



Owning devices for Counterfeiting Values

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Abstract: The paper is an analysis of the crime of possession of instruments in order to falsify values, being structured in a way that allows the identification of essential elements necessary to understand the examination both theoretically and practically. The examination includes the pre-existing conditions of the crime, the objective side, the subjective side, normative forms and modalities, legislative precedents, transitional situations, as well as an introductory part where we have discussed and highlighted the recent changes in the incriminating text and the European normative determined to amend the original indictment text. The paper is part of volume IV of a university course to be published by a recognized publishing house in the field of legal sciences in the country. Given the way it is written and the depth of the examination, we appreciate that it can be useful to the students of the profile faculties in the country, as well as to the practitioners in the field.

Keywords: the objective side, the subjective side, legislative precedents; transitional situations

1. Introduction

The offense of *owning devices for counterfeiting values* is part of the group of offenses provided in the Romanian Criminal Code in Title VI, special part, art. 314.

In view of the evolution of crime in the field of fraud and counterfeiting of non-cash means of payment, as well as the need to prevent and combat this new type of crime more effectively, it has been adopted at EU level the Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on

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combating fraud and counterfeiting in connection with non-cash means of payment and replacing Council Framework Decision 2001/413/JHA¹.

Thus, the preamble to the European legal instrument states that in the recent years there has been not only an exponential growth of the digital economy, but also the emergence of many innovations in various fields, including payment technologies. New payment technologies involve the use of new types of payment instruments, which create not only new opportunities for consumers and businesses, but also opportunities for fraud².

Fraud and counterfeiting in relation to non-cash means of payment have an important cross-border dimension, completed by a growing digital component, which emphasizes the need to take further action to approach criminal legislation in the field of fraud and counterfeiting in relation to non-cash means of payment³.

On the other hand, the European legal instrument notes that significant gaps and differences between Member States' legislation on fraud and counterfeiting domain in relation to cashless payments can obstruct the prevention, detection and sanctioning of these types of crime, as well as other serious forms of organized crime and their associated, which they facilitate and complicate police and judicial cooperation and therefore lead to a decrease in its effectiveness, with negative consequences for security⁴.

Against this background, Law no. 207/2021 for the amendment and completion of Law no. 286/2009 on the Criminal Code, as well as on measures to transpose Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting in connection with non-cash means of payment and the replacement of Council Framework Decision 2001/413/JHA⁵.

Thus, compared to the initial wording from 01.02.2014, the crime of possession of instruments in order to falsify values has undergone a series of changes in its structure, brought by the provisions of art. I, points 9 and 10 of Law no. 207/2021.

Thus, the only text that has not been modified is the one from par. (1), the others being amended and a new paragraph added.

¹ Published in the Official Journal of the European Union L 123/18 of 10.5.2019.

² Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019, par. 6.

³ Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019, par. 5.

⁴ Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019, par. 4.

⁵ Published in the Official Monitor of Romania, Part I, no. 720 of July 22, 2021

According to the provisions of art. 314 para. (1), the offense consists in the manufacture, receipt, possession or transmission of instruments or materials in order to serve to falsify the values or titles provided in art. 310, art. 311 para. (1) and art. 312 of the Criminal Code.

We should mention that the values set out in the texts referred to are as follows: circulating currency, coins issued by the competent authorities before their circulation, credit securities, securities or instruments for making payments or any other similar securities or values, stamps of any kind, postage stamps, envelopes, postcards or international reply coupons.

The same offense shall be committed against the natural or legal person who manufactures, produces, receives, owns, transmits or makes available a device, tool, some computer data, equipment, including hardware or software, or any other means for the purpose of serving to counterfeit cashless payment instruments.

Last but not least, the offense under examination will also persist if the acquisition by a natural or legal person is retained for himself or another, including through the import, export, sale, transport or distribution of a device, instrument, computer data, equipment, including hardware or software, or any other means for the purpose of counterfeiting non-cash payment instruments.

The last two normative ways mentioned above and provided in par. (2) and par. (3) of art. 314 of the Criminal Code, were introduced by Law no. 207/2021 to which we previously referred.

The doctrine of the second half of the last century stated that “in essence the act of possession of tools or materials in order to serve to counterfeit coins, stamps or other values has the character of preparatory action against the offenses of counterfeiting of values, character which results both from the very nature of the instruments and materials held, which are likely to be used to commit counterfeiting, and from the purpose for which those instruments or materials are held. The possession of tools and materials intended to serve as counterfeits of values or securities therefore constitutes a means offense against the offenses of purpose (correlation).

The incrimination of this act is justified precisely on the grounds that any act that serves as a means to commit a crime borrowed from the crime “*of the character of a dangerous social act, against which the sanctions of criminal law become necessary*” (Dongoroz, in Dongoroz, et alli., 1972, p. 397).

The examined crime was also provided for in the 1969 Criminal Code, its marginal title being identical to that of the original wording.

Interestingly, this offense has not been altered or supplemented by its legal content, which is identical to that of the original 1968 wording.

Thus, according to the provisions of art. 285 of the Criminal Code of 1969 from the time of drafting, which remained in force until 01.02.2014, the crime consists in the manufacture or possession of tools or materials in order to serve to falsify the values or titles listed in art. 282-284 of the 1969 Criminal Code.

Regarding the values referred to in the indictment, they are as follows: metallic and paper money, public credit securities, checks, securities of any kind for making payments, issued by the banking institution or other credit institutions, any other titles or similar values, stamps, postage stamps, envelopes, postcards, travel or transportation tickets or sheets, international reply coupons, and coins or stamps issued by other states.

In its initial wording from 01.02.2014, the examined crime consisted in the manufacture, receipt, possession or transmission of instruments or materials in order to serve to falsify the values or titles provided in art. 310, art. 311 par. (1) and art. 312.

In par. (2) of the incriminating text was held to commit the same crime, in an aggravated regulatory manner, when the manufacture, receipt, possession, transmission of equipment including hardware or software, was done in order to serve to falsify electronic payment instruments.

During the completion and modification of the incriminating text, numerous modifications and completions were made, so that in relation to the initial wording from 01.02.2014, only the provisions of par. (1) of art. 314 of the Criminal Code, the following paragraphs being completely amended.

In those circumstances, a comparative examination of those provisions allows us to make the following observations:

- the marginal title was maintained in all three texts;
- compared to the initial wording of the 1969 Criminal Code, which provided for a single normative way, the initial wording of the Criminal Code also mentioned an aggravated normative way, while in the current version there are two aggravated normative ways;

- the fundamental difference between the provisions mentioned in the original wording of the Criminal Code and the current wording is the special incrimination of actions concerning non-cash payment instruments.

2. Pre-existing Elements

2.1. The Legal Object

The legal object of this crime is identical to that of the crimes referred to in par. (1) and consists in the social relations regarding the public trust in the values defended by the norms of incrimination, respectively in the authenticity of the coins, stamps, marks, etc., as well as in the operations carried out with them.

In the previous doctrine it was appreciated that this crime has as its legal object “*generic*, just like the counterfeiting offenses (see above section I, point II and section II point II), the protection of social relations whose formation and development requires defense as a true and important social value of *public trust*, which must benefit any entity (currency, title, stamp, etc.) that bears in its very materiality the proof of its validity.

The *special* legal object of the crime of possession of instruments and materials for the purpose of counterfeiting securities is, in turn, similar to that of counterfeiting crimes, the law protecting by incriminating this fact the same social relations in the formation and development of which the use of coins, titles, stamps or other values is almost inevitable and always indispensable the trust in their validity” (Dongoroz, in Dongoroz, et alli., 1972, pp. 397-398).

2.2. The Material Object

The material object consists of the instruments manufactured, received, held, transmitted, made available, a device, instrument, computer data, equipment or other means that can be used to counterfeit non-cash payment instruments.

2.3. The Subjects of the Crime

An active subject of this crime can be any natural or legal person who meets the general conditions required by law to have this quality.

Criminal participation is possible in all its forms (co-authorship, instigation, complicity).

The *passive subject* is the state in its capacity of holder of the defended social value (trust in the authenticity of these values or titles).

The status of passive subject may also be attributed to the competent public institution to issue or put into circulation coins, credit titles, securities or instruments for making payments, stamps of any kind, postage stamps, postal envelopes, postcards or international reply coupons and any natural or legal persons who have entered into possession of such values without knowing that they are forged.

3. The Constitutive Content of the Crime

3.1. The Objective Side

In the case of the offense provided in par. (1) *the material element* of the objective side is achieved through alternative actions consisting in the manufacture, receipt, possession or transmission of instruments or materials in order to serve to falsify the values or titles provided in art. 310, art. 311 par. (1) and in art. 312 of the Criminal Code.

Manufacturing means “making, producing or adapting in case of tools and preparing, processing or settling materials” (Dongoroz, in Dongoroz, et alli., 1972, p. 399).

Unlike other authors, we consider that the manufacture must be complete, in the sense that the manufactured instrument must be suitable for use in order to serve to falsify the values or titles provided in the provisions of art. 310, art. 311 par. (1) and 312 Criminal Code.

The act of *receiving* means taking possession of instruments or materials offered by another natural or legal person, in order to be used to falsify the values or titles provided by law.

Holding/owning means the act of “receiving and storing tools or materials, or transporting and handing them over to those concerned, depositing them in a hidden place, mixing them with other tools or materials, and wrapping them for storage by other persons who do not know the contents, with the obligation to return them upon request (Dongoroz, in Dongoroz, et alli., 1972, pp. 399-400).

The transmission involves an action by which a natural or legal person remits, gives, to another person the tools or materials in order to be used to falsify the values or titles provided by law.

For the existence of the crime it is necessary to meet certain *essential requirements*.

The first essential requirement presupposes that these instruments and materials manufactured, received, held or transmitted be intended (by construction), to actually serve to falsify the values or titles provided in art. 310, 311 para. (1) and 312 Criminal Code.

The second essential requirement presupposes that these instruments or materials manufactured, received, held or transmitted by the active subject are fit (to be functional) in order to be used to falsify the values or titles provided in art. 310, 311 para. (1) and 312 Criminal Code.

In the event that these instruments or materials cannot cause falsification of the mentioned values or titles, for various reasons (major, irreparable defects, their construction does not allow falsification of the values or titles provided by law), the deed will not meet the typical conditions of the examined crime.

A final essential requirement is that counterfeit values or titles are able to be put into circulation, be likely to mislead bona fide natural persons who have entered into their possession.

Assuming that the instrument or material manufactured, received, held or transmitted can be used both for counterfeiting currency and for counterfeiting credit titles, titles or instruments for making payments, stamps, etc., a natural unit of criminal offence will be held.

In this regard, in judicial practice it has been decided that “The offense of possession of instruments for the purpose of counterfeiting securities constitutes a single offense, whether they may serve to falsify only one or more titles listed by law: coins or other valuables; brands; coins, stamps, other foreign values. As such, the competition for offenses does not exist when some instruments or materials manufactured or held could be used for counterfeiting coins and others for the manufacture of marks or other values, both values being part of the features characteristic of the single crime.”¹

¹ C.S.J., Criminal Section, decision no. 453/1991, available on www.scj.ro (*apud* Udroi, 2021, p. 1027).

Also, if the same perpetrator commits several incriminating acts, such as both the manufacture and the receipt or transmission of such materials or instruments, only one offense will be retained.

At the same time, the examined crime will be retained in competition with the offenses provided in art. 310, art. 311, art. 312 and 313 of the Criminal Code, as well as other offenses, such as fraud, if in addition to the manufacture or receipt of instruments or materials intended for counterfeiting, the same subject using those instruments counterfeits circulating currency, securities, stamps, postage stamps, etc., which after they were put into circulation.

In this sense, in the judicial practice it was decided that “The act of the defendant to counterfeit banknotes, paper money from the denominations of 10 lei, 50 lei and 100 lei (15.02.2016, 16.03.2016, 17.03.2016, 23.02.2016) with the help of an instrument and materials purchased and used for this illicit action, and then to put them into circulation on the basis of the same criminal resolution, it meets the constitutive elements of the crime of counterfeiting currency, provided by art. 310 par. (1) Criminal Code and the offense of putting into circulation counterfeit securities in a continuous form, provided by art. 313 par. (2) Criminal Code with the application of art. 35 par. (1) Criminal Code Defendant's act of misleading between February and March 2016, based on the same criminal resolution, by presenting a false situation as true, and using fraudulent means (presenting as truthful the banknotes, paper money forged by him for injured persons) in order to obtain an unfair benefit, meets the constitutive elements of the crime of deception in a continuous form, provided by art. 244 para. (1) and (2) Criminal Code with the application of art. 35 para. (1) Criminal Code. The act of owning at home an instrument (a printer and related materials highlighted above) that he used to falsify the values provided in art. 310 (counterfeit banknotes) meets the constitutive elements of an offense of possession of instruments for the purpose of counterfeiting securities, provided by art. 314 par. (1) Criminal Code”¹

The material element in the case of the offense provided in par. (2) in art. 314 of the Criminal Code, consists in the manufacture, production, receipt, possession, transmission or making available of a device, instrument, computer data, equipment, including hardware or software, or any other means for the purpose of counterfeiting cashless payment instruments.

¹ Court of Appeal, Galati, Criminal Section and for cases with minors, decision no. 1020 of October 12, 2018, available on www.sintact.ro (*apud* Udrouiu, 2021, p. 1027).

Therefore, the material element is achieved through one of the alternative actions mentioned above.

Regarding the actions of *manufacture, receipt, possession and transmission*, their meaning is identical to the one examined on the occasion of the analysis of the crime from par. (1), which is why we refer to the above.

The *production* of a device, instrument, computer data, equipment, including hardware or software, or the production of any other means for the purpose of counterfeiting cashless payment instruments, involves the production, achievements of such goods, respectively a device, instrument, data computer science etc.

Making available involves giving to someone, transmitting permanently or for a certain period (to be returned after use), a device, tool, some computer data, including hardware or software or other means for the purpose of counterfeiting cashless payment instruments.

For the existence of the crime it is necessary to meet certain *essential requirements*.

The first essential requirement is that these tools, computer data, equipment, including hardware or software or any other means, manufactured, produced, received, held, transmitted or made available or other such means, be intended (by construction), to serve effectively counterfeiting non-cash payment instruments.

The second essential requirement is that these tools, computer data, equipment, including hardware or software or any other means, manufactured, produced, received, held, transmitted or made available or other such materials, be capable (functional) of being used to counterfeit cashless payment instruments.

If these instruments or materials cannot cause the counterfeiting of cashless payment instruments, for various reasons (major, irreparable defects, their construction does not allow the falsification of values or titles provided by the law), the deed will not meet the typical conditions of the examined crime.

A final essential requirement is that counterfeit cashless payment instruments be able to be put into circulation and be likely to mislead bona fide individuals who have entered into their possession.

In the case of the offense provided in par. (3), *the material element* is achieved by the acquisition action for oneself or for another, including through the import, export, sale, transport or distribution of a device, instrument, computer data,

equipment, including hardware or software, or any other means but the purpose of serving to counterfeit cashless payment instruments.

Acquisition means getting something (a thing, an object), earning, getting, finding, buying something.

As in the case of the other two offenses, certain *essential requirements* must also be met for their existence.

The first *essential requirement* is that these devices, instruments, computer data, equipment including hardware or software or any other means, acquired through import, export, sale, transport or distribution, are intended (by construction) to actually serve to falsify cashless payment instruments.

The second essential requirement is that such devices, instruments, computer data, equipment, including hardware or software, or any other means, acquired through importation, exportation, sale, transport or distribution, be fit for use in counterfeiting cashless payment instruments.

If they cannot falsify the payment instruments without cash, for various reasons (major, irreparable defects, their construction does not allow the falsification of the values or titles provided by law), the deed will not meet the typical conditions of the crime examined.

A final essential requirement is that counterfeit cashless payment instruments to be able to be put into circulation and be likely to mislead bona fide individuals who have entered into their possession.

The immediate consequence in each of the three offenses is the state of danger to public confidence in the protected values, including non-cash payment instruments.

The causal link results from the materiality of the deed.

3.2. The Subjective Side

The form of guilt with which this crime is committed is the *direct intention*, qualified by purpose.

As it is clear from the legal content of the offenses, the acts in question concerning the manufacture, receipt, possession, transmission, acquisition, etc., of instruments, devices, etc., must be carried out in order to serve as counterfeit currency of circulating value. , coins issued by the competent authorities before its official

circulation, credit securities, securities or instruments for making payments or any other similar securities or denominations, stamps of any kind, postage stamps, envelopes, postcards or coupons international response or cashless payment instruments.

In the doctrine of the second half of the last century it was considered necessary to distinguish between the situation in which the perpetrator manufactures or holds the instruments for his use and the situation in which he manufactures them at the request of another person, in order to be used.

Thus, “In the first case, in order to be intent, it must be ascertained that the perpetrator manufactured the instruments or materials or held them in order to use them personally when committing counterfeiting of values or titles. Therefore, from the point of view of the subjective side, in this case, the existence of a direct intention characterized by the pursued aim is necessary, in the second case it is sufficient for the perpetrator to have provided that the instruments ordered by other persons could be purchased in order to use for counterfeiting and accepted the risk of such an outcome (indirect intent)” (Dongoroz, in Dongoroz, et alli., 1972, p. 401).

4. The Special Cause of Punishment

According to the provisions of art. 314 para. (4), shall not be punished the person who, after committing any of the deeds provided in par. (1) - (3), before their discovery and before committing the act of forgery, hand over the instruments, materials held or any other means to the judicial authorities or inform these authorities about their existence.

From the interpretation of those provisions it results that, in order to establish the incidence of this special case of non-punishment, the following conditions must be met cumulatively:

- to have committed an act in the standard normative way, aggravated or assimilated to the aggravated one;
- the act should not be the subject of investigations carried out by the judicial authorities empowered by law (not to have been discovered by these authorities);

- the perpetrator has not committed one of the deeds provided in art. 310-312 Criminal Code;
- the perpetrator instructs effectively the competent judicial authorities to investigate the act, instruments, materials held or any other means or to inform those authorities of their existence.

In the hypothesis in which the cumulative fulfillment of these requirements will be ascertained, although the committed deed meets the conditions of typicality of the crime provided in art. 314 of the Criminal Code, the perpetrator will benefit from the special cause of impunity provided by law.

5. Some Procedural Aspects

Usually, the competence to prosecute belongs to the criminal investigation bodies of the judicial police, under the supervision of the competent prosecutor, and the jurisdiction in the first instance belongs to the court in whose district the deed was committed or to the notified court.

In the situation where the crime was integrated into the purpose of an organized criminal group in the sense provided in art. 367 para. (6) of the Criminal Code, regardless of the quality of the person, the competence to prosecute belongs to the Directorate for the Investigation of Organized Crime and Terrorism.

In this case, the jurisdiction in the first instance belongs to the notified court.

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).

6. Legislative Precedents and Transitional Situations

6.1. Legislative Precedent

This act was not incriminated in the Criminal Code of 1864.

In the Carol II Criminal Code, the examined crime was provided in section IV of title IX with the marginal title “Offenses and crimes against public interests”, art. 399.

According to the provisions of art. 399 “The one who manufactures or holds instruments or materials specifically intended for the falsification or alteration of coins, shares, seals, instruments shown in art. 385, 391, 393, 394, 395, 306 and 397, in order to serve for forgery, shall be punished by correctional imprisonment from 3 months to one year and a fine from 2,000 to 5,000 lei.”

The doctrine of the time held that the text incriminates the manufacture or possession of instruments or materials specifically intended for counterfeiting or alteration of coins, shares, seals, instruments shown in: art. 385 (counterfeiting of currency), art. 391 (national titles, state annuities, etc.), art. 393 (state seal), art. 394 (seal of a public authority), art. 395 (seal, mark of a particular authority), art. 396 (tools for marking precious metals, trees, etc.), and art. 397 (imprint or sign of a seal). However, for the act to constitute an offense, it is imperative that the manufacture or possession of the instruments take place for the purpose of counterfeiting, but it is not necessary that the counterfeiting of coins, shares, etc., has taken place, because the law only wanted to incriminate the preparatory act for the forgery of those objects, to which is added the fraudulent intent, that is, the science for the author that they will serve the falsifications provided for in the texts listed above” (Papadopolu in Rătescu et alli, 1937, pp. 559-560).

6.2. The Transitional Situations

In transitional situations, the court will also have to apply the more favorable criminal law, depending on the date of the crime and the date of remaining final.

However, we specify that compared to the initial wording of the Criminal Code from 01.02.2014, the incrimination text has undergone other changes, respectively those introduced by art. I points 9 and 10 of Law no. 207/2021.

It should be noted that these new amendments have added provisions sanctioning actions by which they are manufactured, received, held, acquired, etc., devices, instruments, etc., in order to serve to counterfeit the non-cash payment instruments.

In view of this situation, we specify that the actions taken prior to the amendment of the text in question will not meet the constituent elements of the crime under examination.

Depending on the existence of aggravating or mitigating circumstances, the more favorable criminal law may be both the old and the new law.

Conclusions

Against the background of new changes in the structure of crime in the field of electronic means of payment, the need to prevent and combat such crime more effectively, Directive (EU) 2019/713 of the European Parliament and of the Council was adopted at EU level of 17 April 2019 on combating fraud and counterfeiting in connection with cashless payments and replacing Council Framework Decision 2001/413/JHA.

The obligation to transpose the provisions of this European legal instrument into national law led to the adoption of a new normative act amending and supplementing the examined incriminated text.

Thus, the examination of the crime takes into account the new modifications and completions operated in the structure of the incrimination text from art. 314 of the Criminal Code, from its initial wording from 01.02.2014.

The legislative changes made to the structure of the text and examined are those aimed at incriminated a new aggravated regulatory modality and another assimilated method that concerns non-cash payment instruments.

As a general conclusion, we appreciate the opportunity of the changes in the structure of the text from its initial wording, the purpose being to defend these particularly important values in terms of the evolution of non-cash payment instruments.

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