Jurisprudence Delimitations of Fraud Offense

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Abstract: Fraud crime is particularly complex, especially from the perspective of judicial practice, and often the solutions proposed are considerably different from one case to another. In certain concrete situations, even *the separation of the offense of deceit from the tort liability* committed for non-fulfillment of contractual obligations. Constantly, in such situations, it was considered that the mere non-performance of a civil obligation cannot have criminal consequences as long as one party has not used deceitful means to persuade the other party to execute the convention on time (Hâj, 2000, p. 351). Thus, deception approaches civil and criminal content, but elements of nuance make the difference.

Keywords: error; attempt; embezzlement; robbery; bribery

Introduction

The deception is one of the crimes with a high degree of gravity, which justifies the intervention of the criminal law, which puts into operation the most severe penalties, i.e. punishments. Elements that cause difficulties in interpretation and application are those related to the delimitation of deception from other crimes. Certainly, there are trafficking in influence, abuse of service, but the judicial practice has shown the approximation of the crime of deception with other criminal acts.

1. The attempt to obtain, without right, amounts of money for the refund of value added tax on the basis of fraudulent operations in the accounts of a company committed prior to the entry into force of the provisions of art. 8 of the Law no. 241/2005, meets the constitutive elements of the attempt to commit the offense of deception. The distinct incrimination of the act, by the provisions of art. 8 of the

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Law no. 241/2005 - the special law for preventing and combating tax evasion - does not lead to the conclusion that until the entry into force of the provisions of art. 8 of the Law no. 241/2005, the act was not provided for by the criminal law in relation to the content of the Criminal Code, but to the conclusion that the provisions of the Criminal Code are applicable to the acts committed up to that moment. The High Court of Cassation and Justice considered that the deed - consisting in the attempt to obtain, without right, the amount of 33.116,41 lei for VAT reimbursement after having made the accounting records of the company A. of fraudulent operations - at the time of the commission, in 2004, it was incriminated and sanctioned by the criminal law, by the provisions of the Criminal Code, representing an attempt at the crime of deception provided by art. 20 referred to in art. 215, par. (1) 1969 Criminal Code. The conclusion is based on the special nature of the existing tax legal relationship, in the relationship with the state and not on the special quality of the defendants, that of taxpayers, leading to the conclusion that the defendants were convicted of an act which was not foreseen in 2004 by the criminal law, given that the legal provisions of the Criminal Code that incriminated the deceit were not circumscribed to certain persons or certain legal relations between the passive subject and the active subject of the offense. The fact that, subsequently, by art. 8 of the Law no. 241/2005 there were separately incriminated by a special law, the acts of the nature committed by the defendants in 2004, it does not mean that until then they were not provided for by the criminal law in relation to the content of the Criminal Code[1]. From the interpretation of this decision we can conclude that the offense defined by art. 8 of the Law no. 241/2005 has a special character in relation to the offense of deceit in the Criminal Code, which is why the rule of the special law will have priority in its application.

2. Also in the same matter it was considered that the act of misleading by the presentation, with the help of false documents, of acts of commerce carried out in the country as export acts, for the purpose of evasion of excise duties and VAT, constitutes the offense of tax evasion and not the crime of deceit[2]. In order to establish this, the court held that the defendant, a management adviser to a company and a administrator of a commercial firm, in order not to pay excise duty and VAT charged for domestic alcohol trade, in September 1998 had the understanding of representatives of foreign companies to conclude fictitious alcohol export contracts, in fact the merchandise being sold in Romania. In order to show the reality of the contracts, the defendant was favored by a customs officer,

[1] I.C.CJ, Criminal Section, Decision no. 1341 of April 17, 2013, www.scj.ro.
[2] Article 12 of Law no. 87/1994, normative act repealed and replaced by Law no. 241/2005.

also being charged in the matter, who fictitiously confirmed the exit of alcoholic tanks in the country. Through these fraudulent work the defendant damaged the state budget with the amount of 581,625,578 lei, representing excise duty and unpaid VAT. His deed is an act of deception, but because there is special regulation, it is also impossible to hold the committing of the crime of deception in the Criminal Code.[1]

3. The act of the manager of a company, of acquiring goods of a lower quality, exempt from taxes and excise duties, of selling it as a high quality product, charging taxes and excise duties and of taking the value of the latter components into consideration constitutes the offense of deception committed at the expense of the buyers, and not the embezzlement and deception of the goods referred to in art. 297 Criminal Code 1969. The court held that the two offenses cannot be held because the company is not injured by the deed and the goods have not been forged or substituted[2]. In order to decide in this way, the court held that the defendant, manager of a trading company having as its object the activity of petroleum products, purchased large quantities of lower petroleum products, exempt from excise duty and from July 1999 to February 2000 the FSDP tax, and resold them as premium gas and diesel, tax and excise duties. The money obtained in this way was not paid to the state budget, being trusted by the defendant. Considering that since the defendant did not have the status of an official, he cannot be the active subject of the embezzlement offense, the court acquitted him for lack of constitutive elements of the offense. The appeal sought to change the legal classification of the offense of embezzlement and deceit on the quality of the goods.

The court held that the evidence administered in the case shows that the action of the defendant was not prejudicial to the company whose manager he was; he did not take money from the company's patrimony, and there was no link in his management. That is why he considered that the defendant could not be held responsible for committing the offense of deceit on the quality of the goods either in the form of direct participation or under the improper participation, due to the lack of constituent elements, substitution of goods or products. In the present case, the petroleum products have not been forged, altered or substituted, but have been given a different designation and price which gives them the appearance of authenticity. The defendant, through his actions, cheated buyers who, being

[1] I.C.C.J. Criminal Section, Decision no. 2287 of May 8, 2002, www.scj.ro.
[2] I.C.C.J. Criminal Section, Decision no. 5524 of November 27, 2003, www.scj.ro.

convinced that they are supplied with Premium gasoline and diesel fuel, have in fact acquired inferior quality products.

Since the label under which these lower petroleum products, exempt from the FSDP and excise duty, were sold as petrol and diesel, taxed and excisable products, the price paid by the buyers included these unjustified additional differences as they were induced mistakenly about the quality and cost of the purchased product. The amount of unpaid taxes and excise duties, amounting to 2,568,102,252 lei, included in the paid price, it does not represent obligations to the state budget, but, as it was shown, it constitutes the damage caused to the buyers and the unfair material advantage fraudulently obtained by the defendant. The facts, as described, thus meet the constitutive elements of the deceitful offense.

4. The deeds of the administrator of a company to falsify documents of the company and, based on them to obtain a credit which, in the absence of falsified documents, it would not have obtained and which it did not repay, constitutes the offense of forgery documents under private signature and the offense of deceit, and it does not fall within the provisions of art. 271 point 1 of the Law no. 31/1990, in which the act of the administrator of the commercial company, which presents, in bad faith, in the prospectuses, reports and communications addressed to the public, false information about the constitution of the company or its economic conditions[1].

In order to order this, the court held that the defendant, as a manager of a commercial company, to obtain a 3 billion lei loan, falsified the balance sheet of the company and its balance of verification, thus obtaining the concerned credit.

In the first instance, the defendant requested the change of the legal framing of the offense, from the offense of deception to the offense provided in art. 271 point 1 of the Law no. 31/1990, republished. The request to change the legal framing of the deed was considered unfounded, as art. 271, point 1 of the Law no. 31/1990, republished, provides that the founder, the administrator, the director, the executive director or the legal representative of the company who presents in bad faith, in the documents, reports and communications addressed to the public, is punished by imprisonment from one to five years, untrue data on the constitution of society or its economic conditions, or hides, in bad faith, in whole or in part, such data. However, the first instance considered that the defendant's act of presenting in the creditor file falsified accounting documents without which the bank would not

[1] I.C.C.J. Criminal Section, Decision no. 6017 of October 19, 2006, www.scj.ro

have granted the 3 billion lei loan requested, by these fraudulent means the defendant misleading the bank constitutes the crime of deception and not a misrepresentation of untrue data on the economic conditions of the company whose manager it was.

The High Court of Cassation and Justice found in this situation that the offense provided in art. 271 point 1 of the Law no. 31/1990, republished, has as its legal object the social relations in connection, in general, by the public - people who are seen non-determined, generically – of the data and information regarding the commercial companies - their constitution and the economic conditions. In the case, the defendant committed the crime - the fake in documents under private signature - in order to fulfill the conditions of committing the offense of purpose - the deception, which surpasses the simple misleading of the public regarding the economic conditions of society. It is clear that a certain banking institution is not "public" within the meaning of art. 271, point 1 of the Law no. 31/1990, republished, and the fact that those falsified documents did not have a general purpose, did not address the "public" in general, but were intended for a given banking institution and that, by presenting them, they did not pursue a general purpose, unreal, but a precise purpose, namely misleading the credit institution to obtain credit, by circumventing certain conditions known to the defendant in the course of previous contracts. The concrete way of conceiving and executing the criminal activity reveals the intent of the defrauding the defendant of the banking institution, namely the direct intention in the sense of art. 19 point 1, letter a) of Criminal Code.

5. The defendant's act of making inappropriate qualitative products and selling them packaged and labeled as manufactured by another company, creating the conviction of the buyers that the products are made by this company, does not meet the constitutive elements of the deception crime, but the ones of the deceit on the quality of the goods provided in art. 297 of Criminal Code, and those of the unfair competition offenses provided in art. 5, letters a) and b) of Law no. 11/1991, retained in contest[1]. In order to decide in this way, the court noted that on 26 May 2003 the police officers carried out a control at the companies R. and P., where they found that the purchased materials - asphalted cardboard for waterproofing - from the defendant's society were inscribed with the logo of the commercial company M., the administrators of the two companies, TM an PC were the witnesses, declaring that they had bought them from G. The laboratory analyzes

[1] I.C.CJ, Criminal Section, Decision no. 5241 of September 16, 2005, www.scj.ro.

carried out on the asphalt board raised from the commercial companies R. and P. confirmed that the cartons were made from the commercial company G. and not from commercial company M and that these materials cannot be classified in the class of waterproofing materials because they are limited to a temperature of 40 degrees Celsius versus 80 degrees Celsius as stipulated by the normative acts for such materials.

The defendant admitted that he had made inappropriately quality counterfeit asphalt cartons and sold it to several commercial companies, and the witnesses said they had bought from the defendant the asphalted carton packed and labeled as the one produced by the company M.

At the same time, the witnesses stated that the packaging and labels applied created the conviction that the merchandise was manufactured at company M, that the selling price of the defendant was lower than that of the company M. And that the defendant claimed that the cartons that they were selling were received as compensation from that company. In relation to the facts, the legal framing of frauds in the quality of goods and unfair competition is appropriate.

6. The act of the taxi driver, to hijack, threaten and block the doors to prevent passengers from paying sums that exceed the normal rate of races, constitutes the crime of robbery and not of deceit[1]. The court found that on October 27, 2002 the injured parties, minors, were kept for a few minutes in a car with the doors locked by an order at the defendant's exclusive disposal and pressed to pay 400,000 lei for a part of the travel at which he added 150,000 lei for stationary, felt threatened and unable to defend themselves, conditions in which they agreed to give the defendant the sums required to be able to get out of the car.

In such circumstances, it is found that the defendant acted in order to unjustly acquit those sums of money, disposing of the injured parties by violent means, the constitutive elements of the robbery offense being met. For the existence of the crime of deceit, it is required, from the point of view of the objective side, that the defendant has committed a misleading action by another person by any means and, as a result of this activity, the deceived person has taken a decision with a damaging patrimonial character. In the present case, the injured parties did not make such a decision, but gave the defendant a sum of money under the threat of acts of violence.

[1] I.C.C.J. Criminal Section, Decision no. 135 of 10 Jan. 2005, www.scj.ro.

7. The act of claiming and receiving money by misleading the injured person with regard to the circumstance that the act for whose failure the perpetrator claimed and received the money regards his / her duties, meets the constitutive elements of the deceitful offense and not those of bribery offense[1]. The court in that case held that the defendants had stopped the foreign-registered car abroad, and by misleading the road traffic offenses, at the request of the three defendants, B.R. gave him $ 500 to the defendant B.N., who in turn gave the defendant M.R.

According to the provisions of art. 254 of the 1969 Criminal Code, the offense of bribery was the act of an official who, directly or indirectly, claims or receives money or other benefits that he does not accept or accept the promise of such benefits or does not reject it in order to fulfill, to delay the performance of an act regarding his or her duties or to act contrary to these duties. In the case in question, it is apparent from the documents before the Court that, in reality, B.R. did not violate the traffic law on public roads. The defendants therefore misled him by saying that he was liable to fines or even imprisonment and that, if he handed them over $ 500, they would not draw up the papers of recording the deed. Consequently, the defendants did not claim and receive money to refrain from performing an act that falls within their job duties, but by misleading the injured party, causing harm in order to obtain an unjust material benefit. Consequently, their deed is deception and not bribery.

Conclusions

The post-factum equalization mechanism, the appeal in the interest of the law, could only be activated after a non-unitary practice had been established, which sometimes gave rise to doctrinal alerts and diversified reactions. In this way, it was possible for the doctrine sometimes to crystallize different opinions on the same issue of law, the authors of the criminal law being convinced by the arguments invoked by some or the other courts.

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[1] I.C.C.J. Criminal Section, Decision no. 3622 of 30 June 2004, www.scj.ro.

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