

PROHIBITION ON PRACTICING A PROFESSION, ACTIVITY OR DUTY IN THE CRIMINAL LAW OF REPUBLIC OF SERBIA

Review Article

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Abstract: As a basic principle, the “right to work” is guaranteed under the Constitution of the Republic of Serbia. This human right is further elaborated primarily in the Labor Law, but also in other laws that stipulate the conditions for the establishment, exercise and termination of employment. This paper emphasizes the possibility of restricting both natural and legal persons, including entrepreneurs, to practicing a particular profession, activity or duty, resulting from the imposition of criminal sanctions. The security and protective measures in the criminal law of the Republic of Serbia prohibiting the practice of specific activities are also emphasized. One of the aims is to point out the consequences of the measures imposed, which are often more severe than the sentence itself.

Keywords: *prohibition, criminal offense, misdemeanor, economic offense, activity.*

INTRODUCTION

Under the law, certain security or protective measures are provided for the perpetrators of certain criminal offenses, prohibiting them from practicing a profession, activity or duty. These measures do not prohibit the right to work. Rather, this is a legal way of prohibiting the perpetrators of such offenses from practicing a specific profession, activity or duty for a certain period of time. Given that there are three types of criminal acts in the Republic of Serbia – offences, misdemeanors and economic offenses, a measure (a security or protective measure) may be imposed on the perpetrators of these acts, in other words, they may be prohibited from practicing specific activities.

Our criminal law provides for a security measure prohibiting the practice of a profession, activity or duty, which may be imposed on the perpetrators of

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criminal offenses under the conditions prescribed by the Criminal Code. Prohibition on carrying out a specific registered activity or business is a security measure that can be imposed on legal entities under the Law on the Liability of Legal Entities for Criminal Offenses. The Law on Misdemeanors provides for protective measures prohibiting natural, legal and responsible persons from carrying on certain activities. Finally, commercial and misdemeanor laws, as a part of the criminal law of the Republic of Serbia, provide for protective measures that prohibit a legal entity from carrying out certain commercial activities and the responsible person from carrying out certain duties. The title of the paper bears the name of the measure prescribed by the Criminal Code, there are differences regarding the name of this measure in other criminal laws though.

SECURITY MEASURES PRESCRIBED BY THE CRIMINAL CODE

The Criminal Code² prescribes a total of eleven security measures,³ one of them being the prohibition on practicing a profession, activity or duty. The court may prohibit the perpetrator from practicing a certain profession, activity or all or specific duties related to the disposition, use, management or handling of another's property or taking care of the property, if it is reasonably believed that his further exercise of such an activity would be dangerous.⁴ In order for this security measure to be imposed, it is necessary for the court to determine, during the course of the court proceedings, that the perpetrator's further exercise of a certain profession poses a danger (...). The imposition of a measure is always optional, depending on the court's assessment. The danger of re-offending is a constitutive precondition for the application of all security measures (Vuletić, 2017, p. 35). Thus, an assessment of the perpetrator is necessary. It is believed that the process must be performed objectively and subjectively.⁵ Specifically, danger assessment should be performed vis-a-vis the offense committed, but also by examining the personality of the perpetrator of the criminal offense.

2 Criminal Code, Official Gazette of RS, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016. (hereinafter the CC also).

3 These are the following measures: 1) compulsory psychiatric treatment and confinement in a medical institution; 2) compulsory psychiatric treatment at liberty, 3) compulsory drug addiction treatment; 4) compulsory alcohol addiction treatment, 5) prohibition on practicing a profession, activity or duty; 6) prohibition to drive a motor vehicle, 7) confiscation of items, 8) expulsion of a foreigner from the country; 9) publishing a judgment 10) restraint to approach and communicate with the injured party, 11) prohibition to attend certain sporting events.

4 Article 85, para. 1 of the CC (hereinafter referred to as profession).

5 Judicial practice: It is justified to impose a security measure on a law enforcement officer who has been found guilty of the abuse of the official position, which prohibits a law-enforcement official from exercising his profession, given that he has abused his profession to commit a criminal offense. (Judgment of the Supreme Court of Serbia Kž. 1297/03 of 24 April 2004 and the Judgment of the District Court in Belgrade K. 405/02 of 28 November 2002) - Bulletin of the District Court in Belgrade, no. 64/2005. Source: <http://www.propisionline.com/Practice/Decision/22855> (May 20, 2018).

This measure does not prohibit the perpetrator's right to work. It refers only to a certain profession (...) and the court is obliged to specify in the court judgment what the perpetrator of the criminal offense is prohibited from.⁶ No one can be prohibited from carrying on a profession for the rest of his life, so this protective measure imposed on by the court can only last for a certain period of time. The court determines the length of the measure, which cannot be less than one or longer than ten years, calculating from the day the decision becomes final, whereby the time spent in prison, that is, in a medical institution where the security measure has been exercised is not credited to the term of this measure.⁷

SECURITY MEASURE PRESCRIBED BY THE LAW ON THE LIABILITY OF LEGAL ENTITIES FOR CRIMINAL OFFENSES

The Law on the Liability of Legal Entities for Criminal Offenses⁸ was enacted in 2008 when the criminal liability for legal entities was introduced in the Republic of Serbia (Ignjatović, 2010). This Law regulates the conditions governing the liability of legal entities for criminal offenses, criminal sanctions that may be imposed on legal entities and procedural rules when ruling on the liability of legal entities, the imposition of criminal sanctions, passing a decision on rehabilitation, termination of security measures or legal consequences of conviction and enforcement of court decisions.⁹ This Law also prescribes

6 Judicial practice: Every court decision imposing a security measure prohibiting the exercise of a profession, activity or duty must specify which profession and independent activity is covered by the prohibition. Rationale: In the convicting part of the pronouncement of the first-instance judgment, pursuant to Article 85 of the Criminal Code, a measure prohibiting the practice of a profession, activity or duty is imposed on the defendant P.S. for a period of 3 years, without being stated in the operative part of the first-instance judgment, nor in the rationale, having in mind the provisions of Article 85, paragraph 1 of the Criminal Code, this measure may prohibit the practice of a specific profession, specific activity and specific duty, analyzing the cited dictum of the first-instance judgment, the same judgment does not specify in relation to the exercise of a profession which professional activity the defendant is prohibited from or, in relation to trade services, which trades the measure refers to, because every court decision imposing the said security measure must specify which profession and which independent activity is covered by the prohibition, which the first-instance judgment does not contain, for this reason the first-instance judgment is unclear, and the reasons in respect of to the imposition of the said measure have been specified in the first-instance judgment either, thus violating the procedure under Article 368, paragraph 1, item 11 of the Criminal Procedure Code. (*Decision of the Court of Appeals in Novi Sad posl. No. Kž. I 2420/11 dated 8 December 2011, which revoked the judgment of the High Court in Novi Sad posl. no. K. 572/10 dated 24 March 2011*) – *Bulletin of the High Court in Novi Sad, No. 3/2012, Intermex, Belgrade, Author of the sententia: Svetlana Tomić - Jokić, Judge of the High Court in Novi Sad.* Source: <http://www.proposition-line.com/Practice/Decision/37472> (20 May, 2018).

7 Article 85, para. 2 of the CC.

8 Law on the Liability of Legal Entities for Criminal Offenses, *Official Gazette of RS, br. 97/2008.*

9 See Article 1 of the Law on the Liability of Legal Entities for Criminal Offenses.

security measures, a total of three measures¹⁰ one of them being a prohibition to practice registered professional activities and operations. Additionally, it prescribes that the court may prohibit a liable legal entity from carrying on certain registered professional activities or businesses in respect of the offense committed. The measure may be imposed for a period of one to three years calculating from the day the judgment becomes final.¹¹ As it can be seen, the imposition of a measure is *optional* under this Law as well.

PROTECTIVE MEASURES PRESCRIBED BY THE LAW ON MISDEMEANORS

Misdemeanors are considered to be the least serious offenses with the lowest social danger and therefore the mildest sanctions are prescribed for them (Milić, 2017). The law that regulates misdemeanors is the Law on Misdemeanors.¹² A natural person, an entrepreneur, a legal entity and the responsible person in a legal entity may be liable for a misdemeanor. The Republic of Serbia, territorial autonomies and local self-government units and their bodies *cannot* be liable for a misdemeanor, but the law may stipulate that the responsible person in a government body, a territorial autonomy body or local self-government body may be liable for a misdemeanor.¹³ The Law on Misdemeanors prescribes protective measures as a type of misdemeanor sanction.¹⁴ Protective measures are, in fact, counterparts to the security measures prescribed by the Criminal Code and the Law on the Liability of Legal Entities for Criminal Offenses. Given that there are several subjects to misdemeanor liability, there are several protective measures that may be imposed on individual perpetrators of misdemeanors, which relate to the prohibition on carrying out a certain activity. Although misdemeanors can be prescribed by a law or decree, that is, by a decision of the Assembly of an Autonomous Province, the Municipal Assembly, the City Assembly and the City Assembly of Belgrade, a protective measure may only be prescribed by a law or decree.

10 They are the following measures: 1) prohibition on exercising certain registered activities or duties; 2) confiscation of items; 3) publishing the judgement. Article 23 of the Law on the Liability of Legal Entities for Criminal Offenses.

11 Article 24 of the Law on the Liability of Legal Entities for Criminal Offenses.

12 Law on Misdemeanors, *Official Gazette of RS*, nos. 65/2013, 13/2016, 98/2016 (Constitutional Court's decision). (herein after referred to as LM).

13 Article 18 of the LM.

14 These are the following protective measures: 1) the confiscation of objects; 2) prohibition against exercising an activity; 3) prohibiting a legal entity from carrying out specific activities by a; 4) prohibiting the responsible person from carrying out specific duties; 5) prohibition against driving a motor vehicle; 6) mandatory alcohol and drug addiction treatment; 7) mandatory psychiatric treatment; 8) prohibition on approaching the injured party, facilities, or the location where the misdemeanor has been committed; 9) prohibition on attending sporting events; 10) the publication of the judgment; 11) the expulsion of a foreigner from the Republic of Serbia; 12) the confiscation of animals and prohibition on owning or keeping animals. Article 52 of the LM.

Prohibition on practicing a specific activity

Regarding the protective measure – prohibition on carrying out a specific activity, it is a measure that is primarily imposed on *entrepreneurs* (Delić & Bajović, 2018, p. 95).¹⁵ The prohibition to carry out a specific activity temporarily prohibits the perpetrator of the misdemeanor from carrying out a specific economic or other activity for which a license is issued by the authority or which is registered on the appropriate registry.¹⁶ Thus, this prohibition always refers to a certain commercial or other activity, rather than to all activities. Thus the misdemeanor court is obliged to state in its decision which activities the prohibition refers to. This protective measure *cannot be* imposed under the Law on Misdemeanors; It may be imposed only if the regulation which prescribes a specific misdemeanor (a law or decree) provides for the possibility of imposing this measure. However, the conditions for imposing a measure may or may not be prescribed by a specific regulation, given that the Law on Misdemeanors prescribes the conditions for imposing this measure. The Law on Misdemeanors prescribes that: if the regulation determining the misdemeanor does not specifically stipulate the conditions for imposing a protective measure, the measure may be imposed if the perpetrator *has abused* the activity to commit a misdemeanor or if it can be reasonably expected that further exercise of this activity would pose a threat to human lives and health or other legally protected interests.¹⁷ Based on this stipulation by the Law, the following can be concluded: first, in order for this measure to be imposed, it is necessary that the perpetrator carried out a certain activity, meaning that the measure cannot be imposed on someone who did not perform the activity at the time of the commission of the misdemeanor. Second, in order for a measure to be imposed, it is necessary to meet one of the two alternatively prescribed conditions: 1) that the perpetrator abused the activity, or 2) that it can be reasonably assumed that further exercise of that activity would pose a risk to human lives or health. To determine that there is another alternative condition in misdemeanor proceedings is not simple at all, because it takes time, which, it seems, does not exist in the misdemeanor proceedings. We believe that it is necessary to assess further risks objectively and subjectively. This means that the assessment should include the type of the offense committed and the personality of the perpetrator. The prohibition on practicing a specific activity may be imposed for a period of six months to three years, beginning on the date of the enforcement of the

15 Judicial practice: A protective measure prohibiting the exercise of an activity, which is imposed on an entrepreneur due to pricing certain items in violation of the regulations, can be achieved by banning the sale of those items, rather than by banning all retail and business activity (*Legal understanding of the Administrative Disputes Department of the Supreme Court of Serbia dated 16 May 1994*) – *Bulletin of Judicial Practice of the Supreme Court of Serbia*, No. 4/2008, Intermex, Belgrade. Source: <http://www.propisionline.com/Practice/Decision/7709> (May 20, 2018)

16 Article 55, para. 1 of the the Law on Misdemeanors.

17 Article 55, para. 2 of the the Law on Misdemeanors.

judgment.¹⁸ Time served in a prison is not credited to the length of the measure imposed.¹⁹

The measure of prohibiting legal entities from practicing a specific activity

The name of the protective measure of “prohibiting a legal entity from carrying out a specific activity” indicates that the measure can be imposed only on a legal entity. This measure consists of a prohibition on the production of certain products or carrying out of certain activities in the area of goods trade, finance and services or other specified activities.²⁰ In this case also, a prohibition refers only to a certain activity. This measure cannot be imposed on the basis of the Law on Misdemeanors, but only if a specific regulation, the one prescribing the misdemeanor, provides for the possibility of imposing a measure. However, the Law on Misdemeanors stipulates the conditions for imposing this measure, if they are not prescribed by a special regulation. According to the LM: if the regulation determining the misdemeanor does not specifically stipulate the conditions for imposing a protective measure, the measure may be imposed if further exercise of a certain activity would pose a risk to human lives or health, detrimental to economic or financial business of other legal entities or the economy as a whole.²¹ The measure of prohibiting a legal entity from carrying out a specific activity may be imposed for a period of six months to three years, starting from the date the enforcement of the judgment.²²

Prohibiting the responsible person from carrying out specific duties

Another measure prescribed by the Law on Misdemeanors refers to prohibition on carrying out specific duties and can be imposed only on the responsible person. The Law on Misdemeanors distinguishes two categories of responsible persons: 1) The responsible person in a legal entity who is entrusted with certain duties relating to management, business or work process and 2) the responsible person who carries out certain duties in a government body, in bodies of the territorial autonomies and local self-government units. Prohibiting the responsible person from carrying out certain duties means to prohibit the perpetrator of the misdemeanor from carrying out the duties that he was carrying out at the time of the commission of the misdemeanor or managerial function in economic or financial business or a specific type of duty, or all or some duties related to the disposition, use, management or handling of the entrusted property.²³ These measures as well may be imposed only if such a possibility

18 Article 55, para. 3 of the Law on Misdemeanors.

19 Article 55, para. 4 of the Law on Misdemeanors.

20 Article 56, para. 1 of the Law on Misdemeanors.

21 Article 56, para. 2 of the Law on Misdemeanors.

22 Article 56, para. 3 of the Law on Misdemeanors.

23 Article 57, para. 1 of the Law on Misdemeanor.

is prescribed by the regulation prescribing a misdemeanor, whereby the Law on Misdemeanors stipulates the conditions for the imposition of this measure. Unless otherwise determined by the regulation defining a misdemeanor, the measure of prohibiting the responsible person from carrying out specific tasks is imposed when the responsible person *abuses his/her duty* for the purpose of committing a misdemeanor.²⁴ Based on the legislature's solution, it may be concluded that the measures may be imposed only if the responsible person has committed an offense purposely and knowingly.²⁵ The measure of prohibiting the responsible person from carrying out certain duties may be imposed for a period of six months to three years, starting from the date of the execution of the judgment.²⁶ Time served in prison is not credited to the length of the measure imposed.²⁷

MEASURES PRESCRIBED BY THE ECONOMIC OFFENSES ACT

The Economic Offenses Act²⁸ was enacted back in 1977, and has many shortcomings (Ćorović & Milić, 2016; Milić, 2018). This Act also prescribes four protective measures. Protective measures are, in fact, counterparts to the se-

²⁴ Article 57, para. 2 of the Law on Misdemeanor.

²⁵ In the course of the misdemeanor proceedings, the court is obliged to determine the guilt of the perpetrator of a misdemeanor, which some cases lack. Judicial practice: Since a natural person is liable for a misdemeanor if he/she has committed it purposely or recklessly, the court is obligated to, if it finds the defendant guilty of the misdemeanor, state the reasons regarding the defendant's guilt in the judgment. Excerpt from the Reasoning:

The provision of Article 222 of the Law on Misdemeanors regulates the content of a judgement drawn up writing, and paragraph 4 of the same article stipulates that in the reasoning of the judgement the contents of the motion to institute the misdemeanor proceedings shall be stated briefly, the determined state of facts specifying the evidence based on which certain facts have been proven, regulations on which the judgment is grounded and the reasons for each count of the judgment. The provision of Article 17, paragraph 2 of the Law on Misdemeanors stipulates that a natural person shall be liable for a misdemeanor if, at the time the misdemeanor was committed, he was mentally competent and committed the misdemeanor intentionally or negligently, while the provision of Article 19, paragraph 1 of the same Law stipulates that a perpetrator is guilty if, at the time the misdemeanor was committed, he/she acted knowingly or negligently. By the impugned judgment, the defendant was found guilty of committing a misdemeanor under Article 69, paragraph 1, item 8 in connection with paragraph 2 of the Law on Occupational Safety and Health and a misdemeanor under Article 69, paragraph 1, item 28 in connection with paragraph 2 of the Law on Occupational Safety and Health. The Higher Misdemeanor Court finds that the Misdemeanor Court violated the provisions of misdemeanor proceedings under Article 234, paragraph 1, item 15 of the Law on Misdemeanors, because the decision does not contain any grounds for finding the defendant guilty. (Judgment of the Higher Misdemeanor Court in Belgrade, Branch Office in Novi Sad, III-302, Prž. No. 6292/13 of 25 April 2013). Source: <http://www.propisionline.com/Practice/Decision/45644> (20 May, 2018)

²⁶ Article 57, para. 3 of the Law on Misdemeanor.

²⁷ Article 57, para. 4 of the Law on Misdemeanor.

²⁸ Economic Offenses Act, *Official Gazette of the SFRJ*, nos. 4/77, 36/77, 14/85, 74/87, 57/89, 3/90, *Official Gazette of the SRJ*, nos. 27/92, 24/94, 28/96, 64/2001, *Official Gazette of the RS*, no. 101/2005 (hereinafter referred to as EOA).

curity measures prescribed by the Criminal Code, the Law on Liability of Legal Entities for Criminal Offenses, as well as the protective measures prescribed by the Law on Misdemeanors.²⁹ A subject to liability for economic offenses may be a legal entity and the responsible person of an administrative body, while a special regulation may provide that the responsible person of a body of the socio-political community, another government body or the local community may be held liable for a specific economic offense.³⁰ Regarding the subjects to liability, there are different protective measures related to the prohibition on carrying out a specific activity.³¹ It is important to point out that prohibition on carrying out a specific activity may be imposed on the basis of the Economic Offenses Act, unlike the measures prescribed by the Law on Misdemeanors, which can be imposed only if prescribed by the law or regulation.³²

The measure of prohibiting a legal entity from practicing a specific economic activity

The Economic Offenses Act prescribes what a measure consists of, the conditions for its imposition and the length. The protective measure of prohibiting a legal entity from carrying out a specific economic activity implies the prohibition on the production of specific products or the prohibition on carrying out specific transactions in commodity and service trade and other economic transactions. A judgement imposing that measure shall specify the economic activity the legal entity is prohibited from carrying out.³³ If a regulation defining an economic offence does not specifically describe the terms governing the imposition of the measure referred to in paragraph 1 of this Article, the measure may be imposed on a legal entity if its continuing to conduct a specific economic activity would pose a threat to the people's lives or health or if

29 The following measures may be imposed for economic offenses: 1) the publication of the judgment; 2) the confiscation of objects; 3) prohibiting a legal entity from carrying out a specific economic activity; 4) prohibiting the responsible person from carrying out specific duties.

30 See Article 6 of the EOA.

31 Judicial practice: Protective measures must be precisely defined in terms of the Economic Offenses Act, regardless of how they are formulated in certain regulations enacted on the basis of the Law. Excerpt from the reasoning: However, the first-instance court formulated the protective measures too broadly - imprecisely, which is why they should have been specified in the dispositive of this decision in order not to come to the wrong conclusion that the protective measure of the prohibition on carrying out activities was imposed on the legal entity or that the protective measure of the prohibiting on carrying out of duties was imposed on the responsible person. This is due to the fact that under the provisions of Article 31 of the Economic Offenses Act, only a protective measure prohibiting the carrying out of a specific economic activity may be imposed on a legal entity, while a responsible person may be prohibited from carrying out certain duties, which, in this case, was done by specifying the protective measures imposed without reversing the judgment of the first instance court in that part, given that these measures were, in fact, correctly pronounced in the second part in the first-instance judgment. (Excerpt from the judgment of the Higher Commercial Court in Belgrade, Pkž. 705/93 of 18 December, 1993). Source: <http://www.propisionline.com/Practice/Decision/6447> (May 20, 2018)

32 See Article 29 of the Economic Offenses Act.

33 Article 34, para. 1 of the Economic Offenses Act.

it would be detrimental to economic and financial operations or would harm the reputation of the *Socialist Federative Republic of Yugoslavia* or foreign trade dealings of an organization of associated labor operating abroad, or if the legal entity has already been punished for the identical or similar economic offence in the past two years.³⁴ This measure may be imposed for a period of six months to ten years, starting from the date of the finality of a judgement.³⁵

Unlike misdemeanors, as it can be seen, this measure may last for a long time. As much as ten years. In this way, the length of the measure is equated with the security measure of the prohibition on practicing a profession, activity or duty prescribed by the Criminal Code. As we have seen, the security measure of prohibition on carrying out specific registered activities or businesses prescribed by the Law on the Liability of Legal Entities for Criminal Offenses can last from one to three years, leading to a conclusion that a stricter sanction is prescribed by the Economic Offenses Act, although economic offenses are far less serious offenses. Although it seems paradoxical, considering the length of the measure, it is more favorable for the perpetrator of the “criminal offense” to have criminal proceedings initiated against him, than proceedings for an economic offense. This is another fact that the legislature should pay substantial attention to the regulation of economic offenses.

The measure of prohibiting the responsible person from carrying out specific duties

The responsible person, within the meaning of the Economic Offenses Act, is a person entrusted with a specific range of tasks in the area of economic or financial operations in a legal entity/body of the socio-political community, another government body or the local community.³⁶ The Economic Offenses Act primarily prescribes what a measure may consist of. The measure of prohibiting the responsible person from carrying out specific duties implies that they shall be prohibited from carrying out the duty they were carrying out at the time of the commission of an economic offence, from holding a management position in the sphere of economic or financial operations and from carrying out specific tasks or all or only some of the duties related to the management, use, administration or handling of social assets or to their safekeeping.³⁷ The Act stipulates the conditions for the imposition of the measure. Unless otherwise stipulated by a regulation defining an economic offence, the court shall impose the measure if the responsible person has abused his/her office in order to commit the economic offence or if it may be reasonably assumed that their continuing to execute such one duty would be dangerous.³⁸ The court may impose the security measure even if the responsible person has been repeatedly convicted of

34 Article 34, para. 2 of the Economic Offenses Act.
 35 Article 34, para. 3 of the Economic Offenses Act.
 36 Article 8 of the Economic Offenses Act.
 37 Article 35, para. 1 of the Economic Offenses Act.
 38 Article 35, para. 2 of the Economic Offenses Act.

economic offences or related criminal acts.³⁹ The measure may be imposed for a period of six months to ten years, starting from the date of the finality of the judgement.⁴⁰

CONCLUSION

Although it is considered that sentences, especially imprisonment, are the most serious penal sanctions, in some cases this may not be true. For each criminal offense, there is also the possibility of imposing a measure which is reflected in the prohibition of carrying out specific activities. When pronouncing these measures, it is necessary to determine, during the course of the criminal proceedings, the truth that further exercise of specific activities may be dangerous, because the consequences of measures are serious. Regarding a natural person, his employment may be terminated under certain conditions due to the measure imposed. In regard to legal entities, “economic losses” may be very high, and it all depends on the economic power of the legal entity. In addition to the legal entity, a special issue is what happens to the employees working in the legal entity on which a protective measure has been imposed. We mean a protective measure that can be imposed on a legal entity, which can last for ten years, while in criminal proceedings, a measure that can last up to three years can be imposed on a legal entity.

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39 Article 35, para. 3 of the Economic Offenses Act.

40 Article 35, para. 4 of the Economic Offenses Act.

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