

ECONOMIC CRIME IN THE POLISH LEGAL SYSTEM ON THE EXAMPLE OF THE CRIME OF OBTAINING A BANK CREDIT BY FALSE PRETENCES

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Summary

The analysis of one of the types of economic offences occurring in the Polish legal system presented herein allows to state that law enforcement agencies have an effective possibility of preventing this illpractice. Furthermore, the problem presented clearly indicates how the Polish legal system reduces this kind of crime. It seems that considering the vision of another economic crisis, economic offences, inclusive of the analyzed credit fraud, will be more and more frequently a subject of penal proceedings conducted in Poland.

Keywords: economic crimes, bank credit, banking institutions, credit fraud.

The objective of this study is the presentation of the social significance of economic crimes in the Polish legal system, on the basis of an analysis of a part of economic crime on the example of the offence of obtaining a bank credit by false pretences, which - owing to the socioeconomic transformations of the 1990s caused by the changes of the political system - has become a more and more frequent phenomenon on the market of banking institutions in Poland. The presentation of this issue is caused also by the fact that the regulations concerning the crime of obtaining a bank credit by false pretences have never been uniform and permanent since the very beginnings of the occurrence of this crime in Poland. Another matter is depicting the harmful impact of economic crime, credit fraud, to be more specific, its negative effects upon the appropriate functioning of financial institutions and general functioning of the whole economy within the territory of Poland. This is connected with learning about the criminal law; to be more precise, those institutions which regulate the very crime of fraud and credit fraud as specified in the Polish Criminal Code. Furthermore, for the purposes of presenting the subject of credit fraud, financial institutions of civil law and banking law needed to be briefly discussed as they constitute the most frequent subjects of false pretences, namely a bank loan and a bank credit.

I. General issues connected with the crime of credit fraud

Credit fraud constitutes a criminal law issue, to be more precise – a criminal business law issue. The scope of damage caused to Polish participants of economic circulation and the State Treasury by way of criminal actions accounts for the fact that this issue needs to be examined in more detail. The criminal business law does cover exclusively criminal regulations. It is a domain requiring general knowledge from different fields of law. Effective prevention of economic crime is based on binding numerous institutions from various fields, connecting legal norms, which as a whole allow to reduce economic crime. Considering the fact that criminal economic law constitutes a part of criminal law, and moreover it is closely bound with economic circulation and economic policy of the state, it should be stated that economic crime is a forbidden act in which the violation refers to

economic circulation, and to be more precise the foundations of the economic circulation in Poland, which are fair competition, respect for good practices and legitimate interests of a consumer.¹

The notion of economic circulation as a legal interest subject to criminal protection, should not be limited, however, solely to the exchange of goods and services between economic actors, but it should be connected with the notion of economic activity. Hence in Poland the notion of economic circulation should be understood as factual and legal relations occurring between economic actors when commencing, conducting and terminating economic activity. The notion of the criminal economic law, on the other hand, shall cover criminal regulations specifying offences constituting the basis for punishment for economic crimes.²

Aiming at approaching the issue of economic crime of credit fraud in Poland the foundations of functioning of financial institutions and types thereof should be presented, as well as of a bank credit and the types of bank credits facing the greatest risk of criminal activity.

II. Fundamental issues connected with an institution of a bank credit in the context of a crime of obtaining a bank credit by false pretences.

The institution of a bank credit constitutes one of banking activities. The basic source of banking law in Poland is the Act dated 29 August 1997³, which, however, does not contain a normative definition of a banking activity.

Therefore, the burden of determining the contents and scope of the notion of a banking activity is on the shoulders of the doctrine, whose standpoint concerning this issue is still inconsistent.

The functioning of the banking system in Poland is based on the regulations of numerous legislative acts of various ranks, securing appropriate and consistent functioning of financial institutions constituting this system. The question of basic, and at the same time central state institutions governing the Polish banking system and guarding its proper operation, has been taken into account in the Constitution of the Republic of Poland. To be more precise, this refers to the basic principles of the operation of the National Bank of Poland, its President and the Monetary Policy Council.⁴

The Act dated 29 August 1997 - Banking Law referred to above constitutes the initial legislative act presenting the issue of a bank credit. Another legislative act pertaining to the institution of a credit is the Act on Consumer Credit.⁵ This act governs the principles and procedure of concluding agreements on a consumer credit, the principles of the protection of a consumer who has signed a consumer credit agreement and the obligations of the entity which grants the consumer credit.

The banking legislation does not give a normative, general, universal definition of a credit. The Act - Banking Law defines a credit agreement by indicating essential features thereof. When concluding a credit agreement, a bank commits to provide the borrower with funds for a specific purpose for a period of time specified in the agreement, and the borrower commits to use them in compliance with the terms and conditions of the agreement, to return the amount of the used credit with interests within the specified time limits for the

¹ J. Skorupka, *Prawo karne gospodarcze. Zarys wykładu*, Warsaw 2005, p. 15.

² O. Górniok, *Przestępczość gospodarcza i jej zwalczanie*, Warsaw 1994, p. 130, [after:] J. Skorupka, *Prawo karne gospodarcze. Zarys wykładu*, Warsaw 2005, p. 16.

³ Act dated 29 August 1997 Banking Law, Official Journal 2002 No. 72, item 665.

⁴ Constitution of the Republic of Poland dated 2 April 1997 Official Journal 1997 No. 78 item 483.

⁵ Act dated 12 May 2011 on the Consumer Credit, Official Journal 2011, No. 126, item 715.

credit return and to pay the commission from the credit granted. The use of a credit signifies providing the borrower with funds for the purpose specified in the agreement. Providing the borrower with the funds is to secure that the borrower shall use them in the manner corresponding to his/her interests specified in the credit agreement.⁶

The conclusion of a credit agreement is preceded with two essential activities: the first one is filing a credit application and the second is the determination of the creditworthiness of the potential borrower. Both these activities aim at minimizing the risk of the borrower's insolvency.

Already prior to granting the credit the bank evaluates creditworthiness and this evaluation constitutes a condition for granting the credit. The creditworthiness evaluation, which constitutes one of the basic ways to control the credit risk, is the domain of banks in Poland.

Furthermore, under art. 5 of the Act – Banking Law, banking activities comprise granting a bank credit as well as a bank loan. From the economic point of view these institutions are similar; nevertheless, from the legal point of view there are clear differences between these financial instruments. The difference consists in the fact that under a loan agreement the ownership of the loan subject is transferred onto the borrower, whereas under a bank credit agreement a specific amount, usually in the form of the bank deposit money, is made available for the borrower. The subject of the bank credit are only funds, whereas the loan agreement principally may concern a specific amount of money, as well as items specified exclusively as to their kind. Nevertheless, it should be emphasized that if a bank is the lender, the loan may be of a strictly monetary nature.

An important difference is the fact that in principle one of the parties to a credit agreement must be an entity with the legal status of a bank, whereas parties to a loan agreement could be any entities.

Nevertheless, the most popular form of a credit incurred by borrowers is a consumer credit. Its availability and popularity has become a reason for the most frequent attempts at obtaining it by false pretences in Poland.

The institution of a consumer credit is fully regulated in the Act on the Consumer Credit.⁷ The basis for passing this Act was the Council Directive 87/102/EC dated 22 December 1987 on the approximation of laws, regulations and administrative provisions of Member States concerning consumer credits.⁸ At present this directive is repealed as of 12 December 2010 and in its place the Directive 2008/48/EC dated 23 April 2008 was passed, concerning consumer credit agreements.⁹

The Polish legislator defines the consumer credit agreement, which is to be understood as an agreement under which a business entity understood as a bank or conducting business activities on its own behalf within its scope of activity grants or promises to grant a credit to a consumer in any form, not larger than PLN 255,550 or the equivalent of this amount in a currency other than the Polish currency.

⁶ Ruling of the Supreme Court dated 10 February 2004, IV CK 437/02, *Monitor Prawniczy* 2005, No. 18, p. 907.

⁷ Act dated 12 May 2011 on the Consumer Credit, *Official Journal* 2011, No. 126 item 715

⁸ OJ L 42 dated 12 February 1987

⁹ Directive of the European Parliament and Council 2008/48/EC dated 23 April 2008 on credit agreements for consumers and repealing the Council Directive 87/102/EC, OJ L 133 dated 22 May 2008.

III. The crime of obtaining a bank credit by false pretences in the Polish system of criminal law.

1. Crime of classical fraud vs. the fraud of obtaining a bank credit by false pretences.

When discussing the credit fraud in the Polish legal system, issues connected with the crime of a classical fraud should be briefly presented as regulated in the Polish Criminal Code. Connecting fraud under art. 286 § 1 of the Criminal Code with the bank fraud under art. 297 § 1 of the Criminal Code is bound with a certain common regulation and common qualification of both offences. Placing these two types of fraud in the Criminal Code in two subsequent chapters whose regulations pertain to different types of offences accounts for the fact that they should not be treated in a similar manner.

Moreover, the relation between art. 297 § 1 of the Criminal Code and art. 286 of the Criminal Code is a subject of numerous controversies both in the doctrine and the judicature. There are opinions stating that art. 297 § 1 of the Criminal Code should be treated as *lex specialis* towards art. 286 of the Criminal Code, and the advocate of this view is e.g. R. Góral.¹⁰ Most theoreticians, however, believe that such an interrelation between these regulations is not possible. "The provisions of art. 297 § 1 and art. 286 § 1 of the Criminal Code are crisscross regulations and their factual concurrence is impossible. In case of these provisions the condition of the equality of features, even due to different goals for which they are committed, and specified in these regulations, is not fulfilled. Art. 297 § 1 of the Criminal Code requires that the perpetrator must act in order to obtain a credit or a bank loan, etc., for himself/herself or for a different party, whereas under art. 286 § 1 of the Criminal Code the goal of the actions of the perpetrator is reaching a material profit. Such a form of the aforementioned provisions excludes the possibility of any relations of speciality between them."¹¹ The statement discussed allows to present the differences between the classical fraud and the credit fraud in a brief form, indicating their similarities and close relations occurring between the offences regulated in art. 297 § 1 and 286 § 1 of the Criminal Code.

The offence of fraud is subject to a custodial sentence from 6 months to 8 years. In the event of a cumulative concurrence of provisions under art. 297 § 1 of the Criminal Code it gives a possibility of applying a more severe penalty towards the perpetrator.

2. Offence of credit fraud

The Polish legal system does not fully introduce a view concerning the statutory determination of the issue discussed. The doctrine treats this issue in numerous manners, depending on the fact whether we assume the very activity of obtaining a bank credit by false pretences as an indicator or the whole article 297§ 1 of the Criminal Code, the contents of which comprise the credit offence. One of the designations of this type of offence is "*capital fraud*" as it refers to obtaining financial means or instruments by false pretences.¹² The next of the views presented suggests a name of "*credit fraud*" as among all the financial and economic institutions specified in this article a credit is most often

¹⁰ A. Marek, *Komentarz. Kodeks karny*. Editio II, Dom wydawniczy abc 2005, p. 614

¹¹ Cz. Bylica, *Oszustwo kredytowe na tle obecnego i przyszłego stanu prawnego*, PS No. 3/1998, p. 88. [after:] J. Skorupa, *Wybrane zagadnienia konstrukcji typów szczególnych przestępstwa oszustwa*, MoP 2004, No.12.

¹² J. Skorupka, *Karnoprawna ochrona wierzycieli*, Toruń 2000, p. 85,[after:] A. Marek, *Kodeks Karny. Komentarz*, Editio II, Dom wydawniczy abc 2005, p. 611.

obtained by false pretences.¹³ This name is given to the type of offences discussed also by the legislator.¹⁴ For the purposes connected with presenting these issues, we shall use the expression “*credit fraud*” or “*economic fraud*”.

The very legal regulation connected with art. 297 of the Criminal Code, and to be more precise with the offence of obtaining a bank credit by false pretences, has been functioning in its present form since 2004. The preceding acts – starting from the Criminal Code from 1969, through the Act on the Economic Circulation Protection dated 12 October 1995 to the “new” Criminal Code introduced in 1997 - regulated and described the problem of a credit offence to various extents. Due to the changing political situation in the Republic of Poland, citizens were looking for a suitable place for them in the new socioeconomic reality, basing on the system of market economy. Together with the ongoing transformations in the economic, social and political system at the end of the 1980s, owing to numerous abuses the role of the criminal law was changing.¹⁵

Nevertheless, the newly-established political, social and economic institutions were not fully protected in legal terms. Dynamic changes consisting in the transition from the command-and-quota economy to the free market economy brought about a fast and uncontrolled increase of delinquency of the economic nature. One of the signs of this type of behaviour was the increase of the credit fraud offences. By introducing commercial banks to the Polish market at the end of the 1980s the opportunities to use financial institutions assisting the process of extension of the state economy were broadened. This entailed, however, a risk of the occurrence of individuals willing to abuse these financial institutions in order to use them for their criminal activities.

On 12 October 1994 the Polish Sejm passed an act on the economic circulation protection and on the change of selected provisions of the criminal law.¹⁶ The task of the act was to adjust the legal protection to the new economic conditions, also with reference to the institution of a credit. It was based on equalling all forms of ownership, penalization of offences which had just appeared in the market system, as well as adjustment of the already existing offences to the principles of the new system. Assessing it from the time perspective it should be stated that the introduction of an interim act was the best possible solution for that period; this view is confirmed by numerous experts from the field of the criminal law. The final form of art. 297 § 1 of the Criminal Code was specified as a result of Poland’s accession to the European Union and the adjustment of the provisions of the Polish law to the new political and economic conditions. The fundamental change introduced in the amendment dated 18 March 2004 to the Polish Criminal Code was basing most of all on taking into account the guidelines resulting from the Convention on the protection of the European Communities’ financial interests dated 26 July 1995¹⁷ and the Cyberspace Convention signed by Poland, dated 23 November 2001.

¹³ O. Górniok *Prawo karne gospodarcze*, Warsaw 2003, p.85, [after:] A. Marek, *Kodeks Karny. Komentarz*, Edition II, Dom wydawniczy abc 2005, p. 611.

¹⁴ Justification of the bill dated 18 March 2004 on amending the act – Criminal Code, the act – Criminal Proceedings Code and the Act – Code of Petty Offences, Official Journal No. 69, item 626.

¹⁵ H. Pracki, *Obrót gospodarczy pod ochroną. Zagadnienia prawno karne*, Warsaw 1995, p. 5.

¹⁶ Act dated 12 October 1994 on the Economic Circulation Protection, Official Journal 1994 No. 126 item 615.

¹⁷ Convention dated 26 July 1995 on the protection of the European Communities’ financial interests, Official Journal of EC No. C316 dated 27 November 1995.

Locating art. 297 in the chapter XXXVI of the Criminal Code entitled “Offences against economic circulation” indicates a close relation of the provision with other articles of this chapter. The content of art. 297 of the Criminal Code refers to the offence of economic fraud, also called credit fraud. Nevertheless, the provision discussed also contains a regulation referring to the penal liability of other parties than the direct perpetrator, as well as a regulation pertaining to the exemption from liability for this type of offence. The last paragraph of art. 297 of the Criminal Code is of a nature of an impunity clause, which fulfils the function of presenting circumstances exempting from the liability for the committed offence.¹⁸

The subject of protection of § 1 art. 297 of the Criminal Code is providing the general security of the correctness and reliability in the scope of granting and using credits, monetary loans, sureties, guarantees and other financial instruments. The wording “whoever” used in § 1 art. 297, specifying the entity committing the offence, confirms that the perpetrator could be anyone, therefore what we deal with here is a common offence (*delicta communia*).¹⁹ The use of the verb „submits” clearly indicates that the offence penalized in § 1 is of a causative nature. In the understanding of art. 297 § 1 of the Criminal Code fraud is an offence with a specific purpose. The perpetrator needs to submit false or untrue documents or submit an unreliable statement in writing in order to obtain a credit or another benefit.²⁰

The offence under art. 297 § 1 is an ineffective offence, also referred to as a formal offence. For committing it the act does not require to execute the features of the effect (e.g. damage does not need to occur).²¹ „[...]For the occurrence of a credit fraud it is sufficient when the person trying to obtain a credit submits only one false or untrue document, only one unreliable statement”.²² In order to talk about committing the offence of a credit fraud an action of the perpetrator must occur, the inadvertence of the offence is not mentioned here.²³ The advertence in case of this paragraph is limited to the direct intent²⁴.

Furthermore, § 2 of the cited art. 297 of the Criminal Code stipulates the liability of the party who contrary to the obligation upon him/her failed to notify a competent authority or institution on the occurrence of circumstances which might influence the suspension or limitation of the amount of the granted credit, loan or another type of financial support enumerated in § 1. It is, therefore, a type of crime consisting in negligence.²⁵ Failure to notify signifies the fact of not providing information available to a person obliged to provide information on circumstances which are essentially important for further exploitation of the institutions enumerated in art. 297 § 1. If the source of the obligation does not specify any special form of providing information, the information can be

¹⁸ S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002r.* Warsaw 2004, pp. 74-75.

¹⁹ O. Górniok, *Kodeks karny. Komentarz*, Warsaw 2004, p. 810.

²⁰ A. Marek, *Prawo karne*. Edition IX, amended and updated, Warsaw 2009, p. 579.

²¹ A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, R. Zawłocki, B. Michalski, J. Skrupka, *Kodeks karny. Część szczególna. Komentarz do artykułów 222-316*, Volume II, Edition II, Warsaw 2005, p. 1248.

²² Ruling of the Court of Appeal in Łódź dated 26 July 2000, II Aka 93/00, Prokuratura i Prawo year 2002, No 1, item. 24, p.14.

²³ M. Bojarski, J. Giezek, Z. Sienkiewicz, *op. cit.*, pp.91-112.

²⁴ O. Górniok, M. Mozgawa, J. Majewski, Z. Sienkiewicz, L. Wilk, *Prawo gospodarcze i handlowe. Prawo karne gospodarcze*. Volume 10, C.H. Beck 2003, p. 91.

²⁵ A. Marek, *Komentarz. Kodeks karny*. Edition II, Dom wydawniczy abc 2005, p. 614.

transferred in any manner.²⁶ The obligation of notification may result straight from the statutory provision, internal norms of a specific unit or authority. The source of such an obligation may also be an agreement or a relevant decision of a competent authority.²⁷ The provisions contained in art. 297 § 2 refer to a formal offence, belonging to the category of offences of abstract danger. For the features to be fulfilled it is not necessary to prove that the perpetrator's behaviour caused a risk of property loss on the part of the relevant authority or institution.²⁸ The offence described in art. 297 § 2 is a wilful offence. Wilfulness may occur in the form of the direct intent as well as the conditional intent.²⁹ An important element of the structure of art. 207 is § 3, which constitutes a sort of complement of the two preceding paragraphs. Its role is reduced to presenting the condition which allows to apply the institution of active repentance of the perpetrator. Nevertheless, it should be pointed out right from the start that the impunity clause does not refer to the offence of the perpetrator's falsifying a document on the basis of which the purposes specified in § of this article were accomplished. The provision of this clause does not eliminate the criminal content of falsifying a document nor does it stand for active repentance towards this offence. The perpetrator using a falsified document will be brought to justice.³⁰

3. Object of protection

The regulation of art. 297 of the Criminal Code in § 1 as well as in § 2 refers to the same object subject to protection. However, focusing exclusively on art. 297 of the Criminal Code, and to be more precise on the part criminalizing the offence of economic fraud, it should be pointed out that the object of protection is slightly broader, and principally more detailed than only the proper functioning of economic circulation. The regulation concerning the credit fraud is of a multifaceted nature. Granting protection to the principles of the economic circulation, this provision protects individual interests of economic actors as well as extra-individual economic interests of the society, connected with the proper functioning of economy.³¹

In the Polish legal system the basis for protection is fairness and reliability of financial circulation, in particular in the scope of conduct aiming at granting funds by an authorized institution.³² The object of protection of art. 297 of the Criminal Code is securing the correctness and reliability in the scope of granting and using credits, monetary loans, sureties and other financial instruments intended for a specific economic purpose.³³ The correctness and reliability of economic circulation, and in fact its balance, can be jeopardized by obtaining funds by false pretences. Fraud may lead to granting funds which

²⁶ A. Barczak-Oplustil, G. Bogdan, Z. Cwiąkański, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, pp. 626-627.

²⁷ *Ibidem*, p. 624.

²⁸ *Ibidem*, p. 627.

²⁹ *Ibidem*, p. 628.

³⁰ A. Marek, *op. cit.*, p. 615.

³¹ *Ibidem*, p. 606.

³² Cz. Bylica, *Oszustwo kredytowe na tle obecnego i przyszłego stanu prawnego*. PS 1998, No. 3, p.76 [after:] R. Zawłocki A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, B. Michalski, J. Skorupka, *Komentarz...*, *op. cit.*, p. 1239.

³³ O. Górniok, *Kodeks karny- Komentarz*, Warsaw 2004, p.810.

can be used inconsistently with their intended use and in the manner leading to the lack of possibility of returning them.³⁴

The notion of the object of protection contained in art. 297 of the Criminal Code is also connected with the protection of institutions granting credits and other financial instruments, and to be more precise with the protection of the financial interest of a specific financial institution. The financial interest refers to a broader scope of assets than only the property of a company.

The scope of protection of the provisions regulated in art. 297 is grasped generally as it protects banks, financial institutions conducting similar economic activities on the basis of the act and other institutions administering public funds. In the event when we deal with granting state funds, and to be more precise a credit granted by a bank in which the state is a shareholder, the protection concerns also the correctness of administering the state property.³⁵

The basic principles and rules on which the market economy is based in Poland are also acknowledged as protected goods, as well as – most of all – citizens' trust in the financial institutions protected by art. 297 of the Criminal Code and the whole model of economy.

4. Objective side of the offence of obtaining a credit by false pretences

The objective side of the offence regulated in art. 197 § 1 of the Criminal Code consists in submitting by a perpetrator, acting in order to obtain benefits specified in the provision for himself/herself or another person, of a falsified, altered, untrue or unreliable document or an unreliable statement pertaining to circumstances of essential significance for obtaining the aforementioned financial support, payment instrument or order. This act has a nature of a formal offence. For this offence to be committed the occurrence of any effect is not necessary. Simultaneously, the perpetrator's conduct may consist in acting only, which is clearly indicated by the verb "submits" used in the regulation.³⁶

The form of submitting untrue documents or statements does not matter to the question of penal liability in case of § 1. Therefore, if the perpetrator's action, due to inappropriate form, is legally invalid, the perpetrator is still subject to penal liability.³⁷

Committing an offence of credit fraud is connected most of all with submitting a document exhibiting a defect consisting in forging, altering or certifying untruth. Another form of committing this offence is submitting a written statement in the subject of circumstances crucial for obtaining the financial instrument.³⁸

Furthermore, according to the Polish regulation concerning this issue, credit fraud may also be committed in the situation of submitting an unreliable statement. The term "statement" is to be understood – in compliance with its colloquial meaning – as a declaration of a person who certifies something on his or her own behalf. An unreliable statement is not only a deceitful statement, but also an incomplete or misleading statement.³⁹

Therefore, the activities of the perpetrator consist in submitting of – inter alia – a forged, altered, untrue or unreliable document. A forged document is a document which does not

³⁴ P. Kardas *Oszustwo kredytowe, Rzeczypospolita z dnia 8-9 lipca 1995r.* [after:] J. Karaźniewicz, *op. cit.*, p. 51.

³⁵ J. Karaźniewicz, *op. cit.*, p. 52.

³⁶ *Ibidem*, p. 606.

³⁷ R. Zawłocki A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, B. Michalski, J. Skorupka, *Komentarz...*, pp. 1241-1242.

³⁸ Act dated 19 April 1969 Criminal Code, Official Journal 1969 No. 13 item 94.

³⁹ T. Bojarski, A. Michalska-Warias, J. Piórkowska-Fliger, M. Szwarczyk, *op. cit.*, p. 606.

come from the person on whose behalf it has been drawn up. Forgery is based on keeping up appearances that the document comes from another person.⁴⁰ Forgery of a document is also defined as granting a certain item with the appearances of a document in order to evoke an impression that the contents thereof come from a person authorized to issue it, whereas in fact it is not the case.⁴¹ According to forensic science forgery of a document is nothing else but the preparation, mechanically or chemically, of a new document in the fashion of the authentic one.⁴²

The penal liability of the perpetrator of the offence discussed does not matter, irrespective of the fact whether he/she is the very author of the forgery or if he/she only uses a document forged by another person. The fashion of forging the document and the rank of the forgery also does not matter with reference to the penal liability.⁴³

Committing an offence consists in submitting an unreliable statement in writing which contains untrue information, information omitting the truth or suggesting untruth. A statement submitted in writing is to be understood as statements contained in a letter drawn up by the perpetrator himself/herself or drawn up by another person, but submitted by the perpetrator in the course of the procedure. Statements in the understanding of art. 297 § 1 of the Criminal Code will be letters required by the legal regulations in the procedure leading to obtaining one of the financial institutions specified in the regulations, as well as statements made spontaneously by the perpetrator during the procedure conducted in connection with his/her applying for a credit, a monetary loan, a surety guarantee, a letter of credit. In the understanding of the features of the offence under art. 297 § 1 of the Criminal Code, only statements pertaining to circumstances crucial for obtaining a specific institution are relevant. The decisive criterion in specifying the importance of circumstances could be the purpose of the benefit applied for by the perpetrator. The importance of the circumstances is connected with their significance in the process of deciding on granting one of the forms of financial support specified in art. 297 § 1 of the Criminal Code.⁴⁴

Moving on to discussing the subjective side of § 2 it should be pointed out that it is characterized in a different fashion than in § 1. It is based on the perpetrator's actions consisting in his/her failure to notify the competent authority or institution on the occurrence of circumstances which might influence the suspension or limitation of the amount of a credit, monetary loan, guarantee, letter of credit. The offence under § 2 can be committed only in the form of negligence. The failure to notify consists in the failure to provide information held by the person obliged to provide the information concerning circumstances of crucial importance for the further use of institutions enumerated in § 1. If the manner of providing information is not specified in any particular way, information can be provided in any form. The circumstances which may influence the suspension or limitation of the amount of one of the institutions should be specified in detail in the legal regulations, agreement or decision of a competent authority. The failure to notify signifies

⁴⁰ R. Zawłocki A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, B. Michalski, J. Skorupka, *Komentarz...*, p. 1242.

⁴¹ A. Barczak-Oplustil, G. Bogdan, Z. Ćwiakalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, p. 611.

⁴² Zbigniew Czeczot, Tadeusz Tomaszewski, *Kryminalistyka ogólna*, Toruń 1996, p. 273.

⁴³ R. Zawłocki A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, B. Michalski, J. Skorupka, *Komentarz...*, p. 1243.

⁴⁴ A. Barczak-Oplustil, G. Bogdan, Z. Ćwiakalski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, p. 612.

behaviour consisting in the total negligence in the subject of providing information on the occurrence of a situation which might influence the suspension or limitation of the amount of the financial support granted .⁴⁵

5. Subjective side

The offence of credit fraud, specified in art. 297 § 1 of the Criminal Code according to the Polish regulations, is of a wilful nature. The perpetrator must act in order to obtain a bank credit (targeted action). Therefore, it is impossible to commit this offence with a conditional intent. On the other hand, § 2 of art. 297 of the Criminal Code regulates this problem in a somewhat different way, allowing wilfulness of committing this offence in the form of a direct intent, as well as conditional intent.⁴⁶

The wording “for himself/herself or another party” contained in § 1 means that the provision discussed requires solely a targeted attitude of the perpetrator, without the need to take the described actions in order to obtain a credit for himself/herself.

The aforementioned provision determines the targeted attitude of the perpetrator with the simultaneous lack of requirement of a relation, agreement between the perpetrator and the party for whom the credit has been obtained.

When establishing the intent of the perpetrator of credit fraud who does not plea guilty, we should consider all circumstances on the basis of which it is possible to draw conclusions, without any risk of error, pertaining to the viability of fulfilling the obligations made by the perpetrator towards an employee of the credit institution, and in particular of securing its repayment, resulting from the financial possibilities and scale of encumbrances of the perpetrator, masked with the unreliable statements submitted by him/her .⁴⁷

6. Subject of the offence

Similarly to the discussion of the previously tackled issues, also in case of the subject committing the offence of credit fraud, its duality should be emphasized due to typifying two kinds of punishable acts.

Beginning with the subject committing the offence regulated in § 1, it should be stated that we deal with a common offence, that is an offence which could be committed by anybody. From the point of view of the characteristics of the subject committing credit fraud, it is not important whether the perpetrator commits it in order to obtain benefits for himself/herself, or whether he/she takes actions for the benefit of another party.⁴⁸

This issue has been raised by the Supreme Court, which in one of its rulings stated: “the offence under art. 297 § 1 of the Criminal Code is the subject of responsibility of not only the very person applying for the credit for himself/herself, who submits an untrue document to the bank in order to obtain this credit, but also another party, also a person who under a separate agreement with the bank concludes – as a seller of goods sold in the system of hire purchase – a credit agreement with the purchaser of these goods, if he/she subsequently submits to the bank a document certifying untruth or a similar statement in writing pertaining to the circumstances having crucial significance for obtaining this credit,

⁴⁵ A. Barczak-Oplustil, G. Bogdan, Z. Cwiąkański, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, pp. 626-627.

⁴⁶ A. Barczak-Oplustil, G. Bogdan, Z. Cwiąkański, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, p. 620.

⁴⁷ Ruling of the Court of Appeal in Lublin dated 18 June 2002, II Aka 343/01, LexPolonica No. 360889, *Krakowskie Zeszyty Sądowe* 2003/3 item. 77, *Krakowskie Zeszyty Sądowe* 2004/1 item. 42, *OSA* 2003/2 item. 7 p.. 3, *Prokuratura i Prawo - supplement* 2003/12 item. 22.

⁴⁸ A. Barczak-Oplustil, G. Bogdan, Z. Cwiąkański, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, p. 608.

and therefore a statement without which this credit, according to the relation between the seller and the bank, would not be granted, even if the credit agreement itself was drawn up correctly, and the documents submitted by the goods purchaser, necessary to conclude it, were reliable.”⁴⁹

The manner of determining the subject applying for the credit, using the wording “somebody else” determines the fact that the subject could be a natural person, a legal person and an organizational unit without legal personality. The subject of the offence is not limited by the contents of § 1 to subjects with the status of an enterprise. Therefore, the subject on behalf of which the perpetrator acts submitting a forged, altered or unreliable statement in writing is not required to be the actor in the economic circulation.⁵⁰

A somewhat different nature is assumed by the subject of an offence under § 2; the perpetrator of the offence discussed can be exclusively a strictly determined person encumbered with the obligation to notify the competent entity on the occurrence of a situation which might influence the suspension or limitation of the amount of the credit granted. Therefore, it is an individual offence. The obligation to notify encumbering the perpetrator most frequently results straight from the statutory provision, internal regulations of a specific unit or authority, or it can derive from an agreement or decision of a competent authority. What is important, however, is the fact that the obligation should be of a formal character.⁵¹ Literature also indicates that this obligation should be clearly specified and fully legible to its addressee.⁵²

Most often perpetrators of the offence consisting in the failure to notify shall be employees of financial institutions administering property and employees of institutions of an auxiliary or supervisory nature with reference to economic circulation.⁵³

7. Statutory penalty risk in the Polish penal system

The risk of penalty and punitive measures intended for offences under art. 297 § 1 and § 2 of the Criminal Code is the same. The offences discussed are acts punished with a custodial sentence from 3 months to 5 years.⁵⁴

If the perpetrator acted in order to reach a property benefit or if the perpetrator did not act with this purpose, but he did reach the property benefits, besides the custodial sentence the court can impose a fine in connection with art. 33 § 2 of the Criminal Code. In compliance with the provision of art. 309 of the Criminal Code, the fine adjudicated besides the custodial sentence can be imposed up to the amount equalling 2000 daily rates.

The severity of punishment imposed on a defendant committing credit fraud, in the event when the aggrieved party or another authorized party files a relevant application, may additionally oblige the defendant to rectify the damage caused by his/her offence, fully or partially. The foundation for this penalty is the provision of art. 46 § of the Criminal Code. The fulfilment of the conditions specified in art. 58 § 3 of the Criminal Code gives way to adjudicating a fine or a penalty of restriction of liberty instead of the custodial sentence

⁴⁹ Ruling of the Supreme Court dated 2 December 2003, IV KK 37/03, LexPolonica No. 367891, *Krakowskie Zeszyty Sądowe* 2004/7-8 item. 22, OSN 2003 item. 2603.

⁵⁰ A. Barczak-Oplustil, G. Bogdan, Z. Ćwiąkański, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, pp. 608-609.

⁵¹ A. Barczak-Oplustil, G. Bogdan, Z. Ćwiąkański, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, pp. 624.

⁵² R. Zawłocki A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, B. Michalski, J. Skorupka, *Komentarz...*, p. 1252.

⁵³ *Ibidem*, p. 1252.

⁵⁴ Act dated 6 June 1997 Criminal Code, Official Journal 1997 No. 88 item 553.

specified in art. 297 § 1. If such circumstances occur, a fine in the amount from 10 to 360 daily rates is adjudicated. The provision of art. 309 of the Criminal Code, referring only to adjudicating fines besides a custodial sentence, does not apply here. A fine adjudicated under art. 58 § 3 of the Criminal Code is not a fine adjudicated besides a custodial sentence, but, as it were, instead of this penalty.⁵⁵

It is also permissible to apply a conditional discontinuance of a penal procedure if the conditions specified in art. 66 §1 §3 are fulfilled.

Extraordinary mitigation of penalty in the event of committing credit fraud is possible in the situation where the perpetrator reconciled with the victim and rectified the damage caused by his/her offence or agreed with the aggrieved party on the manner of rectifying it or if he/she tried to rectify the damage or to prevent it in connection with art. 60 § 2 items 1 and 2.⁵⁶

The structure of art. 297 of the Criminal Code contains a separate § 3, which refers to two previous items as it contains an impunity clause towards the acts typified there, specified in the literature as “quasi active repentance”⁵⁷, due to its similarity to such an institution, but referring to stadial forms of an offence, regulated in art. 15 § 1 and art. 17 § 1 of the Criminal Code. The introduction of the possibility of avoiding penal liability by preventing or rectifying the damage, with the simultaneous fulfilment of all the conditions specified in art. 297 § 3 of the Criminal Code, is the manifestation of the growing importance attached by the criminal law to the protection of the interests of an aggrieved party and orienting the goals of combating criminality towards solving social conflicts, and not just applying repressions.⁵⁸ The perpetrator is not subject to penalty if prior to the commencement of the procedure he/she voluntarily prevented using the credit or satisfied the aggrieved party’s claims. For the active repentance to be effective it has to be proven prior to the commencement of the *in rem* procedure.⁵⁹

The essence of prevention comes down to taking actions aiming at the elimination of the effects resulting from the perpetrator’s submission of forged, falsified, untrue documents or unreliable statements in order to obtain a credit. Prevention is possible most of all at the stage preceding the fact of obtaining the credit by the perpetrator or the party the perpetrator was acting for.⁶⁰

The perpetrator who prevented or receded from using the institution of a credit must bear in mind that the matter concerns not just the factual, but also formal and legal conduct, restoring the control over the instrument of the credit, hence when discussing the

⁵⁵ A. Barczak-Oplustil, G. Bogdan, Z. Ćwiąkowski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, p. 622.

⁵⁶ Act dated 6 June 1997 Criminal Code, Official Journal 1997 No. 88 item 553.

⁵⁷ O. Górniok, *Przestępstwa przeciwko obrotowi gospodarczemu w nowym kodeksie karnym [in:] U progu nowych kodyfikacji karnych. Księga pamiątkowa ofiarowana profesorowi Leonowi Tyszkiewiczowi*, ed. O. Górniok, Katowice 1999, p. 32.

⁵⁸ P. Kardas, J. Majewski, *Prawo karne dla ochrony gospodarki*, Rzeczpospolita dated 26 May 1994, *Prawo co dnia*, p. 13; S. Pawela, *Przestępstwo przeciwko obrotowi gospodarczemu oraz przestępstwa o wykroczenia skarbowe*, Warsaw 1998, p. 32.

⁵⁹ T. Bojarski, A. Michalska-Warias, J. Piórkowska-Fliger, M. Szwarczyk, *op. cit.*, p. 609.

⁶⁰ A. Barczak-Oplustil, G. Bogdan, Z. Ćwiąkowski, M. Dąbrowska-Kardas, P. Kardas, J. Majewski, J. Raglewski, M. Rodzynkiewicz, M. Szewczyk, W. Wróbel, A. Zoll, *Komentarz...*, p. 630.

conditions of active repentance the perpetrator must maintain a relevant form and contents of some actions.⁶¹

Finally, it should be emphasized once again that the perpetrator who falsifies or alters a document in order to obtain a credit and next he/she exhibits active repentance specified in art. 297 § 3, the perpetrator is not exempt from his/her liability for the forgery of the document.⁶²

8. Prosecution procedure

In the Polish penal system resulting from the material criminal code, the system of the prosecution procedure is as follows:

- Procedure of prosecution by indictment, i.e. ex officio;
- Procedure of prosecution upon an application (i.e. ex officio, but the prosecution is executed upon an application of the aggrieved party)
- Procedure of prosecution on private accusation.⁶³

The offence of credit fraud described in § 1, as well as the offence of a failure to notify resulting from § 2 art. 297 of Criminal Code, are offences prosecuted ex officio.

⁶¹ R. Zawłocki A. Wąsek, O. Górniok, W. Kozielowicz, E. Pływaczewski, B. Kunicka-Michalska, , B. Michalski, J. Skorupka, *Komentarz...*, p. 1256.

⁶² T. Bojarski, A. Michalska-Warias, J. Piórkowska-Fliger, M. Szwarczyk, *op. cit.*, p. 609.

⁶³ T. Grzegorzczuk, J. Tylman, *Polskie postępowanie karne*, Edition VI amended and completed, Warsaw 2007, pp. 114-116.