Union. In respect of crimes committed in connection with funds paid or payable from a budget, “budget” shall also mean – in addition to the above – budgets and/or funds managed by, or on behalf of, a foreign State;
- b) “financial loss” shall mean any loss of revenue stemming from non-compliance with any budget payment obligation, as well as the claiming of funds from a budget unlawfully or the use of funds paid or payable from a budget for purposes other than those authorized.

Act on Bankruptcy Proceedings and Liquidation Proceedings, actually or fictitiously, diminishes the economic operator's assets:

- a) by concealing, disguising, damaging, deteriorating or destroying, or by making unusable such assets or any part thereof;
- b) by concluding a fictitious transaction, or recognising a doubtful claim; or
- c) by other means, in contradiction to the requirements of prudent management; and thereby prevents the satisfaction of his creditor or creditors in part or in whole. The prescribed penalty is imprisonment between one to five years.

Any person who, in connection with an economic operator covered by the Act on Bankruptcy Proceedings and Liquidation Proceedings:

- a) engages in either of the conduct referred to in Subsection (1) to artificially induce the economic operator's insolvency, or to cause the perception of insolvency; or
- b) in the case of the economic operator's insolvency, engages in either of the conduct referred to in Subsection (1), with intent to prevent the satisfaction of his creditor or creditors in part or in whole, is punishable in accordance with Subsection (1).

The prescribed penalty is imprisonment of two to eight years if:

- a) fraudulent bankruptcy is committed in respect of an economic operator of preferential status for strategic considerations; or
- b) the diminution of assets, actually or fictitiously, is particularly substantial.

Any person who, following the order of liquidation, provides preferential treatment to any creditor in violation of the sequence of satisfaction specified in the Act on Bankruptcy Proceedings and Liquidation Proceedings is guilty of a misdemeanour punishable by imprisonment not exceeding two years.

The criminal offences provided for in Subsections (1)-(3) are punishable if:

- a) bankruptcy proceedings have been opened;
- b) liquidation proceedings, involuntary de-registration or compulsory winding-up proceedings have been ordered; or
- c) liquidation proceedings have not been opened by derogation from the relevant statutory provisions.

Fraudulent bankruptcy shall be considered a criminal act if committed by a person who has power to control the assets, or any part thereof, of the debtor economic operator, or has the opportunity to do so, and also if the contract for any transaction with the assets is considered invalid.

Capital investment fraud (Section 411) is a felony committed by any person who induces other persons to make a new capital investment or to increase an existing one, or to sell or reduce a capital investment:

- a) by disclosing or broadcasting false information concerning the financial position of an economic operator or the executive employee of such economic operator in connection with his office, or concerning financial instruments in relation to the economic operator, or by concealing information; or
- b) by concluding any fictitious transaction relating to financial instruments.

The prescribed penalty is imprisonment not exceeding three years.

A special form of felony punishable by imprisonment not exceeding three years is organization of pyramid schemes from Section 412, which involves any person arranging a scheme based on the collection and distribution of the money of others in a predetermined form which also contains an element of risk, in which the participants joining in a chain-like manner pay cash to, or perform another service for, the participants preceding them in the chain, directly or through the organiser.

Fraudulent attestation of conformity under Section 416 is committed by anyone who certifies false data in the certificate of conformity or conformity declaration, where this is required in connection with any obligation of conformity assessment under the relevant legislation or any directly applicable legislation of the European Union, and where it involves products of substantial quantity or value. The prescribed penalty is imprisonment not exceeding three years. The penalty shall be imprisonment between one to five years if the criminal act is committed:

- a) in criminal association with accomplices; or
- b) on a commercial scale.

Any person who commits this criminal offence by way of negligence shall be punishable for a misdemeanour of imprisonment not exceeding one year.

In the field of fraud related to computer data and programmes, information system fraud under Section 375 and the compromising or defrauding of the integrity of the computer protection system or device under Section 424 are major provisions. Any person who, for unlawful financial gain, introduces data into an information system, or alters or deletes data processed therein, or renders data inaccessible, or otherwise interferes with the functioning of the information system, and thereby causes damage, is guilty of a felony punishable by imprisonment not exceeding three years. The penalty can be imprisonment between one to five years if:

- a) the information system fraud results in damage of substantial value; or
- b) the information system fraud involves a considerable value and it is committed in criminal association with accomplices or on a commercial scale.

The penalty can be imprisonment between two to eight years if:

- a) the information system fraud results in damage of particularly considerable value; or
- b) the information system fraud involves a substantial value and it is committed in criminal association with accomplices or on a commercial scale.

The penalty can be imprisonment between five to ten years, if:

- a) the information system fraud results in damage of particularly substantial value; or
- b) the information system fraud involves a particularly considerable value and it is committed in criminal association with accomplices or on a commercial scale.

Any person who causes damage by using a counterfeit or forged, or unlawfully obtained electronic payment instrument, or by accepting payment with such payment instrument shall be punishable in accordance with Subsections (1)-(4).⁹⁸¹

On the other hand, any person who, for the commission of the criminal offence defined in Section 375 or 423:

- a) creates, transfers, supplies, obtains or places on the market passwords or computer programs required therefore or facilitating thereof; or
- b) offers his economic, technical and/or organizational expertise to another person for the creation of passwords or computer programs required therefore or facilitating thereof is guilty of a misdemeanour punishable by imprisonment not exceeding two years.

In the case of Paragraph a) of Subsection (1), no person shall be prosecuted who confesses to the authorities of his involvement in the creation of any password or computer program required for the commission or facilitating of the criminal offence, before the authorities learned of such activities through their own efforts, if the person surrenders such produced things to the authorities and assists in the efforts to identify the other persons involved.⁹⁸²

The specific fraudulent actions provided for in the Hungarian Criminal Code are mail fraud, odometer fraud and abuse of family ties. Mail fraud, under Section 224, concerns any person who:

⁹⁸¹ Cash-substitute payment instruments issued in other States shall receive the same protection as cash-substitute payment instruments issued in Hungary.

⁹⁸² For the purposes of this Section, “password” shall mean any identifier comprised of a string of alphanumeric characters, codes, biometric data or the combination thereof, designed to gain entry into an information system or any segment thereof.

- a) destroys a sealed consignment containing communication which belongs to another person, or opens or obtains such consignment for the purpose of gaining knowledge of the contents thereof, or conveys such to an unauthorised person for this purpose, or
- b) captures a correspondence forwarded by means of electronic communication networks to another person,

is guilty of a misdemeanour punishable with custodial arrest, insofar as the act did not result in a more serious criminal offence.⁹⁸³

Odometer fraud, under Section 348, can be committed by any person who, for unlawful financial gain, manipulates the odometer reading of a motor vehicle by compromising the reading mechanism of the device itself or the process of metering, or disengages the odometer in any way. Such a person is guilty of a misdemeanour punishable by imprisonment not exceeding one year, insofar as the act did not result in a more serious criminal offence.

Abuse of family ties, under Section 355, is committed by anyone over the age of eighteen years who enters into a family relationship for financial gain for the sole purpose of obtaining a document verifying the right of residence, or consents to a statement of paternity of full effect. Such a person is guilty of a misdemeanour punishable by imprisonment not exceeding two years, insofar as the act did not result in a more serious criminal offence.

⁹⁸³ The penalty can be imprisonment not exceeding one year if the criminal offence defined in Subsection (1) is committed in a professional or official capacity. The penalty can be: a) imprisonment not exceeding two years, if the criminal offence defined in Subsection (1) results in a substantial injury of interest; b) imprisonment not exceeding three years for a felony if the criminal offence defined in Subsection (2) results in a substantial injury of interest.

Chapter 9

Discussion and Conclusion on the Various Types of Fraud

Materialism and consumerism have long been imposed as basic guidelines and principles of modern societies, replacing the maxim *cogito, ergo sum* with *habeo, ergo sum*. The affirmation of such primarily economic, materialistic and consumer values has traditionally and conceptually been recognised in the legal literature as the most pragmatic and flexible system of heteronomous control.⁹⁸⁴ When one writes about fraud, it is imperative to contemplate integrity. Nevertheless, it would be utterly naive to claim that in previous times, when “people were the pillars of integrity”,⁹⁸⁵ there was not a serious lack of norms regulating fraud, since the code of honour, integrity and goodwill were the pre-requisite of living in that period (I am referring to the discriminatory provisions about purchasing “from a Slav or a foreigner” (the Statute of Pag) or a prohibition to trade with the people of Omiš (the Statute of Dubrovnik).

I.

This research commenced with the hypothesis that existing criminal law provisions regarding fraud, fraud in economic transactions, subsidy, computer and electoral fraud properly protect respective legal assets. However, inadequate doctrinal analysis and different interpretation and implementation of basic concepts of these offences in court practice endanger the principle of equality of all before the law and cause legal insecurity. Therefore, we primarily had to determine which legal assets are protected by these offences. Then we had to determine the concepts which endanger the principle of equality of all before the law. The criminal offence of fraud has (always) protected property. Fraud in economic transactions is placed in Chapter 24 of the CC, among the criminal offences against economy, which implies that it protects economic transactions. However, by analysing this offence, we concluded that the final object of protection is property (“in economic transactions ... and thus persuades him into action or failure to act to the detriment of his own or other person’s property”). Can we thus conclude that fraud in economic transactions also protects property, if we take into account that the special criminal offence of economic

⁹⁸⁴ See Cvitanović 2009, 43.

⁹⁸⁵ As sang by Ljubo Stipišić-Delmata in his famous poem “*Dalmatino povišću pritrujena*”.

fraud does not exist in any comparable legislation, but such behaviour is thoroughly analysed and examined in German legal literature and court practice (under § 263), and in Austrian legal literature (under § 146)? By applying historical, systematic, comparative and teleological interpretation, the overall definition of the object of protection of this offence encompasses economic transactions pursuant to the law and *bona mores* (economy as a whole), as well as property. This is supported by the fact that this criminal offence is committed with the aim of acquiring illicit material gain. The establishment of the object of protection of subsidy fraud is by far the most problematic due to the unspecified notion of subsidies. This offence was also included among the criminal offences against economy. However, it would be overly simplified to claim that the economy is the object of protection of subsidy fraud. Therefore, we had to first examine how this criminal offence originated. Subsidy fraud is regulated in the Croatian and German CC for the purpose of protecting the financial interests of the supranational entity, the European Community (Union), with a particularly broad scope. In fact, it was believed that the criminal offence of fraud did not suffice (besides tax evasion and other offences) for the protection of financial interest of the EU (budget and expenditures), so the political consensus also provided a guarantee for the protection from endangerment. The establishment and viability of the EU were identified with the construction and strictness of its repressive system. As a result of that broader notion of legal assets, subsidy fraud is a criminal offence against budget economy (national and EU), but also against influence on the economy or freedom of disposal of the subsidy grantor. The object of protection in computer fraud primarily refers to computer data and systems and property. In fact, the offence is committed with the aim of acquiring illicit material gain by manipulating computer data and systems, thus causing damage to others. Electoral fraud, as defined by Article 338, protects the election results (direct voting right).

At the beginning of this research, we anticipated some issues in establishing and interpreting the notions of facts, predictions, value judgements and special forms of fraud (as abstract endangerment offences). However, this research has shown that these notions have been adequately doctrinally defined (even in the harmonised comparative legal theory). Therefore, critical observations are more discreet in the parts where they are analysed. Nevertheless, it is evident that some issues occur in practice with respect to their interpretation. National and foreign court practice, as well as ECtHR case law show that demarcation of facts, value judgements and predictions is not only a superfluous issue, but in fact the presumption on which the applicable implementation of the specific criminal offence depends. The existence of facts (as present and past occurrences and conditions) can be proved (fact either exist or not), whereas their veracity cannot be proved. Only the veracity or lack thereof of factual claims can be proved. If value judgements and predictions contain a factual core, they will be deemed legally relevant, i.e., appropriate objects of the criminal offence of fraud (even though they are not facts). Standards of certain definitions of these

concepts are set by both criminal law theorists and court practice. However, after their acknowledgement and acceptance, as *condicio sine qua non*, each specific case will require a particularly careful evaluation of the court as to whether a specific perpetrator's conduct represents a fact, factual claim, value judgement or prediction. Misrepresentation of facts, either express or implied, has been adequately theoretically elaborated, and is not sufficiently dealt with in our court practice, although it can have significant repercussions, especially in its demarcation with fraudulent concealment. In fact, fraudulent concealment is a non-genuine legally regulated criminal offence by omission, hence upon establishing the perpetrator or existence of criminal liability, the court should previously determine the existence of a guarantee duty or guarantor's property. Error in the context of fraud includes misconception, as well as the lack of perception about legally relevant content. The establishment of a causal link between error and the possession of property of the injured party is not sufficiently covered in Croatian court practice, because the criminal offence of fraud occurs only when the existence of such causality is proved, provided that all other elements are met. It is important to establish the notion of property in order to determine the scope of material damages. This is particularly characterised by the criminal law property of *ultima ratio*, as well as the restrictive interpretation, as it only includes *damnum emergens*, whereas *lucrum cessans* and personality law infringement are beyond the scope of criminal law protection (in the context of the criminal offence of fraud). In the research of damages, the most theoretically challenging part was to analyse the notion of endangerment equal to damage in German criminal theory (to which the legal literature refers as a hundred-year old legal institution) and potential conversion of fraud as a substantive criminal offence into a criminal offence of endangerment. In that sense, we can finally refer to two BGH decisions. In the Kanther decision of 2006, the Second BGH Council claims that property endangerments according to the definition of the legal text does not constitute material damage, whereas according to the decision of the First senate, property endangerment was no longer described as endangerment, but as final damage. For instance, if person A buys a flat from person B, and person B was aware that A would not be able to obtain *clausula intabulandi* or assume possession of the flat, A is endangered in the economic sense, but will not be protected to the full extent of the law in the criminal proceeding. The analysis of court judgements regarding the decisions on indemnification claims supported the conclusion that the courts should, in fraud-related convicting judgements, accept the filed indemnification claims, also in terms of the statutory default interests (with respect to the principal). Such decisions should represent a rule, and an exception which would still apply to cases when additional special circumstances are to be established for the acceptance of the indemnification claim in terms of interests. Contrary actions result in multiplied court proceedings, which could eventually lead to indemnification claims against the Republic of Croatia for the infringement of the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because it could (and it does) take a substantial amount of time for the victims to receive complete indemnification in this

way (it takes them four court proceedings). The acceptance of the indemnification claim in terms of the principal, and referral to civil proceedings in terms of the statutory default interests also represents a contradiction in itself, and the contradiction between the rationale and the dictum. In economic transaction fraud, we cannot expect the criminal court to deal with contractual interests or special penalties, because these are accessory claims whose establishment could delay criminal proceedings. Since the new CC entered into force, the court has been obliged to confiscate material gain, even if it refers the injured party to realise his indemnification claim in civil proceedings (Article 77, para. 3). Use of the terminology, “the court shall” points to the obligatory nature of such action. It means that the dicta of the convicting judgements, in addition to the decision on referral of the injured party to civil proceedings for the realisation of indemnification claims, should also contain the decision on the forfeiture of material gain, which has not been the case so far. In fact, the courts confiscated material gain only if the indemnification claim had not been filed (the excess over the adjudicated sum). The explanation of the task force – that such a solution would avoid the possible non-forfeiture of material gain, if the injured party fails to file an indemnification claim – is in line with the principle of confiscating material gain from high-ranking officials in the Article 5 of the CC. Indemnification of the victim of a criminal offence of fraud after lengthy and expensive proceedings is not in compliance with the restorative justice which is easily achievable in substantive criminal offences. In that sense, it is high time to harmonise the court practice, because it is entirely inappropriate for the courts in different counties to decide differently on the same facts. Such persistence leads to legal insecurity and inequality before the law.

With regard to new forms of fraud and representation of specific phenomena of fraud, new forms of aggravated fraud should be introduced *de lege ferenda*. These would refer to professional fraud, and it would only suffice to prove that the perpetration is the sole or predominant source of the perpetrator’s income. Such aggravated forms exists in the German, Austrian and Swiss Criminal Code, and also existed in the 1929 Criminal Code of the Kingdom of Yugoslavia (trade fraud under § 337). Although in such cases there is usually a substantial acquisition of material gain, and such conduct can be subsumed under Article 236, para. 2, we believe that only the emphasis of the aggravating circumstance that the perpetrator uses fraud as a professional activity may be deemed a sufficient deterrent for those who use criminal activity as a source of subsistence. Another fact to take into consideration is whether the fact that the perpetrator stalks their potential victims through mass media (usually through printed media, computer systems or networks) can be treated by judges as an aggravating circumstance or it should be prescribed as such in the Criminal Code. Such an evaluation is not fundamental to the material criminal offences, but it exists within insult and libel (as criminal offences against honour).

One of the most important issues in national court practice is the failure to distinguish between the aim to acquire material gain and the intent. In addition to the actual

distinction, courts should make a lexical distinction as well. In that sense, it would be much better if the courts in their fraud-related judgements used the legal term “aim”, and not the term “fraudulent intent” for clear demarcation between the aim to acquire material gain, as a subjective feature of the element of fraud, and the intent (direct or indirect), as the form of guilt. Only then will the principle of legality – which serves to protect the citizens’ legal safety – be realised (hence, every perpetrator should be informed about the grounds for their conviction). That distinction is present in our (historical) legal literature and should, therefore, not be ignored; there is no justification for a “step backwards” (see *Derenčin, Šilović*). A specific problem occurs with interpreting the criminal offence of fraud in economic transactions. In fact, we believe that fraud in economic transactions occurs if the perpetrator acts with the aim of acquiring illicit material gain for himself or another legal person (of course, if other requirements are met), otherwise it is only regular fraud. Here, we lean on the threshold for certain behaviours qualifying as fraud in economic transactions. For the purpose of protecting economic transactions, a whole range of (new) criminal offences was established: abuse of trust in economic transactions and receiving and offering bribes in economic transactions. The claim that fraud in economic transactions is an aggravated form of fraud is *de facto* denied by figures. In fact, as the research has shown, probational judgements from six to twelve months in prison are usually applied to fraud in economic transactions and regular fraud. Furthermore, the difference as to whether material gain is acquired for a natural or a legal person is seldom applied in court practice. In relation to that, we should take into account common cases in the Croatian business environment, where “entrepreneurs” establish fictitious companies which formally partake in legal transactions (but acquire the entire profit for themselves). A more quality based decision-making process in the cases of fraud in economic transactions and subsidy and computer fraud can be ensured only with specialised departments for economic crime. In that sense, after ten years of legal life of the ALLPCO, it is high time for consistent implementation, because everything other than that would result in legal insecurity for all. Punishments which are too mild represent an additional problem. In fact, the research has shown that mild punishments are handed down even to multiple recidivists (the harshest punishment was a non-suspended prison sentence of one year and four months). For the purpose of prevention, the courts should also apply special obligations more (e.g., Article 62, para. 1, item 1 of the CC). For the purpose of protecting the functioning of the economy, courts should resort more boldly to the safety measure of prohibition of certain duties or activities from Article 71 of the CC, which has not been frequently applied so far (or prohibition of founding new companies), and termination of the legal person, where it was founded for the purpose of committing criminal offences or predominantly used to commit crimes under Article 12, para. 1 of the ALLPCO. In fact, if a person keeps founding companies only to get money for himself by dealing with other economic operators on the market, the state generates insolvency by not sanctioning the behaviour with harsher penalties, and it fails to protect those who act in line with the law and with proper

business customs. Continents were discovered and wars were fought for trade and economic transactions. In the modern society, we (only) need to implement statutory provisions (which were introduced for the protection of economic transactions).

The central issue (with two consequences) to the criminal offence of subsidy fraud, as shown by this research, is the concept of subsidies. The CC does not define it, but the comparable legislation dispersed it across various acts with the notions of: state grants, subsidies, aids and subventions. State grants and subsidies are not used as synonyms, since Article 258, para. 1 regulates subsidy fraud associated with state grants, and para. 5 defines how state grants equate subsidies with aids granted from EU funds. This legal text leaves room for the interpretation that there is a legal gap with respect to subsidies and aids of the Republic of Croatia, unless the definition of state grants under Article 3, para. 1 of the SGA is interpreted to include subsidies and aids “regardless of the type of state grant”. If we accept that state grants encompass subsidies and aids (which would be a logical, suitable and acceptable interpretation), and that subsidy fraud includes not only national state grants, but national subsidies and aids as well, it would still leave behind the inconsistency of expression, which is not characteristic of the criminal law and criminal code (*nullum crimen sine lege stricta*, hence *nullum crimen sine lege certa*).⁹⁸⁶ Another issue is whether subsidy fraud refers only to contributions which fulfil a certain economic purpose, or to all contributions. The CC is not helpful here. A certain guideline is presented by Article 2, para. 2 of the SGA – which defines beneficiaries of state grants as legal and natural persons who, in their economic businesses, partake in the trade of goods and services, and use some form of the state grant. This means that criminal law protection would be limited only to those contributions which serve an economic purpose (this interpretation is supported by German legal literature, but only with respect to state subsidies, not the EU subsidies). In that sense, a clearer definition of state grants is provided by the State Grants Act, because it states that it is such an expenditure or reduced state profit which harms or threatens to harm competition by favouring a certain entrepreneur or certain goods and/or services by influencing trade between the EU member states (and Article 107 of the Treaty on the Functioning of the EU). Hence, by mentioning the notion of entrepreneur, i.e., production of goods and/or services, it implicitly indicates the economic purpose of the grant. But the question must be asked: Is there really a reason to deal with abuse of economic grants and other grants differently under criminal law? How is abuse of subsidies in agriculture any different from when an educational institution receives a grant for conducting a certain form of education, but spends it for the purchase of a company vehicle? Is sufficient protection provided by the criminal offence of abuse of position and power? Even though I believe that “non-economic” state grants deserve criminal law protection through subsidy fraud, it is unacceptable to subsume these state grants within the provisions of Article 258, at least until Croatia adopts adequate legal

⁹⁸⁶ See also *Ambos* 2011, 6.

provisions. Arguments supporting this view can be found in the teleological and historical method of interpretation whose primary purpose is, with respect to subsidy fraud, to protect the European Union budget in the area of agriculture and fishery (hence production, trade of goods and provision of services on the market). We could symbolically say that the criminal law protection of financial interests of the EU, i.e., of the supranational entity, is originally built around the “hoe” and “fishnet”. As a result, the German StGB singled out the regulation of EU subsidies by removing all presumptions “serving an economic purpose”, hence it *de facto* provided greater (criminal law) protection to EU subsidies than to state subsidies. With respect to the criminal offence of subsidy fraud, we should consider the fact that an entirely new branch of (national and supranational) law developed in the area of (state) grants. In order to avoid any problems defining the notion of subsidy fraud and to meet the requirements of the legality principle, legislators should *de lege ferenda*, or within the criminal offence of subsidy fraud, or in Article 87, enter a legal definition of subsidies and finally opt “pro or against” equal criminal law protection for all subsidies or only those which serve an economic purpose.⁹⁸⁷ No domestic theory or court practice has so far raised the question about the type of the criminal offence committed by the person who illicitly grants a subsidy (there are cases where the grantor acted in collusion with the grantee or even where he received bribe for granting the subsidy). According to German court practice, in the majority of cases this will be the criminal offence of abuse of trust (*Untreue*). However, the only applicable form in the Croatian system is the abuse of position and power under Article 291, abuse of trust under Article 240.

When legal persons are perpetrators of subsidy fraud, the court should consider possible precautionary measures of preventing them from attaining licences, authorisations, concessions or subsidies under Article 36, para. 1, item 3 of the ALLPCO and Article 17 of the ALLPCO, if there is justifiable fear of recurrence or perpetration.

Croatian incrimination of electoral fraud under Article 338 represents the falsification of elections. Therefore, the title of Article 338 should *de lege ferenda* be changed to “Falsification of Elections”. But the question arises as to whether we need a new criminal offence of electoral fraud which, modelled after German or Austrian legislation, would be committed by a person who fraudulently misleads or deceives another person about the contents of his voting or fraudulently causes him not to vote or cast an invalid vote? The research has shown that this offence is seldom committed. The argument about misleading someone at the time of elections is not plausible,

⁹⁸⁷ Today, it is very difficult to answer the question as to who competes on the market. If the state subsidises one (sports) club, it implies that it influences that club’s position on the market (e.g., the club may have more money to buy better players). By subsidising a private higher education institution, the state can affect its quality and it would result in more students who want to study there as opposed to the state university or other private university.

considering the fact that in these modern times, information is available on the internet and almost every household has a radio, TV, telephone and mobile phones. Finally, it is difficult to prove the perpetration of such an offence – how can one prove that a person persuaded another person to cast an invalid vote? Or is that vote indeed invalid since elections are anonymous and the ballot cannot be obtained in the evidentiary procedure?

II.

Objective and subjective features of the basic form of the criminal offence of fraud are almost identical in the provisions of Article 236 of the CC, § 263 German StGB, § 146 Austrian and § 146 Swiss CC. This is expected considering the historic affiliation with the continental European legal tradition of the Roman-German legal family, which is substantially supported by the research of the historical development of fraud. However, with respect to the aggravated form of fraud, there are some differences between the Croatian solutions and other comparative legal forms. In fact, whereas the CC provides two aggravated forms of the offence (substantial material gain / substantial damage, and when the act is committed as part of the joint criminal venture), Austrian and German aggravated forms presume a whole set of qualifying circumstances and the common circumstance with the Swiss aggravated form – when the perpetrator acts *gewerbsmäßig*, i.e., when fraud is the source of his income. Since our court practice (see Article 47 of the CC) deems such circumstance as aggravating, the justifiability of a special aggravated form can be re-examined for a reason. We have already stated that comparable legislation does not contain a separate offence of fraud in economic transactions, whereas subsidy fraud is regulated as a separate offence in German CC. Austria applies the criminal offence of fraud and abuse of grants from § 146 and § 153b, and Switzerland refers to fraud in § 146. Features of the offence of computer fraud are harmonised in all comparable legislation, which is primarily the result of implementation of the Convention on Cybercrime, and the name of the act is the same in Croatian and German CC, whereas Austrian and Swiss CCs use the term fraudulent abuse. Electoral fraud in the Croatian CC is actually the criminal offence of falsifying elections, which exists as such in all comparative legal systems (§ 107a StGB, § 266 of the Austrian CC and § 282 of Swiss CC). However, electoral fraud is regulated by § 108a StGB and § 263 of Austrian CC. In the context of Croatian affiliation with the continental European legal tradition, we can in fact verify the harmonisation of individual criminal offences with the comparative legal solutions. Exceptions in the context of electoral fraud should be rectified with statutory amendments *de lege ferenda* (of course, not with the exclusive aim of harmonisation with comparable legislation, but because the act thus formulated represents the falsification of elections and not electoral fraud).

III.

Standardisation of legal protection against fraud is not merely an ideal to which we should strive for the sake of dynamics of the transition of the European population, integration of European countries and the intensity of cross-border economic transactions or economic globalisation, but it should also represent our reality. This is directly indicated by the political will expressed in the Convention on Cybercrime (“member states of the Council of Europe and other signatories of the Convention are convinced of the need to have common criminal politics directed towards the protection of society against cybercrime”). This was also indicated in the Report on the Proposal of the Directive of the European Parliament and Council on Preventing Fraud Committed against the Financial Interests of the Union by means of criminal justice of the Committee for Budgetary Supervision and the Committee for Civic Freedom, Judiciary and Internal Affairs, which stresses the need for a common definition of fraud for the sake of protection of legal interests of the Union, which would include all illicit conduct regarding expenditure, revenue, assets and liabilities to the detriment of the Union budget, including the activities of indebteding and crediting (amendment 34). In that sense, the level of political consent is not easy to achieve. Union policy in the area of the protection of the Union’s financial interests has already been the subject of harmonisation measures such as Regulation (EC, Euratom) No. 2988/95. In order to ensure the implementation of Union policy in this area, it is essential to continue to approximate the criminal law of the member states by complementing the protection of the Union’s financial interests under administrative and civil law for the most serious types of fraud-related conduct in that field, whilst avoiding inconsistencies, both within and among those areas of law.⁹⁸⁸

Economic transactions without legal protection against “illicit” or fraudulent conduct can only lead to the termination of business cooperation or economic isolation which is not in the interest of any state. The benefits of being a more powerful state in terms of selective justice are, hopefully, relics of a different time. This research has shown that not only is the level of normative protection very high with respect to the analysed offences, but the Republic of Croatia aptly responded to the challenges of new incriminations, incorporated them into the Criminal Code and harmonised them with international documents (subsidy, computer fraud).

IV.

The basic issue in establishing the criminal offences of fraud referred to the selection of the demarcation criteria. The research included an extensive static and dynamic interpretation of analysed offences. It has been determined that all criminal offences

⁹⁸⁸ Recital 3 of the Preamble of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

denominated as fraud by the legislator do not have the common core of features, whereas there is a whole set of criminal offences which, although not denominated as fraud, effectively represent fraud. Therefore, after fraud was extracted *ex lege*, we devised an original classification of fraudulent criminal offences in a narrow and broad sense. The first group includes criminal offences whose characteristic feature is misleading and/or deceiving and/or material damage of the disponent, or breach of the special relationship of trust or obligation founded by law or a legal transaction. The second group includes offences where fraud or deceit is the manner of perpetration or a motive for perpetration. Typical criminal offences which would be included under fraud in the strictest sense is tax or customs evasion. In fact, the law prescribes the obligation to pay taxes, and if someone presents false data about his income, and thus ensures reduced tax obligation, he has *de facto* misled the state, i.e., tax authorities, and caused the state to act or fail to act (with a lower tax obligation) to the detriment of its property (budget, budgetary revenue). Of course, the legal feature according to Article 256 is not misleading or deceiving nor that material damage results. In deceitful advertising under Article 255, error does not need to be proved; neither does material gain with consumers, but only the possibility that a reasonable consumer may be misled by false or incomplete data.

The research and writing of the thesis have proved to be quite an academic and professional venture. I wanted to deal with a subject which would be theoretically challenging, useful in practice, socially engaged, and integrate knowledge of criminal and civil law (this thesis includes subjects from commercial, financial, constitutional law and state grants law). The hypotheses of the thesis have been confirmed. The objective of the thesis has been achieved and we have managed to prove that the normative level of criminal law protection in the Republic of Croatia in terms of property, economy, computer systems, programmes and data, and electoral right with respect to the criminal offences of fraud is rather high, but there is certainly room for improvement in implementation in court practice. With respect to economic globalisation, the common core of these criminal offences in Europe seems inevitable, no matter how the states oppose it by referring to their criminal law sovereignty. The work of “fraudulent geniuses” or “genius confidence tricksters”, in particular, should be monitored in the area of computer fraud, which provides fertile ground for economic fraud. In the future, we will vote in elections via computers. This will also be a challenge for protection from fraud. The new research should determine the extent to which the judiciary really works, i.e., answer the following questions: What are the amounts of damages committed by fraud; to what extent does the Republic of Croatia bear the costs of criminal proceedings and are the injured parties indemnified at the end of the day, and to what extent?

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Zakon o političkim strankama, NN 76/93, 111/96, 164/98, 36/01, 1/07.

Zakon o sportu, NN 71/06, 124/10, 124/11, 86/12, 94/13.

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Annexes

Annex 1

Questionnaire for Research of Court Practice/ Verdicts in Relation to the Criminal Offence of Fraud

1. PERPETRATOR:

Age

Sex

Education

Profession

Previous punishment

2. VICTIM:

1. A natural person
2. Legal entity
3. The method of misleading or deceiving the person by misrepresentation or concealment
4. The use of property
5. Damage
6. Penalty
7. Other measures
8. Concurrence
9. Mitigating circumstances
10. Aggravating circumstances

Annex 2

Applicable Text of the German Criminal Code

§ 263 Betrug

(1) Wer in der Absicht, sich oder einem Dritten einen rechtswidrigen Vermögensvorteil zu verschaffen, das Vermögen eines anderen dadurch beschädigt, daß er durch Vorspiegelung falscher oder durch Entstellung oder Unterdrückung wahrer Tatsachen einen Irrtum erregt oder unterhält, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.

(2) Der Versuch ist strafbar.

(3) In besonders schweren Fällen ist die Strafe Freiheitsstrafe von sechs Monaten bis zu zehn Jahren. Ein besonders schwerer Fall liegt in der Regel vor, wenn der Täter

1. gewerbsmäßig oder als Mitglied einer Bande handelt, die sich zur fortgesetzten Begehung von Urkundenfälschung oder Betrug verbunden hat,
2. einen Vermögensverlust großen Ausmaßes herbeiführt oder in der Absicht handelt, durch die fortgesetzte Begehung von Betrug eine große Zahl von Menschen in die Gefahr des Verlustes von Vermögenswerten zu bringen,
3. seine Befugnisse oder seine Stellung als Amtsträger mißbraucht oder
4. einen Versicherungsfall vortäuscht, nachdem er oder ein anderer zu diesem Zweck eine Sache von bedeutendem Wert in Brand gesetzt oder durch eine Brandlegung ganz oder teilweise zerstört oder ein Schiff zum Sinken oder Stranden gebracht hat.

(4) § 243 Abs. 2 sowie die §§ 247 und 248a gelten entsprechend.

(5) Mit Freiheitsstrafe von einem Jahr bis zu zehn Jahren, in minder schweren Fällen mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren wird bestraft, wer den Betrug als Mitglied einer Bande, die sich zur fortgesetzten Begehung von Straftaten nach den §§ 263 bis 264 oder 267 bis 269 verbunden hat, gewerbsmäßig begeht.

(6) Das Gericht kann Führungsaufsicht anordnen (§ 68 Abs 1).

(7) Die §§ 43a und 73d sind anzuwenden, wenn der Täter als Mitglied einer Bande handelt, die sich zur fortgesetzten Begehung von Straftaten nach den §§ 263 bis 264 oder 267 bis 269 verbunden hat. § 73d ist auch dann anzuwenden, wenn der Täter gewerbsmäßig handelt.

§ 264 Subventionsbetrug

(1) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geld wird bestraft, wer

1. einer für die Bewilligung einer Subvention zuständigen Behörde oder einer anderen in das Subventionsverfahren eingeschalteten Stelle oder Person (Subventionsgeber) über subventionserhebliche Tatsachen für sich oder einen anderen unrichtige oder unvollständige Angaben macht, die für ihn oder den anderen vorteilhaft sind,
2. einen Gegenstand oder eine Geldleistung, deren Verwendung durch Rechtsvorschriften oder durch den Subventionsgeber im Hinblick auf eine Subvention beschränkt ist, entgegen der Verwendungsbeschränkung verwendet,
3. den Subventionsgeber entgegen den Rechtsvorschriften über die Subventionsvergabe über subventionserhebliche Tatsachen in Unkenntnis läßt oder
4. in einem Subventionsverfahren eine durch unrichtige oder unvollständige Angaben erlangte Bescheinigung über eine Subventionsberechtigung oder über subventionserhebliche Tatsachen gebraucht.

(2) In besonders schweren Fällen ist die Strafe Freiheitsstrafe von sechs Monaten bis zu zehn Jahren. Ein besonders schwerer Fall liegt in der Regel vor, wenn der Täter

1. aus grobem Eigennutz oder unter Verwendung nachgemachter oder verfälschter Belege für sich oder einen anderen eine nicht gerechtfertigte Subvention großen Ausmaßes erlangt,
2. seine Befugnisse oder seine Stellung als Amtsträger mißbraucht oder
3. die Mithilfe eines Amtsträgers ausnutzt, der seine Befugnisse oder seine Stellung mißbraucht.

(3) § 263 Abs. 5 gilt entsprechend.

(4) Wer in den Fällen des Absatzes 1 Nr. 1 bis 3 leichtfertig handelt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

(5) Nach den Absätzen 1 und 4 wird nicht bestraft, wer freiwillig verhindert, daß auf Grund der Tat die Subvention gewährt wird. Wird die Subvention ohne Zutun des Täters nicht gewährt, so wird er straflos, wenn er sich freiwillig und ernsthaft bemüht, das Gewähren der Subvention zu verhindern.

(6) Neben einer Freiheitsstrafe von mindestens einem Jahr wegen einer Straftat nach den Absätzen 1 bis 3 kann das Gericht die Fähigkeit, öffentliche Ämter zu bekleiden, und die Fähigkeit, Rechte aus öffentlichen Wahlen zu erlangen, aberkennen (§ 45 Abs. 2). Gegenstände, auf die sich die Tat bezieht, können eingezogen werden; § 74a ist anzuwenden.

(7) Subvention im Sinne dieser Vorschrift ist

1. eine Leistung aus öffentlichen Mitteln nach Bundes- oder Landesrecht an Betriebe oder Unternehmen, die wenigstens zum Teil

- a) ohne marktmäßige Gegenleistung gewährt wird und
 - b) der Förderung der Wirtschaft dienen soll;
2. eine Leistung aus öffentlichen Mitteln nach dem Recht der Europäischen Gemeinschaften, die wenigstens zum Teil ohne marktmäßige Gegenleistung gewährt wird.
- Betrieb oder Unternehmen im Sinne des Satzes 1 Nr. 1 ist auch das öffentliche Unternehmen.
- (8) Subventionserheblich im Sinne des Absatzes 1 sind Tatsachen,
- 1. die durch Gesetz oder aufgrund eines Gesetzes von dem Subventionsgeber als subventionserheblich bezeichnet sind oder
 - 2. von denen die Bewilligung, Gewährung, Rückforderung, Weitergewährung oder das Belassen einer Subvention oder eines Subventionsvorteils gesetzlich abhängig ist.

§ 263a Computerbetrug

(1) Wer in der Absicht, sich oder einem Dritten einen rechtswidrigen Vermögensvorteil zu verschaffen, das Vermögen eines anderen dadurch beschädigt, daß er das Ergebnis eines Datenverarbeitungsvorgangs durch unrichtige Gestaltung des Programms, durch Verwendung unrichtiger oder unvollständiger Daten, durch unbefugte Verwendung von Daten oder sonst durch unbefugte Einwirkung auf den Ablauf beeinflußt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.

(2) § 263 Abs. 2 bis 7 gilt entsprechend.

(3) Wer eine Straftat nach Absatz 1 vorbereitet, indem er Computerprogramme, deren Zweck die Begehung einer solchen Tat ist, herstellt, sich oder einem anderen verschafft, feilhält, verwahrt oder einem anderen überlässt, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

(4) In den Fällen des Absatzes 3 gilt § 149 Abs. 2 und 3 entsprechend.

§ 108a Wählertäuschung

(1) Wer durch Täuschung bewirkt, daß jemand bei der Stimmabgabe über den Inhalt seiner Erklärung irrt oder gegen seinen Willen nicht oder ungültig wählt, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft.

(2) Der Versuch ist strafbar.

Annex 3

Applicable Text of the Austrian Criminal Code

§ 146 Betrug

Wer mit dem Vorsatz, durch das Verhalten des Getäuschten sich oder einen Dritten unrechtmäßig zu bereichern, jemanden durch Täuschung über Tatsachen zu einer Handlung, Duldung oder Unterlassung verleitet, die diesen oder einen anderen am Vermögen schädigt, ist mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen.

§ 147 Schwerer Betrug

(1) Wer einen Betrug begeht, indem er zur Täuschung

1. eine falsche oder verfälschte Urkunde, ein falsches, verfälschtes oder entfremdetes unbares Zahlungsmittel, falsche oder verfälschte Daten, ein anderes solches Beweismittel oder ein unrichtiges Meßgerät benutzt,
2. ein zur Bezeichnung der Grenze oder des Wasserstands bestimmtes Zeichen unrichtig setzt, verrückt, beseitigt oder unkenntlich macht oder
3. sich fälschlich für einen Beamten ausgibt, ist mit Freiheitsstrafe bis zu drei Jahren zu bestrafen.

(1a) Ebenso ist zu bestrafen, wer einen Betrug mit mehr als geringem Schaden begeht, indem er über die Anwendung eines verbotenen Wirkstoffs oder einer verbotenen Methode nach der Anlage der Anti-Doping-Konvention, BGBI. Nr. 451/1991, zu Zwecken des Dopings im Sport täuscht.

(2) Ebenso ist zu bestrafen, wer einen Betrug mit einem 3 000 Euro übersteigenden Schaden begeht.

(3) Wer durch die Tat einen 50 000 Euro übersteigenden Schaden herbeiführt, ist mit Freiheitsstrafe von einem bis zu zehn Jahren zu bestrafen.

§ 148 Gewerbsmäßiger Betrug

Wer einen Betrug gewerbsmäßig begeht, ist mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren, wer jedoch einen schweren Betrug in der Absicht begeht, sich durch dessen wiederkehrende Begehung eine fortlaufende Einnahme zu verschaffen, ist mit Freiheitsstrafe von einem bis zu zehn Jahren zu bestrafen.

§ 148a Betrügerischer Datenverarbeitungsmißbrauch

(1) Wer mit dem Vorsatz, sich oder einen Dritten unrechtmäßig zu bereichern, einen anderen dadurch am Vermögen schädigt, daß er das Ergebnis einer automationsunterstützten Datenverarbeitung durch Gestaltung des Programms, durch Eingabe, Veränderung, Löschung oder Unterdrückung von Daten oder sonst durch Einwirkung auf den Ablauf des Verarbeitungsvorgangs beeinflusst, ist mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen.

(2) Wer die Tat gewerbsmäßig begeht oder durch die Tat einen 3 000 Euro übersteigenden Schaden herbeiführt, ist mit Freiheitsstrafe bis zu drei Jahren, wer durch die Tat einen 50 000 Euro übersteigenden Schaden herbeiführt, mit Freiheitsstrafe von einem bis zu zehn Jahren zu bestrafen.

§ 263 Täuschung bei einer Wahl oder Volksabstimmung

(1) Wer durch Täuschung über Tatsachen bewirkt oder zu bewirken versucht, daß ein anderer bei der Stimmabgabe über den Inhalt seiner Erklärung irrt oder gegen seinen Willen eine ungültige Stimme abgibt, ist mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen.

(2) Ebenso ist zu bestrafen, wer durch Täuschung über einen die Durchführung der Wahl oder Volksabstimmung betreffenden Umstand bewirkt oder zu bewirken versucht, daß ein anderer die Stimmabgabe unterläßt.

Annex 4

Applicable Text of the Swiss Criminal Code

§ 146 Betrug

(1) Wer in der Absicht, sich oder einen andern unrechtmässig zu bereichern, jemanden durch Vorspiegelung oder Unterdrückung von Tatsachen arglistig irreführt oder ihn in einem Irrtum arglistig bestärkt und so den Irrenden zu einem Verhalten bestimmt, wodurch dieser sich selbst oder einen andern am Vermögen schädigt, wird mit Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe bestraft.

(2) Handelt der Täter gewerbmässig, so wird er mit Freiheitsstrafe bis zu zehn Jahren oder Geldstrafe nicht unter 90 Tagessätzen bestraft.

(3) Der Betrug zum Nachteil eines Angehörigen oder Familiengenossen wird nur auf Antrag verfolgt.

§ 147 Betrügerischer Missbrauch einer Datenverarbeitungsanlage

(1) Wer in der Absicht, sich oder einen andern unrechtmässig zu bereichern, durch unrichtige, unvollständige oder unbefugte Verwendung von Daten oder in vergleichbarer Weise auf einen elektronischen oder vergleichbaren Datenverarbeitungs- oder Datenübermittlungsvorgang einwirkt und dadurch eine Vermögensverschiebung zum Schaden eines andern herbeiführt oder eine Vermögensverschiebung unmittelbar darnach verdeckt, wird mit Freiheitsstrafe bis zu fünf Jahren oder Geldstrafe bestraft.

(2) Handelt der Täter gewerbmässig, so wird er mit Freiheitsstrafe bis zu zehn Jahren oder Geldstrafe nicht unter 90 Tagessätzen bestraft.

(3) Der betrügerische Missbrauch einer Datenverarbeitungsanlage zum Nachteil eines Angehörigen oder Familiengenossen wird nur auf Antrag verfolgt.

§ 282 Wahlfälschung

(1) Wer ein Stimmregister fälscht, verfälscht, beseitigt oder vernichtet, wer unbefugt an einer Wahl oder Abstimmung oder an einem Referendums- oder Initiativbegehren teilnimmt,

wer das Ergebnis einer Wahl, einer Abstimmung oder einer Unterschriftensammlung zur Ausübung des Referendums oder der Initiative fälscht, insbesondere durch Hinzufügen, Ändern, Weglassen oder Streichen von Stimmzetteln oder Unterschriften, durch unrichtiges Auszählen oder unwahre Beurkundung des Ergebnisses,

wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.

(2) Handelt der Täter in amtlicher Eigenschaft, so ist die Strafe Freiheitsstrafe bis zu drei Jahren oder Geldstrafe nicht unter 30 Tagessätzen. Mit der Freiheitsstrafe kann eine Geldstrafe verbunden werden.

§ 282^{bis} Stimmenfang

Wer Wahl- oder Stimmzettel planmässig einsammelt, ausfüllt oder ändert oder wer derartige Wahl- oder Stimmzettel verteilt, wird mit Busse bestraft.