

Liability of Legal Entities for Environmental Criminal Offences in Serbia. Public Prosecutor's Role in Proving

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Abstract:

Environmental criminal offences include illegal behaviours against the environment and its integral parts: soil, air, water, flora and fauna. Their consequences are devastating and long-lasting, especially if committed by legal entities, particularly by powerful multinational corporations. This type of crime, referred to as corporate environmental crime or green-collar crime results in criminal liability of corporations. However, its organised and often trans-national character, its link with corruption and other types of crime as well as high costs of expert findings often cause numerous issues and challenges regarding its discovering and proving. Having in mind the important role of the public prosecutor in collecting evidence according to current Criminal Procedure Code of the Republic of Serbia, the author analyses the characteristics of environmental corporate crime and the difficulties related to its discovering and proving. Finally, the author suggests that all subjects involved with criminal proceedings, including the public prosecutor, should be more environmentally conscious and take a more active part in the prosecution of the perpetrators of corporate environmental crime.

Key-words: *environmental crime, corporate crime, criminal proceedings, evidence, Public Prosecutor.*

1. Environmental criminal offences: definition and types

The term "environmental delicts" encompasses a variety of illegal human activities by which the perpetrators harm or endanger the social values that are aimed to provide the conservation, improvement and protection of the environment.¹ The legislation of the Republic of Serbia is familiar with three groups of environmental delicts: 1) environmental criminal offences, 2) environmental economic offences and 3) environmental administrative offences² (also referred to as environmental infractions or contraventions³).

Environmental criminal offences comprise the most serious violations of legal provisions regulating environmental protection. According to Đurđić and Jovašević, they include various unlawful activities, committed either by individuals or by legal entities,

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¹ Jovašević, D.: *Sistem ekoloških delikata-ekološko kazneno pravo*, Niš: Pravni fakultet Univerziteta u Nišu, 2009, p. 130.

² Jovašević, D.: *Environmental Crime in the Republic of Serbia: Theory, Practice and Legislation*, *Facta Universitatis Series: Law and Politics*, 9(2), 2011, p. 116.

³ Al-Kawadri, L.D.: *The Distinctive Features of European Criminal Law*, *Lex et Scientia International Journal*, 1(21), 2014, p.123.

directed against the environment for which criminal sanctions are imposed.⁴ *Situ* and *Emmons*, define environmental crimes as unauthorized acts or omissions that violate the law and that are therefore subject to criminal prosecution and criminal sanctions.⁵ They further explain that these offences harm or endanger people's physical safety or health as well as the environment itself and serve the interests of individuals or organizations, such as corporations.⁶

Serbian criminal law is familiar with three types of environmental criminal offences: 1) genuine, 2) counterfeit and 3) subsidiary. Genuine environmental criminal offences are systematised within chapter 24 of the Criminal Code of the Republic of Serbia⁷, entitled as "Criminal Offences against the Environment" and they directly protect the environment and its elements such as: air, soil, water, flora and fauna from various negative anthropogenic impacts.⁸ These criminal offences include: 1) Environmental Pollution (Article 260), 2) Failure to Apply Environmental Protection Measures (Article 261), 3) Illegal Construction and Operation of Facilities and Installations Polluting the Environment (Article 262), 4) Damaging Environmental Protection Facilities and Installations (Article 263), 5) Damaging the Environment (Article 264), 6) Destruction, Damage, Transfer Into a Foreign Country or Into Serbia of Protected Natural Asset (Article 265), 7) Bringing Dangerous Substances into Serbia and Unlawful Processing, Depositing and Stockpiling of Dangerous Substances (Article 266), 8) Illegal Construction of Nuclear Plants (Article 267), 9) Violation of the Right to be Informed on the State of the Environment (Article 268), 10) Killing and Abuse of Animals (Article 269), 11) Transmitting Contagious Animal and Plant Diseases (Article 270), 12) Malpractice in Veterinary Services (Article 271), 13) Producing Harmful Products for Treatment of Animals (Article 272), 14) Pollution of Livestock Fodder and Water (Article 273), 15) Devastation of Forests (Article 274), 16) Forest Theft (Article 275), 17) Illegal Hunting (Article 276) and 18) Illegal Fishing (Article 277).

The so-called "counterfeit" environmental criminal offences are also systematised within the Criminal Code, but in its other chapters, dedicated to the protection of other social values such as human health and public safety. Finally, subsidiary environmental criminal offences are not incriminated by the Criminal Code, but can be found in some other laws regulating various aspects of environmental protection, such as Law on Plant Health⁹, Law on the Appliances for Plant Health Protection¹⁰ and Law on Veterinary Medicine¹¹.

⁴ Đurđić, V. & Jovašević, D.: *Krivično pravo: Posebni deo*, Niš: Pravni fakultet Univerziteta u Nišu, Centar za publikacije, 2013, pp. 214-221.

⁵ Situ, Y. & Emmons, D.: *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, London: Sage, 2000, p. 3.

⁶ *Ibid.*

⁷ Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

⁸ Jovašević, D.: Environmental Crime in the Republic of Serbia: Theory, Practice and Legislation, *Facta Universitatis Series: Law and Politics*, 9(2), 2011, p. 116. 109-134.

⁹ Law on Plant Health, *Official Gazette of the Republic of Serbia*, No. 41/2009.

¹⁰ Law on the Appliances for Plant Health Protection, *Official Gazette of the Republic of Serbia*, No. 41/2009.

¹¹ Law on Veterinary Medicine, *Official Gazette of the Republic of Serbia*, No. 91/2005, 30/2010 and 93/2012.

There is a close connection between administrative and criminal law in many countries¹², including the Republic of Serbia. Administrative provisions often determine, for example, the extent of permissible pollution and acceptable risks in certain areas, whereas criminal law links criminal liability to aggravated forms of violations of environmental regulations.¹³ But, while an administrative offence (*i.e.* infraction or contravention)¹⁴ is considered a morally neutral act against public administration (an "anti-administrative" act), the criminal offence¹⁵ represents a materially unlawful behaviour that violates or endangers common public values.¹⁶ In the Republic of Serbia, both-individuals as well as legal entities can be responsible for the aforementioned types of delicts. However, when it comes to economic offences¹⁷, the situation is a bit specific since only legal entities and responsible individuals within legal entities can be liable for them. Economic offences represent a particular type of delicts that Serbian legislation has been familiar with since the period of socialism¹⁸. Some of these offences can also be directed against the environment, but they generally include less serious violations of environmental provisions than environmental criminal offences.

2. Legal entities as perpetrators of environmental criminal offences

Since the last decade of the 20th century, there has been an increase in the number of environmental crimes, antitrust crimes, fraud, pharmaceutical crimes and offences, labour law offences, corruption, economic and fiscal policies crimes committed by legal entities in the United States and Europe¹⁹. The effects of these criminal offences are long-term and particularly affect the environment and human health, causing huge economic and human life losses.²⁰ There is no doubt that some of the most destructive and costly environmental crimes have been committed by large corporations²¹. Hence, the corporations have been traditionally viewed as perpetrators of environmental crime, in large part because of their involvement in pollution and contamination cases²².

¹² Pereira, R.: *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden: Brill, 2015, p. 221.

¹³ *Ibid.*

¹⁴ Administrative Offences Act, Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016 and 98/2016.

¹⁵ Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

¹⁶ Al-Kawadri, L.D.: The Distinctive Features of European Criminal Law, *Lex et Scientia International Journal*, 1(21), 2014, p. 123.

¹⁷ Economic Offences Act, Official Gazette of the Socialist Federative Republic of Yugoslavia, No. 4/1977, 36/1977, 14/1985, 10/1986, 74/1987, 57/1989 and 3/1990, Official Gazette of the Federative Republic of Yugoslavia, No. 27/1992, 16/1993, 31/1993, 41/1993, 50/1993, 24/1994, 28/1996 and 64/2001 and Official Gazette of the Republic of Serbia, No. 101/2005.

¹⁸ Economic Offences Act defines an economic offence as a socially harmful violation of regulations on economic or financial operations, which has caused or may have caused graver consequences and which is defined as an economic offence under the competent authority's relevant regulation (Article 2, Paragraph 1).

¹⁹ Stănilă, L.M.: Criminal Liability of Legal Persons. History, Evolution and Trends in Romanian Criminal Law, *Journal of Eastern European Criminal Law*, 1(1), 2014, p. 109.

²⁰ *Ibid.*

²¹ Shover, N. & Routhe, A.: Environmental Crime, *Crime and Justice*, 32(1), 2005, p. 326.

²² Bricknell, S.: *Environmental Crime in Australia*, Canberra: Australian Institute of Criminology, 2010, p. 6.

Criminal offences against the environment committed by legal entities are usually referred to as corporate environmental crime, and constitute a major variety of corporate crime²³. Corporate crime represents a subtype of white-collar crime that typically involves illegal behaviour by firms and their agents (executives and managers) in the pursuit of corporate benefit.²⁴ The behaviours of corporations that break laws protecting the environment were first referred to as "green crime"²⁵. But, as the similarity between the motives and characteristics of environmental criminal offences committed by individuals working in corporations and the white-collar crime was noticed, they were more often referred to as "green-collar crime".²⁶

Corporate environmental crime comprises a wide variety of unlawful behaviours committed by legal entities (i.e. corporations), including: environmental pollution due to excessive emission of certain chemicals or spill of waste-waters, degradation of the environment by illegal construction, illegal waste disposal etc²⁷. The use of so-called "dirty technologies" that pollute the environment and the transfer of these technologies from developed to undeveloped countries²⁸ as well as failing to apply appropriate environmental protection measures with the intention to minimise production costs is also considered environmental crime²⁹.

Transnational corporations are responsible for the production and emission of a massive amount of carcinogenic pollutants resulting from the manufacture and processing of numerous industrial commodities including plastics, chemicals as well as a series of natural resource extraction processes. Not only do these activities have negative environmental impacts, but they also cause serious health risks.³⁰ The consequences of corporate environmental crime are long-lasting and devastating and may include the destruction of entire ecosystems, which is often referred to as "ecocide"³¹. Apart from causing immense financial losses, environmental corporate crimes frequently affect various, mostly poor and marginalised social groups whose incomes depend on natural resources, exposing them to so-called "environmental discrimination" and "environmental racism"³². That is the reason why it is extremely

²³ Situ, Y. & Emmons, D.: *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, London: Sage, 2000, p. 45.

²⁴ Simpson, S., Gibbs, C., Rorie, M., Slocum, L.A., Cohen, M. & Vandenberg M.: An Empirical Assessment of Corporate Environmental Crime Control Strategies, *The Journal of Criminal Law & Criminology*, 103(1), 2013, p. 232.

²⁵ Frank, N. & Lynch, M.: *Corporate Crime, Corporate Violence*, Albany, NY: Harrow and Heston, 1992.

²⁶ Wolf, B.: "Green-Collar Crime": Environmental Crime and Justice in the Sociological Perspective, *Sociology Compass*, 5(7), 2011, p. 500. and O'Hear, M.: Sentencing the Green Collar Offender: Punishment, Culpability and Environmental Crime, *Journal of Criminal Law and Criminology*, 95(1), 2004, p. 201.

²⁷ House of Commons-Environmental Audit Committee: *Corporate Environmental Crime-Second Report of Session 2004-5*, London: The Stationery Office Limited, 2005, p. 9.

²⁸ Ikanović, V.: *Odgovornost pravnih lica za krivična djela*, Banja Luka: Međunarodno udruženje naučnih radnika-AIS, 2012, p. 298.

²⁹ Ignjatović, Đ.: *Kriminologija*, Beograd: Pravni fakultet Univerziteta u Beogradu, Centar za publikacije, 2008, p. 152.

³⁰ Katz, R.: Environmental pollution: corporate crime and cancer mortality, *Contemporary Justice Review*, 15(1), 2012, p. 98.

³¹ Kramer, R.C.: Climate Change: A State-Corporate Crime Perspective, <https://www.peacepalacelibrary.nl/ebooks/files/352205474.pdf>, 01.11.2017.

³² Bullard, R.: Environmental Justice in the 21st Century: Race Still Matters, *Phylon*, 49(3-4), 2001, pp. 160-161.

important to establish an appropriate mechanism of state reaction to corporate environmental crime that would include the liability of both - legal entities as well as responsible individuals within them in accordance with the provisions of criminal law.

3. Criminal liability of legal entities for environmental criminal offences

The Republic of Serbia adopted its first Law on the Liability of Legal Entities for Criminal Offences in 2008.³³ According to this law, a legal entity may be liable for criminal offences constituted under a special part of the Criminal Code (including criminal offences against the environment, systematised within its Chapter 24) and under other laws if the conditions governing the liability of legal entities provided for by that Law are satisfied (Article 2). However, the Republic of Serbia, the autonomous province and the local-self government unit, that is, government authorities and authorities of the autonomous province and local self government unit cannot be liable for criminal offences.

Other legal entities that have been given public authorisations by the law also cannot be liable for criminal offences they committed when exercising these public authorisations (Article 3).

The law is applied on both - national as well as foreign legal persons that are held accountable for a criminal offence committed in the Republic of Serbia (Article 4, Paragraph 1). Furthermore, the law is applied to foreign legal entities held accountable for criminal offences committed abroad to the detriment of the Republic of Serbia, nationals thereof or national legal entities (Article 4, Paragraph 2) as well as to national legal entities held accountable for criminal offences committed abroad (Article 4, Paragraph 3).

According to the law, the term legal entity (also referred to as legal person) includes a national or a foreign entity that is considered a legal entity under positive legislation of the Republic of Serbia. The Law defines a liable person as a natural person that is legally or *de facto* entrusted with certain duties within a legal entity, as well as a person authorised, i.e. a person who may reasonably be considered authorised to act on the behalf of a legal entity (Article 5).

Criminal liability of a legal entity is based upon the culpability of the responsible person within that legal entity. However, a legal person can also be held accountable for criminal offences committed by the responsible person even though criminal proceedings against the responsible person has been discontinued or if the act of indictment has been refused (Article 7).

The following types of sanctions can be imposed on legal entities liable for criminal offences: punishment, conditional sentence and security measures (Article 12). Punishments for legal entities may include: fine and termination of the status of a legal entity. Both of them can be imposed only as principal punishments (Article 13).

When it comes to conditional sentence, it is worth mentioning that this type of sanction has some specific characteristics in cases of environmental criminal offences. Namely, for some criminal offences against the environment systematised within Chapter 24 of Criminal Code of the Republic of Serbia, the legislator has provided a

³³ Law on the Liability of Legal Entities for Criminal Offences, *Official Gazette of the Republic of Serbia*, No. 97/2008.

possibility for the perpetrator to be sentenced conditionally if he fulfils certain obligations related to protection, conservation and improvement of the environment or to the elimination of negative environmental impacts caused by his offence. This type of conditional sentence is prescribed for the following criminal offences: 1) Environmental Pollution (Article 260), 2) Failure to Apply Environmental Protection Measures (Article 261), 3) Illegal Construction and Operation of Facilities and Installations Polluting the Environment (Article 262), 4) Damaging Environmental Protection Facilities and Installations (Article 263), 5) Damaging the Environment (Article 264).

Although it has been rarely applied since its introduction to criminal legislation of the Republic of Serbia in 1977, this specific modality of conditional sentence designed especially for environmental criminal offences seems quite rational from the aspect of criminal policy³⁴. This type of conditional sentence has particular importance in the cases of corporate environmental crime, since corporations generally have sufficient financial resources and capacities to undertake adequate measures designed to repair environmental damage. Hence, it seems that this type of conditional sentence is more suitable to be imposed on legal entities than on individuals as perpetrators of environmental criminal offences.

4. Criminal proceedings in cases of environmental criminal offences committed by legal entities

If legal entities appear as the perpetrators of criminal offences, the provisions of the Law on the Liability of Legal Entities for Criminal Offences and the Criminal Procedure Code are applied. This refers to environmental criminal offences as well. The Law on Liability of Legal Persons for Criminal Offences contains basic provisions regulating criminal proceedings against legal entities and explains how the provisions of Criminal Procedure Code should be applied in such cases.

The Law on Liability of Legal Entities for Criminal Offences prescribes that the criminal proceedings shall be, as a rule, instituted and conducted jointly against a legal entity and the responsible person and that a single judgment shall be passed (Article 35, Paragraph 1). However, if it is not possible to initiate and conduct criminal proceedings against the responsible person, due to the reasons specified by law, the proceedings may be initiated and conducted against the legal entity alone (Article 35, Paragraph 2). In case that a legal entity ceases to exist before the criminal proceedings has been initiated, the proceedings may be initiated and conducted against the responsible person alone (Article 35, Paragraph 3).

According to the Law on Liability of Legal Entities for Criminal Offences, the court in the territory of which a criminal offence has been committed or the commission attempted has the territorial jurisdiction in cases of criminal offences committed by legal entities (Article 36, Paragraph 1). But, if the proceedings are instituted against an accused legal entity alone, the court is competent in the territory of which: 1) a national legal entity is seated; 2) a foreign legal entity has a representative office or a branch thereof (Article 36, Paragraph 2).

The accused legal entity is represented by a proxy in criminal proceedings (Article 37, Paragraph 1). A proxy is a person who is authorised to represent a legal entity by the

³⁴ Stojanović, Z.: *Komentar Krivičnog zakonika*, Beograd: Službeni glasnik, 2017, p. 797.

law, other regulation or a decision of a competent authority (Article 37, Paragraph 2). A proxy is authorised to undertake any on behalf of an accused legal entity that could be undertaken by the defendant concerned (Article 37, Paragraph 3). An accused legal entity may have only one proxy (Article 37, Paragraph 4). A proxy of an accused foreign legal entity is a person managing a representative office thereof (i.e. a branch of a foreign legal entity operating in the Republic of Serbia) (Article 37, Paragraph 5).

For criminal offences punishable by fine imprisonment of up to three years, the public prosecutor may repudiate a criminal charge filed against a legal entity if he assesses that the initiation of criminal proceedings would not be viable (Article 45, Paragraph 1). When making such decision, the public prosecutor has to take into consideration one or several of the following circumstances: 1) that the legal entity has reported a criminal offence before finding out that prosecuting authorities have detected the commission of a criminal offence; 2) that the legal entity has prevented or compensated the damage and eliminated other detrimental consequences of the criminal offence; 3) that the legal entity has returned voluntarily the proceeds from crime; 4) that the legal entity has no assets or a bankruptcy proceedings has been instituted against such legal entity (Article 45, Paragraph 2). This provision is similar to Paragraph 3 of Article 284 of the Criminal Procedure Code, regulating the repudiation of criminal charge filed against a natural person due to the reasons of viability.

In addition to the elements laid down by the Criminal Procedural Code, the indictment and the proposal for an official charge made to a legal entity contain the name, seat and activities of the legal entity concerned, registration and personal numbers of the legal entity, first name and family name of the proxy thereof, citizenship and number of the passport if the proxy is a foreign national, and the grounds for liability of the legal entity concerned (Article 46).

At the main trial the first person to be heard is the accused responsible person, followed by the proxy of the accused legal entity (Article 47, Paragraph 1). The proxy of the accused legal entity who has not been heard yet may not attend the hearing of the accused responsible person (Article 47, Paragraph 2). The court may order the confrontation of the accused responsible person and the proxy of the accused legal entity be confronted if their respective statements do not match as to significant facts (Article 47, Paragraph 3). Upon the completion of the evidence-related proceeding, following the statements given by the prosecutor and the victim, the defence counsel of the accused legal entity, and the proxy of the accused legal entity may proceed, followed by the defence counsel of the accused responsible person, and the accused responsible person (Article 48).

It is important to note that in the majority of cases of environmental criminal offences, including those committed by legal entities, an abbreviated or summary criminal proceedings is conducted. Namely, according to Article 495 of Criminal Procedure Code, abbreviated proceedings is conducted in cases of criminal offences for which a fine or imprisonment of up to eight years can be imposed. The punishments that Criminal Code of the Republic of Serbia prescribes for criminal offences against the environment, suggest that abbreviated proceedings will be conducted in all cases of environmental criminal offences except from one: an aggravated form of Bringing Dangerous Substances into Serbia and Unlawful Processing, Depositing and Stockpiling of Dangerous Substances (Article 266, Paragraph 3). Namely, for aggravated form of this

criminal offence imprisonment from two to ten years and fine can be imposed, which makes it suitable for regular criminal proceedings³⁵.

Abbreviated criminal proceedings is generally designed for less complicated criminal cases that are considered less hazardous for the society.³⁶ It does not include investigation and is initiated on the basis of a motion to indict submitted by the public prosecutor or on the basis of a private prosecution, when there is justified suspicion that a certain person has committed a criminal offence. (Article 499, Paragraph 1). In such proceedings, before deciding whether to file a motion to indict or to dismiss a criminal charge, the public prosecutor may in the shortest possible period of time conduct certain evidentiary actions (Article 499, Paragraph 2).

The punishments that may be imposed on the perpetrators of criminal offences against the environment suggest that two specific institutions prescribed by Criminal Procedure Code can be applied in such cases: 1) Delay of Criminal Proceedings (Article 283) and 2) Hearing for the Imposition of a Criminal Sanction (Article 512).

The public prosecutor may delay criminal prosecution for criminal offences punishable by a fine imprisonment of up to five years if the suspect accepts one or more of the following obligations: 1) to repair the detrimental consequence caused by the commission of the criminal offence or compensate the damage caused; 2) to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution; 3) to perform certain community service or humanitarian work; 4) to fulfil maintenance obligations which have fallen due; 5) to submit to an alcohol or drug treatment programme;

6) to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct; 7) to fulfil an obligation determined by a final court decision, or comply with a restriction determined by a final court decision (Article 283, Paragraph 1). The public prosecutor determines a time frame (that may not exceed one year) during which the suspect must fulfil the imposed obligations. Supervision of the fulfilment of obligations is performed by an officer of the authority in charge of the execution of criminal sanctions, in accordance with a regulation issued by the minister responsible for the judiciary (Article 283, Paragraph 2). If the suspect fulfils the imposed obligation within the prescribed time limit, the public prosecutor will dismiss the criminal charge and notify the injured party thereof (Article 283, Paragraph 3). In such cases, the injured party will not be entitled to submit an objection (Article 51, Paragraph 2).

In the cases of environmental criminal offences, the application of the aforementioned possibility should be taken into consideration only under some specific circumstances. However, it should not be applied if human health and other substantial social and environmental values have been endangered or harmed by the commission of criminal offence.³⁷

For criminal offences punishable by a fine or a term of imprisonment of up to five years as the principal penalty, the public prosecutor may in his motion to indict request the holding of a hearing for the imposition of a criminal sanction (Article 512, Paragraph 1). The public prosecutor may propose such request if in his opinion, based upon the

³⁵ Bugarski, T.: Krivični postupak za dela protiv životne sredine, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 49(4), 2015, p. 1634.

³⁶ *Ibid*, 1637.

³⁷ Bugarski, T.: Krivični postupak za dela protiv životne sredine, *op. cit.*, p. 1636.

complexity of the case and evidence collected (particularly the arrest of the accused during the commission of criminal offence or his confession of the criminal offence) there is no need for the main hearing (trial) (Article 512, Paragraph 2).

If the accused has confessed the commission of a criminal offence punishable by a term of imprisonment of up to five years, the public prosecutor may propose the following punishments: imprisonment of up to two years, a fine of up to 240 daily amounts or up to 500.000 dinars or probation with the ordering of incarceration of up to one year or a fine of up to 180 daily amounts or up to 300.000 dinars and a probation period of up to five years. If the accused has committed criminal offence for which a fine or imprisonment of up to three years may be imposed, the public prosecutor may propose imprisonment of up to one year, a fine of up to 180 daily amounts or up to 300.000 dinars, up to two 240 hours of community service, revocation of the driver's licence for up to one year, probation with the ordering of incarceration of up to one year or a fine of up to 180 daily amounts or up to 300.000 dinars and a probation period of up to three years, with a possibility of placing the defendant under protective supervision or imposing a judicial admonition (Article 512, Paragraph 3).

5. Public prosecutor's role in proving under Criminal Procedure Code of the Republic of Serbia

As current Criminal Procedure Code came into force, the Republic of Serbia has replaced its former mixed type of criminal procedure with the adversary criminal procedure, which is typical for common law systems such as the United Kingdom and the United States of America. This has made the role and the position of the public prosecutor even more important, similarly to the ones he has in the United States. Today, the Republic of Serbia belongs to legal systems that give the public prosecutor key role in criminal proceedings, particularly in its pre-investigative and investigative phase.³⁸

As prescribed by Article 285, Paragraph 1 of Criminal Procedure Code of the Republic of Serbia, the public prosecutor conducts the pre-investigative phase of criminal proceedings. In this phase of criminal procedure, the public prosecutor can order the police to undertake certain activities in order to discover criminal offences and find the suspect. The police is obliged to act in accordance with public prosecutor's order as well as to inform him regularly about the conducted activities (Article 285, Paragraph 2). Furthermore, the public prosecutor is entitled to conduct the activities that the police already conducted on their own in accordance with the law (Article 285, Paragraph 4).

The initiation and conduct of investigation are within the jurisdiction of the public prosecutor and the police. According to Article 296 of Criminal Procedure Code of the Republic of Serbia, the investigation is initiated upon the order of the public prosecutor. There is no any legal remedy that the defendant could use against the order of the public prosecutor-neither the appeal to a higher court nor the objection to a higher

³⁸ Čvorović, D. Javni tužilac kao moćna figura savremenog krivičnog procesnog zakonodavstva, in: Blagojević, M. & Stevanović, Z. (Eds.) *Kriminal i društvo Srbije: izazovi društvene dezintegracije, društvene regulacije i očuvanja životne sredine*, pp. 223-236, Beograd: Institut za kriminološka i sociološka istraživanja, 2015, p. 225.

prosecutor.³⁹ The abbreviated criminal proceedings (conducted for almost all criminal offences against the environment) is initiated on the basis of public prosecutor's motion to indict, which is submitted to the court (Article 499, Paragraph 1). In this case, the court can control whether the motion to indict has been written in a proper manner (Article 501). In regular criminal proceedings, the public prosecutor conducts the investigation with the assistance of the police or other state bodies, if necessary (Article 298). On the other hand, in the abbreviated criminal proceedings, the public prosecutor conducts certain evidence collecting activities in the shortest term possible, prior to deciding whether to submit motion to indict or discard criminal charges (Article 499, Paragraph 2). It is obvious, however, that in both types of criminal proceedings, the public prosecutor plays key role in the gathering of evidence.

As it has already been explained, the public prosecutor has some other authorisations that significantly influence the course of criminal proceedings, especially in the cases of criminal offences for which less severe punishments are prescribed, including environmental crimes. He decides whether to conduct criminal prosecution in the situations where he can exercise discretion and he is entitled to apply the principle of opportunity of criminal prosecution, the principle of restorative justice as well as the principle of consensual justice in cases of plea bargain.⁴⁰ Similarly to the legislation of Germany, United Kingdom and the United States, in the Republic of Serbia, the efficiency of criminal proceedings largely depends on the efficiency of its pre-investigative and investigative phase, which are predominantly in the hands of the public prosecutor.⁴¹

6. Discovering and proving corporate environmental crime

The main source of information about the commission of environmental criminal offences are criminal charges submitted to the police or the public prosecutor. In the Republic of Serbia, criminal charges for environmental criminal offences are usually submitted by individuals, non-governmental organisations specialised for environmental protection, police officers, inspectors or representatives of the Institute for Nature Protection.⁴² Data collected by the Statistical Office of the Republic of Serbia show that the average number of criminal charges submitted against adult perpetrators of criminal offences against the environment between 2006 and 2014 was 1906 per year. This number represents around 2,03% of all reported criminal offences per year. For example, altogether 2148 charges for criminal offences against the environment were submitted in 2014. From that number, 926 charges were rejected: 171 because the reported offence could not be considered a criminal offence, 152 because the prosecution was excluded, whereas in 603 cases, the reasons for rejection included: lack of evidence, lack of viability and agreement etc.⁴³

Unreported, undocumented or unacknowledged environmental harms seem to be rather common, which makes the measurement of actual scope and dynamics of

³⁹ Bošković, A., Pavlović, Z.: Problemski osvrt na organizaciju prethodnog krivičnog postupka u Republici Srbiji i Republici Hrvatskoj, *Hrvatski ljetopis za kaznene znanosti i praksu*, 23(1), 2016, pp. 194-195.

⁴⁰ Čvorović, D. Javni tužilac kao moćna figura savremenog krivičnog procesnog zakonodavstva, *op. cit.*, p. 224.

⁴¹ *Ibid.*

⁴² Bugarski, T.: Krivični postupak za dela protiv životne sredine, *op. cit.*, p. 1635.

⁴³ *Ibid.*

environmental crime rather difficult.⁴⁴ In many countries, it is assumed that the percentage of so-called "dark" or "hidden" figure of crime is particularly high when it comes to environmental criminal offences.⁴⁵ This means that the number of committed environmental criminal offences is much larger than the number of those that have actually been reported or recorded by law enforcement agencies.⁴⁶ The dark figure of environmental crime is considered very high for several reasons. Environmental criminal offences are closely related to other crimes such as corruption or frauds. So, some of them might be prosecuted as these other criminal offences instead. Moreover, environmental crimes are so-called "control crimes" and, as such, the number of reported cases is in direct correlation to the number of controls conducted by, for example, supervisory agencies in charge of monitoring. Finally, "dark figure" can be considered very high due to the lack of priority given to environmental crimes by enforcement authorities in comparison to other crimes.⁴⁷

Environmental crimes are often committed by organised crime groups that have found a new and highly lucrative business segment in the illegal disposal of waste, trade in endangered species or timber etc.⁴⁸ Criminal organizations are premeditated associations designed to the smallest details regarding the role and mode of action of those who constitute them. Their members are often privileged individuals, placed on top of the social and political pyramid, who use their influence position, wealth, political and economic power to commit unlawful acts which remain undiscovered by the police and criminal justice system.⁴⁹ Transnational environmental crime is particularly related to transnational organised crime, as it requires the cross-border cooperation between various public and private actors. So, transnational and organised environmental crime represent the most profitable illegal markets in the world, similarly to the illegal trade in drugs, firearms and human beings.⁵⁰

This makes environmental crime even more difficult to discover and prove, especially if it includes direct or indirect participation of powerful international corporations. Namely, corporate crimes usually involve multiple actors connected by organisational structure⁵¹ and "criminality within organisations is a shared event, conditioned by one's organisational power, position and motivation"⁵².

⁴⁴ White, R.: *Crimes against Nature: Environmental Criminology and Ecological Justice*, New York: Routledge, 2013, p. 107.

⁴⁵ Sahramäki, I.: Enforcement and Professional Constructions of Environmental Crime in Finland, in: Potter, G., Nurse, A. & Hall, M. (Eds.) *The Geography of Environmental Crime: Conservation, Wildlife Crime and Environmental Activism*, pp. 189-216, London: Springer, 2016, p. 191.

⁴⁶ See: Penney, T.: Dark Figure of Crime (Problems of Estimation), in: Albanese, J. (ed.) *The Encyclopedia of Criminology and Criminal Justice*, Oxford: Wiley-Blackwell, 2014, pp.1-6.

⁴⁷ Vagliasindi, G.M.: The fight against environmental crime in the European Union and its member states: a perspective of the enforcement system, in: De La Cuesta, J.L., Quackelbeen, L., Persak, N. & Vermeulen, G. (Eds) *The Protection of the environment through criminal Law*, Antwerpen: Maklu, 2017, p. 166.

⁴⁸ Gerstetter, C et al.: *Environmental crime and the EU: Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE)*, op. cit., p. 40.

⁴⁹ Stănilă, L.M.: Organized Crime in Action: Trafficking of Human Cells, Tissues and Embryos in Romania, *Journal of Eastern European Criminal Law*, 2(1), 2015, pp. 59-60.

⁵⁰ Gerstetter, C et al.: *Environmental crime and the EU: Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE)*, Berlin: Ecologic Institute, 2016, p. 40.

⁵¹ Gibbs, C. & Simpson, S.S.: Measuring Corporate Environmental Crime Rates: Progress and Problems, *Crime, Law and Social Change*, 51(1), 2009, p. 90.

⁵² Simpson, S. S., Harris, A. R., & Mattson, B. A. (1995) Measuring corporate crime, in: Blankenship, M.B. (Ed.), *Understanding corporate criminality*, pp. 115–140, New York: Garland, 1995, p. 129.

7. Conclusion: challenges and recommendations

Environmental criminal offences committed by legal entities, particularly by powerful international corporations, are rather difficult to discover and prove for several reasons. Their consequences are devastating and long lasting and sometimes emerge several years after the commission of criminal offence. It is not always easy to measure the exact harm caused by these offences, particularly in cases involving the damage or destruction of protected natural assets such as, for example endangered species of animals and plants or their natural habitats. The costs of providing expert findings that can be presented in criminal proceedings for these criminal offences are often very high and their results are not always completely reliable.

The situation becomes even more complicate in cases of corporate environmental crime. Corporate environmental crime is often committed in transnational and organised form, together with other similar criminal offences such as human trafficking, illegal trade in drugs and weapons etc. It is closely related to various forms of corruption and abuse in both, public as well as private sector, which all makes its discovering particularly difficult. A rather low level of environmental awareness of citizens and state representatives and a prejudice that environmental criminal offences represent "victimless crimes"⁵³ contribute to a small number of reported perpetrators. Even when they are reported to the police or to the public prosecutor, it seems that these state bodies do not demonstrate a sufficient level of interest to treat these criminal offences as particularly hazardous and prosecute their perpetrators in accordance with that. Due to these circumstances, the number of persons accused and punished for these criminal offences is rather small in comparison to other criminal offences.⁵⁴

In accordance with new Criminal Procedure Code of the Republic of Serbia, the public prosecutor plays a very important role in both, pre-investigative proceedings and investigation (i.e. evidence collecting activities in abbreviated proceedings). This refers to criminal offences against the environment as well, whether committed by individuals or by legal entities. The fact that criminal proceedings for all criminal offences against the environment (apart from one) is conducted in the abbreviated form means that the public prosecutor does not conduct investigation but only conducts some evidence collecting activities in the shortest term possible. Latest findings and reports confirm that criminal offences against the environment are extremely hazardous as well as that the cases of corporate environmental crime are very complicated and difficult for discovering and proving. That is the reason why it could be discussed whether it is still reasonable to conduct abbreviated criminal proceedings in the cases of environmental crime in general, and particularly for corporate environmental crime.

Within current legislative framework, some improvements regarding the discovering and proving of criminal offences against the environment and the prosecution of their perpetrators could be made if the public prosecutor and the police were more environmentally aware. Namely, their additional education about the nature, scope, consequences and victims of corporate environmental crime and related issues could increase their eagerness to react in these cases in a more active manner, particularly when it comes to collecting evidence and proposing expert findings.

⁵³ Batričević, A.: Ekološka krivična dela – zločini bez žrtve?, *Temida*, 16(1)/2013, pp. 113-132.

⁵⁴ Čavoški, A., Trajković, D.: Analiza statističkih podataka o kaznenopravnoj zaštiti životne sredine u Srbiji, Beograd: OEBS misija u Srbiji, 2011, p. 11.

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