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Intellectual Forgery

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Abstract: In the paper we examined the crime of intellectual forgery, insisting on the subjects and some procedural aspects. We also considered the comparative analysis of how to regulate the crime in the two laws. To give a practical nuance, I also referred to the recent judicial practice of the courts in the country. The paper is part of a university course to be published in the near future at a recognized law firm. The paper can be useful to the students of the profile faculties in the country, as well as to those who carry out their activity in the judicial field.

Keywords: Subjects of the crime; procedural aspects; comparative examination

1. Introduction

According to the provisions of article 321 of the Criminal Code, the crime of intellectual forgery consists in falsifying an official document on the occasion of its preparation, by a civil servant in the exercise of his duties, by attesting facts or circumstances untrue or by knowingly omitting to insert certain data or circumstances.

Please note that in the case of this crime, the attempt is punishable.

Provisions that refer to the sanctioning of intellectual forgery according to the criminal law (art. 321 of the Criminal Code) are also found in article 91 of Law no. 223/2015 on state military pensions[2], as well as in article 116 of Law no. 72/2016 on the pension system and other social insurance rights of lawyers.[3]

Thus, according to the provisions of article 91 of Law no. 223/2015 on state military pensions, *"Intentional completion of standard forms regarding the establishment and payment of pensions with unrealistic data, having as an effect the distortion of records and data regarding military retirees, constitutes an intellectual forgery and is punishable under the Criminal Code".*

According to the provisions of article 116 of Law no. 72/2016, *"Completing and knowingly issuing documents containing unrealistic data that have the effect of distorting the records regarding the insured, the contribution period or the social insurance contribution or making unjustified expenses from the budget of the pension system and other social insurance rights of lawyers constitute the crime of intellectual forgery and shall be punished according to the provisions of the Criminal Code".*

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[2] Published in the Official Monitor of Romania, Part I, no. 556 of July 27, 2015.

[3] Published in the Official Monitor of Romania, Part I, no. 342 of May 5, 2016.

We specify that other such provisions are also found in article 38 para. (1) of Law no. 132/2017 on compulsory motor third party liability insurance for damages caused to third parties by vehicle and tram accidents, according to which *"Issuance and sale of false or falsified MTPL insurance policies is a crime, which is punishable under Law no. 286/2009 on the Criminal Code, with subsequent amendments and completions".*

According to the doctrine, the intellectual forgery "is so called, because in opposition to the false material in official documents, the alteration of the truth does not concern the materiality of the document in its form and source, but only the mentions and findings contained in the official document prepared by the competent body.

In the case of intellectual forgery, the official document is from a material and regular point of view, but the falsification concerns the facts and data about which the official document is called to prove." (Dongoroz line 1972, p. 433)

The examined crime was also provided in the previous Criminal Code in article 289, with the same marginal name.

There are some differences between the two incriminations, such as those concerning the active subject who in the previous law was "an official or other employee", while in the current law the active subject is only a civil servant, within the meaning of the criminal law.

Another difference is the sanctioning regime, where the minimum sentence is different, in the sense that in the old law it is 6 months, while in the new law it is one year.

2. Subjects of the Crime

The *active subject* is qualified having the quality of civil servant who is in the exercise of his/her duties, who has the competence to draw up the respective official document.

According to the provisions of article 175 of the Criminal Code, *a civil servant*, within the meaning of the criminal law, is the person who, on a permanent or temporary basis, with or without remuneration:

- *exercises duties and responsibilities, established under the law, in order to exercise the prerogatives of the legislative, executive or judicial power* (eg President of Romania, senators, deputies, MEPs, members of the Government, members of the SCM, judges, prosecutors, etc.);

- *performs a function of public dignity or a public function of any kind* (eg civil servants under special law and those with special status, civil servants in central and local administration, presidents of county and local councils, president of the court of auditors, employed doctor with an employment contract in a hospital unit in the public health system, the teacher in state pre-university education, etc.);

- *exercises alone or together with other persons, within an autonomous administration, another economic operator or a legal entity with full or majority state capital, attributions related to the accomplishment of its object of activity* (Autonomous Administration "Official Monitor", Administration Autonomous Administration of the State Protocol Patrimony, the governor of the National Bank, the director of an autonomous administration, persons employed in banks with full state capital, etc.);

Also, according to the provisions of article 175, paragraph (2) of the Criminal Code, is *considered a civil servant, within the meaning of the criminal law, the person performing a service of public interest for which he was invested by public authorities or who is subject to their control or supervision*

regarding the performance of that public service (person assimilated to the civil servant). In judicial practice and doctrine it has been pointed out that this category includes the notary public, the bailiff, the judicial technical expert, the bank clerk, an employee of a bank with fully private capital, authorized and under the supervision of the National Bank of Romania, the private entrepreneur of an individual enterprise that exercises a service of public interest that is subject to the control or supervision of the public authorities regarding the fulfilment of the respective public service, authorized interpreters and translators, etc.

In judicial practice, it was decided that "The deed of sale-purchase drawn up and authenticated by the notary public is officially registered, and the notary public has the quality of a civil servant. As a result, the authentication by the notary public of a sale-purchase deed in which the signatures do not belong to the sellers constitutes the crime of intellectual forgery"[1].

Also, "Defendant D.E. who, in his capacity as Chief Prosecutor of the Prosecutor's Office attached to the Pașcani Court, for concealing the defective manner in which he performed his duties, falsified statistical forms, balance sheet reports and information prepared on the basis of statistics, as well as periodic reports which he had to send to the hierarchically superior prosecutor's offices regarding the unresolved files in the records of the Prosecutor's Office attached to the Pașcani Court, in the sense that he included between the solved files and those found in his office during the control 2011, which resulted in the misappropriation of the indicators of the Prosecutor's Office attached to the Pașcani Court, brings together the constitutive elements of the crime of intellectual forgery in a continuous form"[2].

Criminal participation is possible in all its forms (co-authorship, instigation and complicity. In the case of co-authorship, it is necessary for each of the active subjects to have the quality of a civil servant.

In the judicial practice, it was decided that "The deed of the defendant M.A.V., which, on May 21, 2009, determined the defendant R.P., a judge in the Năsăud court, to proceed to draft a conclusion in the criminal case no. /./2008, pending before the Năsăud District Court, in which it falsely records the participation of another sitting prosecutor, seeking to conceal the state of incompatibility of the defendant in the respective case, meets the constitutive elements of the crime of instigating intellectual forgery. Defendant R.P. which, following the request made by the defendant M.A.V., ordered the court clerk to record, falsely, in the conclusion of the hearing the criminal case no. …/2008, the participation of another sitting prosecutor, seeking to conceal the state of incompatibility of the defendant, a conclusion he signed and ordered his attachment to the case file, meets the constituent elements of the crime of intellectual forgery"[3].

In another case, it was assessed that "Regarding the improper participation in the crime of intellectual forgery in the continuous form provided by article 31 para. (2) Criminal Code referred to in article 289 Criminal Code with the application of article 41 para. (2) Criminal Code, Consisting in the fact that the defendant would have determined the judges C.A.U., C.B. and C.I.B. from the Baia de Aramă court to testify without guilt in the conclusions and court decisions pronounced that the judicial stamp duty was paid, the court of first instance considered that it does not fall within the typicality of the incrimination norm, mentioning the following arguments: the record made in practice the conclusion or the court decision regarding the submission of the proof of payment of the judicial stamp duty or the mention in the descriptive part of the decision that the action was legally stamped does not constitute an operation of attestation of circumstances untrue, because the judge does not attest the stamp duty, such an

[1] C.S.J., s. pen., dec. nr. 3378/1998, available on www.scj.ro, apud (Udroiu, 2021, p. 1043).
[2] I.C.C.J., s. pen., dec. nr. 200/5.06.2015, available on www.scj.ro, *apud* (Iugan, 2020, p. 442).
[3] I.C.C.J., s. pen., dec. nr. 90/2015, available on www.scj.ro, *apud* (Udroiu, 2021, p. 1043).

operation not being made in front of him, nor the validity of the receipt for payment of the tax. The fact of payment is attested by the receipt for payment of the stamp duty and not by the court decision, just as the legal act in the sense of manifestation of will that gives rise, modifies or extinguishes a legal relationship - in this case, the payment of stamp duty is not confused with the ascertaining document (in the sense of *instrumentum probationis*) - the payment receipt"[1].

Also, "The facts of defendant C consisting in the fact that, during 2011, he intentionally determined defendant I to present himself under a false identity before notary D (respectively with the civil status data of the said IC) and to intentionally tries to persuade the notary public to insert statements that do not correspond to the truth in a power of attorney by which the defendant C was to be empowered to conclude legal acts the building in Bucharest, str. instigating an attempt at improper participation in intellectual forgery"[2].

Likewise, "The act of defendant A, as an arbitrator at the Court of Arbitration attached to the Galati Chamber of Commerce and Industry, who, acting within the organized criminal group, through actions carried out repeatedly, but on the basis of the same criminal resolution, during of 2006, drafted: the arbitral award no. 59 of May 23, 2006, which contained false statements, fraudulently ascertaining, fraudulently, the property right of the perpetrator U. over the building located in the municipality of Galați, Galati County; drafted the Arbitral Award no. 62 of July 6, 2006, which contained false statements, which fraudulently found the right of ownership of the perpetrator X. over the building located in the city of Galati, Galati County and drafted the Arbitral Award no. 75 of August 1, 2006, which contained false statements, which fraudulently established the right of ownership of the perpetrator V. over the building located in Galati, Galati County meets the constituent elements of the crime of intellectual forgery, in continuous form.

The act of the defendant D. who, acting within the organized criminal group, intentionally determined a worker of the Office of Cadastre and Real Estate Advertising, called E.E., to delete, illegally, from the land register, without guilt, on the 11th. September 2007, the insurance seizure instituted by the Prosecutor's Office attached to the Galați Tribunal on the building in the municipality of Galați, Galați County, meets the constitutive elements of the improper participation in the commission of the crime of intellectual forgery"[3].

The *passive person* is "the public authority, public institution or other legal person governed by public law issuing the official document" (Udroiu, 2021, p. 1044).

The offense under review 'is detrimental, first, to the public's reliance on official documents such as the counterfeit and, second, to the interests of the organization from which the document originates; intellectual forgery also undermines public confidence in the fairness of officials or other employees in the service of the organization in which the forgery was committed" (Dongoroz line 1972, p. 434).

On the other hand, we specify that the document containing intellectual forgery "harms, however, the person in respect of whom the content of the document has been altered or against whom that document may be used. So, the *passive subject* will *eventually* be the person whose interests can be achieved by committing intellectual forgery. The crime can sometimes have a plurality of passive subjects" (Dongoroz line1972, p. 434).

[1] I.C.C.J., s. pen., dec. nr. 107/2015, available on www.scj.ro, *apud* (Udroiu, *2021,* p. 1044)
[2] C.A. București, Criminal Division I, decision no. 868/08.07.2014, unpublished, *apud* (Iugan, 2020, p. 441).
[3] I.C.C.J., Criminal Division, decision no. 392/13.10.2016, available on www.scj.ro, *apud* (Iugan, 2020, p. 442).

According to the provisions of article 328 of the Criminal Code, the *passive subject* of this crime may also be a foreign competent authority or an international organization established by a treaty to which Romania is a party, when the deed refers to documents issued by these authorities or the statements or false identity are given to these authorities.

The place and time of the crime are decisive; the examined crime can be committed only while the civil servant was in the exercise of his duties and in the place of their exercise.

The doctrine stated that "Unlike counterfeit material that can be committed anywhere and anytime, intellectual forgery can be committed only *during the time* the document is drawn up and implicitly at the place where it was drafted, which can be or where the organization within which the document was drawn up has its registered office, or the one mentioned in the document as the place of preparation (e.g. an authentic document is drawn up at the notary's office; a statement of findings is drawn up at the place where the research was carried out" (Dongoroz, line1972, page 434).

3. Procedural Aspects

For the crime of intellectual forgery, the criminal action is initiated ex officio, and the competence to exercise criminal prosecution usually belongs to the criminal investigation bodies of the judicial police under the supervision of the competent prosecutor.

Depending on the circumstances of the crime, the quality of the perpetrator, as well as the existence of a possible concurrence of crimes, the competence to carry out the criminal investigation may also belong to the prosecutor.

Also, depending on the quality of the active subject, the competence to carry out the criminal investigation may also belong to National Anti-corruption Division, according to the provisions of art. 3 lit. a) of Government Emergency Ordinance no. 43/2002, regarding the National Anticorruption Directorate, republished with the subsequent amendments and completions[1] and of art. 1 of Law no. 78/2000 for the prevention, detection and sanctioning of acts of corruption, as subsequently amended and supplemented[2].

As a rule, the jurisdiction in the first instance belongs to the court in the district in which the crime was committed or which was notified.

Jurisdiction in the first instance may also belong to other higher courts in the case, in the event that the criminal investigation is carried out by the prosecutor, Directorate for the Investigation of Organized Crime and Terrorism or National Anti-corruption Division.

If the competence to prosecute belongs to the European Public Prosecutor's Office and the criminal investigation is carried out by this prosecutor's office, the jurisdiction in the first instance belongs to the court notified according to the provisions of art. 20 of Law no. 6/2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).

With regard to the possibility of being held in competition with the crime of abuse of office with intellectual forgery, we consider that, depending on the specific circumstances of the commission of the facts, this possibility may also exist.

[1] Published in Official Monitor no. 244 of April 11, 2002.
[2] Published in Official Monitor no. 219 of 18 May 2000.

Thus, in the event that the crime of intellectual forgery is committed for concealing or committing the crime of abuse of office, the competition between the two crimes will be retained.

The competition between the offenses of intellectual forgery, use of forgery and abuse of office may be retained in the event that the active subject records in the document a false, untrue situation, by attesting certain facts or circumstances alleged to have been committed by a person, which do not correspond to the truth, this record itself being likely to cause damage or injury to the rights or legitimate interests of the passive subject of the crime.

By way of example, we present the case where a traffic police officer, in the exercise of his duties as a traffic control officer on a public road, records in a report of the contravention unreal, false circumstances (such as be overtaking on a continuous line, which was not committed by the driver of the sanctioned vehicle), a record that will cause damage or injury to the interests of the taxpayer which consists in suspending the right to drive a vehicle on public roads and the fine applied. Undoubtedly, in such a case, the offenses of intellectual forgery, use of forgery and abuse of office will be retained in the competition.

The same three offenses in the contest will be retained in the event that by scientific omission, to record some data or circumstances in an official document.

Returning to the previous example, these offenses will be retained if the police officer or the environmental protection inspector finds that a driver or an economic agent has committed a minor offense, but wishes to apply a lower penalty (mild), records in the record of the contravention a completely different deed, for which the law provides for the application of a lighter sanction.

In this situation, the typical conditions of the crime of intellectual forgery are met (the ascertaining agent knowingly omits to record in the record of the contravention the actual act committed by the offender), abuse of office (by incorrectly performing his duties, causes a damage to the budget of the Ministry of the Interior and the mayor's office in the area where the offense was committed, in the sense that these institutions did not benefit from produces the mentioned legal consequences.

In this respect, it has been decided in judicial practice that "(…) the offense of intellectual forgery must be retained as such, and not in competition with the offense of abuse of office, constituting a species thereof, only when no other activity overlaps, by which the civil servant, in the exercise of his duties, causes an injury of the nature of those provided in the incrimination norm.

However, in the present case, the material acts committed in the exercise of the function by the defendants, as police officers, do not overlap, but on the contrary retain their individuality, each of them infringing distinct values protected by criminal law.

In other words, the abuse of office by the defendants consists in the omission of finding and sanctioning more serious acts, in the omission of the application of all sanctions provided by law in the application of sanctions inappropriate to the objective factual situation, following the interventions of others and on subjective grounds intellectually in creating an unrealistic factual situation without objective correspondence, in establishing an appearance of legality that would have justified the application of much milder sanctions for road users, as well as in recording it as such in the content of the minutes of contravention.

Consequently, since the intellectual forgery served to "camouflage" the true facts, such an offense is considered to have been committed in order to create the preconditions for the commission or

concealment of another offense, namely abuse of office against the public interest, so that in competition with both offenses is justified[1]".

4. Conclusions

In this paper we proceeded to examine the subjects of this crime, starting from the finding that the active subject is qualified, and his qualification consisting in his capacity as a civil servant.

Although the current legislator has defined the term civil servant, the aim being to avoid some interpretations that do not correspond to his will, however, the current definition also seems to be insufficient.

Against this background, the intervention of the Supreme Court, which interpreted and subsequently established some functions that are considered to be exercised by civil servants, is fully justified.

Of course, in the future, it is expected that new such functions will be identified that are assimilated to the civil servant.

This aspect is of particular importance, because the execution of the incriminated action by a person who does not have the quality of civil servant, will not meet the conditions of subjective typicality of this crime.

The maintenance of this crime in the Criminal Code is justified due to the rather high crime rate.

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