OFFENCE OF FRAUDULENT MANAGEMENT

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Abstract
The activity of the directors of companies and the activity of others who are required to manage the assets of individuals or legal entities - public or private, as well as people who have special skills in relation to these legal entities must be conducted in compliance with the legal provisions incidental to heritage management. It is important that the manager of the company should not confuse the company patrimony with his own patrimony so as to be detrimental to the legal person and legal administrators, liquidators or their representatives or agents should not enter into legal acts detrimental to the person whose heritage he manages under special procedures provided by law.

From the perspective of the legal protection of corporate assets and individuals, along with other legal provisions of special laws and other offenses relating to the protection of goods, fraudulent management is distinguished as a specific offense to be retained when the perpetrator inflicts an injury to a person, during the administration or preservation of its assets, although he had to take care of the administration or preservation of those goods. Fraudulent management also exists if the offense is committed by the legal administrator, the liquidator of the debtor’s fortune or a representative or his agent.

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I. Introduction

The offense of fraudulent management is part of the crimes against patrimony by ignoring the trust contained in Chapter III of Title II of the new Criminal Code.

These crimes affecting people’s patrimony by ignoring the trust consists in deeds by which a person acquires, disposes or wrongfully goods belonging to another person under a legal act.

The difference between crimes regarding person’s patrimony committed by disregarding trust, such as fraudulent management, and other offenses stipulated in the Criminal Code aimed at individual property, such as theft or robbery for example, consists mainly in the fact that in the first category, goods are in the management or conservation by the perpetrator, that is they are for a limited period in the possession or detention of the offenders, who can make decisions on such goods being excluded only documents available and in the second category, the goods are in possession or detention of another person.

Regarding the legal subject of crimes against property committed by ignoring the trust, it consists in the social relations concerning the legal relationship of patrimony issues involving their conclusion and execution in good faith and trust, so that morality of the parties in these legal relations expressed by honor and honesty are the essential premise in establishing criminal legal protection of individual property.

In the new Criminal Code the offense of fraudulent management is set out in art. 242 which, although in a significant proportion maintains the content of the offense provided by art 214 of the old Criminal Code, has several changes and additions to its structure and content.

According to art. 214 para. (1) of the previous Criminal Code the crime of fraudulent management consists of infliction of harm to a person, in bad faith, on the occasion of its management or conservation of property by the one who has or should be responsible for the management or conservation of those goods. Article 214 para. (2) also provided an aggravated variant which incriminated the fraudulent management act committed in order to gain a material benefit.

It should be noted that in the Romanian Criminal Code the offense of fraudulent management has an existence of its own, unlike other European criminal legislations, where such acts are circumscribed to fraud or breach of trust. [1 G. Antoniu ... p.518]

Legal content of the offense of fraudulent management in the new Criminal Code is given in variant type by art. 242 para. (1) which provides that the act consists in the infliction of harm to a person, when occurs its management or conservation of the goods by the one who has or should be responsible of the management or conservation of those goods.
The Criminal Code contains two aggravated variants: first, provided by art. 242 para. (2), which is retained when the act in para. (1) was committed by the legal administrator, the liquidator of the debtor or a representative or an agent of it, and the second provided by art. 242 para. (3) which includes the assumption that the perpetrator commits the acts referred to in para. (1) and (2) in order to acquire a patrimony benefit.

Fraudulent management is an offense which has as immediate and dangerous results both reducing of patrimony of a natural or legal person and a deception of confidence he enjoyed from the prejudiced person, all of which resulting in failure to fulfill obligations assumed by the management and conservation of assets.

2. Pre-existing conditions and constitutive content

The legal object of the offense is constituted by social relations on the natural or legal person’s heritage that must be protected criminally consisting of the person’s goods and an expression of ownership, as well as in the legal and patrimonial relationships whose birth and realization implies the existence of trust in the person who assumes the management and conservation of assets. It is also necessary that the patrimonial relationships concluded in order to manage and conserve property or assets of a person to be held in good faith.

By analyzing the text of art. 242 Criminal Code we can see that the legislator used the phrase “his property” when referring to the victim, which means that the assets belong to the passive subject, that he owns them, so the incrimination of fraudulent management has in view to protect the rights of ownership and not possession or detention as it is the case with other crimes against person’s patrimony such as theft or robbery.

The material object of the crime of fraudulent management consists of a universality of property of another person, which are not individually assessed and highlighted so that the goods constituting managed or preserved patrimony can be part of several civil classified categories: movable and immovable, fungible and nonfungible, consumable and unconsumable, real or claim rights etc. The universality of goods over which fraudulent management or conservation acts are exercised can be only a part of the assets of the person or can be the entire estate of the passive subject.

In the event that the legal document of fraudulent management ends on a certain property within the universality of goods, which thus becomes a determined, individualized one, the material subject of the crime is that asset. The material object of fraudulent management can be also represented by the assets owned jointly by the perpetrator, if the prejudiced party as co-owner ceded him its right on management or conservation of his part of property.

Starting from the fact that the assets of a person consist of rights and obligations, and in respect of material goods, in relation to the aggravated variant of fraudulent management referred to in Article 242 para. (2) of the new Criminal Code we state that the material object is also formed by the goods entered into the person’s assets during the insolvency period.

The active subject of fraudulent management can only be a person who undertakes the obligation of management or preservation of goods to another person under a legal relationship involving legal and moral conduct of the person who received the assignment. To be an active subject of the offense of fraudulent management it is necessary for the offender to obtain under a legal, conventional relationship or ordered by the court, the right of management or conservation of property of another person, and the correlative obligation, so that fraudulent management cannot fall under, for example, the father administering or preserving the goods of his child or the husband managing his wife’s assets.

Property Management involves the development of management activities undertaken in relation to their nature and destination, and conservation activities involves activities of safety and security of goods.

Criminal participation in the case of fraudulent management is possible in all its forms, the coauthorship existing only if administration or preservation of goods was undertaken by two people, who together perform fraudulent acts that generate a property damage to the injured party. If several persons responsible to manage or conserve the assets of another person have done acts which generate damage without having acted together, then it will retain more crimes of fraudulent management.

The active subject of the offense of fraudulent management provided in the aggravated variant in art. 242 para. (2) The Criminal Code, is qualified, being necessary for him to have one of the following qualities: legal administrator, liquidator or agent of the legal administrator or liquidator. Legal administrator or liquidator are natural or legal persons who have the legal capacity of insolvency practitioner who is appointed to carry out activities of management and preservation of the debtor’s assets in the insolvency or bankruptcy procedure.

The passive subject of the crime of fraudulent management may be, in the variants exposed in paragraph (1) and paragraph. (3) of Art. 242 of the Criminal Code, any natural person or legal entity that owns the assets which form the patrimony entrusted for management and conservation to the offender and which caused damage through criminal activity. If administered or maintained property consists of property in joint tenancy or ownership, there is a plurality of...
passive subjects. In the aggravated version of the crime of fraudulent management provided in art. 242 para. (2) of the new Criminal Code, the passive subject is the insolvent or bankrupt debtor, who was caused to damage through the fraudulent management of his fortune.

The material element of the offense of fraudulent management may consist of any action or inaction contrary to the obligations of the offender, based on the legal relationship between him and the passive subject or under the legal obligations, damaging activity carried out during the administration or preservation of the entrusted goods. For the existence of the offense in variant type provided by art. 242 para. (1) of the Criminal Code, it is necessary and sufficient that the commitment assumed by the offender should deal only with one of the management-driven activities: management or conservation, without excluding the possibility of both activities.

In the version provided by art. 242 (1) of the Criminal Code, the management or preservation of goods are obligations arising from a typical or atypical contract, express or implied, by which the offender is mandated to manage and conserve the assets of another person, and in the version provided by art. 242 para. (2) of the Criminal Code, the management or preservation of goods involves a legal obligation or ordered by the court in insolvency or bankruptcy procedures.

Unlike breach of trust in which the active subject acts to acquire the goods, in the case of the offense of fraudulent management the perpetrator performs management and conservation acts on behalf of and for the owner from whom he received the mandate in this regard, but its activity is fraudulent and producing damage.

In the case of the aggravated variant of the crime of fraudulent management referred to in art. 242 para. (2) of the Criminal Code, the material element consists in any action or inaction detrimental to the owner of the goods in exercising the prerogatives granted by law to the judicial administrator and liquidator or his representative or his agent.

As an essential requirement for the existence of the crime of fraudulent management we primarily distinguish the necessity that the harmful acts of the perpetrator to be committed on the occasion of management or preservation of goods under duty imposed at the start of the legal relation and secondly it is necessary that criminal activity of the one who took care of the goods or had to take care of the goods, to assume a conduct of disinterest and indifference to them and thus create a damage.

The immediate result of the action or inaction of the perpetrator consists in a diminution of the patrimony of the one who owns the assets managed or preserved by creating a damage valued in money. Repairing damage caused to the property owner of ownership right over his goods in management or conservation does not exclude criminal liability.

Between the action of the active subject of fraudulent management or his inaction and immediate consequence, that is infliction of harm, there must be a causal relation, not being in the position of a fraudulent management if the damage, destruction or disappearance of some goods have happened from causes external to the manager’s will and not as a result of improper administration or preservation.

In terms of the subjective side, that of his guilt and how the perpetrator acted mentally in committing the crime circumscribed to the features of fraudulent management crime, it appears that the active subject intentionally acts directly or indirectly. The intention of the perpetrator assumes that he is aware of the fact that he will produce a patrimonial damage to the injured person by a misconduct and abuse over the assets managed or preserved and seeks or accepts this result. Regarding the requirement of a purpose or motive when the offense of fraudulent management is committed, it is found in the text of art. 242 para. (3) which provides an aggravating circumstance, and involves committing the act in order to gain a material benefit. Existence of the offense in variants provided by art. 242 para. (1) and (2) is not bound by the act of committing the deed and pursuing a specific purpose.

Preparatory acts achieved by the offender for committing the offense are not incriminated and the crime of attempted fraudulent management, although possible, is not punishable.

Fraudulent management of the crime occurs when the perpetrator commits detrimental action or when he should have had to comply with his obligations so as to avoid causing prejudice.

If the offense of fraudulent management is committed in continuous form, ie the active subject performs at various intervals, but in achieving the same criminal resolution and against the same passive subject, actions or inactions that present each in part the content of the same crime, fraudulent management exhausts once with committing last action or inaction.

Regarding the punishment of the crime of fraudulent management, for the version provided by art. 242 para. (1) the punishment shall be imprisonment from six months to three years or a fine, for the aggravated variant provided by art. 242 para. (2) the punishment shall be imprisonment from one to five years, and for the aggravated variant provided by art. 242 para. (3) the punishment shall be imprisonment from 2-7 years. Criminal action is initiated upon prior complaint from the injured person, so that lack of prior complaint removes criminal liability.
3. Conclusions

Between text of art. 214 of the Criminal Code of 1969 that incriminated fraudulent management and art. 242 of the new Criminal Code there are some differences in structure and content, although the variant type is kept almost the same conditions of incrimination.

The new Criminal Code, art. 242 para. (1) no longer contains the requirement that existed in variant type of art. 214 of the old Criminal Code, that the infliction of damage to be done in bad faith during the administration or preservation of assets as its maintenance is no longer required in terms of the application of art. , according to which the act committed of guilt is offense only when expressly provided by law, no matter if it is committed by action or inaction.

In art. 242 para. (2) of the new Criminal Code was introduced an aggravated variant of the offense of fraudulent management which requires an active qualified subject, namely the offense can be committed only by the judicial administrator, the liquidator of the debtor’s fortune or a representative or agent of him. Prior to the entry into force of the new Criminal Code, this aggravated form was provided by a special law, namely Law no. 85/2006 on insolvency procedure. The second aggravated version of the crime of fraudulent management, incriminated in art. 242 para. (3) provides that the facts stipulated in para. (1) and paragraph. (2) should be committed in order to acquire a patrimonial benefit. The latter aggravated variant was also provided in the previous Criminal Code, only punishment limits were higher than in the current Criminal Code.

Regarding the sanctioning regime applicable to the offense of fraudulent management in variant type in the new Criminal Code, there is a decrease in the maximum special from 5 years to 3 years and establishing alternative possibility to sanction by criminal fine.

With respect to the penalty imposed for the aggravated variant, consisting of the offense committed by the judicial administrator, the liquidator of the debtor’s assets or a representative or their agent, previously provided by Law no. 85/2006 on insolvency procedure, we notice a decrease of the special limits, so that the punishment is imprisonment now from one to five years, as compared to imprisonment from 3 years to 8 years as stipulated in the previous regulation. The aggravated variant provided by art. 242 par. (3) of the new Criminal Code is different from the corresponding incrimination of the Criminal Code of 1969, because, on the one hand, this relates to the offense committed in the circumstances imposed by art. 242 para. (2), on the other hand, the special sanction limits were reduced substantially by imprisonment from 5-12 years in the old regulation, to imprisonment for 2 to 7 years in the current Criminal Code.

As an element of novelty, the new Criminal Code provides in Art. 242 para. (4) that the criminal proceedings shall be initiated upon prior complaint from the injured person, unlike the previous Criminal Code, under which criminal proceedings could be triggered automatically. This aspect of the initiation of criminal proceedings only prior complaint assumes that, in the absence of such an approach, criminal liability is removed.

Bibliography