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Crimes of Omission and the Role of the Guarantor in Croatian Criminal Law

I. Introduction

Ontologically speaking, omission is not an action. It does not exist in nature. In the physical world, it represents passivity and standstill. Humans react to external stimuli by active commission, doing what they are allowed to do and what they are forbidden to do. The alternative reaction is passivity. In this case, an individual avoids action even though he is supposed to act. Criminal law differentiates between commission and omission based on differences in human reaction. This reaction can be active or passive. In compliance with the aforementioned, criminal law includes both crimes of commission (Lat. *delicta commissiva,* Germ. *Begehungsdelikte*) and crimes of omission (Lat. *delicta omissiva*, Germ. *Unterlassungsdelikte*).

If an omission is seen as a human reaction regarding the expected action or commission, then this omission represents a failure to act. It becomes relevant, contains its real-world substrate and is of certain social importance. In the context of criminal law, an omission appears as a failure to undertake the expected action in accordance with a certain imperative norm (social, ethic, customary etc.).[1] *Ultra posse nemo tenetur* is the applicable principle when it comes to all punishable omissions. Whoever is capable of undertaking the obligatory action, without subjecting himself or another to serious danger, is liable for an omission. The difference between the crimes of commission and the crimes of omission also refers to the capacity of the perpetrator to act. In case no one would be capable of commission (general capacity for commission), then, from the criminal viewpoint there is no crime of commission. In terms of crimes of omission, the individual capacity to act matters. If a person is not in position of undertaking the expected action (individual capacity to act), one cannot speak of a punishable omission.

Qualification of omission as punishable is exceptional in practice. Justification can be found in the primary purpose of criminal law, i.e. prevention of conduct harmful to society. Such a formulation of the purpose of criminal law results in prevalence of crimes of commission over crimes of omission within the scope of the Croatian Criminal Code. The criterion of causality is applied in controversial cases when it is not certain whether a certain crime is commission or omission. Pursuant to this criterion, it always comes to a crime of commission if the action causes a consequence.

According to Article 25(1) of the Croatian Criminal Code (Official Gazette no. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, hereinafter: CC), a crime can also be committed by omission. Article 25(2) of the CC

[1] See F. Bačić i Š. Pavlović, *Komentar Kaznenog zakona* (Zagreb, Organizator, 2004) page 89.

regulates assumptions about the time and the perpetrator of a crime. The possibility for mitigation of punishment for crimes defined in Article 25 of the CC is regulated in Section 3 of the same article . This paper gives an overview of features of crimes of omission and explains the role of the guarantor in Croatian criminal lode. It is divided into the following chapters: classification of crimes of omission into major groups and subgroups accompanied with their relevant features (II. Classification of Crimes of Omission); the classification is followed by an analysis of the significance of the role of the guarantor, by classification of the guarantor's obligations into major groups and subgroups and by the explanation of the relevance of these obligations within each subgroup (III. Guarantor); the fourth chapter describes the possibility of mitigation of punishment for omission (IV. Mitigation of Punishment). The paper ends with Chapter V Instead of a Conclusion.

II. **Classification of Crimes of Omission**

In spite of the differences in the classification criteria for crimes of omission (Lat. *delicta omissiva*, Germ. *Unterlassungsdelikte*), in the Croatian law theory the distinction between authentic and inauthentic crimes of omission has been accepted.[2] The classification is based on the German model.

1. Authentic Crimes of Omission

Authentic crimes of omission (Lat. *delicta omissiva,* Germ. *echte Unterlassungsdelikte*) are committed by not undertaking the action prescribed by law and in that way it is completed, nothing else is needed to confirm the omission. This group of crimes of omission is characterized by the fact that the result is in not in the elements of the offense and therefore the perpetrator is not obligated to avert it. It is assumed that the perpetrator possessed the capacity for commission but he did not do what he could have done.

Due to the fact that the result is not in the elements of the offense the authentic crimes of omission do not entail causality. The authentic crimes of omission are regulated in the Special part of the Criminal Code and the law defines situations in which there is duty to act and the range of that duty. An example of a typical crime of omission would be failure to render aid (Art. 104, Sec. 1 CC). For example, a driver of a parked car who refuses to take a seriously wounded person to the hospital commits a criminal offense of not rendering aid) [3] .

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[2] For the differences in the accepted classification of crimes of omission see B. Pavišić et al., *Komentar kaznenog zakona* (the 3rd amended and revised edition, Zagreb, Official Gazette, 2007) page 102 and further on. See also in F. Bačić i Š. Pavlović, *Komentar kaznenog zakona* (Zagreb, Organizator, 2004) page 89 .

[3] Example taken from P. Novoselec, *Opći dio kaznenog prava* (the 3rd amended edition, Zagreb, Faculty of Law of the University of Zagreb, 2009) page 157.

Similar solutions with regard to the fundamental features of this category of criminal omissions are envisaged by the German criminal theory. [4]

When trying to define potential perpetrators of crimes of omission, it is necessary to take account of the exceptions indicated by the law when defining certain crimes. For example, the criminal offense of not rendering medical aid (Article 243 of the CC) is an authentic crime of omission since the result is not in the elements of the offense . The law defines that this punishable omission can be committed only by a physician, dentist or other health service provider, i.e. a person appearing as a guarantor.

With regard to the exceptions, one can say that anyone can be the perpetrator of an authentic crime of omission, but the guarantor's liabilities can arise from both authentic crimes of omission and from some formal crimes, in which the action is defined only as commission. In such formal crimes a perpetrator is a person who is obligated to prevent a crime [5]. This liability refers only to a particular group of people.

2. Inauthentic Crimes of Omission

Considering their structure, the inauthentic crimes of omission (lat. *delicta commisiva per omissionem*, Germ. *unechte Unterlassungsdelikte*) are more complex than the authentic crimes of omission. The main characteristic of these crimes is breach of a specific duty to avert the occurrence of a result. The result is in the elements of the offense ant that is the main difference in comparison to the authentic crimes of omission. In addition, the result is harmful and jeopardizes legal goods. The perpetrator of the inauthentic crimes of omission can only be a person in his capacity as a guarantor. A guarantor is a person who is legally obligated to avert the occurrence of a result, i.e. a person who guarantees that there will be no result.[6]

Inauthentic crimes of omission should be analyzed on the basis of significant classifications. Therefore, legally regulated inauthentic crimes of omission and legally nonregulated inauthentic crimes of omission are separately analysed in this paper.

a) Legally regulated inauthentic crimes of omission

There is a legal definition for this type of crime in the Special Part of the Criminal Code. It defines the perpetrator and the guarantor, the content of omission and the

[4] See Jescheck/Weigend, *Lehrbuch des Strafrechts*, *Allgemeiner Teil* (5th edition, Berlin, Duncker & Humblot ,1996) page 605.

[5] For more details see in P. Novoselec, *Opći dio kaznenog prava* (the 3rd amended edition, Zagreb, Faculty of Law of the University of Zagreb, 2009) page 158.

[6] Ibid. page 159.

consequence. The example of such a crime is Article 236(2) of the Criminal Code, Endangering life and property by dangerous acts or means.
However, the need to regulate the inauthentic crimes of omission more precisely is focused on the complicated problem of nonregulated inauthentic crimes of omission.

b) Legally nonregulated inauthentic crimes of omission

This group of crimes of omission consists of crimes with a consequence, the description of which does not include omission. [7] The legal definition includes only commission, but in certain circumstances, the perpetrator will be charged with omission . The aim of this solution is to prevent the violation of legal goods which could be committed by active conduct (commission) or by omission. It is noticeable that the same legal definition entails both prohibition and command. The provision of Article 25 (2) of the General Part of the Criminal Code stipulates the situations in which the liability and punishment for the perpetrator of a crime of omission would be established. At the same time, it also eliminates a prohibited analogy regarding the interpretation of the legal definition which includes only commission. According to this provision, a crime is committed by omission if the perpetrator, who is legally obligated to avert the consequence of a criminal offense, fails to do so and such a failure is tantamount in its effect and significance to the perpetration of such an offense by an act. The obligation to avert the consequence is based on the idea that a certain person is obligated to protect endangered legal goods whereas the others can and have to rely on that person's active intervention. In this regard, there is a demand to equate omission with positive commission in terms of averting the consequence.[8] Provision of Article 25 (2) which defines that ''……such a failure to act is tantamount in its effect and significance to the perpetration of such an offense by an act'' contains the equality clause (Germ. *Gleichwertigkeitsklausel*). When omission has the same effect and significance as active commission, it is on the judge to decide whether or not the requirements of this provision have been fulfilled. The significance and role of this clause requires short analysis. On the one hand, it prevents a broad and an inappropriate perception of the legally nonregulated inauthentic crimes of omission. According to this clause, the omission, should be equal to commission described in a concrete legal definition in order to be present. On the other hand, quality decisions by the judge make it possible for judicial practice to influence finding the best solution for potential theoretical problems or dilemmas regarding the legally nonregulated inauthentic crimes of omission.[9] At the same time, inappropriate and wrong interpretations by the judge could contribute **to *nullum crimen sine lege certa*.**

[7] Ibid.
[8] For more see in Jescheck/Weigend , op.cit. note 4, page 620.
[9] The analysis of the structure of criminal omissions in foreign law discloses similarities with the German model which has been accepted by numerous countries, including Croatia. The Austrian Criminal Code contains

III. Guarantor

The analysis of punishable omissions has tangentially touched on the issue of a guarantor (Germ. *Garant*). Despite the fact that the role of a guarantor may exceptionally appear in the authentic crimes of omission as well as in formal crimes of commission in which only the guarantor is liable for omission, the role of a person who guarantees for non occurrence of a result is the framework of liability in the inauthentic crimes of omission. In the legally regulated crimes of omission the law, in the elements of an offense , defines who can be a guarantor. Problems arise with the nonregulated crimes of omission. The provision of Article 25 (2) of the CC requires that a person should be legally obligated to avert the result. However, it does not define when such an obligation exists. The solutions are to be found in legal theory. [10] The following chapter presents theoretical solutions for this problem.

1. Classification of Guarantor's Obligations

The analysis of solutions provided by legal theory should be seen through two fundamental theoretical approaches:

- a formal theory of legal obligations or a theory of source
- a functional theory of legal obligations

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provisions on omissions, setting out certain requirements for the equality clause. In this context, Belgian and French criminal law seem to be highly interesting. French criminal law acknowledges only authentic crimes of omission whereas the inauthentic crimes of omission are recognized in exceptional cases as a type of legally regulated inauthentic crimes of omission . In such cases, the law in its formulation equalizes the causation of consequences by commission with the causation of consequences by omission. Such a legal solution leads to legal gaps, filling of which may cause legal insecurity. French judicial practice deals with this issue by conversion of intentional criminal omissions into negligent criminal omissions or, within economic criminal law, by application of the institute of the liability for action of others. Spanish and Italian legal theories are similar to German theory, but their legal solutions in this sphere differ from the German. Dutch law differentiates between authentic and inauthentic crimes of omission without the established guarantor's obligation. For more details see Jescheck/Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (5th edition, Berlin, Duncker & Humblot, 1996) pp 612 - 613. The same as in P. Novoselec, *Opći dio kaznenog prava* (the 3rd amended edition, Zagreb, Faculty of Law of the University of Zagreb, 2009) page 160.

[10] German theory of criminal law tends to differentiate between the terms guarantor's position (Garantenstellung) and guarantor's duty. (Garantenpflicht). Accordingly, the position of a guarantor depends on the legal or actual relation of the perpetrator to the protected legal good. The duty of a guarantor refers to the obligation to act arising from his position as a guarantor. The importance of this distinction is relevant for dealing with the issue of culpability of the conduct. The guarantor's position is also important in terms of omission in relation to the element of the offense, whereas guarantor's obligation is important when it comes to unlawfulness and guilt. If the perpetrator has misconceptions about his position as a guarantor, he also has misconception about the elements of the offense. In the opposite case, if the perpetrator is aware of the circumstances which his position as a guarantor has arisen from, but he has misconceptions about his duty to act (he thinks that the action is obligatory), then he has misconception concerning the unlawfulness of the commission. For more details see S. von Coelln, *Das " rechtliche Einstehenmüssen" beim unechten Unterlassungsdelikt,* (Berlin, Duncker & Humblot, 2008) pp 84 – 86.

As a traditional theory, the formal theory of legal obligations (theory of source) used the source out of which arises the legal obligation to act. It classifies the sources as follows:

- law
- contract
- a previously dangerous action.

The functional theory of legal obligations, as a more recent theory, defines the guarantor's legal obligation from the materialistic point of view. It takes into account the guarantor's capacity in relation to legal goods.[11] This theory is focused on the social content of obligations. According to this theory the guarantor's obligations are:

- protection of certain legal goods
- obligation to supervise sources of danger

Novoselec advocates both theories in Croatian criminal law. In his opinion, ''…within the framework of functional theories, a distinction between sources of legal obligations should be made.''[12] Similar solutions can be found in the German theory of criminal law.[13] In Croatian criminal law both theories have been accepted and the guarantor's obligations are classified as follows:

- obligation to protect certain legal goods
- obligation to supervise sources of danger

a) Obligation to protect legal goods

A person is obligated to protect legal goods. In this group there are three subgroups.

aa) Obligation to protect based on natural relationship

The obligation to protect certain legal goods such as life and limb, can arise from a natural relationship. Such a relationship exists between parents and children, members of the immediate family and spouses. A natural relationship is the strongest legal cause for guarantor's obligations. For criminal effect, this relationship has to have a legal ground. Pursuant to Article 92(1) of the Family Act (Official Gazette no. 116 / 03, 17/ 04, 136 / 04, 107 / 07, 57 / 11), parents are obligated to take care of their child's life and health. A mother who deliberately refuses to feed her child and the child dies of starvation, is charged with omission pursuant to Article 25 of the CC. A legal obligation for not averting the occurrence of a consequence is derived from the above provision of the Family Act. The obligation of spouses to mutual assistance is also based on the provisions of the Family Act.

[11] Armin Kufmann is considered the founder of the functional theory of legal duties. For more details see Jescheck/Weigend, op. cit. note 4, page 621.
[12] See P. Novoselec, op. cit. note 5, page 163.
[13] For more details see Jescheck/Wegend, op. cit. note 4, page 622.

The answer to the question whether and to what extent the range of potential guarantors can be expanded when determining the obligation to protect within this group, remains doubtful in both theory and practice.

ab) Obligation to protect based on life community

Life communities are based on mutual trust of their members. The members enter into a community in order to help each other in possible risk situations. The guarantor's obligations are significant in extramarital unions and homosexual communities and in dangerous endeavours such as various expeditions, diving or alpine climbing teams and similar. A community based on coincidence is not sufficient for the existence of guarantor's obligations.

ac) Obligation to protect based on voluntary commitment

An individual has voluntarily incurred an obligation to take care of certain legal goods. That obligation can be based on the contract, conclusive acts and work relationships. These sources determine the content and range of the obligations. In that way a guarantor will be a mountain guide in relation to the tourists, a care giver, a baby sitter, a swimming or ski instructor or a night guard.

b) Obligation to supervise sources of danger

The guarantor's position is based on responsibility for certain sources of danger and on his control over these sources. Comparing the guarantor's obligation to protect certain legal goods and the one which is based on supervision of sources of danger, it is noticeable that the range of obligations based on supervision of sources of danger is narrower than the range of obligations which refer to the protection of certain legal goods. The latter case (protection of certain legal goods), the guarantor's obligation is focused on the protection of a facility whereas in the former case (supervision of sources of danger), the emphasis is on situations which could be a potential sources of danger and on the fact that the guarantor has to have sole supervision over them.
There are three subgroups within this group of obligations. The first one includes the guarantor's obligation to avert the harmful consequences that might affect another person due to a previously dangerous action. The second subgroup refers to the guarantor's obligations to supervise sources of danger controlled by the perpetrator. Finally, the third subgroup consists of obligations to supervise the third party which might be potentially dangerous.

ba) Obligation to protect based on a previously dangerous action

The obligation is based on prohibition to inflict harm on others. Whoever creates danger is obligated to do anything to prevent harmful consequences to others. The previously dangerous action has to present an immediate danger for occurrence of a result, it has to be culpable and based on violation of a legal norm which protects the endangered legal goods. An example of such an action would be a distribution of products for which the manufacturer knew they could be harmful to human health. This entails the manufacturer's liability to terminate the distribution of the product in order to prevent harmful consequences for human health. The guarantor may also be a person who gave heroin to another person (endangering that person's life) who later was in a life-threatening situation. The former is obliged to avert the occurrence of harmful consequences and render aid to the latter (call the doctor, take him the hospital as soon as possible or similar). For some legally regulated inauthentic crimes of omission the Croatian criminal law describes obligations based on a previously dangerous action. best example is
the criminal offense of not rendering aid to a person who suffers serious bodily injury in a traffic accident, Article 273, (1) of the Criminal Code.
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bb) Obligation to supervise the sources of danger controlled by the perpetrator

The obligations in this subgroup are based on the fact that society can rely on the person who controls the sources of danger. Society expects that not only he controls the sources of danger, but also supervises them and is capable to avert possible dangers arising from these sources. The range of the guarantor's obligations of supervision depends on the level of potential dangers. Regarding particular sources, the range of supervision can be precisely defined, e.g. regulations on nuclear power plants operation, working with radioactive substances, and radioactive material disposal. However, sources of danger such as dangerous facilities, animals, use of hazardous materials which involve risks, are also included. Thus, the owner has to extinguish the fire on his property in order to prevent it from spreading, despite the fact that he did not set it.[14]

bc) Obligation to supervise a third party

This subgroup involves supervision of potentially dangerous third parties. In this subgroup, a guarantor is a person who, in relation to other people, is in a position of authority. He is obligated to supervise potential dangers and prevent harmful actions by those he has authority over. For example, a teacher in relation to students, parents and children, military commander and soldiers. Accordingly, if a father does not prevent his

[14] Example taken from P. Novoselec, op. cit. note 5, page 164.

child from smashing a shop window, he will be charged with inflicting damage on other people's property.[15]

IV. Mitigation of Punishment

According to Article 25 (3) the punishment of a perpetrator who commits a criminal offense by omission can be mitigated, except in the case of a criminal offense which can be committed only by failure to act. The content of this article undoubtedly stipulates that the possibility of a facultative mitigation of punishment cannot refer to the authentic crimes of omissions and to legally regulated inauthentic crimes of omission which are defined only as an omission. On the other hand, the possibility of optional mitigation of punishment appears in all legally nonregulated inauthentic crimes of omission and in legally regulated inauthentic crimes of omission which can be committed by commission or omission. The reason for restriction of mitigation of punishment in situations implying only an omission lies in the fact that in such cases the law has already taken account of the omission when determining punishment frameworks. In case of crimes that can be committed by both omission and commission, it is possible that the omission is characterized by a lesser degree of " right not do" and guilt than the commission. In such cases, the court assesses whether or not an omission is a milder form of a crime than commission. If this is the case, the provision of mitigation of punishment will be implemented. In compliance with the aforementioned, it is clear that judicial practice even in this segment contributes to the significance and relevance of the crimes of omission.

V. Instead of a Conclusion

In the Croatian Criminal Code a prevalence of crimes of commission (commissive delicts) over crimes of omission (omissive delicts) is noted. Since the consequences of the authentic criminal omissions are not in the elements of the offense, they can be compared with formal crimes (Germ. *Tätigkeitsdelikte*). In this case, the violation of a duty to act is incriminated, i.e. violation of an imperative norm. The guarantor's obligations can also be found in the authentic crimes of omission, which justifies the classification of crimes of omission as authentic and inauthentic as compared to simple and those which involve a guarantor. Regarding the inauthentic crimes of omission, the occurrence of the result is necessary for the elements of the offense. The perpetrator is responsible for the consequences and therefore, these crimes of omission can be compared to the result crimes (Germ. *Erfolgsdelikte*) as a type of crimes of omission. It is

[15] Ibid

certain that the inauthentic crimes of omission belong to the category of the so-called *delicta propria* since only a person in the position of a guarantor can commit them. The position of a guarantor is a necessary feature of the inauthentic crimes of omission. Regarding Croatian criminal law, the prevalence of legally regulated inauthentic criminal omissions over legally nonregulated inauthentic crimes of omission is worth mentioning. This fact makes the Croatian Criminal Code one of the contemporary criminal codes which attempt to, thoroughly and in compliance with the legality principle, deal with the issue of criminal omission. Simultaneously, certain legal gaps remain and they need to be bridged by judicial practice in an appropriate way. The equality clause requires the equality of the relation between a failure to avert the consequences by omission and commission of a crime. It should be pointed out that the existence of an inauthentic crime of omission does not necessarily depend on equalization of the value of omission and commission. Such an approach might challenge legal security. One should also emphasize the generally accepted standpoint that crimes implying only causation of the consequences without explicitly describing the commission, require only the acknowledgment of a guarantor's obligation.[16]The equality clause only relates to crimes accompanied with an explicit description of the commission. This clause can serve as a guideline for practical solutions. Therefore, the request for equalization of the criteria for application of this clause as well as a very precise definition of existence of the liability of the perpetrator concerning legally nonregulated inauthentic crimes of omission are of exceptional importance for final practical solutions.

[16] P. Novoselec, op. cit. note 5, page 165.