# Negative error in law concerning non-claimed and claimed non-penal elements of the body of a crime

## (national and European law aspects)

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### *Abstract*

The paper explains first of all the keywords and then analyzes – selectively – the main problems within the general and special parts of the Czech Criminal Code (according to the existing law and according to the designed law). The text deals with concrete implications of differentiation between a negative error in law concerning normative and descriptive elements of the body of a crime, or the non-claimed non-penal element and the claimed non-penal element, for criminal responsibility. It includes some recommendations for solving this problem giving some comparisons with foreign countries and a view from the European law perspective.



### *Key words*

Error in law, error in criminal law (error of the perpetrator of a crime), error in fact, error of law, positive and negative error, normative element of the body of a crime and descriptive element of the body of a crime and error about them, non-claimed non-penal element and claimed non-penal element and error about them, European criminal law, penal law, European penal law.


### *I. Introduction*

The issue of an error of the perpetrator of a crime, still not sufficiently dealt with in theory, has various "treacherous points" including the problem mentioned above in the title of this paper – negative error in law about normative and descriptive elements of the body of a crime, or as analyzed hereinafter – negative error in law concerning both *non-claimed* and *claimed* non-penal elements. It is an issue on the "boundary" of error in *fact* and error in *law*. This issue fundamentally relates to criminal liability of the perpetrator not only "according to the existing law" (the brackets are used here because the existing regulation of criminal law of adults does not expressly mention their error)[1] but also according to the designed law. It is topical and sensitive especially in connection with certain kinds of crime, i.e. with overlaps to civil, commercial, financial, tax and other areas of law. Consequently, an interpretation and application of the bodies of related crimes cannot do "without help" of these non-penal legal branches and their basic formal sources. This fact is linked with the question of knowledge, or ignorance, of the content of these sources of law from the part of the perpetrator of the above mentioned crimes, i.e. especially pursuant to Chapter II and IX of the special part of the Criminal Code.[2] It is also important for prosecution authorities to handle the above mentioned non-penal sources of law and to work properly with them. It is also connected with knowledge, or ignorance, of sources of European law.

## *II. The basic concepts*

### *Negative error in law concerning the normative element of the body of a crime*

Referring to R 10/1977 and R 28/2002 and File 11 Tdo 732/2005 the *normative* element of the body of a crime is an element expressed by a *legal* concept, relationship or institute included in a *non-penal* legal regulation that is *not claimed*[3] by the *Criminal Code* in its provisions by the so-called "reference" or "generally". The text of the Criminal Code only takes over a concept from the outside, or establishes unlawfulness of an act as its element derived from other non-penal regulations without claiming them in the described manner; for example in Section 213 "legal duty to maintain… the other person" in the sense of the Family Act, in Section 185 "getting a fire arm… ammunition without license"[4] in the sense of the Act on Arms and Ammunition, in Section 247 "another's thing" in the sense of the Civil Code, in Section 255 "duty imposed by law" or in Section 276 "superior", "higher" in the spirit of Zákl-1, etc.[5] Negative error in law concerning a "*non-penal* normative *non-claimed* element" is then considered in the same manner as error in *fact*. However, if the "*non-penal* normative element" is *claimed*, i.e. included in a non-penal legal regulation which is *claimed* by the Criminal Code by "reference" or "generally", e.g. the element of "prohibition established by the Act on Foreign Currencies" in the sense of Section 146, or "dangerous waste" mentioned in Section 181e, Sub-Section 1, in the sense of the Act on Waste, "insolvency proceedings" in the sense of the Insolvency Act in Section 126, Section 89, Sub-Section 20 (as amended by Act No 296/2007 Coll.), or "regulations or rules of (guard) duty" in Section 285, etc., then an error about them is considered as error in *law*.[6]

### *Negative error in law concerning the descriptive element of the body of a crime*[7]

The descriptive element of the body of a crime is then an element with which the *Criminal* Code itself, or a *non-penal* legal regulation claimed by the Criminal Code by the above mentioned "reference" or "generally", defines, i.e. describes a certain element of the body of a crime; e.g. "bribe" in Section 162a, Sub-Section 1, "grievous bodily harm" in Section 89, Sub-Section 7, and in Section 224, "public servant" in Section 89, Sub-Section 9, Section 162a, Sub-Section 2, and Section 156, "child" in Section 216b or "rules of business" in Section 127 established in the respective commercial legal regulation claimed generally, etc. Negative error concerning these elements is error in *law*. This shows that even here we may differentiate "*penal* descriptive" and "*non-penal* descriptive" elements; then within the framework of the *non-penal* descriptive elements we may distinguish the *claimed* ones and the *non-claimed* ones, i.e. included in regulations not claimed by the Criminal Code, e.g. the "accounting book" mentioned in Section 125, which is also important to take into consideration when negative errors in law of the perpetrator about them are judged since this last case is considered to be error in *fact*.[8]

## *III. The basic problems from the viewpoint of the general and special parts of the Criminal Code according to the existing law*

### *III. 1. Judging a negative error in law about a non-claimed non-penal element*

The mode of judging a negative error in *fact* applies to negative errors in law about non-penal rules including elements of the bodies of unlawful acts which are *not claimed* by the Criminal Code despite the fact that the Code takes over legal concepts and institutes from them; e.g. the perpetrator does not know that a thing which he takes from someone is de iure, pursuant to the Civil Code, "someone else's thing", R 38/1961. Such a negative *subsumptive* error in law[9] is then judged in the same manner as a negative error in fact, i.e. according to the principle of *ignorantia facti non nocet*. In other words, such cases of error in law are considered according to the principles of negative error in fact as an error – in the current terminology of the theoretical literature and the case law – about the "normative element" of the body of a crime; comp. the above mentioned R 10/1977 and R 28/2002.

### *III. 2. Judging a negative error in law about a penal and a claimed non-penal element*

According to the court practice and the case law which distinguish an error in penal and non-penal rules[10] (here in the sense of legal regulations), an error about the content of *penal* rules included in the *Criminal Code*, or in other laws (i.e. in its direct or indirect amendments), does not excuse the perpetrator – this is based on the principle of *ignorantia iuris nocet*. The same applies to the content of the rules that we find in primary and secondary *statutory instruments* to the *Criminal Code*; comp. for example the Act No 167/1998 Coll. or the government decree No 114/1999 Coll. The above mentioned legal regulations are rules which are claimed by the Criminal Code in the common provision of Section 195, or whose adoption is presupposed by it, so as such they are actually a regulation that falls within the ambit of the following group, too.

The same approach is in the case of an error about *non-penal* rules *claimed* by the Criminal Code with its *referring* or *general* provisions; see for example the content of copyright law sources, i.e. the Copyright Act in connection with Section 152; R 9/1997-II, or claiming commercial law provisions in Section 127 (generally) or the Foreign Currency Act in Section 146 (by reference) or the above mentioned Act No 167/1998 Coll. and the government ordinance No 114/1999 Coll.

### *III. 3. Implications of different consideration of negative errors in the sense of III. 1., 2. for criminal liability of the perpetrator*

In both cases these are negative errors in law considered each time in a different manner, which has fundamental implications for criminal liability of the perpetrator, the "neuralgic" point being the "*non-penal* element" and the manner in which the Criminal Code approaches it. A negative error in law about the non-penal element of the body of a crime included in a non-penal regulation not claimed by the Criminal Code ("*non-claimed non-penal* element") excludes intention and intentional negligence, including criminal liability if it is preconditioned by these forms of fault. On the other hand, a negative error in law about the penal and non-penal elements of the body of a crime, this time included in a non-penal regulation claimed by the Criminal Code ("*non-penal claimed* element"), is bad for the perpetrator as it does not excuse him. Therefore confusion of one error with the other is not desirable. In the case of confusion of a negative error in law about the non-penal non-claimed element with a negative error in law about the penal, or claimed non-penal - which is more likely - elements leads to an incorrect conclusion about the criminal liability of the perpetrator if he is held liable exclusively for an intentional crime (e.g. pursuant to Section 185, Sub-Section 1)[11], or if an act is criminal only because of intentional negligence (e.g. pursuant to Section 255a). If it were an error of the opposite nature, i.e. confusion of a negative legal error about the penal or non-penal claimed element with a negative error about the non-penal non-claimed element, it would lead to the judgment of impunity or a more lenient sentence for the perpetrator although he should be found guilty of the respective criminal act.[12]

### *III. 4. Criteria for distinguishing non-claimed and claimed non-penal elements and their legislative expression*

If confusion of an error about the *non-penal* <u>*non-claimed*</u> element with an error about the *non-penal* <u>*claimed*</u> element is not desirable – in certain cases there are harsh consequences for the perpetrator – the criminal legislation should consistently and clearly distinguish between these two kinds of elements in the wording of the Criminal Code. Without such a guideline the above mentioned difficulties in the criminal court practice will probably continue. It follows from the described particular cases (comp. footnotes 11 and 12), even if they are not a representative pattern, that there is a tendency rather to confuse the non-penal non-claimed elements (e.g. "customs duty", "tax", etc.) with the non-penal claimed elements and, consequently, to confuse the negative error in fact with the negative error in law. It takes place probably due to the fact that these non-penal legal concepts are, sort of, automatically but incorrectly, considered as "hidden" claiming of a non-penal legal provision by the Criminal Code[13]. This may also be due to the difficult differentiation of normative and descriptive elements as it is stated in the foreign literature mentioned above[14] if we took non-penal non-claimed elements as "normative" ones and non-penal claimed elements as "descriptive" ones. There is a cardinal question then: how can one reliably know that the Criminal Code really claims another non-penal legal regulation and that it is then a negative error in law and not an error considered as an error in fact?[15]

## *IV. The basic problems from the viewpoint of general and special parts of the Criminal Code according to the designed law*

The same questions are examined in this part as in Part III taking into consideration the new positive regulation of the perpetrator's error in law[16]. A negative error in law about the *non-claimed non-penal* element will be considered in the same manner, i.e. as a negative error in fact, even after the adoption of the new Criminal Code[17]. No other approach may be deduced from the provision of Section 18 of the draft mentioned above or from the explanatory note to it. As for the negative error in law about the *claimed non-penal* element, there is a change which follows Section 19 of the draft. After all, this is substantiated by the wording of the explanatory note to the provision: "The proposed regulation of error concerns illegality as an element of a crime in the sense of Section 13, including illegality resulting from the rules <u>*claimed*</u> by the *Criminal Code* as *non-penal* ones. The *description itself of elements of crimes in the Criminal Code* will apply the principle of "ignorance of the Criminal Code is no excuse. … As for *non-penal* legal regulations and legal rules contained in them, whose application the *Criminal Code* <u>*would not claimed*</u> … the draft Criminal Code preserves the existing concept, i.e. considering these cases as negative errors in *fact* (*italics by V.K.*)[18] The original wording of the explanatory note, i.e. before the co-

mmentary procedure, related an excusable error in law also to the content of the Criminal Code itself, i.e. to punishability of a crime. Its new wording, i.e. after the commentary procedure, preserves validity of the existing principle *ignorantia iuris nocet* regardless of the nature of error in law (excusable – non-excusable), in relation to the content of the Criminal Code itself. Resorting to an excusable error is only possible in the case of ignorance of the content of non-penal rules claimed by the Criminal Code (by reference or generally). Here we are getting close to the German and Austrian approaches, if only because those legal regulations of error in law were a certain model for Czech draftsmen[19]. Nevertheless, despite this otherwise positive movement forward (thanks to the adoption of the construction of excusable – non-excusable errors), there may still be problems mentioned above "according to the existing law", i.e. problems connected with different consequences of negative legal errors about both non-claimed and claimed non-penal elements, and also risks of their confusion and difficulties in seeking criteria for expressing clearly in the legal wording this or that type of element of the body of a crime.

## *V. Negative error in criminal law concerning non-claimed and claimed non-penal elements from the viewpoint of the European criminal law[20]*

From the viewpoint of *criminal law - European* (hereinafter also "CLE") a negative error in law about the "*non-claimed and claimed* non-penal elements" also includes an error about legal concepts and institutes …contained especially in *secondary* sources of European law - both "communitary" and "EU" law:

*1. EC law (1st pillar of TEC)*: The given issue is connected with indirect influence[21] of European law on the Czech criminal law in the context of communitarization of European law and its manifestation in national criminal laws[22]. The indirect influence of European law connects the cited source with the existence of "…those bodies of crimes which have general or referential dispositions."[23], i.e. with the provisions of the Criminal Code containing "non-penal elements *claimed*" generally or by reference. "The mentioned bodies of crimes …may refer to non-penal rules …, i.e. to *implemented* legal provisions …or to *directly applicable* rules of European law if they take precedence over the national legal regulation…"[24] For example, the body of the crime of disposal of waste (Section 181e, Sub-Section 2), which is to be claimed generally[25], claims not only the respective national law on waste but also the *regulation* of the European Council No 259/93 on supervision and control of transportation of waste within the EC. A negative error in law about the above mentioned law will then be considered according to *ignorantia iuris nocet*.[26] On the other hand, the error about the "*non-claimed* non-penal element" would fall within the ambit of the principle of *ignorantia facti non nocet*; e.g. the body of the crime of "organizing and enabling illegal crossing of the state border" (Section 171a) implemented the *directive* of the EC Council No 20002/90/ES which defines assisting in unauthorized entering, crossing and residing. Ignorance of this directive should not then be considered as a negative error in fact, which would mean the perpetrator's impunity under the condition of exclusively intentional punishability of the given act. From the viewpoint of the "*non-claimed* non-penal element" it should be irrelevant if concepts and institutes from a non-penal regulation are only "borrowed" through it by the Criminal Code or if they are – as obligatory – taken over, i.e. due to the obligatory implementation of the European law. Anyway, it is a transfer from another non-penal legal regulation into the Criminal Code which does not claim that legal regulation provided of course that the mentioned regulation is a real legal act of both *non-penal* and *substantive* nature. As a "directive", i.e. a legal act of the 1st pillar – the communitary one – I think that it has that nature. However, it should be objected that Section 171a is not a classic provision of the Criminal Code as it only "borrows" a certain legal concept or institute from a non-penal legal regulation without claiming it. On the contrary, being an implementation provision[27] it includes the above mentioned directive so that its purpose would be achieved in the national law. It does so with the help of elements (concepts) that are established in Section 171 and designated as *criminal* elements. Therefore a negative error about them should be considered according to the principle of *ignorantia iuris nocet*; see hereinafter the identical manner of considering a negative error in law about *criminal* elements of the bodies of crimes implementing framework decisions of EU law. So the question remains open to a certain extent even if I hold the view that, because of the comparable nature and purpose of communitary "directives" and EU "framework decisions", consideration of negative errors in law about them should be subject to a single regime if they have been implemented in the national criminal law – i.e. to the principle of *ignorantia iuris nocet*.

*2. EU law (3rd pillar of TEU):* In this context the analyzed problem is related to indirect impact of the European law which depends on *Euro-conforming* interpretation of the national criminal law,[28] i.e. such an interpretation that takes into consideration not-yet-implemented *framework decisions* so that the fulfillment of their purpose in the national law of a EU member is ensured already in this stage. From the standpoint of the "*claimed* and *non-claimed* non-penal elements" the situation is rather simple but at the same time paradoxically connected with various possible compli-

cations. The point is that the analyzed problem requires an overlapping of the Criminal Code and a legal regulation, i.e. also the European law, which is of *non-penal* nature whereas the above mentioned framework decisions are undoubtedly of *penal* nature. However, it should be noted that regarding Footnote 8 framework decisions of criminal *procedural* nature are also considered to be non-penal ones. Therefore, regarding the nature of the given issue, the content of these framework decisions – of criminal *substantive* nature, even if not yet implemented, will be the *penal* one, or elements contained in them will be of this penal nature. A negative error about them should therefore fall within the ambit of the principle of *ignorantia iuris nocet* in contrast to an error concerning framework decisions of the above mentioned procedural nature. Framework decisions already implemented do not present any problems in that respect, either, as the mentioned error in law is again considered as an error about the *penal* element of the body of a crime within the national law. On the other hand, this simplicity paradoxically means that there are rather great requirements on perpetrators of crimes, i.e. on their subjective features, which is due to the indirect impact of the EU secondary law. This applies despite the fact that "according to the existing law" the Czech law does not require the relationship of fault and punishability itself of an act because not only the Czech one but also the above mentioned national legal regulations or theoretical approaches to negative errors in law in relation to *punishability* of an act stick to the unrestricted principle of *ignorantia iuris nocet*. This complication and the related increased demands on work with sources of national criminal law cannot be avoided of course by the prosecuting and adjudicating bodies.

Due to the abolition of the three-pillar structure of the EU connected originally with the *Treaty establishing a Constitution for Europe* (2004)[29], now with the *Reform Treaty (2007)*[30], the existing intensity of the process of communitarization of the III. pillar of TEU will probably increase. More importance is then attributed to the approaches mentioned above in connection with the communitary law rather than with the EU aspects, without the content being considerably changed. But it does not mean that the indirect impact of the existing secondary EU law related to framework decisions would disappear completely. "Regulations" and "directives" mentioned by the Reform Treaty, i.e. in the sense of Article 249 of TEC, are not changed in the content or terminology. However, directives are likely to take over the role of the existing framework decisions. At the same time the newly formulated types of legal acts of the European secondary law suggest that they should "take care" of the existing EC and EU matter. As such they are also likely to start to deal with the issues analyzed in this paper in order to make it not only more varied but also, logically, more complicated.[31]

From the viewpoint of *European law - criminal* (hereinafter also "ELC") a negative error in law about the "*claimed* and *non-claimed* non-penal elements", i.e. an error about legal concepts and institutes, should be dealt with in ways that are offered so far only by model projects of the supranational ELC, i.e. "European model criminal code" and "Corpus Juris 2000".[32]

## *VI. Conclusions and recommendations*

This paper, restricted in extent, cannot naturally give an exhausting answer to relatively fundamental questions hinted in its title. Nevertheless, at least some basic conclusions and necessary recommendations according to the existing law may be worded as follows:

- a negative error in law about *non-claimed non-penal* elements is considered as a negative error in fact according to the principle of *ignorantia facti non nocet*; *intention* and *intentional negligence* will be excluded;
- a negative error in law about *claimed non-penal* elements is considered as a negative error in law according to the principle of *ignorantia iuris nocet*; if the perpetrator's error is *excusable,* the perpetrator is acting without guilt or his acting is not based on culpability (Draft of the Criminal Code of the Czech Republic, 2008);
- a negative error in law about *penal* elements of the body of a crime is considered as a negative error in law according to the principle of *ignorantia iuris nocet* regardless of the nature of the error as excusable or not-excusable; the perpetrator's guilt or culpability will not be excluded;
- the nature of *non-penal* elements *not-claimed* and *claimed* by the Criminal Code from the viewpoint of the *national* and *European law* must be expressed by the lawmaker in the text of the Criminal Code in as much a *consistent* and *unambiguous* manner as possible.

## *Note:*

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[1] Unlike Section 11, Sub-Section 1, Para b), Act No 218/2003 Coll. as amended On Criminal Judiciary for Youth (hereinafter also „ZSM").

[2] Act No 140/1961 Coll. as amended, Criminal Code (hereinafter also „tr. zak."). If there are citations of sections without any specifications hereinafter they are citations from the Criminal Code.

[3] *Roxin, C.* Strafrecht. Allgemeiner Teil, Band I, Grundlagen der Aufbau der Verbrechenslehre, 3. Auflage, München: C. H. Beck, 1997, pp. 252-253 and further.

[4] *Novotný, O., Vanduchová, M. a kol.* Trestní právo hmotné – I. Obecná část. (Substantive Criminal Law – I. General Part.) 5., jubilejní, zcela přepracované vydání. Praha: ASPI, 2007, p. 228. *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. II. díl. (Criminal Code. Commentary. Volume II) 6. vyd. Praha: C. H. Beck, 2004, pp. 1135-1144 does not mention, either, that the provision 185 is of blanket nature in spite of citing R 28/2002. In other places it is expressly written; for example on page 968 in connection with the provision of § 152.

[5] Comp. *Červenka, L.* Poznámka k problematice omylu v trestním právu. (A note on error in criminal law) Trestní právo, 1997, No 12, p. 18; *Šámal, P.* Judikatrura k omylu v trestním právu. (Case law concerning error in criminal law) Soudní rozhledy, 1998, No 10, p. 256; *Šámal, P., Púry, F., Sotolář, A., Štenglová, I.* Podnikání a ekonomická kriminalita v České republice. (Entrepreneurship and economic crime in the Czech Republic) 1. vyd. Praha: C. H. Beck, 2001, p. 257, 258; *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. I. díl. (Criminal Code. Commentary. Volume I) 6. vyd. Praha: C. H. Beck, 2004, p. 48; *Solnař, V., Fenyk, J., Císařová, D.* Systém československého trestního práva. Základy trestní odpovědnosti. Podstatně přepracované a doplněné vydání. (System of Czechoslovak criminal law. Foundations of criminal lability. Revised and ammended edition.) Praha: Orac, 2003, pp. 130, 305; *Kratochvíl, V. a kol.* Trestní právo hmotné. Obecná část. (Substantive criminal law. General part.) 3. vyd. Brno: MU Brno, 2002, dotisky 2003, 2006, p. 271; *Kratochvíl, V.* Recenze: Marek, K. Smluvní obchodní právo. Kontrakty. (Review: Marek, K. Contractual commercial law. Contracts.) 2. vyd. Brno: Masarykova univerzita, 2006, Právní rozhledy, 2006, No 11, p. 601; *Novotný, O., Vanduchová, M. a kol.* Trestní právo hmotné – I. Obecná část. (Substantive criminal law) 5., jubilejní, zcela přepracované vydání. Praha: ASPI, 2007, p. 255; see also *Fuchs, H.* Österreichisches Strafrecht. Allgemeiner Teil I. 6. überarbeitete Auflage. Wien, New York: Springer – Verlag, 2004, p. 111 and further.

[6] *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. II. (Criminal Code. Commentary II) díl. 6. vyd. Praha: C. H. Beck, 2004, p. 1114.

[7] The above mentioned distinction, i.e. whether it is a purely normative or purely descriptive element is not an absolute one. Normative elements have "something" from description in them; e.g. "insult" requiring consideration not only in the social context but also its perception in the acoustic form or on the basis of its material fixation. On the other hand, descriptive elements are not free of any value content; e.g. "dispossession", "building", "human being" or "thing" are interpreted in disputable cases with the help of normative criteria from the viewpoint of penal-law protection. The differentiation of normative and descriptive elements into non-penal and penal, quite complicated itself, would then make explanations about errors about them even more complicated being combined with rather an unnatural differentiation into normative and descriptive. There is another, more essential, aspect, i.e. *whether the Criminal Code claims or does not claim a non-penal legal regulation and an element of the body of an act included in it regardless the fact whether the element claimed or non-claimed is normative or descriptive.* Therefore I will stick to this aspect hereinafter and it requires a respective terminology – in order not to make the text overloaded I will then use concepts "non-claimed non-penal element" and "claimed non-penal element".

[8] However, a specific problem is the element of "witness" in Section 175, Sub-Section 2, Criminal Code, defined in Section 97, Act No 141/1961 Coll. on Criminal Procedure as amended, Rules of Criminal Procedure (hereinafter also "tr. ř"). The point is that this legal concept "borrows" from the Rules of Criminal Procedure without the Criminal Code itself claiming this legal regulation. Therefore it should be considered as a non-claimed non-penal element of the body of the crime of "false evidence", including an error about it. On the other hand the "non-penal" nature of the regulation out of which the Criminal Code takes a normative element of the body of a crime is only connected with a *substantive* legal regulation. Therefore the Rules of Criminal Procedure should also be seen as a "non-penal" legal regulation , i.e. one standing "outside" the Criminal Code.

[9] *Solnař, V., Fenyk, J., Císařová, D.* Systém československého trestního práva. Základy trestní odpovědnosti. (System of Czechoslovak criminal law. Foundations of criminal lability.) Podstatně přepracované a doplněné vydání. Praha: Orac, 2003, p. 305; *Roxin, C.* Strafrecht. Allgemeiner Teil. Band I. Grundlagen Aufbau der Verbrechenslehre. 3. Auflage. München: C. H. Beck, 1997, p. 408.

[10] *Červenka, L.* K problematice právního omylu v trestním právu. (On questions of error in law in criminal law). Bulletin advokacie, 1989, No. 3, p. 19.

[11] Comp. the above mentioned File 11 Tdo 732/2005 Coll., No 5/05, p. 279: The element "without licence" of the body of the crime of unlawful possession of arms pursuant to Section 185, Sub-Section 1, does not express in any case a reference to the Arms and Ammunition Act as it is stated in the reasoning of this decision but expresses the very normative element of the cited body of a crime. In the given case the court took the offender's ignorance of the above mentioned non-penal legal provision as a negative error in law without releasing him from liability for the given crime. However, it should have been taken as an error in a normative element of this body of crime which, as a negative error, excluded the offender's intention so he should not have been held criminally liable for the exclusively intentional possession of arms. The same problem in connection with the crime of avoiding tax, charge or similar obligatory payment pursuant to Section 148 was solved by the Supreme Court in its judgment File 5 Tdo 411/2006.

[12] For example, the offender does not know that he must not torment his dog to death despite the fact that it is his own dog (Section 203, Sub-Section 2); such a negative error in law will undoubtedly be considered as an error about a *non-penal* non-claimed element ("tormenting an animal to death" in the sense of the Act on Protection of Animals against Torturing"), i.e. as an error in fact although the Criminal Code itself describes, or defines, what is criminally liable ("tormenting an animal to

death"). So it is not a non-penal non-claimed element but a criminal one (see *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. II. (Criminal Code. Commentary II.) díl. 6. vyd. Praha: C. H. Beck, 2004, p. 1223, R 6/2002).

[13] The decision File 11 Tdo 732/2005 even mentions an "indirect reference" to a non-penal provision contained in the body of a crime pursuant to Section 185, Sub-Sectin 2, letter b), Criminal Code, in spite of it not being referential. So this uncertain concept prevents a consistent distinguishing between claimed and non-claimed non-penal elements with consequences already mentioned above.

[14] Např. *Roxin, C.* Strafrecht. Allgemeiner Teil, Band I, Grundlagen der Aufbau der Verbrechenslehre, 3. Auflage, München: C. H. Beck, 1997, p. 253.

[15] The limited extent of this text only enables to outline possible *criteria* of the required distinguishing. In my view they may be seen in the manner of *expression* of the respective element of the body of a crime regardless of its normative or descriptive nature as well as in the use of *non-penal terminology*. I mean by "the manner of expression" whether a text of the Criminal Code uses terms of a *larger* impact for designating an element of the body of a crime, such as a "generally binding legal regulation" (Section 127), or "legally protected rights to an author's work" (Section 152), or "Act on Foreign Currency" (Section 146), or if a *narrower* term is used, for example "constitutional order" (Section 93), "accounting book" (Section 125), "tax" (Section 148), "expert" (Section 175), etc. If that narrower term is a term from a *non-penal* legal field, which includes Rules of Criminal Procedure, too (see Footnote 8), we may say that it will be a *non-claimed* non-penal element of the body of a crime. On the other hand, in other cases (of a larger impact…) we would meet *claimed* non-penal elements of the body of a crime. This includes a situation where the Criminal Code itself expressly mentions in its commentaries in the general part claiming to a non-penal regulation; Section 89, Sub-Section 19, 20 as amended by Act No 296/2007 Coll. I am aware of a certain imperfection of this approach but seeking other criteria and their specification could gradually bring light to these issues. There I consider them open, of course. An inspiration may also be found in foreign approaches (Austria, Germany) which could not be mentioned here due to the restricted extent of the paper.

[16] *Šámal, P.* Osnova trestního zákoníku 2004 – 2006. (A Draft of the Criminal Code 2004-2006) Vydání první. Praha: C. H. Beck, 2006, pp. 55 – 57. Sněmovní tisk č. 410/0, část č. 1/9, 2008.

[17] *Kratochvíl, V. a kol.* Trestní právo hmotné. Obecná část. (Criminal Substantive Law. General Part.) 3. vyd. Brno: MU, 2002 (reprint: 2003, 2006), pp. 249, 271. The explanatory note to the draft says: "As to non-penal legal regulations and legal rules contained in them whose application is *not claimed* by the Criminal Code (*italics by V. K.*), it will be necessary to consider their relevancy to a committed crime. The draft Criminal Code preserves the existing conception, i.e. considering these cases as negative errors in fact."

[18] Důvodová zpráva k návrhu trestního zákoníku ČR 2007, přijatému vládou na jejím jednání 13.–14. 12. 2007, (Explanatory note to the draft of the Criminal Code ČR 2007 adopted by the government on 13-14 December 2007) p 23; accessible from www MS ČR (cit. dne 5. 1. 2008).

[19] See Section 9 of Austrian and Section 17 of German Criminal Code.

[20] On the concepts „European criminal law" and „criminal law – European" and „European law – criminal" see *Kratochvíl, V.* Trestněprávní rozměr smlouvy o Ústavě pro Evropu a jeho význam pro evropské trestní právo; rakouské zkušenosti. (Criminal law aspect of the Agreement on Constitution for Europe and its significance for European criminal law; Austrian experience) Právník, 2007, č. 3, pp. 274 - 276.

[21] More on this concept can be found in *Púry, F.* Vliv evropského práva na trestní postih některých negativních jevů v podnikání. (Impact of European law on criminal prosecution of certain negative phenomena in business) Trestněprávní revue, 2005, č. 9, p. 221 and further.

[22] More details in *Kratochvíl, V.* Tendence ke komunitarizaci evropského práva, její projevy a prosazování v trestním právu hmotném a procesním ČR. (Tendency to communitarization of European law, its manifestations and implementation in the Czech criminal substantive and procedural law.) In: Hurdík, J., Fiala, J., Selucká, M. Evropský kontext vývoje českého práva po roce 2004. (The European context of the development of Czech law after 2004) Brno: AUBI, No 305, 2006, p. 93 and further. *Čakrt, F.* Nástin komunitarizace v rámci III. pilíře. (An outline of communitarization within the III. pillar) Trestněprávní revue, 2007, č. 1. *Čakrt, F.* Spolupráce v oblasti trestního práva a vnitra v kontextu vznikající Reformní smlouvy. (Cooperation in the area of criminal law in the context of the arising Reform Agreement) Trestněprávní revue, 2007, č. 10, p. 285.

[23] *Púry, F.* Vliv evropského práva na trestní postih některých negativních jevů v podnikání. (Impact of European law on criminal prosecution of certain negative phenomena in business) Trestněprávní revue, 2005, č. 9, p. 224.

[24] Ibid.

[25] *Šámal, P., Púry, F., Rizman, S.* Trestní zákon. Komentář. (Criminal Code. Commentary) II. díl. 6. vyd. Praha: C. H. Beck, 2004, p. 1112.

[26] This is related to the publication of such a regulation in a member state language if that language is one of the EU official languages. Even if lack of such a translation does not affect *validity* of the given regulation it cannot be used against an *individual*, even if published in the Official Journal of the EU in another language, but it can be applied to the state. For more detail see *Petr, M.* Účinky oficiálně nepřeložených pramenů komunitárního práva. (Effects of the officially not-translated sources of the EC law) Právní zpravodaj, č. 1/2008, p. 16.

[27] Comp. Act No 178/2007 Coll.

[28] The judgment of the full ECJ panel from 16. 6. 2005 on C-105/03, Maria Pupino, EUR-Lex – 62003J0105. Towards the same issue see also *Špicar, P.* K povinnosti eurokonformního výkladu českého práva a k rozšíření jeho dopadu na oblast III. pilíře Evropské unie. (Towards the duty of the Euro-conforming interpretation of Czech law and broadening its impact on the area of III. pillar of the EU). Trestněprávní revue, 2005, č. 10, p. 253-259; *Tomášek, M.* Cesty k eurokonformnímu výkladu v trestním právu. (Ways to the Euro-conforming interpretation in criminal law.) Trestněprávní revue, 2006, č. 7, p. 200-203; *Killmann, B.-R.* Die rahmenbeschlusskonforme Auslegung im Strafrecht vor dem EuGH. Juristische Blätter, 2005, č. 9, pp. 566–575. Of course, the requirement of indirect impact also concerns directives (comp. *Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R.* Evropské právo. 3. vydání. Praha : C. H. Beck, 2006, pp. 306–307.).

[29] *Syllová, J., Pítrová, L., Svobodová, M. a kol.* Ústava pro Evropu. Komentář. (Constitution for Europe. Commentary.) 1. vyd. Praha: C. H. Beck, 2005, p. 11.

[30] *Francová, J.* Co nového by Evropské unii měla přinést

„Reformní smlouva“. (What should the Reform Treaty bring to the EU.) Právní zpravodaj, 2007, č. 12, p. 5.

[31] This characteristic feature, or the internal tendency of the European law to ever more increasing complexity despite efforts to restrict it, is an obvious danger to this legal system. At a certain critical point of complexity of the legal regulation its weakened functionality or even disfunctionality may appear. This risk is even more apparent if the complexity begins to grow in contacts between the given legal system and another system. And this is the problem of the European law “contaminated” by the law of member states, or vice versa, the problem of national law influenced by the process of Europeization.

*Delmas-Marty, M., Vervaele, J. A. E.* Corpus Juris 2000. Trestněprávní ustanovení za účelem ochrany financí Evropské unie. (Criminal law provisions to protect finances of the EU.) Překlad do češtiny: J. Fenyk, S. Kloučková. Brno: Vyd. Sypták, 2001, p. 19.