

PUNISHMENT OF ATTEMPT IN EU “CRIMINAL” INSTRUMENTS

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ABSTRACT

Taking into account the continuous changes regarding the definition of attempt, a “magic formula” for distinguishing preparatory actions from attempts has not been found yet. Some suggest looking at the matter from objective observer’s standpoint, considering the circumstances the third party must be aware of, as well as the existing causal line. The objective observer fiction is the main point in the observation mode of attempt. This thesis can be applied by analysing two stages to “filter” the actions that represent attempt. In the first stage, it is necessary to decide whether and which prohibited activities may possibly be the result of a criminal offence attainment (in abstracto). In the second stage, it is necessary to ascertain whether these activities really are true, and if they are, whether or not they have reached the beginning of attempt by the CC, taking into account the perpetrator’s plan (in concreto). If a criminal offence cannot be completed, either due to natural or legal circumstances, we are referring to impossible attempt. With impossible attempt, a perpetrator needs to believe that he or she can complete a criminal offence. There are different types of impossibility, like attempt on impossible object, attempt with impossible means and double impossibility. This paper also analyses gross lack of understanding, imaginary offence and supernatural attempt as important institutes for impossible attempt. Punishment of these types of attempts is analysed in European Union instrument in the field of criminal law and related texts.

Keywords: *possible attempt, impossible attempt, EU legislation*

1. INTRODUCTION

When analysing the complexity of attempt and types of attempt, it is necessary to discuss crime policy and threat. The fundamental question is to which degree illegality has to be present in order for something to be qualified as an attempt. Impossible attempt illegality is significantly different from possible attempt illegality, hence there are different definitions of these two types of attempts.¹ It is necessary to see if there is a disturbance of legal order and if it is necessary to find actions which would be encompassed by a definition of attempt. Possible

¹ Bloy, R., *Unrechtsgehalt und Strafbarkeit des grob unverstandigen Versuchs*, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 113, No. 1, 2001, p. 78

attempt is dangerous while impossible attempt is not, and as such, it should not be punished.² Dangerous attempt presents real danger because there is a risk of consequence mentioned in a definition of criminal offence.³ But with impossible attempt there is no such danger.⁴ Impossible attempt with gross lack of understanding presents abstract danger since it does not include a possibility of criminal offence completion, so the action of impossible attempt cannot be perceived as abstract endangering.⁵ Criminal nature of taken action can be determined only if we analyse a definition of criminal offence in Special part of Criminal Code (further: CC). Objective attack of the impossible attempt does not pose an objective threat. Here we are talking about illegality of an attempt, and not attempt of illegality, because illegal achieves significance only when put in correlation to legal provision. Missing causality must be subsumed under legal provision of impossible attempt, and not subjectively by looking only at a perpetrator's aspect of thinking of what is possible. From this aspect of special prevention, that analyses danger of perpetrator as a person, impossible attempt should be punished because the perpetrator who started a criminal offence but failed to complete it, poses a threat and will probably continue with his or her criminal action after his or her failure.⁶ The endangerment of legal goods⁷ is not necessary for the impossible attempt, but it is important to see if there are any acts in furtherance of the crime towards the realization of the elements of the offense and if the means for committing or object were impossible.⁸ False perception can be found in criminal offence situation or due to dangerous way of conducting it. Impossible attempt exists if a person intrudes building, not knowing there are no wanted counterfeit means.⁹ Possibility for punishment exemption exists in Croatian CC for an attempt, but only with gross lack of understanding. That means that perpetrator's perception needs to be completely different from the usual causal chain for causing criminal offence consequence. So, impossible attempt is equal to regular attempt with consequence of mitigation of punishment, but impossible attempt with gross lack of understanding enables a possibility of punishment exemption. This provision in Croatia has a role model in German and Swiss CC. As The Supreme Court of the

² *Ibid.*, p. 80

³ Hillenkamp, T, *Leipziger Strafgesetzbuch Kommentar*, De Gruyter (on-line), 2007, p. 1579

⁴ Mintz, S. J., *Die Entwicklung des sogenannten untauglichen Versuchs im 19. Jahrhundert unter dem besonderen Aspekt der Einordnung als Wahnverbrechen*, 1994, p. 137

⁵ Bloy, *op. cit.* note 1, p. 81

⁶ *Ibid.*, p. 97; Hirsch, H. J., *Untauglicher Versuch und Tatstrafrecht*, Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001., p.723

⁷ Hirsch, *Ibid.*

⁸ Hillenkamp, *op. cit.* note 3, p. 1582

⁹ *Ibid.*

Republic of Croatia states, for determining the impossible attempt, it is enough to establish that with used means of commission towards the existing object in a specific moment and situation, no one, even a skilled perpetrator, could complete a criminal offence.¹⁰ It is incorrect to say that a criminal offence could not be completed under any other circumstances. If different conditions were given, perhaps a criminal offence could be completed. However, in the existing situation, it is not possible.¹¹ Therefore, it is necessary to distinguish possible attempt, impossible attempt and impossible attempt with gross lack of understanding. Due to this explanation, it is necessary to analyse types of attempt in EU documents since all European states recognize attempt as a form of criminal offence or as one of the stages in criminal offence.

2. EU LEGISLATION

European documents state some actions where attempt is punishable. Analysis of complexity of attempt reveals various types of attempt; attempt can be possible or impossible. Possible attempt involves intent, immediate verge of committing offence and incompleteness of criminal offence. Legal consequences for impossible attempt are usually the same as those for possible attempt, if not prescribed differently. There are different Directives and Framework decisions that regulate this matter. This paper uses only one Directive as an example. Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA prescribes common table of offence categories referred to in Article 4 on attempt or preparation which is marked as A. There are many EU legal documents, so, for example, Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA prescribes that attempt to commit the main counterfeiting offences, including the misuse of legal facilities or material and including the counterfeiting of notes and coins not yet issued but designated for circulation, should also be penalised where appropriate. This Directive does not require member states to render punishable attempt to commit an offence relating to an instrument or component for counterfeiting. Intentional attempt is punishable if it consists of immediate verge that includes any fraudulent making or altering of currency, whichever means are employed, the fraudulent uttering of counterfeit currency, the import, export, transport, receiving or obtaining of

¹⁰ Novoselec, P., Bojanić, I., *Opći dio kaznenog prava*, Zagreb, 2013, p. 309

¹¹ Turković, K. (ed.), *Komentar Kaznenog zakona*, Zagreb, 2013, p. 53

counterfeit currency with the aim of uttering the same and with knowledge that it is counterfeit. Member states have a duty to take necessary measures to ensure that such conduct is punishable also in relation to notes and coins which are not yet issued, but are designated for circulation as legal tender. Main question is how to interpret the term of attempt in EU documents. EU consists of member states that include common law and continental law system. The definition in The Rome Statute can be of great help, where the attempt to commit such a crime starts by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions get in the way. The definition of attempt in The Rome Statute has its roots in French and American law. The International Law Commission wondered whether there was a distinction between the definition of an attempt in French and German law and concluded that the difference does not exist and that both definitions under the notion of the attempt implied not necessarily the realization of the elements of definition of criminal offense in Special part of CC.¹²

3. INTERPRETATION OF A TERM *ATTEMPT*

The analysis of legal systems in EU shows case law and continental law influence. According to that assumption, definition of *attempt* needs to be analysed from aspects of both of these legal systems.

3.1. Possible attempt

3.1.1. *Intent*

Some authors¹³ believe that “initial intent” or “intent to try to commit” is sufficient to define attempt, while completion presumes the intention to finish the criminal offence. With this assumption, until the attempt is completed, i.e. while the act of perpetration is being committed, the perpetrator cannot act with the intention of completing the act. This viewpoint gains practical significance in the case of a premature appearance of result, involuntarily of the perpetrator's intentions. Should consequences occur during an action that represents an attempt and perpetrator at that moment does not want it, it will not be attributed to his intent. The perpetrator who decided to counterfeit money, but then inadvertently

¹² Ambos, K., General principles of criminal law in the Rome statute, Criminal Law Forum No. 10, 1999, p. 15

¹³ For critics of those attitudes see Roxin, C., *Strafrecht, Allgemeiner Teil, Band II*, München, 2003, p. 351; Also Novoselec P., *Razgraničenje pripremnih radnji i pokušaja*, Zbornik radova Pravnog fakulteta u Rijeci, Vol. 29, No. 2, 2008, p. 723; Vukušić, I., *Razgraničenje pripremnih radnji i pokušaja u teoriji i sudskoj praksi*, Zagreb, 2014, pp.160-161

completed the criminal offence, would not have caused result with intent, but only with negligence, and would not be responsible for result with intent. Such conclusion is unacceptable¹⁴. The perpetrator wanted to counterfeit money and he succeeded in it. The fact that the action was completed before he wanted it, is just a deviation of realistic causal course of events from the imaginary one and as such has no legal effect.¹⁵ The perpetrator's intent was directed at his aim all the time and that aim was achieved. It is therefore unjustifiable to conceptualise the "intent to try to commit" as different from "the intent to commit the offense" because they are reduced to the same.¹⁶ A distinction between *intent oriented to attempt* and *intention oriented to completion* has drastic consequences regarding voluntary abandonment. When a person wants to commit a counterfeit act in periodic actions (for example, 7 actions in 7 days), and gives up after two actions, despite believing that the action needs to be taken five more times in order to finish the act, he or she cannot be punished for counterfeiting since the intent of completing the action is missing. If taken the opposite way, believing that the perpetrator initially had the intent to counterfeit, a finished crime should not be negated only because the result occurred after two times. Involuntarily premature completion of an offence should be perceived as a consequence of an insignificant diversion of planned causal course of events from the realistic one.¹⁷ In real life partial damage can serve as a reason to suspect the aim of the perpetrator's intent.¹⁸ One of the reasons why the intention is punishable at attempt is that it is a fundamental and grave form of guilt. If the base form of guilt is negligent, then the responsibility for an impending attempt could also be considered.¹⁹ In case law attempt entails a special intent. It is necessary to prove that the perpetrator has a special intent to commit a particular criminal offence. General intention to engage in some criminal offence is insufficient. There are three tests to determine the existence of a special intent. *Probable desistance test* refers to determination of intention from an aspect of facts and circumstances which indicate whether the perpetrator decided to abort the criminal offence. *Equivocality test* constitutes the existence of intent in the act of the perpetrator, it indicates the existence of intent directed to the perpetration of a particular criminal offence. *Indispensable element*

¹⁴ Eser in Schönke, A.; Schröder, H., *Strafgesetzbuch Kommentar*, München, 1997, p. 343

¹⁵ Roxin, *op. cit.* note 13, p. 352; Novoselec, *op. cit.* note 13, p. 723

¹⁶ Novoselec, *Ibid.*

¹⁷ Roxin, *op. cit.* note 13, p. 351; Eser, *op.cit.* note 14, p. 343; Hillenkamp, *op. cit.* note 3, p. 1474

¹⁸ Enker, A.N., *Mens rea and criminal attempt*, American Bar Foundation Research Journal, Vol. 2, No. 4, 1977, p. 865

¹⁹ Klee, K., *Wille und Erfolg in der Versuchslehre*, Breslau, 1898, p. 6

test, however, focuses on the perpetrator's ability to complete the criminal offense concerning the means of perpetration or his or her capability.²⁰

3.1.2. Immediate verge of committing offence

When distinguishing preparatory actions and attempt, there are many different theories. The most appropriate theory in continental law is individual-objective theory. Taking into account different changes of the definition of attempt, “magic formula” for distinction between preparatory actions and attempt has still not been found. Giese suggests observing the situation from an objective observer's viewpoint. However, the question regarding the circumstances which the third party must be aware of, as well as the causal chain that exists, has to be taken into consideration. The objective observer fiction is the leading point in the observation mode of the attempt. Thus, for example, an objective observer can wrongfully conclude that a person has not commenced the action of counterfeiting. Also, due to his imprecision, an objective observer can conclude that the perpetrator will not complete the criminal offence.²¹ *Ex ante* evaluation cannot be started by requiring the impossible and his or her knowledge must include all the circumstances that necessarily prevent the occurrence of the result. There is an objective tendency to the course of action being taken. Since the danger is impossible feature of distinction between preparatory actions and attempts, we come to unlawfulness as the criterion for distinction, which by itself is an objective element. When we have decided to qualify attempt as a threat of a criminal offence (objective view) and not as a threat of a perpetrator (subjective view), then we conclude that the concept of a perpetrator's plan may also be observed through Frank's formula in some cases. Giese states that some actions are inseparable and act in natural sense as well as from the aspect of the perpetrator's plan.²² However, according to individual-objective theory²³, simultaneous assessments of such circumstances, firstly from the perpetrator's and secondly from the objective observer's aspect, cannot be conducted.²⁴ Existence of attempts should be determined by objective criteria, but on a subjective basis. This thesis can be applied by analyzing two stages to “filter” the actions that represent attempt.²⁵ In the first stage, it is necessary to decide

²⁰ Carlan, P.E.; Nored, L.S.; Downey, R.A., *An introduction to Criminal law*, Massachusetts, 2010, p. 134

²¹ Giese, D., *Zur Abgrenzung von Vorbereitung und Versuch*, Frankfurt a.M., 1961, p. 39; Eser, *op. cit.* note 14, p. 343

²² Giese, *Ibid.*, p. 55

²³ *Ibid.*, str. 43

²⁴ *Ibid.*, str. 43

²⁵ Papageorgiou-Gonatas, S., *Wo liegt die Grenze zwischen Vorbereitungshandlungen und Versuch?: Zugleich eine theoretische Auseinandersetzung mit dem Strafgrund des Versuchs*, München, 1988, p. 185

whether and which prohibited activities may possibly precede the realization of a concrete criminal offence (*in abstracto*). In the second stage, it is necessary to ascertain whether these activities really exist, and if the answer is affirmative, have they reached a limit point of attempt definition, defined by the CC taking into account the perpetrator's plan (*in concreto*). Whether the same action will be perceived as preparation or attempt is dependant upon the perpetrator's plan. The perpetrator's individual plan, as a criterion for distinguishing preparatory actions and attempts, is objective in nature because it is viewed and estimated from reasonable and neutral viewpoint. Therefore, the plan to execute the act is a part of objective rather than subjective theory.²⁶ This is so because the perpetrator's real subjective perception can encompass the awareness of the immediate realization of the criminal offence, although he or she objectively may still be in the preparatory action stage. How perpetrator himself or herself perceives this immediacy is irrelevant. Roxin is right to point out that the reason for the punishment of immediate act should not be seen through the prism of immediacy of the endangerment of legal goods, but through the immediacy of the definition of the criminal offence as is pointed in the CC. The main focus should be on the will of a criminal offence and not on legal goods. This is important because there can either be a case of a preparatory action or an attempt even if they are distant from protected legal property. For example, an attempt to counterfeit money, according to Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of euro and other currencies against counterfeiting by criminal law is punishable when a perpetrator commits a counterfeiting act, while the protected legal good - the currency of the member state - is infringed only by putting the counterfeit money into circulation.²⁷ The word "start" implies that the perpetrator has taken action on the object of the action. German verdicts state that there must be a physical connection with the object of the attack.²⁸ Attack criterion cannot serve as a legal standing for criminality of an attempt when a perpetrator needs to take substantial steps or when, after establishing a connection with a criminal offence, there is an intermission in criminal offence completion.²⁹ But the object of an attack is not synonymous with the sphere of the victim. In a legal sense, the sphere of a victim is defined by the criminal offence, while in the laic sense it is defined by the object of action. Common law also recognises the substantial step theory which aims to reduce the rigidity of the unequivocal test. Proximity doctrine, represented in common law, requires space and time proximity as well as possibility

²⁶ *Ibid.*

²⁷ Vukušić, I., *Teorijski aspekt razgraničenja pripremnih radnji i pokušaja*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 19, No. 2, 2012, p. 684

²⁸ Kühl, K., *Strafrecht-Allgemeiner Teil, Band II*, München, 2008, p. 456

²⁹ *Ibid.*, p. 457

of action. Although the preparatory actions are insufficient to establish the probability of an attempt, no evidence of the last proximate act is required.³⁰ The two most important proximity tests are physical proximity and dangerous proximity tests.³¹ The former aims to determine which actions the perpetrator still must do in order to complete the criminal offense while the later analyses whether or not the accused seriously approached the criminal offence completion. According to these theories there has to be a high risk of offence completion. The emphasis is more on the perpetrator's behaviour and not on the perpetrator's aim. It is necessary to examine whether an act from a physical and probable effect leads to the commission of a criminal offence. There must be an apparent, not actual possibility. Duff often criticizes the forgetfulness of a timeframe that limits the existence of proximity.³²

3.2. Impossible attempt

Impossible attempt exists if a criminal offence can not be completed, either due to physical or legal circumstances.³³ If a perpetrator knows that under the existing circumstances a criminal offence can not be completed, than he or she has no will focused on completion.³⁴ With impossible attempt, the perpetrator needs to believe that he or she can complete the criminal offence.³⁵ A case in which a modification of perpetrator's act is of such nature that leaves no possibility for criminal offence completion because of the nature of object, is referred to as *attempt on impossible object*. Such cases are often in jurisprudence.³⁶ This is a case when a perpetrator tries to provide transport for counterfeit money, with intention, not knowing that the potential driver will not do any action with the car. In this case, nature of object for transport is impossible. Sometimes there is no possibility of completing a criminal offence due to the nature of means that are used for transport and completion of criminal offence. This situation is called *attempt with impossible means*. Attempt with impossible means on impossible object can also exist, in which case an attempt is impossible in double way. In this case perpetrator

³⁰ Lehmann, B., *Die Bestrafung des Versuchs nach deutschem und amerikanischem Recht*, Bonn, 1962, p. 80-81

³¹ Carlan; Nored; Downey, *op. cit.* note 20, p. 134

³² Duff, R.A., *Criminal Attempts*, Oxford, 1996., p. 46 - 47

³³ Sometimes authors use term putative crime in case of impossible attempt. Toma, M. E., *Killing a corpse - a putative crime*, *Logos Universality Mentality Education Novelty - Section: Law*, Vol. 6, No.1, 2018, 31-36

³⁴ Hillenkamp, *op.cit.* note 3, p. 1573

³⁵ *Ibid.*

³⁶ Roxin, *op. cit.* note 13, p. 446

is in mistake (error) and wrongfully³⁷ tries to make a profit with false blank checks, not knowing that the monetary value is not in force in that country. Action at impossible attempt needs to represent immediate step towards the realization of the elements of the offence.³⁸ This type of attempt is punishable because basic ground for punishing impossible attempt is the image of a perpetrator, and the perpetrator's act needs to represent immediate step towards completion even though there is no possibility of completing the criminal offence.³⁹ The most severe case of attempt is attempt of impossible subject. In this case we usually speak about imaginary offence that is not punishable. This involves a case when a person, due to false interpretation of legal provision, thinks that he or she is committing something illegal, and considers himself or herself a perpetrator. This is a case of reversal subsumption mistake that is always unpunishable. This is a case when the accused thinks that he or she commits perjury. Here we are speaking about imaginary offence because there is no legal obligation for a person to tell the truth in court. It is different with a witness who is obligated to tell the truth in front of the court. On the other side, impossible attempt exists also when impossible subject is a product of impossible object. If the intention of a perpetrator encompasses impossible object then we are talking about attempt, and not about imaginary offence. If a person provides immediate verge of committing counterfeiting offences, wrongfully thinking that other accomplices will make a counterfeit action, he or she commits an attempt and not imaginary offence if he knows this action is punishable. Punishable impossible attempt exists because all elements of definition of some criminal offence in Special Part of CC have equal value. The most important thing is to establish required quality of a perpetrator prescribed in a definition of a criminal offence (clerk, doctor); this quality of perpetrator can be a result of existing circumstances (obligation to prevent result - garant obligation). If a person is garant toward legal provisions, then he or she is obliged to eliminate and prevent danger in the moment when this danger occurs and becomes actual. If a person wrongfully thinks that he or she put to risk the integrity of the financial markets because he or she did not take action of "rescue" even though he or she was aware of his or her obligation, then that person is responsible for impossible attempt of result that occurred. Stratenwerth correctly claims that the attempt is punishable only if it is illegal, which means that the person plans to breach some demand or prohibition. It is important to note that the action of attempt due to circumstances actually exists.⁴⁰

³⁷ *Ibid.*

³⁸ Hillenkamp, *op.cit.* note 3, p. 1578

³⁹ Roxin, *op. cit.* note 13, p. 447

⁴⁰ *Ibid.*, p. 449

3.2.1. *Attempt with gross lack of understanding*

Attempt with gross lack of understanding refers only to an attempt that is from the beginning completely safe. There are difficulties when distinguishing between dangerous and non-dangerous attempts. Safety of attempt must be obvious to everybody.⁴¹ This is a case when someone tries to fraud a cashier with child toy money. It is not enough that the third person considers situation circumstances and facts as impossible, but it is also necessary to analyse the perception of a perpetrator about possibility or impossibility of a situation. Also, it is necessary to see if the perpetrator acted sloppy/messy without gross lack of understanding or reckless with gross lack of understanding.⁴² CC from 1962, in Germany, defined impossible attempt with gross lack of understanding as imagination of perpetrator that deviates from generally known causal chain. This is an action of attempt that no person takes seriously because the perpetrator fails to recognize that the attempt could not possibly lead to completion due to the nature of the object on which, or the means with which it is to be committed.⁴³ General meaning of causal relationship is interpreted through every person with average experience and knowledge. Safety of attempt must be known and visible as „special foolishness“. This mistake should be described as nomological (error about causal chain) and ontological (error about physical status). It is hard to conclude whether gross lack of understanding exists because of the attitude of many others. It is possible that some conduct referred to as impossible attempt is considered possible by a large circle of people.⁴⁴ As Jakobs states, if some opinion about the appropriateness of an action to cause consequence is accepted by many people, it does not mean that the action is possible. Subjective element of this type of attempt punishes volition and false perception, and certain safe behavior.⁴⁵ If we are speaking about the perception of a way to commit a criminal offence, we need to analyse physical causal chain, because in supernatural attempt, perpetrator believes in his „supernatural“ power. It is crucial to determine whether a perpetrator in his perception connects his behavior to circumstances while taking action, does he or she it match them with reality. How could such a perpetrator be justly held responsible for this consequence? It is necessary to combine rules of experience with normative elements of criminal offence definition, which means that it is important to analyse both subjective and objective elements of impossible attempt. Subjective element of impossible attempt with gross lack of understanding is related only to a

⁴¹ *Ibid.*, p. 452

⁴² Brockhaus, M., *Die strafrechtliche Dogmatik von Vorbereitung, Versuch und Rücktritt im europäischen Vergleich : unter Einbeziehung der aktuellen Entwicklungen zur "Europäisierung" des Strafrechts*, Hamburg, 2006, p. 182

⁴³ Roxin, *op. cit.* note 13, p.452

⁴⁴ *Ibid.* p. 453

⁴⁵ Bloy, *op. cit.* note 1, p. 86

perpetrator's perception that his or her action is possible. These actions are not reasonable from the aspect of scientific and rational criteria. Quantity and insufficient reach of means for committing are criteria for relative or absolute attempt.⁴⁶ Real impossible means of committing implies quality that presents probability of causing consequence (for example as low degree of means for committing).⁴⁷ Taking into consideration the result of an impossible attempt, it is important to analyse gross lack of understanding.⁴⁸ Such danger can be considered only by ex ante approach. It is irrelevant what occurred later.⁴⁹ Attack on a money printing office is not necessarily an impossible attempt with gross lack of understanding if papers were, as planned, transferred to another place a day before. Perpetrator's action needs to be put into context of a real situation. With impossible attempt there is no threat or assault on legal good that is protected by constitution. Possible attempt defects legal good of criminal law, while impossible attempt defects legal order. If a perpetrator, according to his or her opinion, uses "dangerous" means of committing, he acts with gross lack of understanding.⁵⁰ From the objective observer's viewpoint, completion of a criminal offence was not possible.⁵¹ Some authors analyse danger from the victim's viewpoint, but sometimes ex ante view of the victim is not important because the victim can or cannot expect attack.⁵² That means that we need to compare the perpetrator's idea of how he considers to complete the criminal offence and assessment of a third objective person – observer.⁵³

3.3. Imaginary offence

If there is a false interpretation of legal provisions, than we are speaking about imaginary offence.⁵⁴ There is no gross lack of understanding in a case in which a person transports blank paper only because paper can be by its shape mistaken for counterfeiting money. A distinction between impossible attempt and imaginary offence depends on a type of mistake. If a person takes action and makes a mistake about causal chain, thinking that he or she is completing a criminal of-

⁴⁶ *Ibid.*, p.103

⁴⁷ Mintz, *op. cit.* note 4, p. 106

⁴⁸ Timpe, G., *Untauglicher Versuch und Wahndelikt*, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 125, No. 4, 2014, p. 755

⁴⁹ *Ibid.*, p. 758; Brockhaus, *op. cit.* note 41, p. 179

⁵⁰ Timpe, *op. cit.* note 47, p. 775

⁵¹ Hillenkamp, *op.cit.* note 3, p. 1573

⁵² *Ibid.*, p. 1577

⁵³ Zaczyk in Kindhäuser, U.; Neumann, U., Paeffgen, H. U., *Strafgesetzbuch*, Nomos, 2005, p. 773

⁵⁴ Brockhaus, *op. cit.* note 41, p. 484; Gillies, P., *The law of criminal conspiracy*, Australia, 1990, p. 152. For imaginary offence is also used term putative offence

fence, then we are speaking about impossible attempt.⁵⁵ If a person is aware of all circumstances, wrongfully thinking that by action he is doing something that is forbidden, then that person is committing imaginary offence. If a person is picturing circumstances that are defined as criminal in CC criminal offence definition, then we are speaking about impossible attempt and not imaginary offence. We are speaking about imaginary offence if a person acts by mistake. This happens in a case when person pays with legal paper bills thinking they are false.⁵⁶ If a criminal offence does not exist in legal system, then such action is treated as a imaginary offence. Perpetrator's mistake about elements of penal norms (definition of criminal offence in Special Part of CC) presents imaginary offence and imaginary offence could not be considered as mistake about possibility of object or means of committing.⁵⁷ It is possible to pay car with real paper money today with intention to pay tax after one month with false paper money. This is an unnecessary action if paper money is real and attempt of counterfeit has not started yet.⁵⁸ This is imaginary offence. Reverse mistake on elements of penal norm is impossible attempt and reverse mistake of law is imaginary offence⁵⁹.

3.4. Supernatural attempt

With gross lack of understanding, perpetrator is unfamiliar with natural causal law of some action⁶⁰, while with supernatural attempt perpetrator uses methods to commit criminal offenses that are unreal not analyzing them through natural causal law.⁶¹ For example, using magic to get real paper bills. Impossible attempt is unpunishable because of safety of it. With impossible means for committing criminal offence there is a possibility of causing consequence. With supernatural attempt, there is no such possibility.⁶²

4. CONCLUSION

The EU documents analysis shows that attempt is prescribed as punishable in many cases. For the purpose of example of criminal actions, paper analyzes Direc-

⁵⁵ Roxin, *op. cit.* note 13, p. 458

⁵⁶ *Ibid.*, p. 459.

⁵⁷ Mintz, *op. cit.* note 4, p. 146

⁵⁸ Roxin, *op. cit.* note 13, p. 462

⁵⁹ Hillenkamp, *op. cit.* note 3, p. 1573

⁶⁰ Brockhaus, *op. cit.* note 41, p. 484; Bochlanger, M., *Principles of German Criminal law*, Oregon, 2009, p. 145-146

⁶¹ Roxin, *op. cit.* note 13, p. 455

⁶² *Ibid.*

tive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of euro and other currencies against forgery by criminal law. All those actions are listed in this paper so it is not necessary to analyse them again. It is important to note that EU documents prescribe attempt as intentional criminal offence and not negligence criminal offence.

When considering which theory should be applied to establish immediacy of attempt act, it is shown that proximity test or individual objective theory, certainly with the help of perpetrator's plan, answer the question where preparatory action ends and where attempt begins. Another attempt element is that criminal offence is not finished yet. In EU documents attempt is prescribed as punishable, but without specific reference to which type of attempt. It can be concluded that it encompasses all types of attempt that national legislation recognizes. It is important to state that impossible attempt includes a possibility to cause consequence in other conditions, while imaginary offence and supernatural attempt elude such possibility. EU has restricted jurisdiction in criminal matters, therefore each member state will judge according to its national legislation. In order to unify the complexity of attempt, this paper also examines provision of attempt prescribed in The Rome Statute and its common elements with definition of attempt in case law and in continental law. It can not be concluded that EU has unique definition of attempt on EU level and the question is whether that really is necessary since The Rome Statute aims to unite all definitions of attempt in the world. As for the Europe is concerned, there are no major differences in definition. It can be stated that attempted criminal offences in EU documents should be interpreted and applied similarly in each state.

REFERENCES

BOOKS AND ARTICLES

1. Ambos, K., *General principles of criminal law in the Rome statute*, Criminal Law Forum Vol. 10, 1999
2. Bloy, R., *Unrechtsgehalt und Strafbarkeit des grob unverstandigen Versuchs*, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 113, Issue 1, 2001, pp. 76 – 111
3. Bochlander, M., *Principles of German Criminal law*, Oregon, 2009
4. Brockhaus, M., *Die strafrechtliche Dogmatik von Vorbereitung, Versuch und Rücktritt im europäischen Vergleich : unter Einbeziehung der aktuellen Entwicklungen zur "Europäisierung" des Strafrechts*, Hamburg, 2006
5. Carlan, P.E.; Nored, L.S., Downey, R.A., *An introduction to Criminal law*, Massachusetts, 2010
6. Duff, R.A., *Criminal Attempts*, Oxford, 1996

7. Enker, A.N., *Mens rea and criminal attempt*, American Bar Foundation Research Journal, Vol. 2, Issue 4, 1977, pp. 845 – 879
8. Giese, D., *Zur Abgrenzung von Vorbereitung und Versuch*, Frankfurt a.M., 1961
9. Gillies, P., *The law of criminal conspiracy*, Australia, 1990
10. Hillenkamp, T., *Leipziger Strafgesetzbuch Kommentar*, De Gruyter (on-line), 2007
11. Hirsch, H. J., *Untauglicher Versuch und Tatstrafrecht*, Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001, pp. 711 – 729
12. Kindhäuser, U.; Neumann, U., Paeffgen, H. U., *Strafgesetzbuch*, Nomos, 2005
13. Klee, K., *Wille und Erfolg in der Versuchslehre*, Breslau, 1898
14. Kühn, K., *Strafrecht-Allgemeiner Teil, Band II*, München, 2008
15. Lehmann, B., *Die Bestrafung des Versuchs nach deutschem und amerikanischem Recht*, Bonn, 1962
16. Mintz, S. J., *Die Entwicklung des sogenannten untauglichen Versuchs im 19. Jahrhundert unter dem besonderen Aspekt der Einordnung als Wahnverbrechen*, 1994
17. Novoselec, P., Bojanić, I., *Opći dio kaznenog prava*, Zagreb, 2013
18. Novoselec P., *Razgraničenje pripremnih radnji i pokušaja*, Zbornik radova Pravnog fakulteta u Rijeci, Vol. 29, Issue 2, 2008, pp. 721 – 759
19. Papageorgiou-Gonatas, S., *Wo liegt die Grenze zwischen Vorbereitungshandlungen und Versuch?: Zugleich eine theoretische Auseinandersetzung mit dem Strafgrund des Versuchs*, München, 1988
20. Roxin, C., *Strafrecht, Allgemeiner Teil, Band II*, München, 2003
21. Schönke, A.; Schröder, H., *Strafgesetzbuch Kommentar*, München, 1997
22. Timpe, G., *Untauglicher Versuch und Wahndelikt*, Zeitschrift für die gesamte Strafrechtswissenschaft, Vol. 125, Issue 4, 2014, pp. 755 -787
23. Toma, M. E., *Killing a corpse - a putative crime*, Logos Universality Mentality Education Novelty - Section: Law, Vol. 6, No.1, 2018, 31-36
24. Turković, K. (ed.), *Komentar Kaznenog zakona*, Zagreb, 2013
25. Vukušić, I., *Razgraničenje pripremnih radnji i pokušaja u teoriji i sudskoj praksi*, Zagreb, 2014 (Doctoral Thesis)
26. Vukušić I., *Teorijski aspekt razgraničenja pripremnih radnji i pokušaja*, Hrvatski ljetopis za kazneno pravo i praksu, Vol. 19, Issue 2, 2012, pp. 669 – 688

EU LAW

1. Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS)[2009] OJ L 93
2. Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law,[2014] OJ L 151/1

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. Criminal Code, Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18