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THE POWER OF THE PROSECUTION TO MODIFY CRIMINAL CHARGES AND THE IMPLICATIONS FOR THE DEFENDANT'S POSITION**

ABSTRACT: Evidence presented during a trial may portray a criminal offence differently than how it was described in the indictment. The same set of facts may require a different legal qualification or newly discovered facts may show that the prosecutor's initial description of events should be different. Two potential solutions to this problem exist: the prosecution loses the case or is allowed to modify the charges. In Slovenian criminal procedure, the prosecutor is granted the authority to modify the charge during the trial. This paper focuses on the question of how broad the powers of the Slovenian prosecutor to modify the criminal charge are and how the existence of this power, along with its scope, affects the position of the defence. For that reason, we have examined the decisions of the Slovenian Constitutional Court and ordinary courts. After establishing the extent to which modifications can occur in practice, we highlight potential key points associated with the modification of

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the charge, as provided for in the current regulation. At the end, we discuss reform options that would improve the defendant's position.

Keywords: modification of the criminal charge, Slovenia, prosecution, rights of the defence

INTRODUCTION

Evidence presented during a trial may show a criminal offence in a different light than how it was described in the indictment. The same set of facts may require a different legal qualification or newly discovered facts may show that the prosecutor's initial description of events should be different. Two possible solutions to this problem exist: the prosecution loses the case or is allowed to modify the charges.

In Slovenian criminal procedure, the rules governing the main hearing regarding possible charge modifications have contradicting tendencies. The rule that the proceedings can (only) be conducted on the basis of a request of a prosecutor (Article 19(1) of the Criminal Procedure Act (hereinafter: CPA))¹ separates the function of the judge from that of the prosecutor and limits the subject matter of the dispute. This results in the rule that the judgement can only be based on the criminal offence outlined in the indictment (pursuant to Article 354 of the CPA). This provision, however, conflicts with the court's duty to thoroughly investigate all the relevant facts, including both the facts favourable to the accused and those incriminating him (Article 17 of the CPA). To solve this conflict, the legislator has adopted a compromise: the prosecutor is granted the power to modify the charge, but the modification should not be so extensive that it would relate to a different act.²

This paper focuses on the question of how broad the powers of the Slovenian prosecutor to modify the criminal charge during the trial are, i.e., to amend the legal qualification or to correct errors in the description of the offence, and how the existence of this power and its scope affect the position of the defence. Although it is noted in scholarly literature that the question of how the charges can be modified during the trial is controversial,³ this particular subject has not been often and comprehensively explored in the existing

¹ National Assembly of the Republic of Slovenia, Criminal Procedure Act, *Official Gazette of the Republic of Slovenia*, no. 63/94, Ljubljana, 1994, as amended.

² Šugman Stubbs, K., Gorkič, P., Fišer, Z.(2020). *Temelji kazenskega procesnega prava*. Ljubljana: GV Založba,119.

³ Horvat, Š. (2004). *Zakon o kazenskem postopku s komentarjem*. Ljubljana: GV Založba, 718.

literature. On the other hand, Slovenian courts frequently grapple with modifications of charges and their decisions will serve as the primary and most extensive sources for the analysis at hand.

THE SCOPE OF THE PROSECUTORIAL POWER TO MODIFY CHARGES

Article 344 of the CPA allows the prosecutor to modify the charge⁴ during the hearing of evidence stage of the main hearing, provided that the evidence presented indicates that the facts alleged in the indictment have changed. The CPA limits the prosecutor's room for manoeuvre by stipulating that the modified indictment may only relate to the act already charged. In the same provision, the CPA allows the court to suspend the main hearing, to allow the prosecutor to prepare a new indictment (if it is not modified orally) or to give the defence time to prepare.

As mentioned, the power to modify the charge is understood to pursue the principle of material truth (Article 17 of the CPA), which is considered to be one of the most important principles in criminal procedure law. According to the Supreme Court, neither the prosecutor nor the court know the truth at the beginning of the trial but establish it only during the trial.⁵ It follows from the Court's interpretation that the prosecution's modification of the charge is one of the means by which the truth can be established.

Although it has been repeatedly criticised, the prosecutor's statutory power has essentially remained more or less the same over time; the legislator narrowed its scope only once, in 2011. Prior to the legislative change, the prosecutor was allowed to modify the charge for the duration of the entire main hearing, even in the closing statements.⁶ Under the current rules, the prosecutor can only modify the charge during the hearing of evidence.

An extensive body of (constitutional) case law has been established concerning the modification of the charge. More than two decades ago, the

⁴ I use the term charge as an overreaching term for the formal accusation contained in the charging document (an indictment in ordinary criminal proceedings).

⁵ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 250/2009 from 28. 1. 2010; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 33147/2016 from 23. 12. 2020.

⁶ Government of the Republic of Slovenia. (2011). *Proposal for Amendments to the Criminal Procedure Act (EVA 2010-2011-0009) – proposal for consideration*. Available at: <https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/2ee00c477a45ee07d0a47dba5d5a84327e85e27361348b1ef5d6a410d80a7ad4>

Constitutional Court took the position that the prosecutorial power to modify charges does not in itself violate the constitutional guarantees in criminal proceedings. The Constitutional Court consistently reiterates this position in its jurisprudence.⁷ However, its decisions have narrowed the scope of the power – making the prosecutor more accountable in its exercise, while at the same time strengthening the court’s supervisory role.

The Constitutional Court added two additional conditions to those set out in the CPA. The first condition for the modification of the charge to be admissible is that the prosecutor has not abused the power and the second condition is that the defendant is allowed to protect their rights in the proceedings, in principle, in the same legal position as if the modification of the charge had not taken place.⁸ If these two conditions are not met, the court must deny the admissibility of the prosecutor’s modification.⁹

Based on an analysis of the CPA’s provisions and the jurisprudence, we can conclude that, despite the limitations described above, the prosecutor enjoys a rather wide discretion when modifying the charges, particularly for the following reasons.

First, the statutory wording of Article 344 of the CPA allows the prosecutor to modify the charge if, during the evidentiary proceedings, they become aware that the evidence presented shows that the facts alleged in the indictment have changed. This provision has been interpreted broadly both in legal commentary and case law. The prosecutor may modify the charge, regardless of whether new evidence has come to light in the case.¹⁰ Even if the prosecutor already had the respective evidence before the time of the filing of the charge, or if they had already obtained it during the pre-trial phase, charges may still be modified, if their assessment of the facts changed after the evidence was

⁷ Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4. 12. 1997; Ruling of the Constitutional Court of the Republic of Slovenia, U-I-40/00 from 16. 1. 2003; Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005.

⁸ *Ibid.*

⁹ Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4. 12. 1997.

¹⁰ Horvat, Š. (2004). *Zakon o kazenskem postopku s komentarjem*. Ljubljana: GV Založba, 718; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 250/2009 from 28. 1. 2010; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 33147/2016 from 23. 12. 2020; Ruling of the Supreme Court of the Republic of Slovenia I Ips 75/2011 from 20. 10. 2011; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 14593/2015 from 28. 11. 2019; Ruling of the Supreme Court of the Republic of Slovenia I Ips 29407/2010-1018 from 20. 3. 2015, Ruling of the Supreme Court of the Republic of Slovenia, I Ips 61800/2010-63 from 16. 1. 2014, Ruling of the Supreme Court of the Republic of Slovenia, I Ips 45062/2014 from 22. 6. 2017, Ruling of the Supreme Court of the Republic of Slovenia, I Ips 97604/2010 from 2. 7. 2020.

presented at the main hearing.¹¹ It is sufficient that the prosecutor's subjective assessment of the evidence changed after the evidence was presented at trial.¹² The Supreme Court elaborates that the factual situation is still being discovered until the verdict¹³ (so the assessment may, naturally, change).

Second, what constitutes the "same act" (in the context of Article 344's requirement that the modified charge must relate to the same act as the original charge) is interpreted as a "historical event" in case law.¹⁴ In legal theory, it is explained that a historical event consists of facts that, in accordance with commonly recognized life experiences, form an indivisible unit.¹⁵ The Supreme Court gives a similar definition, stating that it means "a life event that occurred in the same circumstances of place and time".¹⁶ Unlike the factual

¹¹ Horvat, Š. (2004). *Zakon o kazenskem postopku s komentarjem*. Ljubljana: GV Založba, 718; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 44415/2010-3763 from 15. 10. 2015; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 4920/2013 from 29. 7. 2021; Ruling of the Supreme Court of the Republic of Slovenia 2021, I Ips 61800/2010-63 from 16. 1. 2014.

¹² Ruling of the Supreme Court of the Republic of Slovenia, I Ips 250/2009 from 28. 1. 2010; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 422/2007 from 7. 7. 2008; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 64/2010 from 20. 2. 2014; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 33147/2016 from 23. 12. 2020; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 74949/2010 from 28. 3. 2013; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 7564/2010 from 14. 6. 2012; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 44051/2013 from 14. 1. 2021; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 75/2011 from 20. 10. 2011; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 29407/2010-1018 from 20. 3. 2015.

¹³ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 422/2007 from 7. 7. 2008; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 250/2009 from 28. 1. 2010; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 33147/2016 from 23. 12. 2020.

¹⁴ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 52779/2014 from 24. 5. 2018, line 14.

¹⁵ Šugman Stubbs, K., Gorkič, P, Fišer, Z.(2020). *Temelji kazenskega procesnega prava*. Ljubljana: GV Založba, 103–105. The concept of a historical event (*geschichtlicher Vorgang*) is also used in German theory and jurisprudence (see, e.g., Roxin, C. (1989). *Strafverfahrensrecht: Ein Studienbuch von Klaus Roxin*. München: Verlag C. H. Beck München, 122; Schmitt, B. (2021). § 264. in: *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen* (B. Schmitt & M. Köhler – ed.), München: Verlag C. H. Beck, 1311; Rostalski, F. (2019). *Der Tatbegriff im Strafrecht: Entwurf Eines Im Gesamten Strafrechtssystem Einheitlichen Normativ-Funktionalen Begriffs Der Tat*. Tübingen: Mohr Siebeck, 148.), which is relevant for the Slovenian context because the Slovenian Supreme Court has already assessed that the two concepts are similar (Ruling of the Supreme Court of the Republic of Slovenia, I Ips 6258/2010 from 12. 3. 2015).

¹⁶ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 6258/2010 from 12. 3. 2015.

circumstances, the legal qualification of the offence is irrelevant in assessing the identity of the acts described in the original and the modified charge.¹⁷

Third, the prosecutor is allowed to change the description of the offence, both to the advantage and disadvantage of the accused, as long as it remains within the framework of the given historical event.¹⁸ Given that the prosecutor is not bound by their original legal qualification, this means that they can add an additional qualifying factual element to the charge and then change the legal qualification accordingly. A modification of the charge which results in a stricter legal qualification than the original charge is the most intense intervention of the prosecutor within the scope of their powers. Article 344 of the CPA does not prohibit such modifications and jurisprudence has consistently followed the language of this provision, affirming the prosecutor's authority in this regard.

In summary, the prosecutor's authority to modify the charge is broad, with its primary limitation being the requirement that the modification must refer to the same historical event as the initial charges. However, it can be observed that courts face difficulties in interpreting the concept of the same historical event,¹⁹ leaving room for some uncertainty in the prosecutor's already broad power.

THE IMPACT OF THE MODIFICATION OF THE CHARGES ON THE DEFENDANT'S POSITION

While the prosecutor's power to modify the charges has many broader implications, among them implications regarding the relationship between the prosecutor and the judge,²⁰ this article focuses on its impact on the defendant's position.

¹⁷ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 14593/2015 from 28. 11. 2019.

¹⁸ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 6155/2013 from 5. 7. 2017; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 52779/2014 from 24. 5. 2018; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 3691/2013 from 4. 3. 2021; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 61800/2010-63 from 16. 1. 2014; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 97604/2010 from 2. 7. 2020.

¹⁹ Šošić, M. (2016). *Enotnost dejanja v kazenskem pravu (doctoral thesis)*. Ljubljana: University of Ljubljana, Faculty of Law, 195.

²⁰ Suffice it to say that by modifying the charge, the prosecutor can only follow the active role of the court, which establishes incriminating circumstances that were not included in the indictment (Jelenič Novak, M., Auersperger Matić, A., Čibej, Z., Gorkič, P.

In the following section, we will address three major concerns associated with the modification of the charges and the position of the defence in the Slovenian system. First, we will explore the impact of the modification of the charge on the right to be informed of the charges. Second, we will examine its effect on the right to have adequate time and facilities to prepare the defence. Finally, we will look at the modification of charges from a broader perspective, by assessing the impact of the mere existence of this power on the defence's position.

Notification about the modified charge

The right to have adequate time and facilities to organise a defence against criminal charges is a constitutional right set out in Article 29 of the Slovenian Constitution (hereinafter: the Constitution).²¹ A logical prerequisite for securing adequate time and facilities to organise a defence is to be informed of the charges²² – also a right expressly provided for by Article 6(3)(a) of the European Convention on Human Rights (hereinafter: ECHR).²³ Accordingly, the defence must receive information and have adequate time and opportunity to prepare before the trial begins. But the right to be notified is not already exhausted at this point. If the allegations from the indictment change during the trial, the defence must be properly notified.²⁴

If the prosecutor modifies the charges orally during the hearing itself, the CPA stipulates that the defendant who is present at the hearing has been directly and sufficiently informed of such a modification. Additionally, if the prosecutor modifies the charges in writing by preparing a new indictment, the new indictment is served to the defendant. In both cases, the defendant will be notified about the modified charges.

(2006). Vmesna faza in glavna obravnava. in: *Izhodišča za nov model kazenskega postopka* (Šugman, K. – ed.). Ljubljana: Institute of Criminology at the Faculty of Law in Ljubljana, 273–74).

²¹ National Assembly of the Republic of Slovenia, Constitution of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, no. 33/91. Ljubljana, 1991.

²² Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4. 12. 1997.

²³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Rome, 1950.

²⁴ Bošnjak, M., Žaucer Hrovatin, M. (2019). 29. člen. in: *Komentar Ustave Republike Slovenije (del 1: Človekove pravice in temeljne svoboščine)* (Avbelj, M. – ed.). Nova Gorica: Nova Univerza, European Faculty of Law, 284.

However, a potentially problematic situation may arise where the prosecutor modifies the charges orally at the hearing held in the absence of the accused. In such cases, earlier jurisprudence has taken the view that a defendant who failed to appear at the main hearing without a valid reason has waived the right to be heard on the modified charges.²⁵

This interpretation was rejected by the Constitutional Court, stressing that if the trial is held in the absence of the defendant and the prosecutor substantially modifies the charge, the court must serve the modified indictment to the defendant and ensure their presence at the main hearing where the defendant will have the opportunity to be heard regarding the modified charge.²⁶ This reasoning of the Constitutional Court has been accepted by the Supreme Court. The Supreme Court distinguishes between substantive modifications, which require a suspension of the main hearing, and non-substantive modifications of the charge, which do not require such actions by the court.²⁷ In summary, following the Constitutional Court's decisions, the CPA is interpreted in such a way that adequate mechanisms exist to secure the right of the defendant to be notified of the modified charges.

Preparation of the defence against the modified charge

The modification of charges raises another issue: its impact on the time and facilities of the defendant to prepare the defence, a right guaranteed by both Article 29 of the Constitution and Article 6(3)(b) of the ECHR. In this section, we will examine how the defendant's ability to prepare is affected after the prosecutor modifies the charge during the proceedings. Since the defendant can respond to a modification of the charge in two ways, either by challenging its admissibility or requesting additional time to adjust the defence strategy, we have divided this section into two subsections.

²⁵ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 313/2001 from 6. 3. 2003; Ruling of the Basic Court in Ljubljana, I K 393/95 from 13.6.2001.

²⁶ Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03 from 12. 5. 2005; Ruling of the Constitutional Court of the Republic of Slovenia, Up-124/04-20 from 9. 11. 2006.

²⁷ Ruling of the Supreme Court of the the Republic of Slovenia, I Ips 8838/2016 from 12. 10. 2017; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 28944/2019 from 14. 10. 2021; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 37/2011 from 15. 9. 2011; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 273/2004 from 2. 12. 2004.

***The possibility to object to the admissibility
of the modification of the charges***

The CPA does not expressly set out the right of the defence to petition the court to find a modification of the charge inadmissible, nor does it expressly grant the court the authority to declare a modification inadmissible. However, the Constitutional Court has clarified, by applying the equal protection of rights principle (Article 22 of the Constitution), that the defendant has the right to challenge the modification of the charge that constitutes an abuse of the prosecutor's powers. If the court finds that the prosecutor abused their procedural right when modifying the charge, the court is obligated to refuse its admissibility.²⁸ Furthermore, the Constitutional Court emphasised that the court must examine the admissibility of the modification on its own initiative, irrespective of the actions taken by the defence.²⁹

The Constitutional Court recognised that the prosecutor's modification of the charges improves the prosecution's chances of success and, conversely, exacerbates the defendant's position. With this in mind, it established procedural safeguards to balance the position of the defence after the modification. One such safeguard is the supervisory role of the court, which cannot accept the modification of the charges without conducting a review. In doing so, the Constitutional Court has indirectly also increased the responsibility of prosecutors. Prosecutors must modify the charge in accordance with the conditions set out in the CPA and case law of the Constitutional Court or they risk unsuccessful prosecution of the alleged criminal offence.

The Slovenian legislator and the courts have not entirely embraced this trend towards greater judicial and prosecutorial responsibility indicated by the Constitutional Court. The relevant provision of the CPA setting out the procedure for modifying the charges has remained the same, despite the fact that the CPA was amended numerous times since the relevant decisions of the Constitutional Court were made. A notable shortcoming of Article 344 of the CPA is that it does not require the prosecutor to give reasons for the modification of the charge, and, building on the statutory rules, no such requirement can be found in the prevalent judicial practice of the ordinary courts.³⁰

²⁸ Ruling of the Constitutional Court of the Republic of Slovenia, U-I-40/00 from 16. 1. 2003.

²⁹ Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005.

³⁰ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 14593/2015 from 28. 11. 2019; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 338/2009 from 28. 1. 2010.

In our opinion, the absence of an explicit requirement for the prosecutor to give reasons for the modification of the charge has a negative impact on the position of the defence. The prosecutor's presentation of the grounds and conditions for the modification is crucial for the defence to be able to object to the admissibility of the modification (in accordance with the constitutional right to judicial protection from Article 23 of the Constitution) or to adapt its defence strategy³¹ (in accordance with the constitutional right to prepare one's defence from Article 29 of the Constitution). The broader the scope of the prosecutor's power, the more precautionary mechanisms must be incorporated in the legal regime to prevent its abuse. The prosecutor, as we have seen, may modify the charge at any time during the evidentiary hearing, meaning that there is no requirement to modify the charge immediately after the evidence that prompted the change came to light. Such broad powers further increase the need for the prosecutor to be transparent about the basis on which the change has been made. Finally, requiring the prosecutor to present the grounds and conditions for the modification is important to ensure equality of arms between the defence and the prosecution. Article 285d of the CPA requires the defendant to state the reasons for evidentiary submissions and the same should apply vice-versa to prosecutor's modification of the charge.

Our analysis showed that, in practice, regular courts have adopted a somewhat narrower application of the explicit requirement established by the Constitutional Court that the court is obligated to provide reasons in its judgment regarding the admissibility of the modification and the decision to suspend or continue the main hearing.³² The Supreme Court has limited this obligation mainly to cases where the defence opposes the modification with relevant objections.³³ According to the Supreme Court, a court is not obligated to provide reasons for its decision in situations that are "perfectly clear",³⁴ where the modification of the charge did not catch the defence by surprise or could have been expected, since the reasons for it were known to the defence.³⁵ This perspective raises concerns because it indicates that, at least in some cases, the

³¹ Florjančič, D. (2007). Sprememba obtožnice v kazenskem postopku. *Pravna praksa*, 26 (21), 17–19.

³² Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005.

³³ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 57/2010 from 13.5. 2010.

³⁴ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 57/2010 from 13. 5. 2010; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 44051/2013 from 14. 1. 2021.

³⁵ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 14593/2015 from 28. 11. 2019.

defence is burdened with the responsibility to anticipate the prosecutor's exercise of this power, which is already used to improve the prosecutor's chances of success. Moreover, a system where the prosecutor is not required to provide reasons for the modification of the charge and the court is required to give reasons for its assessment only in certain cases appears to shift the responsibility to provide arguments and show the (in)admissibility of the modification from the prosecutor to the defence. If the defence must oppose the modification to receive a reasoned decision, the defence is effectively compelled, in the absence of the prosecutor's reasoning, to speculate on the possible reasons for the modification.

***Adequate time and facilities for the preparation
of the defence against the modified charge***

In addition to the possibility for the defence to argue that the modification is inadmissible, the CPA allows the main hearing to be suspended for the preparation of the defence, thus, (indirectly) allowing the defence to petition the court to suspend the main hearing (Article 344(2) of the CPA).

The Constitutional Court and the Supreme Court have adopted the position that the court does not have to suspend the main hearing after each modification of the charges,³⁶ but only if it deems it necessary for the defence to be able to exercise its rights.³⁷ This stance is reasonable because modifications of charges sometimes include corrections that do not change the meaning of the accusation. As was already mentioned, the Constitutional Court requires a court to examine the admissibility of the modification on its own initiative, and the same applies to the assessment of whether to suspend the main hearing or not.³⁸

The case law of the Supreme Court indicates that the court's decision of whether to suspend the hearing for the purpose of preparing a defence should

³⁶ Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4. 12. 1997; Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 133/2007 from 24. 5. 2007; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 37/2011 from 15. 9. 2011; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 283/2005 from 1. 12. 2005.

³⁷ Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4. 12. 1997.

³⁸ Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005.

be based on the substance³⁹ and extent of the modification.⁴⁰ If the modified charge does not change the substance of the initial one, the hearing does not need to be suspended.⁴¹ Non-significant changes of the charges include, for example, stylistic changes to the description in the original indictment.⁴²

We agree with the stance found in legal literature that a defendant's request to suspend the main hearing may be justified even in cases where modification of the charges is made to their advantage,⁴³ such as a reduction of the charge where, after the amendment, the defendant is charged with a less serious offence that carries a lower sentence. While the modification may benefit the defendant in terms of the gravity of the charge, in terms of the chances of procedural success, the modification usually benefits the prosecutor by increasing the likelihood of conviction or, at the very least, reducing the extent of the burden of proof. Regardless of whether the prosecutor increases or decreases the accusation from the charge, the defence must be given the opportunity to respond, which may require a suspension of the trial in certain cases.

Impact of the power to modify charges on the position of the defence

Up to this point, we have considered the rights of the defence if the prosecutor exercises the power to modify charges. However, we believe that the mere existence of the power to modify charges already affects the position of the defence, regardless of whether the prosecutor exercises it in a particular case or not.

Since the prosecutor has the power to substantially change the description of the offence during the hearing of evidence, the defendant cannot be certain whether they chose the appropriate defence strategy until the last piece of evidence has been presented and the court has concluded the

³⁹ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 18312/2017 from 4. 7. 2019.

⁴⁰ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 61422/2010 from 13. 3. 2014; Ruling of the Supreme Court of the Republic of Slovenia, I Ips 15991/2010-267 from 14. 5. 2015.

⁴¹ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 15991/2010-267 from 14. 5. 2015.

⁴² Ruling of the Supreme Court of the Republic of Slovenia, I Ips 18312/2017 from 4. 7. 2019.

⁴³ Horvat, Š. (2004). *Zakon o kazenskem postopku s komentarjem*. Ljubljana: GV Založba, 719.

evidentiary phase of the proceedings and moved to the closing statements of the participants.⁴⁴

Moreover, such a system not only puts the defence in an uncertain position, but also hinders the development of an active defence strategy. Namely, if the defence argumentatively rebuts the prosecution's initial version of events, the prosecutor may correct the potential mistakes and change the narrative from the indictment. Consequently, the existence of the power to modify charges encourages the defence not to actively highlight potential errors in the prosecution's case or to delay doing so until the end of the trial.

Despite the fact that the wide scope for changing the subject matter of the case during the trial has been subject to much criticism over time,⁴⁵ the basic premise of the Slovenian system remains the same: the uncertainty of the defence, exposed not only to the accusation as it appears in the initial indictment but also to similar accusations that may be formulated within the same historical event with a modification of the charge, is understood by our system as the unavoidable price that needs to be paid in the criminal justice authorities' active pursuit of the truth (Article 17 of CPA).

For the purposes of this article, we will leave aside the discussion of whether it would be reasonable to change the system altogether and bind the prosecutor and the court to the prosecutor's original legal qualification and thereby significantly limiting the prosecutor's room for manoeuvring in changing the description of the offence. However, we would like to stress that the current regime should not cause the defence to pay an unlimited price in the name of the search for truth. We believe that the system should, at the very least, first, consistently limit the modifications of the charges that constitute an abuse of power and, secondly, seek to minimise the frequency of modifications in practice.

As discussed above, the Constitutional Court has highlighted the constitutional dimensions of charge modifications and explicitly prohibited the abuses of power to modify the charge.⁴⁶ While regular courts have been somewhat cautious in applying this argument, it serves as a starting point for safeguarding the defence against total uncertainty stemming from the possible modifications within the same historical event. Our analysis of the case

⁴⁴ Jelenič Novak, M., Auersperger Matić, A., Čibej, Z., Gorkič, P. (2006). Vmesna faza in glavna obravnava. in: *Izhodišča za nov model kazenskega postopka* (Šugman, K. – ed.). Ljubljana: Institute of Criminology at the Faculty of Law in Ljubljana, 359–60.

⁴⁵ *Ibidem*, 360; Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4.12.1997, Dissenting Opinion of Judge B. M. Zupančič.

⁴⁶ Ruling of the Constitutional Court of the Republic of Slovenia, U-I-289/95 from 4. 12. 1997.

law of the Supreme Court and higher courts has shown that the argument that the prosecutor has abused the procedural right to modify the charge has been successful in cases where the initial indictment lacked certain statutory elements of the criminal offence, and the prosecutor had only identified all the elements for the first time during the main hearing by modifying the charge.⁴⁷ Additionally, one of the higher courts had to address a situation where the defence objected that the offences in the indictment were time-barred, however, the prosecution later modified the charge to a different offence (by merging the charged initial offences into one continuing offence) which was not yet time-barred. The higher court found such a modification of the charge to be an abuse of procedural rights.⁴⁸ In recent literature, it has been argued that it should also be inadmissible for the prosecutor to change the date of the offence when the alibi proved by the defence is linked to the defence against the original indictment,⁴⁹ but no such cases have been found in the case law analysed so far. Based on the foregoing, we conclude that our system provides tools for the court to disregard a modification of the charge that completely undermines the defence strategy, namely, the abuse of process argument. This argument is further clarified on a case-by-case basis, with the courts setting the outer limits of the prosecutor's power.

Finally, the frequency with which prosecutors exercise their power impacts the defendant's position. If the defendant can rely on the fact that modifications of the charges will only occur in exceptional circumstances, their position will be more certain than if modifications are a regular, almost routine practice. Our analysis has shown that modifications of charges are relatively common, occurring in a third or even half of the cases where the court passes a sentence or orders a security measure after the main hearing.⁵⁰ At the same time, it can also be noted that the modifications significantly vary in their intensity, ranging from grammatical corrections or paraphrasing the description to changes in the circumstances constituting the statutory elements of the alleged offence. Based on this, we can conclude that in our system the defence can expect, with a relatively high degree of probability, that the allegation contained in the original charge will be modified in one way or another during the trial. Such excessive use of power should rightly be criticized. Frequent modi-

⁴⁷ Ruling of the Supreme Court of the Republic of Slovenia, I Ips 11111/2011 from 7. 10. 2020.

⁴⁸ Ruling of the Higher Court in Ljubljana, II Kp 6056/2012 from 29. 9. 2022.

⁴⁹ Fišer, Z. (2023). 344. člen. in: *Zakon o kazenskem postopku s komentarjem* (Šepec, M.– ed.). Ljubljana: Lexpera, GV Založba, 721.

⁵⁰ Briški, L. (2023). *Spreminjanje parametrov spora v kazenskem postopku (doctoral thesis)*. Ljubljana: University of Ljubljana, Faculty of Law, 185–86.

fications of the charges may indicate a lack of due care and attention on the part of the prosecutors when drawing up the indictment or an unnecessary ease in modifying them.⁵¹ The system tolerates such approaches and, consequently, does not encourage a careful assessment of the facts before the start of the trial, to the detriment of the defence.

CONCLUSION

In Slovenian criminal proceedings, the prosecutor has a wide range of options for correcting errors or omissions in an indictment by modifying the charge. This is shown by the following findings from the analysis of the relevant case law. First, the prosecutor's statutory authority is interpreted by jurisprudence to mean that the prosecutor may modify a charge regardless of whether new evidence has appeared in the case. Second, the concept of the same act to which the change of charge is limited to is interpreted as an autonomous procedural concept, which means that the prosecutor's change in the description of the facts can also result in a change in its legal qualification if the description still refers to the same historical event. Third, the charge may be modified both to the defendant's advantage and to their disadvantage.

At the same time, however, we have noted that the prosecutor's power has been limited over time through legislature and especially (constitutional) jurisprudence. The legislator constrained the prosecutor's power to the evidentiary procedure. The Constitutional Court set further objective conditions for the admissibility of the modification, emphasising the importance of the supervisory role of the court, which must assess the admissibility of the modification and use the appropriate measures to improve the position of the defence after each modification of the charge. Consequently, the Constitutional Court indirectly strengthened the responsibility of the prosecutors, who must modify the charge in line with the established criteria or otherwise risk the failure of the charge. In this respect, the Constitutional Court acknowledges the substantive (constitutional) dimensions of the modification of the charge and sends an important message that the authorities in criminal proceedings must not approach the modification of charges as a mere technical task⁵² that has no significance for the position of the defence.

⁵¹ Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005, Concurring Opinion of Judge Z. Fišer.

⁵² See also: Ruling of the Constitutional Court of the Republic of Slovenia, Up-328/03-21 from 12. 5. 2005, Concurring Opinion of Judge Z. Fišer.

We have demonstrated that the prosecutor's extensive authority to modify charges inevitably impacts the defendant's position. The latter is uncertain until the conclusion of the criminal proceedings, as the defendant cannot rely on the scope of the trial as outlined in the indictment to remain unchanged. While we have not delved into whether it would be more reasonable to narrow this power by limiting the prosecutor to the initial legal qualification from the indictment, we highlighted three potential key points related to the modification of the charge, as provided for in the current regulation. These issues include the impact of the modification on the notification about the modified charge and on providing adequate time and opportunities to prepare a defence against the changed charge, as well as on the opportunities to prepare a defence in a system that provides for such powers regardless of whether they are exercised. Our analysis focused on understanding the defence's position in these scenarios and identifying possible improvements to the current provisions. We have concluded that following a modification of a charge, procedural rules should be improved to ensure that the accused has a genuine opportunity to respond and challenge it. Additionally, the system should consistently limit modifications of charges that constitute an abuse of power and seek to minimise the frequency of modifications in practice.

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