
**FRAUDULENT CONDUCT IN THE MANAGEMENT OF APARTMENT BUILDINGS -
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Abstract. Many of us are living in apartment buildings and this form of living is becoming more frequent and popular with urban development. A large number of those living in apartment buildings are also owners of the apartment they live in (or other non-residential premises in the apartment building). Not only rights, but also certain obligations are associated with the ownership of apartments. One of the legal obligations is to bear the common costs of goods and services, which are being provided to the apartment building. In Slovak republic, the division of these costs and the settlement of monthly advance payments is being done on an annual basis. The basis for the division of these costs is the proportionality of the use of the common parts and common facilities of the apartment building, which is expressed in the so called *person months* (metric unit for settlement). By not reporting the true number of personmonths to the administrator, an owner may gain material benefit (achieve higher overpayments and lower arrears) and this illegal financial benefit needs to be covered and compensated by other owners in the same apartment building. In terms of criminal law, the owner is committing fraud (a related offence to insolvency crimes). The authors analyze the legal aspects related to this criminal offence with relation to case law, legal doctrine, based on the systematical and teleological method of interpretation of relevant legal norms. The article addresses also issues related to the purposefulness of sanctioning of perpetrators, reflecting that the primary purpose of their fraudulent behaviour was enrichment (material gain).

Keywords: apartment buildings management; fraud; criminal liability; insolvency; insolvency and related offences

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1. Introduction

Ownership of apartments and non-residential units entails a legal obligation to bear a proportionate share of the common costs of an apartment building. An owner's proportionate share of such costs is determined based on "person months", a unit expressing the number of persons using an apartment in a particular month. In practice, owners are often motivated by selfishness to report incorrect numbers of person months to the administrator for longer periods, which reduces the share of the building's common costs that they have to bear when the accounts are settled.

The present article addresses the theoretical aspects of fraudulent behaviour occurring in the processes of apartment buildings management. The authors focus on the significance of property values and means of their legal protection from the viewpoint of criminal law and misdemeanour law area. Fraud is a criminal offence, which protects property against a conduct, by which a perpetrator enriches himself or others at the expense of some-

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one else's property by misleading them or exploiting the other person's error so that the person acting in error executes disposition of property. The authors analyze the criminal offence of fraud with regard to (besides the legal theory - its constituent elements) case law and legal doctrine and differentiate between fraud as a criminal offence and misdemeanour. The perpetrator needs to fulfill the condition of minor damages in order to be prosecuted and the article addresses also ways how this condition may be fulfilled (either by one attack or by cumulation of damages caused in continuous attacks against the property of others). The theoretical approach is supported by the statistics of the Ministry of Justice of Slovak Republic (2013-2018; basic form of fraud) with the sentencing overview (as a percentage of the number of convictions and in absolute numbers), number of persons convicted and crimes detected.

With regard to methodology, the article is based on a detailed legal analysis of applicable substantive legal norms. By means of analysis of current legislation of fraudulent conduct and by comparing criminal and administrative liability (as alternative ways of sanctioning of the perpetrator - based on total incurred damages, the authors aim at addressing the effectiveness of legal regulation in the section of fight against fraudulent conduct of the owners of apartments and non-residential premises in apartment buildings. Based on the application of quantitative methods related to acquisition and analysis of official statistics of the Ministry of Justice of the Slovak Republic it can be stated that current legislation regulating criminal law sanctioning of fraudulent conducts requires attention as it is not effective as it should be. These offences occur at a large scale, although data between 2013-2016 show a partial decrease in registered offences. The statistics also show that penalties might not always be purposeful, as fines (sanctions aimed at the perpetrators property) are being applied at an average yearly rate of only 6-7 %. The sanctioning of perpetrators (mainly by a suspended sentence) is thus not eligible to act as an effective instrument of general prevention on potential offenders of fraud (or other property crimes).

The authors also reflect previous research on the topic of fraudulent behaviour, property offences in general or other relevant issues (ČENTĚŠ, J. et al., 2015; ČENTĚŠ, J., MRVA, M., KRAJČOVIČ, M., 2018; STRÉMY, T., 2010; ŠAMKO, P., 2012; ŠAMKO, P., 2016; JURGILEWITZ, M., 2020; IVANČIKS, J., TROFIMOV, I., TEIVANS-TREINOVSKIS, J. (2019), but it needs to be emphasized, that no sufficient previous attention has been paid to the problematics of fraudulent behaviour occurring in the apartment buildings management (only to other forms of fraudulent behaviour or fraud in general terms).

2. Property as the subject-matter of legal protection

Property represents the aggregate of goods accumulated through the performance of various activities over the course of a human life, or goods acquired through gifting (by transfer) or through inheritance (succession) from a legator, or by other means (by operation of law, original acquisition etc.).

The asymmetry of society in the quantity of property owned and the differences in how individuals rank property in their value hierarchy cause differences in the intensity of demand for its protection. Some of the population subjectively consider crimes against property as especially serious because the perpetrator attacks or threatens things that they are most proud of and which are not infrequently the source of their social standing. The importance of property in the ordinary life of an individual affects the degree to which they demand its protection (not only) by the state (e.g. ČENTĚŠ, J., MRVA, M., KRAJČOVIČ, M., 2018).

The legitimacy of the legal protection of property is inherent in the conditions of the legal state (concept of legal state), including the protection afforded by criminal law, provided that it is proportionate. The aim is to provide legal security (JURGILEWITZ, M., 2020) to citizens and other entities. By using legal methods of social regulation, including elements of the state's coercive powers, the state seeks to prevent the infringement or endangerment of values and interests protected by law. This is a manifestation of the regulatory function of law in the form of the deterrence and elimination of social deviance leading to the protection of specific values (and the setting of state policy priorities), goods, persons and their needs and interests in the interest of ensuring the smooth functioning of society and social integrity (for more detail, see MARŠÁLEK, P., 2018, pp. 34 - 41). In other words, ensuring an effective framework for criminal proceedings falls under the state's internal functions – the protection of public and

private property (against the gravest offences against these values) against the gravest forms of unlawful conduct. The protection of property by criminal law can be looked at in the light of the principle of *ultima ratio*, in the sense that this type of repression is used only in cases where it is needed, where the intensity of the punishment of the offender is proportionate and just and the objective pursued by the sentence could not be achieved by milder repressive means. The case law of the Constitutional Court of the Slovak Republic states that punishment is “*the sharpest instrument of state coercion that the state uses in performing its functions*”. (Finding of the Constitutional Court of the Slovak Republic, PL ÚS 106/2011-85). In certain cases, the criterion of proportionality may be satisfied by liability under administrative or private law, but following the Constitutional Court of the Czech Republic (Finding, PL ÚS 17/10) we take the view that in certain cases it is possible to speak about effective prevention and protection of victims only based on the criminal law – the enforcement of legal responsibility through application of the provisions of criminal law. At the same time, we recognise that the most effective form of protection for society is an effective state social policy.

Since it is in the public interest to provide an effective framework for the protection of property (amongst other values), the principles by which the rule of law is organised and implemented must always include *creation of an effective system for the investigation, prosecution and judging of crimes* (cf. TOMOSZEK, M., 2015, pp. 72 -74). To uphold the values of democracy and the rule of law proclaimed in Article 1(1) of the Constitution of the Slovak Republic (“*the Constitution*”), it is also necessary to ensure the quality of the protection that the criminal law provides for the most important interests protected by law.

The article applies this perspective in considering the protection of property rights under criminal law, more specifically with reference to **criminal fraud**. This is a relatively common crime that can take various forms. The specific form of interest for the present article is a latent and hard-to-detect fraud in the management of apartment buildings related to the calculation and billing of the annual management costs of an apartment building. The present article first considers this issue with reference to the specific constituent elements of the crime. Since the offence causes damage to the property of the owners of apartments and non-residential units in an apartment building (“*owners*”), we will consider how these can be protected effectively (and how owners can exercise their rights) in criminal proceedings, proceedings on misdemeanours and insolvency proceedings.

3. The management of apartment buildings

It is a legal duty of owners to pay a fair and proportionate share of the common costs of their apartment building based on a regular annual settlement of accounts. These costs are distributed in proportion to the use of the common parts and common facilities of the apartment building (and necessary services such as emergency services and municipal waste disposal). In practice, these proportions are calculated using “**person months**” representing the number of persons using a flat in a calendar month.

If an owner fraudulently conceals one or more persons’ use of an apartment and common areas and facilities in an apartment building, this causes the administrator of the apartment building to calculate the cost distribution incorrectly and thus damages the integrity of the other owners’ property.

They are unfairly obliged to bear a greater cost for the goods and services related to use of the apartments than they would if the owner had not misled the administrator when reporting the data necessary for the administrator’s allocation of the apartment building’s management costs. The amount unfairly borne by the other owners is the damage that the perpetrator causes and the sum of the partial damages (on the level of actual damage) corresponds to the benefit obtained by the perpetrator.

4. Protection of property in the legal system

In considering how the law protects property, our attention focuses primarily on the protection provided by public law – in particular criminal and administrative liability, whose essence is repressive action against the responsible person for the protection of society and deterrence on the individual and general levels. A public

law sanction is not equivalent to the damage or other harm suffered and can also be applied for matters where there is no liability under private law, for example if there was no damage (preparing or attempting a crime or an administrative offence).

If the state and society aim to respond justly to illegal actions, the reaction must be **proportionate** to the severity of the act that created the substantive liability relationship comprising the right to impose a sanction and the responsible subject's duty to comply with the sanction. Only a fair (proportionate) penalty for the responsible person can terminate the substantive relationship without the state or other public authority being liable for unlawful infringement of the given person's rights.

The general effort of the legislature to preserve criteria of proportionality in the enforcement of public law liability for unlawful conduct can be seen primarily in their division into crimes and administrative offences depending on their severity (social danger) and further in the different ranges of penalties laid down in law. Depending on how they are defined, penalties can be classified as *absolutely definite*, *absolutely indefinite* and *relatively definite*.

Absolutely definite penalties are those where law does not give the court or other public authority any space in their decision-making process (see VRABKO, M. et al., 2013, p. 14 et seq.) to choose the most suitable variant of a penalty because it exactly determines its type and extent. In the case of relatively definite penalties, upper and lower limits are set for a specific penalty (legal differentiation) and through the penalty levels applied, the legislature expresses the damage or the typical severity of a given illegal action. Furthermore, by comparing the set levels, it is possible to determine which illegal actions the legislature considers to be more harmful to society. In criminal law, every legal differentiation of penalty levels corresponds to the level of severity of a crime of the given type (See also Finding of the Constitutional Court of the Slovak Republic, Pl. ÚS 106/2011-85).

Since the legislature cannot foresee the development of specific social relationships (the actions of members of society), it must leave the authorities responsible for applying the law adequate space for reflection and individualisation of penalties in specific cases if it is concerned with preserving the criterion of fairness. Absolutely definite penalties are usually inadmissible (there must be at least one alternative or variant in the decision-making process) and they are acceptable only for extremely harmful illegal actions.

Absolutely indefinite penalties weaken the feeling of legal certainty in the addressees of the law and allow wide scope for the arbitrary application of law by the authorities. The principle of legal certainty is a pillar of the rule of law and, following Dr Mrva (MRVA, M., 2013, pp. 66-79), it can be seen as "*the principle of confidence in the law, because people must have confidence in the law and the foundation of this confidence depends on both the content and form of the law, and the quality of its application and implementation*". In judicial proceedings and the like, the parties must have a degree of certainty that their legitimate expectations will be met as regards the predictability of the decision-making of the authorities responsible for applying the law. Absolutely indefinite penalties impair the predictability of decision-making and the authority responsible for applying the law is reduced to the level of an ideology of free application of law (for more detail see KÜHN, Z., 2002, p. 237).

In practice, it is most appropriate to accept relatively definite penalties which, subject to set criteria, provide the authority applying the law adequate space for reflection and an individual approach, and since they have upper and lower limits laid down by law, they provide a formal guarantee against manifestly disproportionate penalties (either formalistic or draconian). They are primarily found in the special part of Act No 300/2005, *the Criminal Code* ("*Criminal Code*" or "*CC*") and administrative criminal law.

5. Criminal versus administrative liability

This section considers in more detail the issue of public law liability under criminal law and administrative criminal law, which defines the penalties for administrative offences. The type of administrative offences with which the present article is primarily concerned is misdemeanours, which are their largest subcategory and are

often distinguished from other administrative offences only formally – because they are not explicitly identified as misdemeanours. Misdemeanour law is the most complex part of administrative criminal law, in part because misdemeanours are not concentrated in a single law. Both types of liability are distinguished primarily by the penalties that can be imposed for specific types of conduct condemned by law (conduct constituting a crime or an administrative offence) and the procedures by which such penalties are imposed and enforced.

A common feature of the two branches of public law is that in both cases legal theory stipulates that the primary characteristic of their penalties is **repression**. They deliberately infringe an offender's human rights. The purpose of this is to protect society (and specific values), to reform the offender and to have a deterrent effect on society. **The fundamental purpose of repressive penalties in criminal and administrative proceedings is to cause harm in a sphere of the offender's life that should be individually and appropriately chosen to create a subjective awareness proportionate to the severity of the threat or attack against a specific interest protected by law, and it should also be capable of achieving the intended purpose.**

In terms of the potential consequences, the qualification of an action as an administrative offence and the imposition of a penalty under administrative law is more favourable to a perpetrator. The act on misdemeanours lays down an exhaustive list of penalties in Section 11, under which the perpetrator of an misdemeanour may be given *a reprimand, a fine, a disqualification or forfeiture of assets*.

The general penalty under **misdemeanour law** is a fine, as a penalty of an economic nature whose imposition should make the offender aware of the economic disadvantages of unlawful conduct in society. It cannot be imposed cumulatively with a reprimand. Section 13 stipulates that a fine **must not exceed 33 Euros** unless the law sets a higher upper limit in the legal differentiation of the fine.

In **criminal law**, the universal penalty is an unsuspended sentence of imprisonment and the different levels of this penalty are laid down in law in the definitions of constituent elements of crimes in the special part of the Criminal Code. The Criminal Code divides criminal penalties into punitive and protective measures. The imposition of a sentence is not an obligatory consequence of a crime, as Section 40 of the Criminal Code allows a criminal court to waive punishment on the satisfaction of set criteria (as regards misdemeanour law, see SREBALOVÁ, M. et al. 2015, p. 56).

Through the individual provisions of the Criminal Code and the Code of Criminal Procedure, especially the definition of the types of punishments, their level and the rules for their imposition, the legislature seeks to deter individuals and groups from certain types of conduct defined mainly in a descriptive manner. The aim of deterrence is to deter the transition from those stages of criminal conduct that are not relevant under criminal law to those that are relevant and punishable. This is not to deny that deterrence depends primarily on the timeliness, targeting and inevitability of punishment that incorporates elements encouraging the rehabilitation of offenders and their reintegration into society.

The Criminal Code also provides an exhaustive list of the permitted punishments in Section 32(a) to (l). The present article will not consider protective measures. A sentence of imprisonment can be imposed for any crime provided it respects the principle that the sentence should only be imposed if another type of punishment could not achieve the intended purpose. This principle favours the ideal of restorative justice, under which criminal justice should primarily be based on alternative punishments and alternative solutions to criminal matters. Alternative punishments allow discretion so as to avoid excessive imprisonment by offering a wide range of fair and effective criminal penalties. Alternative punishments can also be seen as a tool for supporting the rehabilitation of convicted offenders. (m.m. STRÉMY, T., KLÁTIK, J., 2018).

The main alternative punishments are house arrest (electronic tagging), community service and fines. When applying the law, a criminal court must consider whether the purpose of punishment can be achieved by a non-custodial sentence (an alternative punishment or a suspended custodial sentence) or one of the alternative forms of criminal proceedings.

5.1. Protection of property in the provisions of criminal and administrative law

The present work is concerned with specific forms of legal protection for property through the definition of the constituent elements of crimes and administrative offences and their subsequent application to impose penalties on offenders. It reflects in particular on fraudulent conduct relating to the management of apartment buildings in which the perpetrator misleads the administrator or exploits an unforced error for material benefit at the expense of others' property.

One of the pillars of the rule of law is the strict application of the principle of legality, a derivative of which in the field of criminal law is *nullum crimen sine lege, nulla poena sine lege*. If illegal conduct against another's property is to be qualified as a crime, it must be identified as a crime *expressis verbis* in law and cannot be subject to any penalty other than that stipulated by law. The same guarantee applies in administrative criminal law, under which an action can only be classified as an administrative offence if it has been expressly designated as such.

The extension and application of criminal law principles to administrative criminal law is in accordance with the consistent interpretation of Article 6 of the Convention (*Right to a Fair Trial*) by the European Court of Human Rights starting from *Engel and Others v. the Netherlands* of 8 June 1976 and subsequent case-law (decisions are based on the *Engel criteria* – *legal classification of an offence under national law, the nature of the offence* (in terms of the protected interest and purpose of the legal rule) and *the material nature and severity of the penalty* (consideration of the unfavourable consequences for the offender) – compare ČENTĚŠ, J., 2017, SVÁK, J., BALOG, B., 2012).

For this reason, the constituent elements of administrative offences must also have an exact definition and only when the requisite evidence is presented can the public authorities impose a penalty on an offender.

Misdemeanour law

In misdemeanour law, fraudulent conduct can be classified under Section 50 of the act on misdemeanours, which is labelled with the systematic heading ***Misdemeanours against Property***. This provision “*regulates misdemeanours against property, which, in the most general terms, are aimed at protecting property interests, primarily ownership rights, as one of the fundamental human rights*” (Srebalová, M. et al. 2015, p. 233).

The qualification criteria for such an misdemeanour are that the offender (a general subject) deliberately causes damage to another's property through **theft, embezzlement or fraud, or the damage or destruction of items** constituting such property or **attempts such an act**. The attempt is thus promoted to the same level as a completed misdemeanour. A fine of up to 331 Euros may be imposed for such an misdemeanour.

The method by which an offender commits an misdemeanour (as regards the objective constituent elements of the misdemeanour) are not specified in more detail in the act on misdemeanours. The content must therefore be stabilised by reference to the descriptive constituent elements of the relevant crimes under the Criminal Code, i.e. by using formal-systematic interpretation (considering arguments arising from the system of law making and other parts of the legal system) that abides by the aim of objective interpretation and legal certainty (compare MELZER, F., 2011, pp. 130-152). Such interpretation is legitimised by the similarity of the regulated subject-matter, which is relatively specialised in criminal law.

The legal qualification of the defined conduct depends on the amount of damage caused. Qualification as an misdemeanour against property is possible only if the damage caused to other's property by the offender's conduct **does not exceed 266 Euros** (the criterion of minor damage). This does not mean that if the criterion of minor damage is fulfilled, conduct will automatically be qualified as a crime. Classification as a crime has a formal and substantive base that also considers the intensity (severity) of the attack or threat against a legally protected interest.

Criminal law

A principle of criminal is the **subsidiarity of criminal repression**, which means that the criminal law should not serve as a substitute for the protection of the rights and legally protected interests of individuals in private law relationships and that it should only react to illegal conduct in the gravest cases because overvaluing the role of criminal law in solving social problems will not contribute to their solution. (MENCEROVÁ, I., TOBIÁŠOVÁ, L., TURAYOVÁ, Y. et al., 2013, p. 21, m. m. JELÍNEK, J. et al., 2013, p. 24).

This guiding idea, which is mainly relevant to the law's interpretation and application, is also reflected in the formal and substantive understanding of a crime, which Section 8 of the Criminal Code defines as an action whose constituent elements are laid down in the act, unless the act stipulates otherwise. It is expressed in another way in the negative definition of a crime concerning the substantive nature (or extra-legal social content – see KRATOCHVÍL, V., KUČHTA, J., KALVODOVÁ, V., 2002, pp. 149-150) of an act that otherwise has the formal characteristics of a misdemeanour (Section 10(2) of the Criminal Code). This is a *substantive corrective* that is a necessary condition for the substantive understanding of the category of a crime where the character of illegal conduct is formally defined by its generic traits.

The substantive understanding includes a certain objectivised social conception of which offences are so severe (harmful) for development and relationships in society that they need to be penalised under the criminal law. (BURDA, E. 2006). It is important to note that the severity of an offence can only be assessed against others with the same constituent elements – comparable offences. Otherwise, absurd conclusions could be drawn, because crimes against property are nearly always less severe (harmful) than crimes against life and health (JIRÍČEK, P., MAREK, T., 2014, p. 43).

The application of the substantive corrective in law excludes the legal classification of an act as a misdemeanour if its method, its consequences, the circumstances in which it was committed, the degree of fault and the motivation of the perpetrator make its severity negligible. With reference to young offenders, an offence is not a misdemeanour if it is of minor severity (Section 95(2) of the Criminal Code).

The substantive nature of the action must be considered in the case of every misdemeanour – to allow an assessment of proportionality in the application of criminal repression and consideration of whether the purpose of punishment cannot be achieved with other means of social regulation than those established in criminal law. This also applies to property crime where the principle of subsidiarity of criminal repression is fulfilled mainly through application of the **institute of minor damages**.

6. Fraud

Fraud has one basic and three qualified constituent elements as a criminal offence.

The criminal offence has a general **subject**.

In its **subjective aspect**, it requires deliberate fault, which expresses the principle of individual responsibility for fault. The intention must apply to all the constituent elements defined in law, otherwise there is no liability for fraud. There must be a direct intention (*dolus directus*) or indirect intention (*dolus indirectus*) firstly to mislead or exploit error and secondly to benefit materially by causing damage to others' property.

The **object** of the mentioned offence is **other people's property** regardless of the type and form of ownership.

Regarding its **objective aspect**, the law describes it as illegal conduct in which the perpetrator enriches himself or others at the expense of someone else's property by misleading them or exploiting the other person's error so that the person acting in error executes disposition of property resulting in minor damage. "*The triggering mechanism for fraud is misleading another into error or exploiting another's error, because fraud can only take*

place when the cause of damage to the other person's property involves another's error." (Judgement of the Supreme Court of the Slovak Republic, 2 TdoV 21/2013)

Error means discrepancy between a person's knowledge or ideas and the actual situation. It is aptly described by Šamko as a non-violent (hidden) means by which the perpetrator influences the will of a person making a decision on the disposition of their property, who is unaware of their error (they are not acting under physical or psychological pressure) and whose interior world is based on false information that does not reflect reality (ŠAMKO, P., 2012, pp. 19-20 (a), compare ČENTÉŠ, J. et al., 2015, p. 417).

Misleading means that the perpetrator states or falsifies circumstances that do not correspond to reality or the actual state of affairs and **exploiting an error** includes exploiting a discrepancy between the victim's ideas and reality that was not created by the perpetrator but arose independently of their actions.

Fraud also takes place if the perpetrator conceals significant information or fails to disclose, in the course of the fraudulent conduct, any matters that are decisive or significant for the victim of the fraud because if the other party were aware of them, they would not engage in the relevant transaction (Judgement of the Supreme Court of the Slovak Republic, 2 TdoV 21/2013).

The perpetrator must be aware of the error of the person acting and the error (whether forced or unforced) must be used for the disposition of property – thus, from the perspective of time, awareness of the error must precede the disposition of property. Disposition of property means a transfer of property by the victim that results on the one hand in damage to the integrity of the victim's property and on the other to the enrichment of the perpetrator at the victim's expense.

A further requirement is that **the misleading information or error must have a certain "quality"** (it cannot be just any falsehood) and must be a means capable of deceiving another person in the specific situation. If a person that conducts a disposition of property in error has a duty (by law, contract or custom) to investigate the claims of other persons using means that are routinely available and routinely used in similar cases, the presentation of false claims by themselves cannot be considered "misleading" in the sense of the constituent elements of criminal fraud (Judgment of the Supreme Court of the Slovak Republic, 2 TdoV 21/2013).

*Consideration of the objective merits of fraud cases includes examination of the causal nexus – **causal connection**, as an objective quality that cannot be presumed but must always be properly proven. "The number of potential causal factors is infinite. It is always necessary to identify the causes that the law can consider as qualification of an infringement of rights. To recognise a certain behaviour of a person as the cause of an occurrence, the behaviour must be a necessary condition for the occurrence (conditio sine qua non)." (OSINA, P., 2013, p. 111).*

It must not be forgotten that a causal connection must be distinguished from the mere proximity and sequence of phenomena in time and space. In other words, **one must not apply the principle of "ante hoc, propter hoc"** (Finding of the Constitutional Court of the Slovak Republic, I. ÚS 177/08-31; Section 16). The principle *ante hoc, propter hoc* means "before this, because of this" and is sometimes written "*Ante hoc, ergo propter hoc*", meaning "Before this, therefore because of this". It characterises a logical error in which the fact that two events follow each other in time is assumed to indicate a causal relationship between them. (Judgement of the Supreme Court of the Slovak Republic, R 21/1992). Phenomena that precede other phenomena in time can be their causes but may not be. A temporal relationship only helps the assessment of the substantive relationship. (m. m. Finding of the Constitutional Court of the Slovak Republic, I. ÚS 177/08-31).

Fulfilment of the conditions giving rise to criminal fraud thus requires the existence of a causal connection between one person's error and their disposition of property and another causal connection between this disposition on the one hand and on the other the loss of a third party's property and the enrichment of the perpetrator or another person. A fraud can thus involve up to 4 persons: the perpetrator, the person acting in error, the victim and the beneficiary (ČENTÉŠ, J. et al., 2015, p. 418).

The perpetrator's conduct may fulfil the criteria of one or more of the special qualification elements laid down in Section 221(2), (3) and (4) of the Criminal Code. It must not be forgotten that in this case, one of the special qualification elements cannot be applied – the use of deceit in committing the crime. This special qualification element (as one of the aggravating factors under Section 221(3)(c) of the Criminal Code) is excluded because the law already defines it as a basic constituent element of criminal fraud.

In the event of a qualification under Section 221(2) of the Criminal Code (causing at least major damage) the perpetrator is punishable by a sentence of imprisonment for **one to five years**, In the event of a qualification under Section 221(3) of the Criminal Code (causing significant damage, committing the crime with a special motive, with an aggravating factor, or against a protected person), the range is **three to ten years** and under Section 221(4) of the Criminal Code (causing large-scale damage, committing the crime as a member of a dangerous group or in a crisis), the range is **ten to fifteen years**. As previously mentioned, increased regard for restorative justice ideals has given rise to a preference for alternative sentences not involving imprisonment provided that the sentence fulfils the purpose of punishment – punishment should ensure that society is protected against the offender by preventing them from committing further crimes, it should create conditions in which they are motivated to live a normal life, and it should deter others from committing crimes; punishment also expresses society's moral condemnation of the offender.

The following table shows the frequency of criminal fraud and the methods used to punish (convicted) offenders based on the ministerial statistics of the Ministry of Justice of the Slovak Republic for the period 2013–2018 (using the statistical yearbook for 2018 and statistics provided based on a freedom of information request). Separate statistics are not kept for fraud in the management of apartment buildings.

Table 1. Fraud - number of persons convicted

	2018	2017	2016	2015	2014	2013
Number of persons convicted	1004	414	463	518	627	676

Table 2. Fraud - number of crimes detected

	2018	2017	2016	2015	2014	2013
Number of crimes detected	1092	457	504	601	706	758

Table 3. Sentencing overview – absolute numbers

Penalty	2018	2017	2016	2015	2014	2013
Suspended imprisonment including proportionate restrictions or obligations	125	59	59	79	75	35
Suspended imprisonment with probation	48	25	27	28	32	34
Suspended imprisonment without proportionate restrictions or obligations	306	225	255	276	343	422
Community service work	17	16	29	39	63	65
Fines	47	36	31	36	42	53
Imprisonment in a low-security prison	117	34	36	24	40	31
Imprisonment in a medium-security prison	62	14	22	26	20	22
Imprisonment in a high-security prison	5	-	1	-	-	2
Prohibition of motor vehicle use	15	2	2	-	1	-
Disqualification from employment / occupation / function / other	15	10	3	2	4	3
Expulsion	1	-	-	-	-	-
Prohibition of residence	5	1	1	2	2	1
House arrest	1	1	-	-	-	4
Detention; juvenile	-	-	-	-	-	-
Forfeiture	12	4	1	2	1	5

Table 4. Sentencing overview – as percentage of the number of convictions

Penalty	2018	2017	2016	2015	2014	2013
Suspended imprisonment including proportionate restrictions or obligations	12.45%	14.25%	12.74%	15.25%	11.96%	5.18%
Suspended imprisonment with probation	4.78%	6.04%	5.83%	5.41%	5.10%	5.03%
Suspended imprisonment without proportionate restrictions or obligations	30.48%	54.35%	55.08%	53.28%	54.70%	62.43%
Community service work	1.69%	3.86%	6.26%	7.53%	10.05%	9.62%
Fines	4.68%	8.70%	6.70%	6.95%	6.70%	7.84%
Imprisonment in a low-security prison	11.65%	8.21%	7.78%	4.63%	6.38%	4.59%
Imprisonment in a medium-security prison	6.18%	3.38%	4.75%	5.02%	3.19%	3.25%
Imprisonment in a high-security prison	0.50%	-	0.22%	-	-	0.30%
Prohibition of motor vehicle use	1.49%	0.48%	0.43%	-	0.16%	-
Disqualification from employment / occupation / function / other	1.49%	2.42%	0.65%	0.39%	0.64%	0.44%
Expulsion	0.01%	-	-	-	-	-
Prohibition of residence	0.50%	0.24%	0.22%	0.39%	0.32%	0.15%
House arrest	0.01%	0.24%	-	-	-	0.59%
Detention; juvenile	-	-	-	-	-	-
Forfeiture	1.20%	0.97%	0.22%	0.39%	0.16%	0.74%

Source: Statistical yearbook of the Ministry of Justice of the Slovak Republic for year 2018 and freedom of information request replies

When interpreting the quantitative research, one must come to the conclusion, that fraud is perpetrated at a large scale and when comparing the period 2013-2018, it's perpetration (officially registered) in 2018 rises significantly (influenced by the change in methodics by the Ministry of justice of the Slovak republic) after a yearly decline in number of detected crimes and convicted persons. It needs to be emphasized, that sentencing of perpetrators focuses mainly on suspended imprisonment without proportionate restrictions or obligations. The average sentencing (percentage of the number of total convictions) in the period 2013-2018 is at 49,35%. This can be a result of different causes. This fact does not automatically mean, that the criminal offences are of lower severity and therefore don't require a more severe punishment. One of the possible explanations is that the courts don't need to be active in monitoring the execution of sentence (punishment) in this way. Whether criminal punishment has fulfilled its purpose (whether the perpetrator behaved as he should), will be known from the fact, that no indictment has been filed against the perpetrator during the probational period. The role of courts is thus passive and this can be subjectively considered by the judge as an effective time management tool in his agenda.

It is unclear, whether the justice system reflects the ideas of reciprocity (as a subprinciple of the principle of justice - fairness) in sentencing, because when taking into account that fraud is a property criminal offence (and the perpetrator's motive is enrichment), then the fine (sanction based on repression against the property values of the offender) should be applied at a much broader scale. The average sentencing in the period 2013-2018 is only 6,62%.

The authors emphasise (reflecting previous stance and research in this area, ČENTÉŠ, J., MRVA, M., KRAJČOVIČ, M., 2018) that fines can be considered as effective measures against the perpetrators of property crimes, because the sentencing results in a result directly opposite to what the perpetrator had in mind when committing this property crime (enrichment). The loss of property values as a result of punishment motivates the perpetrator to avoid criminal behaviour in future - because of the previous knowledge, which motivates him/her to cover the material (financial) needs by lawful means of fulfilment, not those prohibited by the legal order. Effectiveness of this sentence is supported also by the current era of consumption (prioritisation of material values), when the fine restricts the perpetrator from buying goods or services, which he/she would have otherwise bought, if there was no conviction and fine. The main disadvantage for our quantitative research is that it cannot be fully individualised on the topic of frauds occurring in the processes of apartment buildings management, because separate statistic are not available. As sufficient previous attention has not been paid to

the topic of our research, we hope that mainly the Ministry of transport and construction of the Slovak republic (as a authorised guarantor in this field) will develop efforts in order to make data of unlawful behaviour of owners occurring in the management of the apartment buildings available.

6.1. On the fulfilment of the criterion of minor damage (on a continuous criminal offence)

A criminal offence is considered to be a continuous criminal offence if the perpetrator continuously repeats the same crime. Criminal liability for a number of partial offences will be treated as one offence if all the partial offences of the same offender have an objective link in time, in the manner in which they are committed and subject-matter of the offence, and a subjective link such as a unifying intent of the offender to commit the given crime (Section 122(10) of the Criminal Code).

Causing consequences in the form of (at least) minor damage can occur in two ways – in a single offence or gradually (through multiple partial offences that the offender commits against the property of others). It is not necessary for the offender to cause minor damage by a single action (offence) with the constituent elements of criminal fraud.

There can be multiple offences against legally protected interests. The criterion of causing minor damage can therefore be fulfilled gradually when the offender's partial offences do not individually cross the threshold of minor damage but in aggregate (in terms of the total damage caused) the criterion of at least minor damage is fulfilled. It is also possible for individual offences to fulfil the criterion of minor damage but for the aggregate damage of individual offences (with objective and subjective links) to fulfil the criterion of major, significant or large-scale damage, which are usually fixed as special qualification elements in the definition of individual crimes.

This applies in the case of criminal fraud, where the law stipulates more severe sentences of imprisonment based on the extent of the damage (major damage, significant damage, large-scale damage). The present article focuses on the special qualification element of committing criminal fraud for a longer period of time (an aggravating factor). As a rule, this aggravating factor comes into consideration in continuous offences and perpetual offences.

A continuous criminal offence is regarded as one action – a separate offence. In the event of prosecution for a subsequent partial offence, a previous valid conviction must be set aside as regards the conviction for other partial offences of the same criminal offence (Section 41(3) of the Criminal Code). The **time of commission** of a continuous offence is considered to be the time when the last partial offence against a protected interest was committed. The bringing of charges is considered an interruption in a continuous offence and after this procedural act, continued criminal conduct is deemed to be a new offence.

To be classified as a single offence, the offender's partial offences must have **a link in their subject matter, the method used in the partial offences** and above all **in timing**, which is the most significant from the objective perspective (Decision of the Supreme Court of the Slovak Republic 2Tz/32/2005). In addition to the objective factors, subjective factors are also required – at the time of the first partial offence the offender must already intend to commit further partial offences (**the unifying intent of the offender**). In the absence of a unifying intent, the offender's partial offences against legally protected interests can “only” be qualified as concurrent offences and will not be treated as a single offence.

6.2. Analogically to a continuous administrative offence

To provide the reader with a comprehensive approach to the qualification of partial offences against property, it is also necessary to consider their sanctioning in misdemeanour law. The act on misdemeanours does not recognise the institute of a continuous misdemeanour (administrative offence) but in practice a statutory analogy with the Criminal Code is used: *due to the lack of special regulation, a continuous administrative offence must be regulated by statutory analogy with Section 122(10) of Act No 300/2005* (Judgement of the Supreme Court

of the Slovak Republic, 5Sž/21-22/2011). It would be more appropriate to call this an *argument a simili* because “analogy” tends to be used in the area of judicial law-making in the process of interpretation of applicable law (this view of the terminology is shared by Melzer – MELZER, F., 2011, pp. 166-167).

With reference to the provisions of Section 122 (10) of the Criminal Code, a continuous misdemeanour can be defined as conduct of an offender that is condemned by law (in individual partial offences) that meets the definition of the same misdemeanour (has the same constituent elements) where the offender’s partial offences have both an objective link (in time, method and subject-matter) and a subjective link, especially a unifying intent of the offender (Compare KRAJČOVIČ, M., 2015).

In proceedings under the act on misdemeanours, such conduct must be considered one offence that has just one consequence based on the cumulative damage committed by the offender in the partial offences against legally protected interests. A single penalty is imposed for this offence (not separately for the partial offences).

Thus, a repeated fraud may remain an misdemeanour if the cumulative damage from the partial offences does not pass the threshold of minor damage. It will still be continuous and repeated unlawful conduct but on a less serious level. The qualification of such an offence depends on the total damage caused by the offender’s partial offences that are objectively and subjectively linked. The area of minor misdemeanours against property that are committed for a longer time or repeatedly (recidivism) is one in which an inadequate differentiation of fines can be discerned. This theoretical investigation will now turn to the qualification of the fraud perpetrated by apartment owners in the management of apartment buildings that was described earlier.

Conclusions

The article approached the theoretical aspects of fraudulent behaviour occurring in the processes of apartment buildings management. Our work. The authors focused on the significance of property values and means of their legal protection - with special focus on criminal law and misdemeanour law area. It is in public interest to provide an effective framework for the protection of property and from a general viewpoint this is the authors’ main interest. Fraud is a criminal offence, which protects property against a conduct, by which a perpetrator enriches himself or others at the expense of someone else’s property by misleading them or exploiting the other person’s error so that the person acting in error executes disposition of property. Similar misconduct is sanctioned as a misdemeanour against property under par. 50 Act on misdemeanours under the circumstance, that damages are not higher than 266 Euros (the legislator thus reflects the principle of proportionality in sanctioning). One of the forms of fraudulent behaviour is fraud occurring in the processes of apartment buildings management, when the administrator is misled in the process of settling arrears and overpayments from the previous year. The authors provided the reader with a brief introduction into rights and obligations associated with the ownership of apartments - being aware of them is a primary step to understanding the mentioned latent form of fraudulent behaviour. The theoretical approach to the criminal offence of fraud is supported by the statistics of the Ministry of Justice of Slovak Republic (2013-2018; basic form of fraud) with the sentencing overview (as a percentage of the number of convictions and in absolute numbers), number of persons convicted and crimes detected. This supports the conclusion, that this frequent (and in many forms latent) form of unlawful behavior requires sufficient attention in order to provide an efficient protection of society and values of others.

In the september issue of the Entrepreneurship and sustainability issues journal, the authors will publish their article Fraudulent conduct in the management of apartment buildings and related issues - a case study, in which they will focus on deepening their analysis of fraudulent behaviour in the process of settlement of arrears and overpayments, issues relating with insolvency (as fraud is a related offence to insolvency crimes) and efficient protection of owners in an apartment building with regard to potential or existing insolvency of one of the owners. Based on this analysis (demonstrated on the case study) and application of the theoretical findings, the authors will draft recommendations *de lege ferenda* towards a more effective way of apartment building management, settlement of arrears and overpayments, insolvency issues and sanctioning of perpetrators of the criminal offence of fraud.

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