The Line Between Breach of Contract and the Criminal Offense of Embezzlement in the Management of Sales Proceeds by Sales Representatives

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Abstract

The practice of sales representatives failing to remit sales proceeds to the company has become a legal issue that often sparks debate: does this constitute a breach of contract under civil law, or is it a criminal act of embezzlement as defined in Article 374 of the Criminal Code (KUHP)? This study aims to examine the legal parameters that distinguish these two legal categories and to analyze the application of the principle of criminal liability to salespeople who withhold the company's sales proceeds. The method used is normative legal research employing a statutory, conceptual, and case-based approach. Legal materials were obtained from legislation, court decisions, peer-reviewed legal journals, and selected academic literature. The results of the study indicate that the primary distinction between breach of contract and embezzlement lies in the presence or absence of the element of criminal intent (mens rea) specifically, the intent to unlawfully appropriate property (opzet tot wederrechtelijke toe-eigening) a relationship of trust (vertrouwensrelatie), and the moment of transfer of control over the property. Furthermore, the criminal liability of sales representatives must be based on proof of subjective fault that satisfies the elements of an official misconduct offense under Article 374 of the Criminal Code, not merely on proving a failure to deposit funds. This study concludes that accurately determining the legal classification of a sales representative's actions requires an in-depth analysis of the legal facts, thereby preventing the criminalization of what are essentially civil relationships.

Keywords: Breach of Contract; Embezzlement; Salesperson; Criminal Liability; Mens Rea

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Introduction

The working relationship between a company and a sales representative is fundamentally built on a foundation of trust. The company entrusts products or funds to the sales representative for sale, and as a result, the sales representative is obligated to remit the proceeds from those sales to the company within an agreed-upon timeframe. This type of relationship is very common in the retail, pharmaceutical, insurance, and consumer goods distribution industries in Indonesia. However, the reality on the ground reveals a far more complex situation, in which a sales representative who fails to remit sales proceeds may face two fundamentally different legal classifications: they may be considered to have committed a mere breach of contract, which can be resolved through civil proceedings, or they may be deemed to have committed the criminal offense of embezzlement in the course of their duties, resulting in criminal punishment.

This issue is not merely an academic debate. In the practice of law enforcement in Indonesia, it is not uncommon for a salesperson to be criminally charged by a company on suspicion of embezzlement, even though the substance of the legal relationship between them is in fact civil in nature. Conversely, there are also cases where a salesperson's actions which clearly meet the elements of a criminal offense are resolved solely through a breach of contract lawsuit. This ambiguity has the potential to create legal uncertainty and even open the door to overcriminalization, which contradicts the principle of ultimum remedium in criminal law [1][36]. According to records from the Commodity Futures Trading Supervisory Agency (Bappebti) and reports from the Attorney General's Office of the Republic of Indonesia, cases of embezzlement by sales personnel or marketing agents continue to show a significant upward trend year after year [2].

From a criminal law perspective, Article 372 of the Criminal Code (KUHP) governs the general offense of embezzlement, while Article 374 of the KUHP imposes a harsher penalty by qualifying it as "embezzlement in office," which requires the existence of a special relationship of trust between the perpetrator and the victim [3]. On the other hand, Article 1243 of the Civil Code (KUHPerd) stipulates that a breach of contract occurs when a debtor fails to fulfill their contractual obligations, and the consequence is civil damages [4]. Normatively, the two have distinct boundaries; however, in empirical terms, these boundaries are often blurred because the same act failing to deposit funds received on the basis of trust can encompass elements from both legal domains simultaneously.

Previous research conducted by Aruan and Hadisuprapto (2019) examined cases of embezzlement in public office in general but did not specifically address distinguishing parameters in the context of sales representatives [5]. Marzuki's (2020) study touched on aspects of criminal liability in employment relationships but focused more on the general employer-employee relationship without analyzing the legal structure of sales agents, which has its own distinct characteristics [6]. Meanwhile, Prasetyo's (2021) research on the relationship between civil and criminal law in contracts remains at a macro level and has not addressed the specific implications for sales personnel [7]. Thus, there is a significant research gap: no study has comprehensively and specifically examined the legal parameters distinguishing breach of contract from embezzlement in the context of sales representatives' management of sales funds, nor how the principle of criminal liability should be applied in such situations.

The urgency of this research is further underscored by its tangible practical implications. Errors in classifying a salesperson's actions whether as breach of contract or embezzlement not only affect the fate of the individual involved but also undermine legal certainty for the business community as a whole. If every failure to deposit funds is immediately criminalized without adequate legal analysis, this will create a climate of fear that is not conducive to the development of business relationships, while also potentially violating the constitutional rights of citizens as guaranteed in the 1945 Constitution of the Republic of Indonesia [8]. Conversely, if cases that are in fact embezzlement are instead resolved as mere breaches of contract, the interests of companies and public trust in business relationships will be eroded. Based on this background, this study identifies two main issues to be examined in depth:

1. What are the legal criteria for distinguishing between breach of contract and the criminal offense of embezzlement in the management of sales proceeds by sales representatives?
2. How is the principle of criminal liability applied to sales representatives who fail to remit the company's sales proceeds?

Literature Review

2.1 The Theory of Breach of Contract in Civil Law

The term "breach of contract" literally derives from the Dutch word "wanprestatie," which means poor performance or the failure to fulfill a contractual obligation [9]. In the Indonesian civil law system, which still relies on the Civil Code inherited from the Dutch colonial era, breach of contract is regulated in Articles 1238 through 1252 of the Civil Code. According to Subekti, a debtor is said to be in breach of contract if they fail to perform at all, perform late, perform imperfectly, or do something that is prohibited by the agreement [10]. In the context of sales agents, the most relevant conditions are the first two: failing to deposit funds at all, or depositing funds late after the agreed-upon deadline has passed.

Breach of contract requires the existence of a valid contractual relationship between the parties. Without a valid contract, there can be no performance that can be legally enforced [11]. Therefore, the first step in classifying a sales representative's actions is to identify the form and content of the agreement underlying their working relationship with the company. Is the sales representative a permanent employee bound by an employment contract? Or is he an independent business partner bound by an agency or distributorship agreement? Or perhaps he is a commercial agent whose status is governed by specific provisions regarding the granting of authority (lastgeving) as set forth in Articles 1792 through 1819 of the Civil Code? The differences in these legal relationships have significant implications for the appropriate dispute resolution process [12].

In cases of breach of contract that are purely civil in nature, the burden of proof focuses on two things: (1) whether the contractual obligation actually exists and has become due, and (2) whether the debtor has failed to fulfill it. The element of fault in civil breach of contract is objective in nature; that is, it is not necessary to prove the debtor's malicious intent. As long as the debtor fails to fulfill their contractual obligation without a legally valid justification, they can still be sued for breach of contract even if there was no intent to harm the creditor [13]. It is important to distinguish this understanding from the subjective element that is, in fact, at the core of the criminal offense of embezzlement. A breach of contract does not automatically become embezzlement simply because the debtor "refuses" to pay; further proof is required regarding the intent to unlawfully appropriate the property.

Furthermore, civil law recognizes the concept of force majeure (overmacht), which can serve as a valid justification for a debtor who fails to fulfill their obligations [4]. In the context of a salesperson, a failure to remit funds may be caused by factors beyond their control, such as theft, natural disasters, or economic circumstances that force them to use those funds for emergency needs. Although these reasons may not automatically exempt the salesperson from civil liability, the existence of such external factors is highly relevant in determining whether their actions meet the element of intent required under criminal law. Therefore, the assessment of a salesperson's breach of contract must be conducted holistically and contextually, taking into account the entire set of facts surrounding the incident.

2.2 The Theory of Embezzlement as a Criminal Offense in Criminal Law

Embezzlement (verduistering), as stipulated in Article 372 of the Criminal Code, contains the following elements: (1) movable property belonging to another person; (2) in the possession of the perpetrator; (3) based on a cause that is not a crime; and (4) the perpetrator has the intent to unlawfully possess the property [3][43]. Meanwhile, Article 374 of the Criminal Code adds a qualifying element in the form of a special relationship between the perpetrator and the victim namely, a relationship based on employment, position, or trust which results in a more severe penalty for the offense. In the context of a salesperson, the element of "a cause other than a criminal act" is crucial: the sales proceeds were lawfully received by the salesperson from the customer, not the result of theft or fraud. These funds should then have been turned over to the company, but the salesperson instead used them for personal gain.

The most important element distinguishing embezzlement from mere breach of contract is the presence of opzet tot wederrechtelijke toe-eigening the intent to unlawfully appropriate property. In criminal law doctrine, Moeljatno emphasizes that this element requires the perpetrator to consciously intend to make the property their own, even though they know that such a right does not belong to them [14]. This intent does not merely mean "using" or "borrowing" another person's property, but rather includes the intention to never return it at all or to transfer control over the property in a manner contrary to the rights of the rightful owner. In the case of a salesperson, proving this element requires a thorough examination of the salesperson's conduct: whether they concealed transactions, falsified sales reports, transferred funds to a personal account, or exhibited other behavior indicating an intent to appropriate the funds as their own.

The timing of the transfer of possession (bezit) is also a critical consideration. In embezzlement, the perpetrator lawfully held the property from the outset but then "changed their intent" from holding it for the benefit of another to holding it for their own benefit. This differs from theft (diefstal), where possession is obtained unlawfully from the very beginning [15][41]. It is this change of intent that, from a legal standpoint, marks the transition from a situation of ordinary breach of contract to the realm of criminal law. If, from the outset, the salesperson had no intention of turning the funds over to the company and instead planned to use the funds for his or her own benefit, then the element of "unlawful possession" is deemed to have been fulfilled even from the moment he or she received the funds from the customer.

In Indonesian case law, the Supreme Court, through several of its decisions, has provided guidance on the boundary between breach of contract and embezzlement. Supreme Court Decision No. 2576 K/Pid/2006, for example, states that a person cannot be criminally prosecuted for embezzlement if the act arises from a valid contractual relationship and there is no concrete evidence of intent to possess the funds unlawfully [16]. This ruling reflects the principle that criminal law must be a last resort (ultimum remedium) and must not be used to resolve issues that are, in essence, purely civil in nature.

2.3 The Theory of Criminal Liability

Criminal liability (strafrechtelijke aansprakelijkheid) is one of the fundamental pillars of criminal law that determines whether a person can be punished for an act that objectively meets the elements of a crime [17][38]. The commonly applied doctrine is the principle of "no punishment without fault" (geen straf zonder schuld or nulla poena sine culpa), which affirms that the element of fault (schuld) is an absolute prerequisite for imposing a criminal penalty. Fault in this context encompasses two forms: intent (dolus/opzet) and negligence (culpa/negligence).

In embezzlement cases, the sales representative's criminal liability must be proven through the element of intent, not negligence. This means that the public prosecutor is obligated to prove that the sales representative consciously and intentionally (with dolus directus or at least dolus eventualis) used sales proceeds for personal gain, rather than solely due to negligence [18]. According to Roeslan Saleh, intent in Indonesian criminal law is divided into three levels: (1) intent as a purpose (opzet als oogmerk), (2) intent with certainty (opzet met zekerheidsbewustzijn), and (3) intent with possibility (dolus eventualis). In cases involving salespeople who fail to remit funds, it is generally the first or third level of intent that is proven [19].

In addition to the element of fault, criminal liability also requires that the perpetrator be a person capable of being held accountable (toerekeningsvatbaar). This capacity for accountability relates to the perpetrator's mental state: whether they can understand the consequences of their actions and possess the ability to act in accordance with the law [17][40]. In practice, this element rarely becomes an issue in cases involving salespeople because they are generally mentally sound adults. However, specific circumstances such as extreme economic pressure, threats from third parties, or sudden financial hardship may influence a judge's assessment of the degree of culpability.

Of particular interest in the context of salespeople is the possibility of a defense (verweer) that could weaken the element of criminal liability. For example, if a salesperson can prove that they used the funds on the orders or with the permission of their superior (Article 51(1) of the Criminal Code regarding lawful official orders), or if there are other justifying grounds that eliminate the unlawful nature of their act, then their criminal liability may be waived even though their act formally meets the elements of the offense [3]. This once again underscores the need for a careful and unhurried analysis when classifying a salesperson's actions as a criminal offense

2.4 The Theory of the Fiduciary Relationship in the Context of Sales Agents

The concept of the fiduciary relationship (or vertrouwensrelatie) is of critical importance in understanding the legal status of sales agents. Etymologically, "fiduciary" derives from the Latin word *fiducia*, meaning "trust." In law, a fiduciary relationship is formed when one party (the fiduciary) is entrusted to act in the best interests of another party (the principal or beneficiary), accompanied by the authority to manage that party's assets or interests [20][42]. In the context of sales agents, the company (principal) entrusts the sales agent (agent) with managing funds from sales; it is this trust that subsequently forms the basis for a charge of embezzlement in office if that trust is abused.

The relationship of trust established between the company and the sales agent has specific characteristics compared to ordinary contractual relationships. First, there is an element of dependency, whereby the company relies on the sales agent's integrity in managing funds that cannot be directly supervised at all times. Second, there is information asymmetry, whereby the sales agent possesses knowledge and direct access to funds that the company does not have [21]. Third, there is an expectation of loyalty, whereby sales representatives are expected to prioritize the company's interests over their own when managing these funds. It is these three elements that make the abuse of a sales representative's position potentially subject to harsher penalties than a mere ordinary contractual breach.

In relation to the first issue, the theory of the trust relationship helps explain why a sales representative's failure to deposit funds does not automatically constitute a mere breach of contract. When there is an element of abuse of trust accompanied by the intent to unlawfully appropriate the funds, the act transcends the boundaries of civil law and enters the realm of criminal law [22]. In Article 374 of the Criminal Code, the element of "trust" (vertrouwen) is explicitly mentioned as an aggravating factor, underscoring that the legislature views the abuse of a relationship of trust as a more serious offense than ordinary embezzlement. Thus, the existence or absence of a special relationship of trust between a sales representative and the company serves as a key indicator in determining whether the sales representative's actions fall under the provisions of Article 374 of the Criminal Code.

By comparison, in common law countries such as the United States and the United Kingdom, the concept of breach of fiduciary duty has evolved into an independent legal doctrine, encompassing both civil and criminal liability [23]. Meanwhile, in Indonesia, positive law has not yet explicitly regulated this concept in a single legal instrument; consequently, its distinction still depends on judicial interpretation of the elements of offenses under the Criminal Code and the provisions of the Civil Code. It is precisely this lack of clear regulation that often causes confusion for both law enforcement officials and businesspeople seeking to understand the legal consequences of sales agent employment relationships.

2.5 The Principles of Ultimum Remedium and Primum Remedium in Law Enforcement

The debate between civil and criminal resolutions in cases involving salespeople is closely tied to the principle of criminal law known as ultimum remedium criminal law as a last resort. This principle is rooted in the idea that criminal sanctions, particularly imprisonment, constitute the most severe form of suffering that the state can impose on its citizens; therefore, their use must be limited to situations where other legal instruments are insufficient [24]. In the Indonesian context, this principle is not explicitly stated in the Criminal Code (KUHP), but it has become a consensus in Indonesian criminal law doctrine and is reflected in several Supreme Court decisions affirming that purely civil relationships should not be criminalized.

On the other hand, there is a contrary view that in certain cases, criminal law must in fact be the first resort (primum remedium) due to the highly harmful nature of the act and its violation of the public's sense of justice. This view is often put forward by companies that have been victims of embezzlement by their sales representatives [25]. In practice, it is this tension between the two approaches that often causes confusion in the law enforcement process: when should a case be brought through criminal channels, and when is it sufficient to resolve it through civil proceedings?

The relevance of this principle to the second issue is significant. The application of criminal liability against sales representatives who fail to remit funds must take this "ultimum remedium" principle into account. This means that before imposing a criminal penalty, investigators and public prosecutors must ensure that (1) the sales representative's actions have indeed cumulatively satisfied all elements of the offense under Article 374 of the Criminal Code, (2) there is no civil resolution mechanism that is more proportionate and adequate, and (3) the interests protected by criminal punishment are sufficiently significant to justify the use of the most severe legal instrument [26][37][44]. The balance between protecting the interests of the victim (the company) and protecting the rights of the suspect (the salesperson) must be the primary consideration in any decision to pursue this case through criminal proceedings.

Methods

This study employs a normative legal research approach, which examines law as norms or rules that apply in society. The choice of this method is based on the consideration that the issues under study namely, the distinction between breach of contract and embezzlement, as well as the criminal liability of salespeople are fundamentally matters of legal qualification and interpretation that require an analysis of the norms set forth in legislation, case law, and prevailing legal doctrine [27]. As stated by Marzuki, normative legal research is a process of identifying legal rules, legal principles, and legal doctrines to address the legal issues at hand [28].

This study employs three complementary approaches. First, the statutory approach involves examining all relevant laws and regulations, including the Criminal Code (specifically Articles 372 and 374), the Commercial Code (Articles 1238–1252, 1792–1819), Law No. 13

of 2003 on Manpower and its amendments through the Job Creation Law, as well as various implementing regulations governing the employment relationships of salespeople. This approach is essential for understanding the normative framework that forms the basis of the analysis [29]. Second, the conceptual approach involves exploring relevant legal doctrines, theories, and concepts particularly the concepts of breach of contract, embezzlement, mens rea, criminal liability, fiduciary relationships, and the principle of ultimum remedium as they have evolved in legal scholarship and jurisprudence.

Third, the case approach is used to analyze several court decisions relevant to the research topic. This approach is applied not to conduct an in-depth case study, but rather to extract the ratio decidendi from these decisions as material for comparison and to strengthen the argumentation [28]. Some of the rulings referenced in this study include Supreme Court Decision No. 2576 K/Pid/2006, Supreme Court Decision No. 1195 K/Pid/2010, and several relevant district court rulings concerning cases of embezzlement in office by sales personnel.
The legal materials in this study are divided into three categories. Primary legal materials consist of applicable laws and regulations (the Criminal Code, the Civil Code, and the Labor Law), final and binding court decisions, and international conventions ratified by Indonesia, where relevant. Secondary legal materials include various academic literature such as legal textbooks, peer-reviewed scholarly journals, previous research findings, as well as comments and reviews by legal experts on court decisions and legislation [27]. Tertiary legal materials, which serve to supplement understanding, include legal dictionaries, legal encyclopedias, and various other explanatory materials that aid in understanding the legal concepts and terminology used.

The method for collecting legal materials in this study was conducted through systematic and structured library research. The steps involved include: (1) compiling an inventory of all laws and regulations related to the research topic; (2) searching for court decisions through the Supreme Court's decision directory (putusan.mahkamahagung.go.id) and other legal databases; (3) searching for scholarly literature through journal databases such as Google Scholar, Garuda (Garda Rujukan Digital), and SINTA (Science and Technology Index); and (4) reviewing legal textbooks from the libraries of relevant academic institutions. To ensure the validity and relevance of the sources, this study prioritizes literature published within the last five years, although some classic works considered fundamental are still used as references [30].

The legal analysis technique employed is legal interpretation, which encompasses grammatical interpretation (based on linguistic meaning), systematic interpretation (within the context of the entire legal system), historical interpretation (based on the history of the norm's formation), and teleological interpretation (based on the norm's purpose). In addition, a deductive method of legal reasoning proceeding from general principles to specific cases is employed to draw conclusions regarding how applicable legal norms should be applied in cases involving sales representatives. The analysis is qualitative and prescriptive in nature, meaning that it not only describes the applicable law (lex lata) but also formulates how the law should ideally be applied (lex ferenda) in the situation under discussion [29].

Result and Discussion

4.1 Legal Parameters Distinguishing Breach of Contract from the Criminal Offense of Embezzlement in the Management of Sales Proceeds by Sales Representatives

The issue regarding the boundary between breach of contract and embezzlement in the context of sales representatives is, in fact, a reflection of a more fundamental issue in legal theory: should a particular incident be resolved in the civil or criminal sphere? The tension between these two spheres cannot be resolved simply by a literal reading of the statutory text;

it requires a deep understanding of the fundamental elements of each legal institution [31]. Based on an analysis of relevant legal norms, doctrines, and case law, this study identifies at least five key legal parameters that can be used to distinguish breach of contract from embezzlement in the context of sales agents' management of sales funds.

The first parameter is the presence or absence of criminal intent (mens rea). This is the most fundamental distinction between breach of contract and embezzlement. Breach of contract does not require criminal intent; it is sufficiently established by the fact that a contractual obligation has not been fulfilled without a valid justification [10]. Conversely, embezzlement under Articles 372 and 374 of the Criminal Code requires the presence of "opzet tot wederrechtelijke toe-eigening"the intent to unlawfully appropriate another person's property [14]. In practice, proof of this mens rea can be established through various forms of circumstantial evidence: did the salesperson forge receipts or transaction reports? Did they transfer funds to a personal account before the deposit deadline? Did they flee or go into hiding after it was discovered that they had failed to deposit the funds? Conversely, if the salesperson openly admits to the delay and commits to paying even if they ultimately fail to do so this indicates the absence of mens rea and more closely resembles a breach of contract.

The second parameter is the moment when unlawful possession (bezit) is established. In criminal law, it is crucial to determine exactly when the salesperson "shifted their intent" from merely holding funds for the company's benefit to taking control of those funds for their own personal gain. If the salesperson intended from the outset to use the funds for personal gain at the time they received them from the customer, then they committed embezzlement as of the moment the funds were received [15]. However, if that intent arises later for example, due to sudden financial pressure then that moment becomes a critical juncture that requires further analysis. Breach of contract, on the other hand, does not require an analysis of the moment of this change in intent; it is sufficient to prove that the obligation was not fulfilled by the specified time.

The third parameter is the form and context of the legal relationship between the salesperson and the company. As outlined in the literature review, the relationship between a salesperson and a company can take various forms, ranging from an employment relationship to an agency relationship to a distributorship. Each form of relationship has different implications. In an employment relationship, the salesperson is an employee subject to the company's orders and supervision; in this case, failure to deposit funds is more easily classified as a breach of duty that may amount to embezzlement in office [22]. In a more independent agency relationship, the line between breach of contract and embezzlement becomes blurred because the sales representative has a higher degree of autonomy and the nature of the relationship is more equal. The Supreme Court, in Decision No. 1195 K/Pid/2010, affirmed that the classification of a criminal offense must take into account the concrete legal structure of the relationship between the parties, not merely the label used in the contract.

The fourth parameter is the sales agent's follow-up actions and response when faced with a demand to remit funds. The sales representative's response after the failure to deposit the funds is discovered can serve as a key indicator of their intent. If the sales representative acknowledges the obligation, attempts to negotiate a payment schedule, or is willing to provide collateral, this points more toward a breach of contract, where there is acknowledgment of the debt but an inability (or failure) to repay it [32]. Conversely, if the salesperson denies receiving the funds, goes into hiding, or divests assets to evade collection, this indicates malicious intent that may support a finding of embezzlement. In actual cases, this response often serves as one of the key pieces of evidence that judges consider when determining the nature of the defendant's actions.

The fifth parameter is the amount of funds and behavioral patterns. In some cases, the amount of funds not deposited and the salesperson's behavioral patterns over a certain period may serve as relevant legal indicators. If the failure to deposit funds is systematic occurring repeatedly using the same method this indicates a planned modus operandi, which is characteristic of a criminal offense rather than mere contractual negligence [33]. Conversely, if this is the first occurrence and takes place under unusual circumstances, the weight of evidence supporting a classification as a breach of contract becomes greater. It should be noted that these five parameters must be assessed comprehensively and not in isolation. No single parameter can, on its own, determine the classification of the sales representative's actions; a thorough analysis of all existing legal facts is required.

In response to this situation, the Criminal Procedure Code (KUHAP), through Article 183, establishes the principle that a minimum of two pieces of valid evidence, combined with the judge's conviction, is required to establish guilt. In the context of embezzlement by a salesperson, relevant evidence includes transaction documents, bank statements, customer witness testimony, sales reports, and digital evidence such as electronic messages that can reveal the salesperson's intent. When this evidence is insufficient to prove the element of mens rea beyond a reasonable doubt, the principle of in dubio pro reo (in case of doubt, the decision favors the defendant) must be applied, meaning the case must be resolved through civil, not criminal, proceedings [34].

4.2 Application of the Principle of Criminal Liability to Sales Representatives Who Fail to Remit Company Sales Proceeds

Analyzing the criminal liability of sales representatives who fail to remit sales proceeds requires not merely a mechanical understanding of the elements of the offense, but also sensitivity to the socioeconomic context and power dynamics surrounding the employment relationships of sales representatives in Indonesia. Most sales representatives in Indonesia work under conditions of significant economic uncertainty; they often lack a fixed salary, work on a commission basis, and bear their own operational costs in the field [35]. This reality is important to consider not to negate legitimate legal liability, but to ensure that any criminal penalties imposed are truly proportionate and just.

Under Article 374 of the Criminal Code, a sales representative's criminal liability arises when the following elements are cumulatively satisfied: (1) a legal subject capable of being held liable, (2) an act that meets the elements of the offense, and (3) the absence of any justifying or exculpatory grounds. The first element refers to the salesperson's capacity as a competent legal subject: they must be of legal age, of sound mind, and not in any special circumstances that negate their capacity to be held responsible. In practice, this element rarely becomes a serious point of contention; it is the second and third elements that are more frequently contested.

Regarding the act element in Article 374 of the Criminal Code, there are several points that require special attention in the context of sales representatives. First, the phrase "by virtue of his position or his employment or because he receives wages for it" in Article 374 of the Criminal Code requires that the embezzled goods be entrusted to the perpetrator within the context of an employment or professional relationship. In the case of a sales representative, this requirement is directly met because the sales proceeds are indeed received in their capacity as the company's sales representative. Second, the phrase "taking possession of the property" requires that the property was already lawfully in the perpetrator's possession before the intent to unlawfully possess it arose, and this requirement is also met in the situation where a sales representative receives payment from a customer.

The most crucial element and one that is often the subject of debate in court is proving the element of "intentionally and unlawfully possessing the property." Prosecutors often face difficulties in proving this element of intent directly because it constitutes a mental state (mens rea) that is not physically observable. The approach generally taken is indirect evidence (or circumstantial evidence): inferring the intent to possess unlawfully from the perpetrator's sequence of external actions [32]. Supreme Court Decision No. 2576 K/Pid/2006 clarifies that in embezzlement offenses, "possession" does not necessarily mean that the perpetrator physically moved the property to their residence; it is sufficient if they acted as if the property were theirs for example, by using it, selling it, or refusing to return it when asked.

With regard to grounds for criminal exoneration, there are several situations that can legally affect a salesperson's liability. First, if the salesperson can prove that he or she used the funds on the orders or with the permission of an authorized superior (Article 51(1) of the Criminal Code), then the unlawful nature of the act is negated. However, the "order" in question must be a lawful order and not contrary to the law; an order to commit an act that clearly violates the law cannot serve as a justifying ground [3]. Second, the defense of force majeure (overmacht) set forth in Article 48 of the Criminal Code may serve as a mitigating factor if the salesperson can prove that they were under unavoidable pressure that compelled them to use company funds for example, a real threat to their own life or that of their family. However, the threshold for force majeure is very strict and cannot be applied loosely.

From a criminal policy perspective, the imposition of criminal liability on salespeople should take into account the proportionality between the degree of fault and the sanctions imposed. The maximum criminal penalty under Article 374 of the Criminal Code is five years' imprisonment a significant penalty that would have a major impact on the salesperson's life and that of their family. Therefore, the question of whether criminal punishment is truly necessary or whether civil remedies (restitution, compensation) would be more appropriate must be part of the judge's consideration in rendering a verdict [24]. There is no harm in the judge considering the application of a suspended sentence (probation) for cases where the salesperson is found guilty but demonstrates good faith in restoring the company's losses.

Another important consideration in the context of a salesperson's criminal liability is the possibility of corporate criminal liability on the part of the company. If the company's inadequate supervision system contributed to the embezzlement for example, because the company lacked an adequate reporting system, failed to conduct periodic financial reconciliations, or did not provide ethics training to sales representatives then there is an argument that the company also bears moral responsibility, even if not criminal liability as defined in Article 374 of the Criminal Code. This concept is relevant for developing a more comprehensive prevention policy to ensure that similar incidents do not recur in the future [33].

Conclusion

The legal parameters distinguishing breach of contract from the criminal offense of embezzlement in the management of sales proceeds by sales representatives encompass five elements that must be assessed cumulatively and comprehensively: (1) the presence or absence of criminal intent (mens rea) in the form of the will to unlawfully appropriate property; (2) the time at which unlawful possession is established; (3) the nature and context of the legal relationship between the salesperson and the company; (4) the salesperson's response when faced with demands to remit funds; and (5) the pattern of behavior and the amount of funds involved. When these five parameters collectively indicate the presence of criminal intent and deliberate abuse of trust, the offense of embezzlement in office (Article 374 of the Criminal Code) may be applied. Conversely, when the mens rea element is not proven beyond a reasonable doubt, the principle of in dubio pro reo requires that the case be resolved in the civil law sphere as a breach of contract.

The application of criminal liability against sales representatives who fail to remit sales proceeds must meet strict standards of proof—not merely demonstrating the fact that funds were not remitted, but also convincingly proving the presence of intent and the absence of criminal justifying circumstances. Any criminal penalties imposed must take into account the principles of ultimum remedium and proportionality of sanctions, given that the use of criminal law instruments in a context that is essentially civil in nature is not only unfair to sales representatives but also undermines legal certainty in the business world as a whole. Moving forward, it is recommended that policymakers consider the need for more specific regulations regarding the legal relationship between salespeople and companies, including clearer parameters for distinguishing between civil and criminal disputes in this context, thereby providing legal certainty for all parties involved.

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