ECOLOGICAL CRIME – CHALLENGES AND PROBLEMS IN PRACTICE

EKOLOŠKI KRIMINAL – IZAZOVI I PROBLEMI U PRAKSI

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UVODNE NAPOMENE:
ANALIZA DVA AKTUELNA SLUČAJA

Naš partner Jelena Milinović, analizirala je dva aktuelna krivična postupka za krivična dela iz oblasti takozvanog ekološkog kriminala sa namerom da, stručnu, a i laičku javnost, koju bi, s obzirom na profesionalnu delatnost kojom se bavi, ova tema mogla zanimati, upozna sa problemima u odbrani okrivljenih sa kojima smo se nedavno susreli u ovom delu naše advokatske prakse.

Analiza ukazuje kako se lica koja se po prirodi svoje profesije mogu naći u situacijama sličnim sa onima u kojima su se našli klijenti koje JPM brani u ovim postupcima, kao članovi uprave velikih kompanija, iako nisu preduzeli ni jednu jedinu protivpravnu radnju, našli u više nego ozbiljnoj situaciji da budu okrivljeni u krivičnim postupcima koji se protiv njih vode .

U oba analizirana slučaja, okrivljenima je na teret stavljeno izvršenje radnji koje nikako ne mogu predstavljati krivična dela za koja se terete, za šta im se preti kaznama zatvora u trajanju i do deset godina, pri čemu su suočeni sa neizvesnim ishodima postupaka koji se protiv njih vode.

Nadamo se da će ova analiza doprineti boljem razumevanju kompleksnosti u krivičnim postupcima vezanih za krivična dela iz oblasti zaštite životne sredine

FOREWORD :
ANALYSIS OF THE TWO CURRENT CASES

Jelena Milinovic, partner at the Jankovic Popovic Mitic (JPM) Law Office, has analyzed two criminal proceedings for criminal offenses of so-called ecological crime. The objective of the analysis is to make acquainted the professionals and also the lay audience, in view of the professional activity they are performing, with this topic that may be of their interest, and to inform them about the issues our Law Office has recently encountered in its practice.

The analysis indicates that persons who, by the nature of their profession, may find themselves in situations similar to those found by clients defended by JPM in these proceedings, as members of the management of large companies, without having been involved in any illicit activity, found themselves in a more than serious situation and have capacity of the defendants in the criminal proceedings.

In both cases defended are charged with perpetration of the acts that can in no way represent the criminal offenses they are charged with, for which actions sanction of imprisonment up to ten years is envisaged, and are facing uncertain outcome of the cases conducted against them in both these cases.

We hope that this analysis will contribute to a better understanding of the complexity of criminal proceedings related to environmental crimes.

KRIVIČNA ODGOVORNOST OKRIVLJENIH

Reč je o krivičnim postupcima u kojima JPM zastupa klijente kojima se na teret stavljaju dva specifična krivična dela protiv životne sredine, odnosno, dva tipična krivična dela takozvanog ekološkog kriminala. U pitanju su klijenti koji pripadaju, jedan, srednjem menadžmentu određene kompanije, dok je drugi generalni direktor jedne druge kompanije. Ovi postupci se vode u dva različita grada u Srbiji i ovi klijenti međusobno nemaju nikakve veze. Jedina veza koja između njih postoji jeste ta da su oba klijenta JPM izložena krivičnopravnom progonu u krivičnim postupcima u kojima se formalno terete za izvršenje određena dva krivična dela protiv životne sredine, a da su im na teret stavljene radnje koje ne predstavljaju ni ona krivična dela za koja se terete, niti neka druga krivična dela.

Krivični progon najviše od svih drugih pravnih postupaka, zadire u zagarantovana ljudska prava, i to do te mere da su određena načela krivičnog prava i krivičnopravne procedure podignuta na nivo ustavnih. Osnovno od ovih ustavnih načela, koje je istovremeno i ustavna garancija, ima status apsolutnog prava koje ne podleže nikakvim odstupanjima. Ono je predviđeno članom 34 stav 1 Ustava Republike Srbije koji propisuje to da se niko ne može oglasiti krivim za delo koje, pre nego što je učinjeno, zakonom ili drugim propisom zasnovanim na zakonu, nije bilo predviđeno kao kažnjivo, niti mu se može izreći kazna koja za to delo nije bila predviđena.

Kako su u pitanju krivični postupci koji nisu pravosnažno okončani, radi zaštite profesionalne tajne i zajamčene pretpostavke nevinosti, u ovom tekstu se, bez navođenja bilo kakvih podataka pomoću kojih bi se moglo zaključiti o kojim predmetima i postupcima je reč, analiziraju se elementi krivičnih dela ekološkog kriminala, naročito njihovih posledica, kao i pojmovi iz oblasti zaštite životne sredine. Sve veće zagađenje i uništenje životne sredine u svetu dovelo je do potrebe za pooštravanjem i proširivanjem inkriminacija na takva ponašanja koja izazivaju posledice u vidu zagađenja i uništenja životne sredine. I domaće zakonodavstvo je sa uobičajenim zakašnjenjem pratilo ove trendove, tako da su krivična dela protiv životne sredine uvedena u naše krivičnopravno zakonodavstvo dosta kasno, tek 1977. godine, a način njihovog propisivanja se menjao. Prema stanovištu iznetom u ovoj analizi, u oba slučaja klijentima koje JPM brani na teret stavljeno izvršenje radnji koje nikako ne mogu predstavljati krivična dela za koja se terete.

CRIMINAL RESPONSIBILITY OF THE DEFENDANTS

These are the criminal proceedings in which JPM defends the clients charged with two specific criminal offenses against the environment, i.e. two typical criminal offenses of the so-called ecological crime. As to the clients, one belongs to a medium level management of one company while the other one is a managing director of another company. These proceedings are conducted in two different cities in Serbia and these clients do not have any mutual relationship. The only relation existing between them is the fact that both JPM clients are subject to criminal-legal persecution in the criminal proceedings in which they are formally charged for execution of two separate criminal offences against the environment, and that both are charged for the activities that neither represent the criminal offences they are charged with nor any other criminal offenses.

When compared with all other legal proceedings, criminal persecution encroaches most upon the guaranteed human rights, even to the extent where certain principles of criminal law and criminal legal procedures are raised to the level of constitutional ones. The basic among these constitutional principles, which is at the same time a constitutional guarantee, has the status of absolute right that is not subject to any dissent. Article 34 paragraph 1 of the Constitution of the Republic of Serbia sets forth that nobody shall either be declared guilty of an act which before its commission had not been envisaged as punishable by law or other regulation based on the law, or be adjudged a punishment not envisaged for such act.

As the matter at hand involves the ongoing criminal proceedings, for the purpose of protecting the professional secret and guaranteed assumption of innocence, this work, without mentioning any information that could identify the subject cases and proceedings, is an analysis of the elements of ecological crime and consequences thereof in particular, and the terms of the environment protection area. Currently, the increasing environmental pollution and devastation worldwide now necessitate tightening and expansion of the incriminations to also encompass the conducts that cause consequences in the form of environmental pollution and devastation. Domestic legislation was monitoring these trends with a usual delay and, accordingly, the criminal offences against the environment were introduced into our criminal legislation rather late, only in 1977, and the manner of their enactment used to be changed. According to the opinion presented in this analysis, in both cases defendants by JPM are charged with perpetration of the acts that can in no way represent the criminal offenses they are charged with.

Kako Partner Jelena Milinović u svojoj analizi pokazuje, klijenti koje JPM brani u ovim postupcima, kao predstavnici menadžmenta dve različite velike kompanije, ne preduzevši ni jednu jedinu protivpravnu radnju, našli su se u više nego ozbiljnoj situaciji i procesnoj ulozi okrivljenih u krivičnim postupcima. Oni su izloženi krivičnopravnom gonjenju za postupanja koja u stvarnosti uopšte ne predstavljaju krivična dela, za šta im se preti kaznama zatvora u trajanju i do deset godina, pri čemu su suočeni sa neizvesnim ishodima postupaka koji se protiv njih vode. Kod skoro nepostojeće sudske prakse u Srbiji iz ove oblasti krivičnog prava, krivični progon za krivična dela ekološkog kriminala se svodi se na puko eksperimentisanje in vivo. Kao takav, on predstavlja primer najgrubljeg kršenja osnovnih ljudskih prava okrivljenih lica garantovanih Ustavom, zakonima i međunarodnim ugovorima.

PROBLEMI U KRIVIČNOPRAVNOJ PRAKSI

U Republici Srbiji krivična dela iz oblasti zaštite životne sredine predviđena su Glavom XXIV Krivičnog zakonika (dalje: KZ) u okviru koje je predviđeno 18 krivičnih dela iz ove oblasti. Za nas su najznačajnija bila dva krivična dela o kojima ćemo u daljem nastavku teksta govoriti, a to su krivično delo zagađenja životne sredine iz člana 260 KZ (u daljem tekstu: Delo iz čl. 260 KZ), koje je, ujedno, i najopštije krivično delo iz ove oblasti, i krivično delo unošenja opasnih materija u Srbiju i nedozvoljeno prerađivanje, odlaganje i skladištenje opasnih materija iz člana 266 KZ (u daljem tekstu: Delo iz čl. 266 KZ), koje se, u odnosu na prvopomenuto krivično delo, javlja kao posebno.

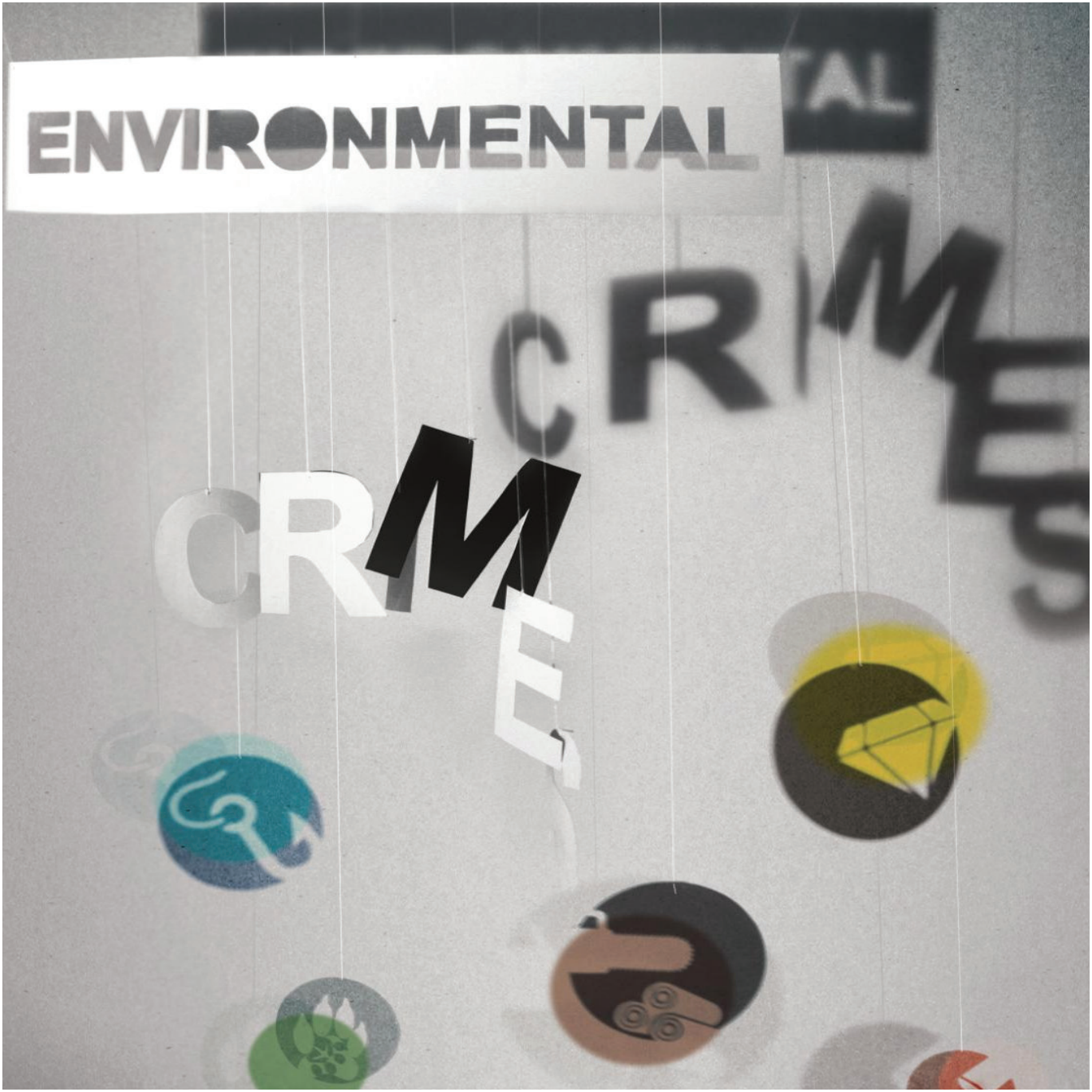
Sudska praksa koja bi se odnosila na najtipičnija krivična dela protiv životne sredine ne postoji. Za potrebe izrade ovog rada pregledali smo sve objavljene odluke Vrhovnog kasacionog suda i apelacionih sudova u Beogradu, Novom Sadu, Kragujevcu i Nišu, kao i sve objavljene biltene navedenih sudova u periodu od deset godina i, kada je reč o krivičnim delima koja su predmet ovog razmatranja, kod kojih se kao posledica javlja konkretno zagađenje životne sredine, postoji objavljena samo jedna jedina sudska odluka. Reč je pravosnažnoj presudi Osnovnog suda u Užicu u krivičnom postupku koji je vođen zbog krivičnog dela iz člana 260 stav 3 u vezi sa stavom 1 KZ koja je potvrđena presudom Apelacionog suda u Kragujevcu .

As shown by Partner Jelena Milinović in her analysis, the clients defended by JPM in these proceedings, as representatives of the management of two different big companies found themselves, without having been involved in any illicit activity, in a more than serious situation and have capacity of the defendants in the criminal proceedings. They are subject to criminal persecution for the actions which in reality do not represent criminal offences at all, for which actions sanction of imprisonment up to ten years is envisaged, whereby they are facing uncertain outcome of the cases conducted against them. With the almost non-existing judicial practice in this field of criminal law in Serbia, criminal persecution for ecological criminal offence is nothing else but experiment in vivo. As such, it represents an example of the most severe violation of the basic human rights of the accused guaranteed by the Constitution, the laws and international treaties.

ISSUES IN CRIMINAL PRACTICE

In the Republic of Serbia, criminal offenses in the field of environmental protection, 18 in total, are envisaged by Chapter XXIV of the Criminal Law (hereinafter: CL). For us two most important criminal acts, to be discussed in a greater detail further in the text are: (a) the criminal offense of environmental pollution referred to in the Article 260 of the CL (hereinafter: Act from the Article 260 of CL) which is at the same time the most general criminal offense in this area, and (b) criminal offense of bringing hazardous materials in Serbia and unpermitted treatment, disposal and storage of hazardous materials referred to in the Article 266 of the CL (hereinafter: Act from the Article 266 of CL) which, in relation to the first mentioned criminal offense appears as separate.

Judicial practice that would relate to the most typical criminal offenses against the environment does not exist. For the needs of this work we have also looked into the published decisions of the Supreme Court of Cassation and of the Appellate Courts in Belgrade, Novi Sad, Kragujevac and Niš, as well as into all bulletins of the mentioned courts published in the period of ten years and, when talking about the criminal offences subject of this analysis, the consequence of which was a concrete pollution of the environment, there is only one published court decision. It is the final judgment of the Basic Court in Užice in the criminal proceedings conducted in the case of the criminal offence from the Article 260 paragraph 3 in connection with paragraph 1 of the CL, which was confirmed by the judgment of the Appellate Court in Kragujevac .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Krivična dela zagađenja životne sredine iz člana 260 Krivičnog zakonika i unošenja opasnih materija u Srbiju i nedozvoljeno prerađivanje, odlaganje i skladištenje opasnih materija iz člana 266 Krivičnog zakonika

Delo iz čl. 260 KZ jeste osnovno i opšte krivično delo protiv životne sredine. Njegovim osnovnim oblikom je predviđeno to da će se zatvorom od šest meseci do pet godina i novčanom kaznom kazniti onaj ko, kršeći propise o zaštiti, očuvanju i unapređenju životne sredine, zagadi vazduh, vodu ili zemljište u većoj meri ili na širem prostoru. Zakonodavac je inkriminisao i nehatno izvršenje Dela iz čl. 260 KZ predvidevši za ovaj njegov oblik novčanu kaznu ili zatvor do dve godine.

Radnja izvršenja Dela iz čl. 260 KZ, bilo da se ono vrši sa umišljajem ili iz nehata, nije posebno definisana i to može biti svaka radnja koja može dovesti do zakonom predviđene posledice ovog krivičnog dela i koja sa njom mora stajati u direktnoj uzročnoj vezi. Ovo znači to da posledica i ovog, kao i svakog drugog krivičnog dela, mora biti direktno uzrokovana radnjom njegovog izvršenja. Postupanje učinioca, ma o kakvom se njegovom manifestovanju u stvarnosti radilo, mora biti takvo da njime krši tačno određena norma nekog zakona ili drugog opšteg akta podzakonskog nivoa kojima se štiti, čuva ili unapređuje životna sredina.

Criminal Offences of Environmental Pollution from the Article 260 of the Criminal Law and of Bringing Hazardous Materials in Serbia, and Unpermitted Treatment, Disposal and Storage of Hazardous Materials from the Article 266 of the Criminal Law

The Act from the Article 260 of the CL is the basic and general criminal act against environment. Its basic form envisages the sanction of imprisonment from six months to five years and a fine to be imposed on whoever pollutes the air, water and soil to a large extent, and a broader area by violating the regulations on the protection, preservation and improvement of the environment. The legislator has also incriminated the negligent perpetration of the Act from the Article 260 of the CL having envisaged for this type of criminal offense a fine or imprisonment of up to two years.

The criminal act of Act from the Article 260 of the CL, whether perpetrated with intent or out of negligence, is not particularly defined so that it may be any activity that leads to a law envisaged consequence of this criminal offense and which must be in direct causal relation with the same. It means that the consequence of this type of criminal offense, as well as of any other, must be directly caused by the commission of such act. Actions of perpetrator, no matter the way of its manifestation in reality, must be in the manner which breach a strictly stipulated provision of law or other general legal act at by-law level that protect, preserve or improve the environment.

Ovde se, zapravo, radi o takozvanom blanketnom krivičnom delu koje se vrši kršenjem norme nekog drugog zakona ili podzakonskog opšteg akta i takva krivična dela ne postoje ukoliko učinilac svojim ponašanjem koje je preduzeo u stvarnosti nije prekršio normu nekog drugog zakona ili podzakonskog opšteg akta koja propisuje ili zabranjuje određeno ponašanje. U slučaju Dela iz čl. 260 KZ, s obzirom na to da je zakonodavac upotrebio termin „propisi", u obzir dolazi i postupanje, kako suprotno zakonima, tako i podzakonskim opštim aktima. Kao osnovni zakoni kršenje čijih bi odredaba moglo predstavljati radnju izvršenja Dela iz čl. 260 KZ, javljaju se, pre svega, Zakon o zaštiti životne sredine, Zakon o zaštiti zemljišta, Zakon o zaštiti vazduha, Zakon o vodama i Zakon o upravljanju otpadom. U slučaju ostalih propisa bi se, uglavnom, radilo o opštim aktima upravnopravnog karaktera, kao što su uredbe ili pravilnici, s tim što je u konkretnom slučaju neophodno da se radi o opštim aktima koji se odnose na zaštitu, očuvanje ili unapređenje životne sredine.

Za postojanje Dela iz čl. 260 KZ, kao i za postojanje svakog drugog krivičnog dela, pored postojanja radnje njegovog izvršenja koja mora ispunjavati gore navedene elemente, pored krivice koja se ogleda u postojanju umišljaja ili nehata kod učinioca, mora postojati i posledica, kao rezultat radnje izvršenja dela i ona mora nastupiti u stvarnosti. Kod Dela iz čl. 260 KZ posledica je određena alternativno i ona se sastoji ili (i)u zagađenju vazduha, vode ili zemljišta u većoj meri ili (ii)u zagađenju vazduha, vode ili zemljišta na širem području. Jednostavno rečeno, zamišljeni učinilac može preduzimati u stvarnosti radnje koje predstavljaju kršenje normi predviđenih propisima o zaštiti, očuvanju i unapređenju životne sredine, ali ukoliko usled takvog njegovog postupanja nije došlo do zagađenja bilo zemlje, bilo vode, bilo vazduha, i to takvog njihovog zagađenja koje se u stvarnosti mora manifestovati kao ili zagađenje u većoj meri, ili kao takvo zagađenje koje je nastupilo na širem području, tada se ne može govoriti o postojanju Dela iz čl. 260 KZ. U takvom slučaju bi se, eventualno, pod pretpostavkom ispunjenosti uslova predviđenih nekim drugim zakonima ili opštim pravnim aktima, moglo raditi o nekom prekršaju ili privrednom prestupu iz oblasti zaštite životne sredine, ali nikako o navedenom krivičnom delu.

KZ predviđa i teži oblik Dela iz čl. 260 KZ koji, u zavisnosti od toga da li je osnovni oblik učinjen sa umišljajem ili iz nehata, predviđa i teže kazne za njegovo izvršenje.

The subject issue here is, actually, a blanket criminal offense that is committed by violation of a provision of another law or other general legal act at by-law level and such criminal offences do not exist if perpetrator by its actions in reality does not breach any provision of other law or other general legal act at by-law level prescribing or prohibiting certain behavior. In the case of the Act from the Article 260 of the CL, since the legislator used the term „regulations", into account is also taken the actions, both the one contrary to the laws and to general legal acts at the by-law level. The basic laws which provisions, if violated, could account as committing the Act from the Article 260 of the CL, include primarily the Law on Environment Protection, the Law on Soil Protection, the Law on air protection, the Law on Waters and the Law on Waste Management. In the case of other regulations, these would mainly be general acts of administrative-legal nature, such as government regulations or rulebooks, provided that in the concrete case the general acts relate to the environment protection, preservation or improvement.

In order to Act from the Article 260 of CL exists, as well as for any other criminal offense to exist it is necessary to have in place, apart from the criminal act that must meet the above listed elements, apart from the guilt manifested in the existence of intent or negligence on the part of the offender, also must be in place the consequence as a result of the criminal act, and such consequence must exists in reality. In the case of the Act from the Article 260 of CL, the consequence is determined alternatively and consists either of (i) considerable air, water or soil pollution or (ii) air, water or soil pollution in a broader area. Simply speaking, a fictitious perpetrator can in reality undertake activities that violate the provisions envisaged by the regulations on the environment protection, preservation and improvement, but if such acting on his part did not pollute either soil, water or air and did not cause their pollution that in reality must manifest either as a significant pollution or as a pollution caused in a broader area, one cannot speak in such circumstances of the Act from the Article 260 of CL. In such a case, one might possibly speak, assuming that the conditions set forth by some other laws or general legal acts are fulfilled, of a petty offense or corporate offense in the area of the environment protection, but in no way the mentioned criminal offense.

The CL also envisages a more serious form of the Act from the Article 260 of CL which, depending on whether the basic form was committed with intent or out of negligence, sets forth more severe punishments for its perpetration.

Tako je propisano to da će se zatvorom od jedne do osam godina i novčanom kaznom kazniti učinilac težeg oblika Dela iz čl. 260 KZ kada je ono izvršeno sa umišljajem, dok će se učinilac težeg oblika Dela iz čl. 260 KZ izvršenog iz nehata kazniti zatvorom od šest meseci do pet godina i novčanom kaznom.

Delu iz čl. 260 KZ teži, odnosno, takozvani kvalifikovani oblik daje upravo teža posledica koja nastupa njegovim izvršenjem zajedno sa osnovnom posledicom dela. Kod ovakvih krivičnih dela kvalifikovanih težom posledicom, da bi ona postojala, pored osnovne posledice koja mora nastupiti u stvarnosti, potrebno je da u stvarnosti nastupi i još neka okolnost koja tu, već nastalu, posledicu, a time i samo krivično delo, čini još težim.

U slučaju Dela iz čl. 260 KZ teža posledica se može javiti u dva alternativna vida i da bi postojao teži oblik Dela iz čl. 260 KZ zagađenje vazduha, vode ili zemljišta, koje je, kao posledica izvršenja osnovnih oblika ovog dela već nastalo ili:
(i) u većoj meri ili
(ii) na širem području, mora biti toliko da je usled njega došlo ili
1. do uništenja ili oštećenja životinjskog ili biljnog sveta velikih razmera ili
2. do zagađenja životne sredine u toj meri da su za njegovo otklanjanje potrebni duže vreme ili veliki troškovi.

Definicije pojma životne sredine i njenog zagađenja date su, pre svega, u Zakonu o zaštiti životne sredine, kao sistemskom zakonu iz ove oblasti, koji definiše životnu sredinu kao skup prirodnih i stvorenih vrednosti čiji kompleksni međusobni odnosi čine okruženje, odnosno, prostor i uslove za život i predviđa to da su vrednosti koje čine životnu sredinu prirodna bogatstva - vazduh, voda, zemljište, šume, geološki resursi i biljni i životinjski svet, voda i zemljište. Prema kriterijumima datim u ovom zakonu, može se, jednostavnim jezikom opisano, reći da je zagađena ona životna sredina koja u određenom vremenu i na određenom prostoru sadrži nivo zagađujućih materija koje prevazilaze propisane granične vrednosti u meri u kojoj je to predviđeno posebnim propisima.

It is thus envisaged that the sanction of imprisonment from one to eight years and a fine will be imposed on the perpetrator of a more serious form of the Act from Article 260 of the CL when it was committed with intent, while the perpetrator of such more serious form of the Act from Article 260 of the CL committed out of negligence will be punished by the sanction of imprisonment from six months to five years, and a fine.

A more serious, i.e. the so-called qualified form of the Act from Article 260 of CL exists when a more serious consequence, together with the basic consequence of the criminal offence, result from its perpetration. In case of criminal offences qualified by a more serious consequence, in order for such consequence to exist, in reality is necessary to arise, apart from the basic consequence, additional circumstance which makes such consequence, and the criminal offence also, more serious.

In the case of the Act from Article 260 of CL, a more serious consequence can manifest in two alternative forms and, in order to exist a more serious form of the Act from Article 260 of the PC, consequence of the committing the basic form of this criminal offence, being the pollution of air, water or soil either:
(i) to a significant extent or
(ii) in a broader area, such pollution must be of a magnitude that either led:
1. to destruction or deterioration of large proportions of the flora and fauna, or
2. to the pollution of the environment to such an extent that the removal thereof requires a rather long time or sizable costs.

Definitions of the concept of the environment and its pollution are provided, in the first place, in the Law on Environment Protection as a systemic law in this area, which defines the environment as a set of natural and created values whose complex mutual relations make up the environment, i.e. the space and the conditions for living, also envisaging that natural resources – air, water, soil, forests, geological resources, flora and fauna are the values that make up the environment. According to the criteria provided in this law one can describe a polluted environment, by using simple language, as the environment that for a certain period of time and in a certain area contains the level of pollutant matters that exceed the prescribed limit value to the extent that is envisaged by specific regulations.

Drugo krivično delo koje predstavlja predmet ove analize jeste Delo iz čl. 266 KZ čijim je osnovnim oblikom predviđeno to da će se zatvorom od šest meseci do pet godina i novčanom kaznom kazniti onaj ko, protivno propisima, u Srbiju unese radioaktivne ili druge opasne materije ili opasne otpatke, ili ko prevozi, prerađuje, odlaže, sakuplja ili skladišti takve materije ili otpatke. KZ je predvideo još jedan poseban oblik Dela iz čl. 266 KZ koji se od osnovnog oblika razlikuje prema njegovom mogućem učiniocu i posebnom svojstvu na njegovoj strani, a to je svojstvo službenog lica.

Poseban oblik Dela iz čl. 266 KZ vrši se zloupotrebom službenog položaja ili ovlašćenja i, drugim rečima, ovaj poseban oblik konkretnog dela čini onaj ko, zloupotrebom svog službenog položaja ili ovlašćenja, dozvoli ili omogući da se u Srbiju unesu radioaktivne ili druge opasne materije ili opasni otpaci, ili onaj ko omogući da se takve materije ili otpaci prevoze, prerađuju, odlažu, sakupljaju ili skladište. Za poseban oblik Dela iz čl. 266 KZ predviđena je zatvorska kazna u rasponu od jedne do osam godina kumulativno sa novčanom kaznom. Kao izvršilac sa posebnim svojstvom, u slučaju posebnog oblika Dela iz čl. 266 KZ, pored službenog, može se, na osnovu opštih odredaba KZ, javiti i odgovorno lice u pravnom licu, a to je lice koje na osnovu zakona, propisa ili ovlašćenja vrši određene poslove upravljanja, nadzora ili druge poslove iz delatnosti pravnog lica, kao i lice kome je faktički povereno obavljanje tih poslova.

Radnja izvršenja osnovnog oblika Dela iz čl. 266 KZ određena je alternativno i ona se može sastojati ili

(i) u unošenju u Srbiju radioaktivnih ili drugih opasnih materija ili opasnih otpadaka, ili
(ii) u njihovom prevoženju, ili
(iii) u njihovom prerađivanju, ili
(iv) u njihovom odlaganju, ili
(v) u njihovom sakupljanju ili, najzad,
(vi) njihovom skladištenju.

Sa druge strane, radnju izvršenja posebnog oblika Dela iz čl. 266 KZ predstavlja ili

1. omogućavanje ili
2. dozvoljavanje od strane službenog ili odgovornog lica u pravnom licu preduzimanja radnji izvršenja osnovnog oblika Dela iz čl. 266 KZ, pod uslovom da to službeno ili odgovorno lice izvršenje ovih radnji omogućava ili dozvoljava zloupotrebljavajući svoj službeni položaj ili ovlašćenja, odnosno, položaj odgovornog lica u pravnom licu i ovlašćenja koja ima u tom svojstvu.

The second criminal offense subject of this analysis is the Act from Article 266 of CL whose basic form envisages that the sanction of imprisonment from six months to five years and a fine shall be imposed on whoever, contrary to the law, brings in radioactive or other hazardous matters or dangerous matters or dangerous wastes, or whoever transports, treats, disposes, stores or gathers such matters or wastes. The CL envisages one more special form of the Act from Article 266 of CL that differs from the basic form in respect to its possible perpetrator and the special capacity of the perpetrator, which is the capacity of official person.

Special form of the Act from Article 266 of CL is abuse of office or authority, in other words, this special form of a concrete act is perpetrated by someone who by abuse of his office or authority, permits or enables to be brought into Serbia radioactive or other hazardous matters or hazardous waste or who enables transportation, treatment, disposal, gathering or storing of such matters and waste. Sanction of imprisonment in the range from one to eight years cumulatively with a fine are envisaged for the specific form of the Act from Article 266 of CL. Based on general provisions of the CL, in the case of the specific form of the Act from Article 266 of CL, perpetrator in special capacity may be, apart from the one holding an official function, a person responsible in a legal entity, i.e. a person who performs certain managing, supervision or other activities falling within the scope of operation of the legal entity, as well as the person entrusted, de facto, with the performance of such activities.
The commission of the basic form of the Act from Article 266 of CL is determined alternatively and it can involve either
(i) bringing into Serbia radioactive or other hazardous matters or hazardous waste, or
(ii) their transportation, or
(iii) their treatment, or
(iv) their disposal, or
(v) their gathering or, finally,
(vi) their storing.
On the other hand, commission of the special form of the Act from Article 266 of CL is also considered to be the one that the official person or responsible person in a legal entity either

1. enables or
2. permits to be undertaken the activities intended for perpetration of the basic form of the Act from Article 266 of CL, provided, however, that such official or responsible person enables or permits execution of these activities by abuse of his office or authority, i.e. the position of the person responsible in the legal entity and the authorities having in such capacity.

Za postojanje oba oblika Dela iz čl. 266 KZ, isto kao i za postojanje Dela iz čl. 260 KZ, neophodno je i to da se radnja njegovog izvršenja preduzima „protivno propisima", što znači da je i ovo krivično delo delo sa blanketnom normom i da je i za njegovo postojanje neophodno kršenje od strane njegovog učinioca tačno određene zakonske ili podzakonske opšte norme relevantne za konkretni slučaj koja nameće ili zabranjuje određeno ponašanje, uz napomenu da za postojanje Dela iz čl. 266 KZ nije neophodno da se radi o postupanju protivno propisima kojima se štiti, čuva ili unapređuje životna sredina, kao što se to zahteva za postojanje Dela iz čl. 260 KZ, već se može raditi i o drugim propisima kršenjem čijih normi se može ostvariti posledica ovog dela.

Posledicu i opšteg i posebnog oblika Dela iz čl. 266 KZ, isto kao i kod Dela iz čl. 260 KZ, predstavlja zagađenje životne sredine.

The essential element for having in place both forms of the Act from Article 266 of CL, and equally for having in place the Act from Article 260 of CL, is that their commission is undertaken „contrary to regulations", meaning that this criminal offense is also with the blanket provision and that in order for the same to exists, its perpetrator must violate the precisely determined general legal by-law provision relevant for the concrete case, which imposes or prohibits certain behavior. It is noteworthy that the Act from Article 266 of CL does not necessarily require acting contrary to regulations that protect, preserve and improve the environment, unlike the requirements needed for having in place the Act from Article 260 of CL. Instead, at issue may also be other regulations whose provisions, if violated, can result in the consequence of this act.

The consequence of both the general and special form of the Act from Article 266 of CL, equally as in the case of the Act from Article 260 of CL, is the pollution of the environment.

KZ predviđa i teži oblik Dela iz čl. 266 KZ kvalifikovan istom težom posledicom kao i kod kvalifikovanog oblika Dela iz čl. 260 KZ, a za koji je, nezavisno od toga da li se radi o opštem ili posebnom obliku Dela iz čl. 266 KZ, propisana kazna zatvora od jedne do osam godina kumulativno sa novčanom kaznom ako je usled izvršenja bilo kog od ova dva oblika Dela iz čl. 266 KZ došlo ili

(i) do uništenja životinjskog ili biljnog sveta velikih razmera ili
(ii) do zagađenja životne sredine u toj meri da su za njegovo otklanjanje potrebni duže vreme ili veliki troškovi.

The CL also envisages a more serious form of the Act from Article 266 of CL qualified by the same more serious consequence as in the case of the qualified form of the Act from Article 260 of CL for which, irrespective of whether a general or special form of the Act from Article 266 of CL is concerned, sanction of imprisonment from one to eight years cumulatively with a fine is envisaged, if the commission of any of these two forms of the Act from Article 266 of CL has caused either:

(i) to destruction or deterioration of large proportions of the flora and fauna, or
(ii) to the pollution of the environment to such an extent that the removal thereof requires a rather long time or sizable costs.

PROBLEMI SA KOJIMA SMO SE SUSRELI U ADVOKATSKOJ PRAKSI PRILIKOM ODBRANE KLIJENATA, A KOJI SE ODNOSE NA KRIVIČNA DELA KOJA SU PREDMET OVOG RAZMATRANJA

SLUČAJ BROJ 1

U prvom slučaju koji je predmet ove analize i koji smo označili kao Slučaj broj 1, životni događaj se odigrao tako što je klijent koga branimo, kao predstavnik srednjeg menadžmenta u kompaniji X, podneo inicijativu višem menadžmentu svoje kompanije za otuđenje određene robe u vlasništvu kompanije.

Viši menadžment kompanije X je, kao jedino ovlašćen, doneo odluku o usvajanju inicijative i odluku o prodaji konkretne robe kompaniji Y. Između kompanija X i Y potpisan je ugovor u čijem zaključenju klijent, isto kao ni u donošenju odluke o prodaji robe, nije učestvovao, jer za donošenje te vrste odluka i zaključenje ovakvih poslova nije imao ovlašćenja. Kompanija Y je robu koju je na ovaj način kupila namenila za dalju prodaju u inostranstvo i o tome je već načinila dogovor. Sama roba koja je bila predmet kupoprodaje, iako specifična, nije u režimu ograničenog ili zabranjenog prometa. Takođe, imala je upotrebna svojstva i bila je i namenjena daljoj eksploataciji, a kada bi bila pretvorena u otpad, predstavljala bi opasan otpad u smislu Zakona o upravljanju otpadom.

Inače, ovaj zakon propisuje to da je otpad svaka materija ili predmet koji držalac odbacuje, namerava ili je neophodno da ga odbaci, a da je opasan otpad onaj otpad koji po svom poreklu, sastavu ili koncentraciji opasnih materija, može prouzrokovati opasnost po životnu sredinu i zdravlje ljudi i ima najmanje jednu od opasnih karakteristika utvrđenih posebnim propisima, uključujući i ambalažu u koju je opasan otpad bio ili jeste upakovan.

Iz ove zakonske definicije, kao i iz već citirane definicije životne sredine i toga šta predstavlja zagađenu životnu sredinu, koja predstavlja i posledicu i Dela iz čl. 260 KZ i Dela iz čl. 266 KZ, svakome bi moralo biti jasno to da otpad nije isto što i zagađenje životne sredine, kao i to da ni opasan otpad nije isto što i zagađenje životne sredine jer on samo može prouzrokovati opasnost po životnu sredinu, dok se njeno zagađenje izražava kroz tačno zakonom i podzakonskim propisima predviđene parametre, merila i kriterijume.

ISSUES ENCOUNTERED IN OUR LAW PRACTICE ON THE OCCASION OF DEFENDING THE CLIENTS, RELATING TO THE CRIMINAL OFFENSES SUBJECT OF THIS ANALYSIS

CASE NUMBER 1

In the first case subject of this analysis, designated as Case number 1, the vital event took place in the manner that the client we are defending, as a representative of the medium level management in the company X, filed an initiative to the senior level management of his company for disposal of certain goods in the company's ownership.

The senior management of the company X, as the only authorized, decided to adopt the initiative and to pass a decision on the sale of the concrete goods to the company Y. The company X and the company Y signed a contract in the conclusion of which the client did not participate. The client did not participate, either, in the passing of the decision on the sale of goods because he was not authorized to make such a decision or to conclude such contract. The company Y purchased the goods for further sale abroad and had already executed an agreement for that purpose. The goods, subject of the purchase-sale, although specific, did not fall under the regime of restricted or banned trading. It also had usable characteristics and were intended for further exploitation, but upon conversion into waste would represent hazardous waste within the meaning of the Law on Waste Management.

As to the law itself, it stipulates that waste is any matter or object that the holder thereof disposes, intends to dispose or that needs to be disposed of necessarily, and that hazardous waste is the waste which in terms of its origin, composition or concentration of hazardous matters can cause danger to the environment and health of people, and has at least one of the hazardous characteristics determined by special regulations, including the packaging material in which the waste was or is packed.

It must be clear to anybody from this legal definition and from the already quoted definition of the environment and from the definition of what represents a polluted environment, which represents also the consequence of the Act from Article 260 of CL and of the Act from Article 266 of CL, that waste is not identical to the environment pollution, and that hazardous waste is not identical to the environment pollution because it can only cause danger to the environment, while the pollution of the environment is expressed by parameters, measures and criteria envisaged strictly by the law and by-law regulations.

Dalje se u Slučaju 1 dogodilo to da je inspekcija za zaštitu životne sredine izvršila kontrolu kompanije Y i da je svojim rešenjem naložila toj kompaniji da, u skladu sa Zakonom o upravljanju otpadom, izvrši klasifikaciju pomenute robe namenjene daljoj prodaji, kao da u pitanju jeste otpad, a ne roba, što je kompanija Y, postupajući po ovom nalogu, i učinila.

Rezultati su pokazali da je u pitanju materija koja može, kada bi postala otpad, predstavljati opasan otpad. Inspekcija je, dalje, naložila kompaniji Y da svoju robu, koja je, suprotno volji kompanije Y i suprotno odredbama Zakona o upravljanju otpadom, jednostavnom „voljom" inspekcije, postala otpad, preda ovlašćenom operateru na zbrinjavanje što je, takođe, učinjeno.

Apsurd ove situacije kulminira time da nadležni javni tužilac započinje preduzimanje dokaznih radnji protiv našeg klijenta zbog osnovane sumnje da je, navodno, izvršio Delo iz čl. 266 KZ zbog postupanja koje, najjednostavnije rečeno, opisuje kao "davanje inicijative" za donošenje odluke o prodaji pomenute robe koja predstavlja opasan otpad.

Dakle, za konkretnog javnog tužioca, elemente bića Dela iz čl. 266 KZ koji su napred izloženi predstavlja životni događaj koji je opisao na ovakav način.

Further, in the Case number 1, the inspection for Environmental Protection carried out a control of the company Y and ordered this company by its decision, in accordance with the Law on Waste Management, to classify the mentioned goods intended for sale as if they were waste and not goods, which the company Y did acting in conformity with this order.

The results showed that at issue was the matter which, if it became waste, could represent a hazardous waste. The inspection further ordered the company Y to hand over to an authorized waste disposal operator its goods which, contrary to the will of the company Y and contrary to the provisions of the Law on Waste Management became waste on the grounds of the simple „will" of the inspection.

The absurdity of this situation culminated when the competent public prosecutor started undertaking evidence gathering activities against our client because of the grounded suspicion that our client has allegedly committed the Act from Article 266 of CL by, as described by the public prosecutor, most simply speaking, as "giving the initiative" for adoption of the decision to sell the mentioned goods representing hazardous waste.

So, for the concrete public prosecutor the above mentioned element of the Act from Article 266 of CL was the life event that he described in this way.


CRIME SCENE DO NOT CROSS
CRIME SCENE DO NOT CROSS
CRIME SCENE DO NOT CROSS
CRIME SCENE DO NOT CROSS

O eventualnom zagađenju životne sredine, do koga nije ni došlo, u samom postupku nema ni reči, o tome ne postoji, niti je pribavljan ijedan dokaz.

U Slučaju broj 1 iniciran je krivični progon protiv pojedinca iz razloga što je javno tužilaštvo u uverenju da samo posedovanje neke robe ili nekog predmeta koji, kada jednom, u budućnosti, postanu otpad, mogu predstavljati opasan otpad, automatski da čini i elemente bića Dela iz čl. 266 KZ, kao da se opasan otpad ne bi smeo prodavati, niti posedovati i da je već i to dovoljno da se pokrene krivični postupak protiv nekog lica za Delo iz čl. 266 KZ, bez obzira na to da li se takvi životni događaji mogu ili ne mogu podvesti pod ovu normu i da li mogu predstavljati krivično delo uopšte.

Poseban logički apsurd predstavlja konstrukcija o „***davanju inicijative***" za donošenje odluke koju su u kompaniji X donela druga lica, a koja bi, verovatno, trebalo da predstavlja radnju izvršenja Dela iz čl. 266 KZ i koja bi našem klijentu dalo svojstvo odgovornog lica u pravnom licu. O eventualnom kršenju neke blanketne norme u Slučaju broj 1 u postupku nije bilo ni govora.

Ne možemo da potpuno ostavimo ironiju na stranu. jer smo, kao odbrana, bili prinuđeni da objašnjavamo stvari trebalo da budu banalne, a to je da bi, u hipotetičkoj situaciji u kojoj bi, na primer, neko odlučio da baci svoj mobilni telefon u kantu za otpatke u prostoriji u kojoj radi, taj mobilni telefon tada postao otpad, i to bi se, i bez posebne klasifikacije, već samo po hemijskim elementima koje sadrži, moglo reći da je u pitanju opasan otpad, i da, u vezi sa ovim, postavljamo pitanje da li to znači da je takvim bacanjem mobilnog telefona izazvano zagađenje životne sredine i da li bi i protiv svakog takvog lica trebalo pokrenuti krivične postupke za isto krivično delo za koje je postupak pokrenut protiv našeg klijenta.

Bili smo prinuđeni da postavljamo pitanja da li, a što predstavlja potpunu analogiju onome za šta se tereti naš klijent, činjenica da je neko uopšte vlasnik mobilnog telefona koji može, onda kada postane otpad, predstavljati opasan otpad, već znači i to da je samim tim posedovanjem mobilnog telefona izvršeno Delo iz čl. 266 KZ koje se na teret stavlja našem klijentu.

As to possible environmental pollution, that did not occur, there was no mentioning it during the proceedings nor was any proof of that acquired.

In the Case number 1 criminal persecution is initiated against individuals due to the fact that public prosecution has belief that just possessing certain goods or a certain object which, when they become waste at some point of time in the future would become waste, may represent a hazardous waste, automatically represent all elements of the Act from Article 266 of CL, as well as that hazardous waste must neither be sold nor held and that these two facts are sufficient for initiation of the proceedings against a person for the Act from Article 266 of CL, irrespective of whether such life events can be subsumed under this provision and whether they can represent a criminal offense at all.

Special logical absurd is the construction of "***giving of the initiative***" for adoption of the decision which in the company X was made by other persons and which would probably need to account for perpetration of the Act from Article 266 of CL that would give to our client the capacity of responsible person in the legal entity. In the procedure there was no mention of a possible violation of the blanket provision in the Case number 1.
We cannot put irony fully aside because, as defense counsels, we were forced to explain the things that should be banal, such as, hypothetically, a situation where someone decides to throw away his cell phone into a trash bin in the room where he works, this cell phone becomes a waste that could be declared a hazardous waste without any special qualification but only due to the chemical elements it includes. Further, we were asking the question whether such throwing of the cell phone has caused environmental pollution and whether in such case, criminal proceedings would have to be initiated against any such person for the same criminal offense that is initiated against our client.

We were further forced to ask, since representing full analogy with what our client is charged, whether the fact that someone is an owner of the cell phone which upon becoming a waste will represent hazardous waste means that by having in his ownership the cell phone such persons committed the Act from Article 266 of CL that our client is charged with.

SLUČAJ BROJ 2

U slučaju koji smo označili brojem 2 situacija je nešto komplikovanija i u ovom slučaju se krivični postupak, pokrenut na osnovu takozvane neposredne optužnice, nalazi u fazi glavnog pretresa, što znači da je optužnica potvrđena od strane veća suda pred kojim se postupak vodi i da je stupila na pravnu snagu.

Životni događaji o kojima je reč u ovom slučaju su takvi da je naš klijent generalni direktor kompanije koja je, pored ostalog, i operater otpada na deponiji kojom upravlja sa svim neophodnim dozvolama, kako za skladištenje, tako i za tretman svih vrsta otpada, pa i opasnog, što je neupitno. Javni tužilac u jednom trenutku donosi odluku da obavi uviđaj na deponiji i da, uz pomoć lica iz laboratorije koja pripada određenoj javnoj ustanovi, prikupi jedan broj uzoraka.

Na ovom mestu se nećemo baviti razlozima i mogućim motivima ovakve odluke javnog tužioca, kao ni veoma spornim načinom na koji je prikupljanje ovih uzoraka obavljeno. Kada su uzorci prikupljeni, javni tužilac je doneo naredbu za veštačenje u kojoj je istoj ustanovi koja je prikupljala uzorke naložio da izvrši klasifikaciju otpada iz nađenih uzoraka, što je ova ustanova i učinila i u svom izveštaju je zaključila da određen broj uzoraka predstavlja tragove neopasnog otpada određenih indeksnih brojeva koje pobraja, da određen broj uzoraka predstavlja tragove inertnog otpada indeksnih brojeva koje, takođe, pobraja i da su u nekoliko uzoraka pronađeni tragovi koji predstavljaju opasan otpad određenih indeksnih brojeva.

Iz nekog razloga i bez ikakve naredbe javnog tužioca, ova ustanova u svom izveštaju pominje i to da je na konkretnoj deponiji, po njenoj proceni, uskladištena određena količina otpada za čije trajno zbrinjavanje je potreban određeni novčani iznos, a da je za dovođenje zemljišta na kome se nalazi deponija u stanje pre nego što je deponija izgrađena, potreban drugi određeni novčani iznos.

Nakon ovoga, protiv našeg klijenta podneta je optužnica bez sprovođenja istrage zbog navodnog izvršenja i Dela iz čl. 266 KZ i Dela iz čl. 260 KZ..

CASE NUMBER 2

In the case we designated as Case number 2 the situation is somewhat more complicated, and in this case the criminal proceeding initiated on the basis of the so-called direct indictment is in the stage of main hearing, which means that the indictment has been confirmed by the court council before which the proceeding is conducted and that it has become legally effective.

Life events in question in this case are such that our client is general director of a company which is, among other things, also an operator of the waste on the landfill site managed, including all necessary permits both for the storing and treatment of all types of waste, including hazardous waste, which is unquestionable.

At one point of time, the public prosecutor renders a decision to control the landfill site and to gather a number of samples with the assistance of the staff of a laboratory that belongs to a certain public institution. The reasons and possible motives of such a decision made by the public prosecutor will not be dealt with here, as will not, either, the highly disputable manner applied to the gathering of these samples. After the samples were picked up, the public prosecutor issued an order to the same institution that had gathered the samples, asking for classification of the waste from the gathered samples. The institution fulfilled the order and concluded in its report that a certain number of samples present traces of non-hazardous waste of specific index numbers that it lists, that certain number of samples present traces of inert waste of index numbers also listed by it, and that in some samples were found the traces representing hazardous waste of certain index points.

For some reasons and without any order from the public prosecutor, this institution mentions in its report that on the concrete landfill site, according to the institution's estimate, was stored a certain quantity of waste which, in order to be cared for on a lasting basis, requires a certain amount of money, and that for bringing back the soil where the landfill is located to the condition before the landfill establishment, another amount of money is necessary..

After this, indictment was raised against our client without conducting prior investigation for the allegedly commission of the Act from the Article 266 of CL and Act from the Article 260 of the CL.

Krivična dela za koja je optužen naš klijent opisana su tako što je navedeno da je naš klijent, kao odgovorno lice u pravnom licu, „omogućio“ preradu, skladištenje i odlaganje otpada, što predstavlja citiranje dela apstraktne zakonske odredbe, a ne i radnju izvršenja krivičnog dela opisanu kao životni događaj, i što apsolutno, između ostalog, predstavlja i poslovnu delatnost kompanije čiji je naš klijent glavni menadžer. U optužnici su pobrojani i svi indeksni brojevi različitih tragova otpada koji su, prema zaključku pomenute javne ustanove, pronađeni u uzetim uzorcima, čime je, prema opisu događaja iz ove optužnice, koji predstavlja mešavinu delova apstraktnih zakonskih normi i delova životnih događaja, došlo do odlaganja otpada na deponiji operatera koji za to poseduje sve neophodne dozvole u određenoj količini za čije su kasnije zbrinjavanje potrebna sredstva u određenom novčanom iznosu.

Iako je zbrinjavanje otpada upravo delatnost kompanije u kojoj je naš klijent generalni direktor, dalje se u ovoj optužnici, doslovce navodi da je došlo i do zagađenja zemljišta na deponiji u određenoj površini, koja predstavlja upravo površinu same deponije, za šta su, takođe, potrebna novčana sredstva u određenom iznosu, čija visina bi, verovatno, prema samoj pravnoj kvalifikaciji iz ove optužnice, trebalo da predstavlja kvalifikovanu posledicu predviđenu odredbama KZ i kvalifikovane oblike Dela iz čl. 266 KZ i Dela iz čl. 260 KZ – veće troškove neophodne za otklanjanje zagađenja životne sredine koje je nastupilo.

The criminal offences our client is charged with are described by the assertion that out client as a responsible person in the legal entity „made possible“ the treatment, storing and disposal of waste, which represents a quotation of an abstract legal provision and not the act of perpetration of the criminal offense as a life event and which, beyond any doubt, represents, inter alia, the business activity of the company whose general director is our client. In the indictment are listed all index numbers relating to different traces of the waste found in the gathered samples according to the conclusion of the mentioned public institution, whereby description of events from this indictment, being a mix of abstract legal provisions and life events, lead to storage of waste on the landfill site of the operator who has all necessary licenses, in the certain quantity for which quantity later care requires certain amount of money.

Although the care for the waste is precisely the activity of the company in which our client is general director, it is further literally stated in this indictment that a certain part of the landfill site became polluted, representing the “certain part” the surface of the landfill itself, which also requires certain money for removal. The amount of this money would probably need to represent, according to the legal qualification from this indictment, a qualified consequence envisaged by the provisions of the CL and qualified forms of the Act from the Article 266 of CL and Act from the Article 260 of CL – larger costs necessary for the removal of the environmental pollution that has occurred.

Vezano za navodno prekršene blanketne norme, u optužnici su samo pobrojane brojčane oznake određenih članova Zakona o upravljanju otpadom, Zakona o zaštiti zemljišta i Uredbe o odlaganju otpada na deponije, pri čemu uopšte nije naveden sadržaj normi i opis ponašanja našeg klijenta koji im je suprotan, a što je obavezan sadržaj, kako izreke optužnog akta, tako i presude kod svih krivičnih dela blanketnog karaktera, dok su određeni članovi pomenutih zakona toliko obimni da, na primer, sadrže po pet stavova, a samo jedan od tih stavova 22 tačke, neki se međusobno potpuno isključuju u smislu da je apsolutno nemoguće postupiti suprotno oba takva člana zakona istovremeno, dok su neki su apsolutno neprimenljivi na konkretnu situaciju jer propisuju, primera radi, obaveze Vlade Republike Srbije i slično. Ovakvo postupanje dovodi do izuzetno opasne i krajnje nezakonite situacije u kojoj se teret dokazivanja optužbe koji je na strani optužbe, „prevaljuje", sa jedne strane, na optuženu stranu koja je prinuđena da, pored ostalog, dokazuje i to da nije prekršila ni jednu od više samo pobrojanih odredaba nekog propisa, a sa druge strane, i na sam sud kome, u navedenom smislu, prepušta „izbor" između više mogućnosti.

Dalje, konkretnom optužnicom je obuhvaćen period od četiri godine, kao period navodnog izvršenja krivičnih dela za koja se naš klijent tereti,, a u tom periodu je došlo do izmena Zakona o upravljanju otpadom, dok Zakon o zaštiti zemljišta nije uopšte postojao u jednom vremenskom periodu koji je optužnicom obuhvaćen. Kod postojanja zabrane retroaktivne primene zakona u krivičnom pravu prilikom ocene postojanja bilo kog krivičnog dela, od suštinskog značaja je tačan dan ili vreme izvršenja krivičnog dela, kao i tačno navođenje povređenog propisa čije bi kršenje predstavljalo radnju krivičnih dela sa takozvanom blanketnom normom.

Ovo iz razloga što, ukoliko je neki propis koji je, na primer, u toku vremena izvršenja navodne radnje nekog krivičnog dela sa blanketnom normom koje se nekom, zamišljenom, optuženom stavlja na teret, izmenjen jednom ili više puta, tako da taj zakon, u nekom trenutku, hipotetički, ne predviđa obavezu čije bi kršenje moglo predstavljati krivično delo, na tog zamišljenog optuženog bi se, shodno odredbi člana 5 KZ, morao primeniti najblaži zakon, a to bi bio onaj koji njegovu radnju ne predviđa kao krivično delo. U Slučaju broj 2 našem klijentu, kao neodređene i samo pobrojane blanketne norme koje je on, navodno, prekršio, stavljene su na teret i norme koje nisu važile i norme do čijih je izmena dolazilo i, najzad, i norme iz zakona koji, u čitavom jednom vremenskom periodu obuhvaćenom optužnicom, nije ni postojao.

As to allegedly violated blanket provisions, in the indictment are only stated numbers of certain articles of the Law on Waste Management, Law on soil protection, Ordinance on Waste Disposal from a Landfill Site without absolutely no mention of the content of the provisions and description of our client's acting contrary to such provisions, which is an obligatory content of both the accusatory act and the judgment in the case of each and any criminal offense of blanket character, while some articles of the said laws are so voluminous having, for example, five paragraphs each, and one of such paragraphs having as many as 22 points. Moreover, some paragraphs exclude completely one another so that it is absolutely impossible to act at the same time contrary to both such articles of laws, while some are absolutely inapplicable to the concrete situation as they stipulate, for example, the obligations of the Republic of Serbia Government, etc. Such acting leads to an exceptionally dangerous and extremely illegal situation in which burden of proving the charges is "shifted" from the accusatory side, to the side of the accused who is forced to prove, inter alia, that it has not breached any of the listed provisions of a certain regulation. It is also "shifted" the said burden to the court onto which the public prosecutor passes the "choice" among several possibilities.

Further, by the concrete indictment is encompassed the four-year period of the alleged commitment of criminal offences for which our client is accused, and in such period Law on Waste Management was amended, while the Law on Soil Protection did not exist at all for a part of the period covered by the indictment. It is worth recalling that retroactive application of the laws is banned in the criminal law when assessing existence of any criminal offense, of essential importance is the date or the time of commission of the criminal offence, as well as the exact quotation of the breached regulation the violation of which would represent the perpetration act with the so-called blanket provision.

The reason is the following: if a regulation which is, for example, during the time of the commission of an alleged perpetration act of a criminal offense with blanket provision that a fictitious accused person is charged with, has been amended several times, in the manner that such law does not envisage at some point in time, hypothetically, the obligation whose violation could represent a criminal offense, to such person would have to be applied, in conformity with Article 5 of the CL, the mildest law being the one that does not envisage his act as a criminal offense. In Case number 2 our client is charged with non-determined but only listed blanket provisions that he has allegedly violated, and is also charged with the provisions which were not in force and provisions which were subsequently amended and, finally, with the provision of the law which did not exist in a part of the period encompassed by the indictment.

Sledeći problem konkretne optužnice je problem pogrešne pravne kvalifikacije krivičnih dela, što u praksi i nije redak slučaj, ali za temu kojom se u ovom tekstu bavimo, jeste indikativan. Naime, javni tužilac je radnje za koje tereti našeg klijenta kvalifikovao kao krivično delo iz člana 260 stav 3 u vezi sa stavom 1 KZ izvršeno u sticaju sa krivičnim delom iz člana 266 stav 3 u vezi sa stavom 1 KZ.

Kao što smo već naveli, krivično delo iz člana 260 KZ jeste opšte krivično delo protiv životne sredine i ono, kao takvo, pod pretpostavkom ispunjenosti svih bitnih elemenata koji ga čine, postoji samo u slučaju da radnjama izvršenim od strane nekog zamišljenog učinioca nisu ostvareni elementi nekog drugog krivičnog dela koje se, u odnosu na ovo prvo, javlja kao posebno.

Upravo krivična dela iz člana 260 KZ i ono iz člana 266 KZ stoje u odnosu takozvanog specijaliteta i između njih ne može biti sticaja, to jest, radi se samo o prividnom sticaju krivičnih dela. Ovo, dalje, znači to da, kada su ostvarena obeležja „specijalnog" krivičnog dela iz člana 266 KZ, može postojati samo to delo, kao posebno, a ne istovremeno i krivično delo iz člana 260 KZ.

Iz ovog, proistekao je i sledeći problem koji se sastoji u tome da je jedna konstatacija napred pominjane javne ustanove o tome da je na deponiji (!) odložena određena količina otpada, zajedno sa procenom te ustanove o novčanim sredstvima potrebnim za njegovo potpuno zbrinjavanje, u optužnici „pretvorena" u posledice krivičnih dela iz članova 260 i 266 KZ., sa istovremenim zaključkom da je samim odlaganjem otpada na deponiju automatski došlo i do zagađenja zemljišta na kome se deponija nalazi, a da su za otklanjanje takvog „zagađenja" potrebna novčana sredstva za koje je pominjana javna ustanova, mada to od nje niko nije zahtevao, niti ju je pitao, navela da su potrebna, ne za otklanjanje nastalog zagađenja, već za vraćanje deponije u stanje pre nego što je deponija uopšte formirana. Kako su iznosi koji su pomenuti u izveštaju javne ustanove kojoj je, kako smo rekli, povereno samo veštačenje klasifikacije vrsta otpada u uzetim uzorcima sa deponije, visoki, ovime je, prema stavu optužbe, ostvarena i teža posledica predviđena stavovima 3 i člana 260 i člana 266 KZ, iako je pomenuta javna ustanova u svom izveštaju izričito navela to da se nije bavila stanjem životne sredine, već, upravo po nalogu javnog tužioca, samo ispitivanjem konkretnih uzoraka o eventualnom prisustvu opasnih materija u njima.

The next issue of the concrete indictment is the issue of incorrect legal qualification of criminal offenses, which is not a rare case in practice, however, for the subject we are dealing with in this work is indicative. Namely, the public prosecutor qualified the acts he is charging our client with as the criminal offense from Article 260 paragraph 3 in connection with paragraph 1 of the CL commissioned in conjunction with the criminal offense from Article 266 paragraph 3 in connection with paragraph 1 of the CL.
As mentioned, the criminal offense from Article 260 of the CL is a general criminal offense against the environment and one can speak of it as such, on the assumption that all essential elements thereof are fulfilled, only in the case that the acts perpetrated by a fictitious perpetrators did not generate the elements of another criminal act that appears, in relation to the former, as a separate act.

Actually, the relationship of criminal offenses from Article 260 of the CL and from Article 266 is that of the so-called specialty and there cannot be any conjunction between them, i.e. it is just an illusion of the conjunction of criminal offenses. It further means that when the elements of the "special" criminal offense from Article 266 of the PC are fulfilled, one can speak only of that criminal offense, as separate, and not at the same time of the criminal offense from Article 260 of the CL.

From the aforesaid arose the next problem being one statement of the above mentioned public institution that on the landfill site is stored (!) a certain quantity of waste, and the institution's estimate of the monetary resources needed for full care thereof was „transformed" in the indictment to the consequence of the criminal offences from Articles 260 and 266 of the CL. At the same time is concluded that storing of the waste on the landfill site automatically caused the pollution of the soil on which the landfill site is located and that the removal of such „pollution" requires monetary assets that the institution, although neither requested nor asked to provide such estimate, indicated as necessary not for the removal of the pollution that had occurred but for the return of the landfill site to the condition existing before its formation. As the amounts mentioned in the report of the public institution, which was only entrusted with the provision of an expert opinion concerning classification of the types of waste in the samples gathered from the landfill, which amounts seem excessively high, in the indictment is additionally concluded that the more serious consequence envisaged by paragraphs 3 of both Articles 260 and 266 of the CL was suffered, although the mentioned public institution explicitly stated in its report that it did not deal with the condition of the environment but only, based on the order of the public prosecutor, with the analysis of the concrete samples and possible presence of dangerous matters in them.

Sumarno opisujući situaciju u kojoj se našao naš klijent iz ovog ***Slučaja broj 2*** kojim smo se bavili koji je, na žalost, optužen i protiv koga je krivični postupak uveliko u toku i nalazi se u fazi izvođenja dokaza na glavnom pretresu, i koji je, isto kao i naš klijent iz ***Slučaja broj 1***, ne preduzevši ni jednu jedinu protivpravnu radnju, ne prekršivši ni jedan propis, samo zato što se nalazi na najvišoj poziciji u kompaniji kojom upravlja i rukovodi, a usled još jednog potpunog nerazumevanja elemenata bića krivičnih dela predviđenih odredbama članova 260 i 266 KZ i neshvatanja elementarnih pojmova iz oblasti zaštite životne sredine, možemo zaključiti da je ovaj naš klijent prinuđen da zajedno sa nama dokazuje da je postojanje otpada ili njegovih tragova na deponiji operatera koji za to poseduje apsolutno sve neophodne dozvole, najnormalnija stvar, kao što je najnormalnija stvar to da se u kanti za smeće u nekom domaćinstvu nalazi smeće, a ne sterilne gaze, da je prinuđen da objašnjava, ali u ovom slučaju već sudu, to da otpad nije isto što i životna sredina, niti njeno stanje, to da prisustvo otpada na nekom zemljištu, kakav god to otpad bio i koja god bila njegova količina, ne znači automatski i zagađenje zemljišta, to da je zbrinjavanje i odlaganje otpada upravo jedna od delatnosti kompanije čije je odgovorno lice i koja za to poseduje sve dozvole, a da cena tretmana otpada koji se nalazi na deponiji nije novčani izdatak za otklanjanje zagađenja zemljišta, kao što to nisu ni troškovi vraćanja zemljišta na kome se nalazi deponija u prvobitno stanje pre njenog formiranja, da se zagađenjem zemljišta u postupku koji se protiv njega vodi niko nije ni bavio, pa ni sama javna ustanova kojoj je javni tužilac naredio obavljanje veštačenja, ali o sasvim drugim činjenicama, što je i sama ta ustanova navela, da dokazuje da ne zna koju je to odredbu, kao blanketnu, prekršio, u kom je to periodu navodno učinio, prema kom i kada važećem propisu i na koji način i slično, čime je, kao što smo već naveli, celokupan teret dokazivanja koji je na strani optužbe „prevaljen“ na stranu odbrane, koja je, najjednostavnije rečeno, prinuđena da dokazuje da optuženi klijent nije izvršio krivična dela koja to, već prema samom njihovom opisu iz optužnice, a ni prema onome što se u stvarnosti dogodilo, to i nisu.

To sum the situation which our client is facing out in the ***Case number 2*** who, unfortunately, has been accused and against whom criminal proceedings are well underway and are in the stage of presentation of evidence in the main hearing and who, identically as our client from the ***Case number 1***, without having taken any illegal act, without having violated any regulation, but only for holding the highest position in the company he is administering and managing, and who due to complete lack of understanding of the elements of the criminal offenses envisaged by Articles 260 and 266 of the CL and due to non-comprehension of the elementary terms from the environment protection area, we may conclude that our client is forced to prove together with us that existence of waste or its traces on a landfill site of an operator who holds absolutely all necessary permits therefore, is the most normal thing, as it is also the most normal thing to have rubbish and not sterile gauze in a trash bin of a household, who is forced to explain to the court, in this case, that waste is neither the environment nor the environment's condition, that presence of waste on a soil, irrespective of the type of waste or its quantity does not automatically mean the pollution of the soil, that the care for waste and its disposal is just one of the activities dealt by the company in which is our client responsible person. Needless to say and repeat, that the company of our client has all permits for this type of activity and that the price of the treatment of the waste on the landfill site is not a monetary expense for the removal of the soil pollution as are not, either, the costs of returning the soil on which the landfill is located to the original state prior to its formation. Our client is forced to prove that nobody has dealt with the soil pollution in the proceedings conducted against him, including the public institution which was ordered by the public prosecutor to provide expert opinion on completely different facts, which was also stated by the said institution, to prove that he does not know which provision, as a blanket provision, he has violated, in which period the exactly named and applicable regulation was allegedly violated by him, in what manner it was violated, and the like. Additionally, as we already stated, the whole burden of proofing which is on the side of the accusation is "shifted" on the side of defense, and defense is now, to put simply into words, compelled to prove that accused client has not committed criminal offences which, according to description from the indictment as well as from the happened events in real life, are not criminal offences.

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