Removal of Assets under Seizure

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Abstract: In the present paper we have examined the offense of removal of assets under Seizure, with a greater emphasis on its constitutive elements. Although in its legal content the offense examined presents identity elements with the offense with the same marginal name in the old law, we have highlighted the differentiation which refers to the lower limits of the punishments in the old law, in relation to the new law. This aspect may be important in transient situations, in identifying and enforcing the more favorable criminal law. The paper is part of an academic course to be published in the near future. This work can be useful for students and practitioners in the field of criminal law.

Keywords: Offense; objective side; subjective side; sanctions

1. Introduction

The offense of removing assets under seizure is the deed of a person who evades an asset that is legally seized.

The act is more serious when committed by the custodian.

In situations expressly provided by law, some state authorities impose, on some assets that are the material object of some offenses or represent the product of other crimes, the precautionary measures consisting in their unavailability by the seizure.

In this context, the deed of removing assets under seizure "presents an obvious social danger for the social value of the authority and therefore for the social relations, whose protection is ensured by the defense of the precautionary measures imposed by the state authority against violations of these measures" (Stănoiu, 1972, p. 59).

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The provisions of art. 261 Criminal Code reproduce the provisions of art. 244 Criminal Code from 1969.

The only difference lies in the minimum limits of the sanction, which are lower in the old law, in both normative modalities (imprisonment from one month to one year or fine and imprisonment from 3 months to one year or fine, and imprisonment from 3 months to 2 years or fine, compared to 6 months to 2 years imprisonment or fine).

2. Pre-existing Elements

The special legal object consists in the social relations whose "normal deployment is ensured by maintaining the seizure of a legally seized asset" (Stănoiu, 1972, p. 59). *The material object* of this offense is the asset on which the seizure measure was applied. With regard to the asset that is the material element of the offense, the doctrine stated that "by *asset* is meant anything that has a material (corporeal) existence and represents an economic (patrimonial) value. This asset must be part of the *movable* category, since only these can be evaded, even if immovable asset can be seized (Article 163 of the Criminal Procedure Code). In this respect, the opinion that the material object of the seizure offense can also be a real asset, even if the provisions of the Criminal Procedure Code cannot be ignored is questionable" (Diaconescu & Duvac, 2009, p. 379).

Contrary to the above-mentioned opinion, we consider that the asset in question can be both movable and immovable.

The active subject of this offense can be any natural or legal person who fulfills the general conditions required by law to have this quality (criminal responsibility). In the aggravated way the active subject is qualified, its qualification being its custodial quality. *The main passive subject* is the state as the holder of the defended social values. *Secondary passive subject* is represented by the state authority that imposed the seizure measure.

3. Structure and Legal Content of the Offense

3.1. Premise Situation

The offense examined cannot be conceived without the pre-existence of an asset on which a lawful application of seizure has been imposed.

3. 2. Constitutive Content

3.2.1. Objective Side

The material element of the objective side consists of an act of evading. According to an opinion, "The notion of evasion has the same meaning as in the case of crimes against personal asset through evading" (Stănoiu, 1972, p. 60).

In another opinion, on the contrary, it was argued that "evasion is not synonymous with the appropriation we encounter in the case of theft, because there is an offense of seizure even when the seizure of the asset was done for a purpose other than that of the misappropriation. However, objectively, support is appreciated by the same criteria as taking away from theft, that is, the material element will exist whenever the assets taken by the perpetrator have been removed from the realm of seizure, passing into the disposition power of the perpetrator" (Loghin & Filipas, 1992, p. 180).

In another opinion it is argued that "by *evasion* it is meant the removal of the movable/immovable asset from the legal seizure applied (all the conditions provided by the law for the application of seizure must be analyzed in order to determine the legality of this measure of precautionary measure); it was rightly pointed out in the doctrine that *the act of eviction* creates a situation in which the evaded asset ceases to fulfill the function assigned to it by applying the seizure; the evaded asset from the seizure ceases to be one of those that secured the claim of the pursuing lender, reducing the general pledge that he had on the debtor's patrimony" (Udroiu, 2017, p. 325). The act of evading may also be incriminated if the seized asset was replaced by another.

The essential requirement lies in the concrete situation of the asset in question, which must be *"legally seized"*.

By the phrase "legally seized asset" is meant the asset against which the measure of seizure has been applied under the law, which implies:

- the body that applied the seizure had this attribution or obligation, according to the law;
- the asset must be subjected to seizure, according to the law.

In the case of the aggravated normative way, it is necessary for the asset to be evaded even by the custodian.

In the judicial practice it was decided that "For the existence of the offense of removing assets under seizure of a quantity of wood material it is necessary for it to be seized according to the provisions of the Forestry Code, according to which the retained wood materials will be given in custody, according to circumstances, to the forestry unit which will ensure the storage and guarding of retained timber. On the other hand, the minutes of custody was not legally drawn up, lacking some of the elements that they had to encompass according to Art. 17 par. (1) in conjunction with art. 18 from G.O. no. 427/2004 for the approval of the Norms on the circulation of wood materials and the control of their circulation and of the round wood processing plants, for wooden materials retained / confiscated under the law, respectively, the person to whom the assets were entrusted was not identified and also, the attendance of witnesses was not mentioned. Therefore, it was right to note that the present crime lacks one of its constitutive elements, namely the objective side" (Udroiu, 2017, p. 326).

Although this decision was issued prior to the entry into force of the new Codes, it remains current at the moment, as the solution in question was ordered due to the non-fulfillment of the essential requirements, but also of the substantive and procedural elements of the procedural documents drawn up.

Also, "It cannot be remembered the existence of the offense of seizure as long as the civil sentence by which the establishment of the seizure was decided, although definitive, was not enforced" (Udroiu, 2017, p. 326).

The immediate consequence is the creation of a state of danger for the protected social relations, "the danger caused by the illicit putting in the state of availability of an indispensable asset" (Stănoiu, 1972, p. 60).

The causal link derives from the materiality of the deed (resulting *ex re*).

3.2.2. Subjective Side

The form of guilt of the offense is the intention that may be *direct* or *indirect*. There will be intent when the perpetrator knew that the asset he was evicting was legally seized and provided the outcome of his deed which he pursued or accepted. If the active subject did not know that the asset was legally seized, his deed would not meet the constitutive elements of the offense of removing assets under seizure, but of the crime of theft.

4. Forms, Modalities, Sanctions

4.1. Forms

Preparatory acts, as well as *attempt*, although possible, are not sanctioned by law. *Consummation* of the offense takes place at the time when the act of evasion was executed and the immediate consequence required by the law occurred.

With regard to *exhaustion*, this may be the case where "seizure has been imposed on several assets, in which case the criminal activity may be prolonged in time over the moment of consuming the deed of the first evicted asset, by repeating the acts of evasion against other seized assets, resulting in the same resolution" (Stănoiu, 1972, p. 61). Under these circumstances, the moment of exhaustion will be identified at the time of the last act of evasion.

4.2. Modalities

The offense examined presents a typical normative (simple) way and an aggravated normative way. Provided under art. 261 par. (1) Criminal Code, the typical normative way consists in the eviction of an asset that is legally seized.

The aggravated normative way is provided in the provisions of art. 261 par. (2) Criminal Code and consists of the act of evicting a legal asset seized by the custodian. The most important feature of this approach is the existence of a competent active subject, competence which is the custodial quality of the seized asset.

4.3. Sanctions

In the case of the typical normative modalities, the sanction stipulated by the law is imprisonment from 3 months to one year or fine, and in the case of aggravated normative modalities the sanction is imprisonment from 6 months to 2 years or fine.

Regarding the sanctions provided by the law, we consider that it is too gentle in relation to the seriousness of the offense.

As far as we are concerned, we believe that the offense of removing assets under seizure must be penalized more severely than the offense of theft in the simplest way, because it is more serious than the theft, which is why we consider that there are changes in the special limits of the sanction provided by law.

5. Complementary Explanations

5.1. Connection to other Offenses

The offense examined has some links to the offense for the breach of a seal.

5.2. Some Procedural Aspects

The competence to carry out the criminal prosecution belongs to the criminal investigation bodies of the judicial police, under the supervision of the prosecutor from the Prosecutor's Office attached to the district in whose district the offense was committed. The criminal action is initiated ex officio, and the jurisdiction in the first instance belongs to the court.

In relation to the quality of the active subject at the time of the offense, or sometimes of the trial of the case, the jurisdiction can also belong to higher courts.

If "the deed was committed for the purpose of misrepresentation, the offense of theft will be withheld; so, also the evasion of the seizure will be held in concert with the offense of theft and in the event that the owner, who does not have custody of the seized property, evades it from the custodian" (Udroiu, 2017, p. 325).

6. Legislative Precedents and Transitional Situations

6.1. Legislative Precedents

The offense of removing assets under seizure was also provided in the Criminal Code of 1864 in Art. 200 and 201, as well as in the Criminal Code Carol II where it was stipulated in art. 264 and 265.

6.2. Transitional Situations. Enforcement of the More Favorable Criminal Law

Considering the lower limits of punishment in the previous law, as well as the effects of attenuating circumstances, we appreciate that most often the more favorable criminal law will be the old law.

Thus, if one or more attenuating circumstances are retained, the more favorable criminal law will be the old law.

We make it clear that given the reduced limits of the maximum punishments provided by the law, problems related to the application of more favorable criminal law have only theoretical importance.

7. Conclusions

In the present paper I examined the offense of removing assets under seizure according to the normative content stipulated in art. 261 of the Criminal Code.

In the introductory part we considered the concept and characterization of the offense as well as some comparative elements provided by the two laws. We also examined the pre-existing elements of the offense, the constitutive content, as well as some aspects regarding the forms, modalities and sanctions provided by the law. Last but not least, we have tried to highlight some situations regarding the way of applying the more favorable criminal law in transitory situations, since this offense was also foreseen in the previous law.

We conclude by claiming that, against the background of the still high level of crime in the field, complemented by the need to defend specific social values, it is necessary to maintain incrimination in the Criminal Code.

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