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**The Difference between the Offenses of  
Deceiving and other Offenses with Fraudulent Feature**

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**Abstract:** Frequently in the judicial practice but also in the doctrine there have been difficulties in delimiting the computer offense from the deceiving offense. Often this relationship was interpreted in the sense that it was about two competing offenses affecting different social values - namely those of patrimonial type and those referring to normal operation of information systems. The doctrine observes that with the technological revolution, the opportunities to commit crimes against patrimony have multiplied. Goods that are represented or taken from information systems (electronic funds, deposits, etc.) have become targets of manipulation, as the traditional forms of property. Such offenses usually are done by entering incorrect data into a system through manipulation programs or other interference during processing. This article aims at incriminating any act of free handling as in data processing with the intention to operate an illegal transfer of property. Such offenses are usually achieved by entering incorrect data into a system through manipulation of programs or other interference during processing data. This article aims at incriminating any act of manipulation without the right in the data processing with the intention of operating an illegal transfer of property. (Dobrinou, et al., 2012)

**Keywords:** act of manipulation; data processing; illegal transfer of property

The offense was provided in almost identical legislation in art. 49, Ch. III, Title III, Book I of Law no. 161/2003 and in the new Criminal Code is provided by art. 249 with the following content: “Insertion, modification or deletion of computer data, restricting access to such data or preventing in any way the operation of a computer system, in order to obtain a financial benefit for himself or another, if it has caused damage to a person”.

The relationship between the two crimes, especially under the new regulations falling within the same legal object is very well captured in a decision of the High Court of Cassation and Justice<sup>2</sup>. Having the value of principle in that decision, the court shows that the online fictional sales of goods, achieved through platforms specialized in trading goods online, causing prejudice to persons injured misled by the introduction of computer data on the existence of property and determined in this way, to pay the price of nonexistent goods meet the constitutive elements of the offense of computer fraud. In this case, they are not met also the constituent elements of the offense of deceiving, since the crime of computer fraud is a variant of the offense of deceiving committed in the virtual environment, and art. 49 of Law no. 161/2003 (currently repealed and adopted in art. 249 Criminal Code) constitute the

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<sup>2</sup> I.C.C.J., Criminal Division, Decision no. 2106 of 14 June 2013, www.scj.ro.

special rule in relation to art. 215 of the 1969 Criminal Code, which is the general rule, being applicable only to special norm.

Penetrating further into the depth of the problem of law, the court found that the provision defining the offense of computer fraud, in relation to that provided for in art. 215 of the 1969 Criminal Code (244 Current Criminal Code) constitutes the special rule governing a particular form of fraud i.e. in the computer system. Clearly this means that as the material element, conducting specific activities (insertion/modification/deletion of data, restricting access to such data, preventing the operation of a computer system) in order to obtain a patrimony and the resulting in the determination of damage. The court, in its decision, found that the normative variants of the offense - with reference to the many ways in which it can be achieved the objective side in terms of material element of it – have as common point and effect, on the one hand, the fraud with harmful consequences for the passive subject, and secondly obtaining manifestly unfair and unlawful the use of an asset by the active subject. Also, it is obvious that the fraud of the passive subject involves inducing it in error because, otherwise, the assertion of the crime would be impossible. Moreover, the conclusion that fraud computer is actually a variant of deceiving committed in the virtual environment results also from the penalties prescribed by the rules of incrimination. (Boroi, 2014, p. 271)

However, the court observed that achieving constitutive content of the offense provided for by the special rule on incrimination produces the same prejudice that might retain corollary the appreciation for the purposes of the committed offense provided for by the general rule (art. 244 of the Criminal Code). So, given the principle according to which the special rule derogates from the general rule and that it is inadmissible the possible unjust enrichment of the civil party by the double repairing of the prejudice both by the effect of detaining the crime of special law and that of the general rule, i.e. the Criminal Code, it must be concluded that in case of contest between special and general rule, it will be effective the special rule. Moreover, a contrary conclusion would have as effect the double sanctioning (due to an excess of regulation) at the level of civil and criminal law, which is inadmissible.

As these are the facts and being in full agreement with the reasoning included in the quoted decision, we will show that the computer fraud (just as any fraud offense) has a special character in its relation to the offense of deceiving, a reason for which they are unable to achieve an offense contest.

### **Other Delimitations on the Crime of Deception**

In some situations, it was even proceeded into separating *the offense of deceiving by the tort liability* engaged for the non-compliance of the contractual obligations. Constantly in such situations it was considered that the mere breach of a civil obligation cannot have criminal consequences as long as a party has not used deceptive means to persuade the other party to perform the agreement on term. (Hâj, 2000, p. 351)

In jurisprudence there were also pointed out other distinguishing features. We will briefly present some of these solutions:

1. Trying to get without the right sums of money as reimbursement of value added tax on the basis of carrying out fraudulent transactions in the accounts of a company committed before the entry into force of art. 8 of Law no. 241/2005, it meets the constitutive elements of the offense of the attempted deception offense. The distinct incrimination of the offense, by the provisions of art. 8 of 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 art. 8 of Law no. 241/2005 the act is not provided by the criminal law,

in relation to the contents of the Criminal Code, but it concludes that the committed acts until the moment mentioned, it is applicable to the depositions of Criminal Code.

High Court of Cassation and Justice held that the deed - consisting of trying to get without the right the amount of 33116.41 lei in reimbursement of VAT, after the conducting the accounting status of the A company of fraudulent transactions - at the time of committing, in 2004, it was incriminated and sanctioned under criminal law, by the provisions of the criminal Code offense, representing attempted to the offense of deception, being provided for in art. 20, reported in art. 215, par. (1) of the 1969 Criminal Code. The conclusion is based on the special nature of the existing legal tax relationship, in relation to the state and not by the special quality of defendants, i.e. as taxpayers, leading to the conclusion that the defendants were convicted for an offense which in 2004, was not provided by the criminal law, given that the legal provisions of the criminal Code that incriminated deception were not circumstanced to certain people or certain legal relationships between passive and active subject of the subject offense. The fact that, subsequently, by art. 8 of Law no. 241/2005 were incriminated separately, through a special law, acts of the nature of the one committed by the defendants in 2004 does not mean that by that time they were not provided by the criminal law, in relation to the contents of the Criminal Code.<sup>1</sup> After interpreting this decision we conclude that the offense defined by art. 8 of Law no. 241/2005 has special character in relation to the offense of deceit of the Criminal Code, for which the norm of special law enforcement takes precedence.

2. On the same matter, it was considered that the act of misleading by presentation, using false documents, the trade acts as acts performed in the country as documents of export, in order to evade excise duty and VAT, constitute offense of **tax evasion** and not the offense of deceiving<sup>2</sup>. To determine this, the court found that the defendant, Management councilor at a company and owner of a commercial firm, in order to avoid paying excise duty and VAT levied on internal trade in alcohol, in September 1998 agreed with the representatives of foreign companies to conclude fictitious contracts of alcohol export, in reality the commodities were sold in Romania. To give the appearance of real contracts, the defendant was favored by a customs official also condemned in the concerned offense, confirming the fictitious exit of the alcohol tanks. For these fraudulent schemes the defendant damaged the state budget with the amount of 581 625 578 lei, representing unpaid excise duty and VAT. His act is an act of deception, but because there is a special regulation, it can no longer retain also the charge of deceiving from the Criminal Code.<sup>3</sup>

3. The deed of the administrator of a company, to purchase merchandise of inferior quality, exempted from taxes and duties, the right to sell it as top quality products, bearing taxes and duties, and to retain the value of these latter components of the price represent the offense of deception, perpetrated at the expense of buyers, not crimes of embezzlement and deceiving on the quality of goods provided for in art. 297 of 1969 Criminal Code. The court concluded that the two offenses cannot be accepted as the company is not prejudiced by the committed offense and the goods were not adulterated or substituted.<sup>4</sup>

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<sup>1</sup> I.C.C.J., Criminal Division, Decision no. 1341 of 17 April 2013 [www.scj.ro](http://www.scj.ro).

<sup>2</sup> Provided for in article 12 of Law no. 87 / 1994 repealed and replaced by Law no. 241/2005.

<sup>3</sup> I.C.C.J., Criminal Division, Decision no. 2287 of 8 May 2002 [www.scj.ro](http://www.scj.ro).

<sup>4</sup> I.C.C.J., Criminal Division, Decision no. 5524 of 27 November 2003, [www.scj.ro](http://www.scj.ro).

In order to decide, the court noted that the defendant, administrator of a company having as main activity the sale of petroleum products, acquired during July 1999 - February 2000 large quantities of oil of lower quality, exempted from excise duty and FSDP tax and resold them as premium gasoline and diesel fuel with taxes and excise. The money obtained in this way has not been paid to the state budget, being appropriated by the defendant. Considering that since the defendant has not had the quality of official personnel, he cannot be the active subject of the crime of embezzlement, the court acquitted him on the absence of elements of crime. During the appeal it was requested the change of the legal classification of the crime of embezzlement and deceive on the quality of goods.

The court concluded that the evidence provided in the case that the offense committed by the accused it was not prejudiced the company whose administrator was; he did not stole money from the company's heritage and there is no shortage in its management. This is why it is also considered that to the defendant it cannot retain any offense of cheating on the quality of goods nor under the form of the direct participation, or by the improper participation, from the lack of constituent elements, there was no falsification or substitution of goods or products.

In the case of petroleum products have not been forged or altered or substituted, but received a new name and a price that gave them the appearance of authenticity. The defendant, by his actions deceived buyers who are confident that it was delivered Premium gasoline and diesel, purchasing in reality lower quality products.

Whereas the label under which it was sold this oil of lower quality, tax exempt FSDP and excise, was gasoline and diesel products bearing taxes and duties, the price paid by buyers included these unjustified surcharges, being misled about the quality and cost of purchased product.

The amount of taxes and excises are not due, amounting to 2,568,102,252 lei, included in the paid price, there are obligations to the state budget, but, as noted, is the damage caused to buyers and unjust material benefit gained by the defendant fraudulently.

The facts, as described, meet so the elements of the offense of deceiving.

**4.** The acts of the manager of a company, to falsify documents of the company and, on that basis, to obtain a loan on forged documents failing it would not have been achieved otherwise and which he did not returned, constitutes the offense of forgery of private documents and the offense of deceiving and in art. 271, pt. 1 of Law no. 31/1990 which incriminates it, among other things, the act of the manager of the company, which has, in bad faith, in the prospects, reports and communications to the public, untrue data on the formation of a company or on its economic conditions.

In order to decide, the court held that the defendant, as manager of a company in order to obtain a loan of 3 billion lei, falsified the balance sheet of the company and the balance of verifying it, thereby obtaining the loan in question.

In the first instance, the defendant requested the change of the legal classification of the offense, from the offense of deceiving into the offense under article 271, point 1 of Law no. 31/1990, republished. The request to change the legal classification of the offense was considered unfounded, since art. 271 pt. 1 of Law no. 31/1990, republished, states that there are punishable by imprisonment of one to five years the founder, manager, director, chief executive or legal representative of the company that presents, in bad faith, prospects, reports and communications to the public, false data on the formation of a company or on its economic conditions or hides, in bad faith, in whole or in part such data. Or, the court of first instance held that the act of the defendant to present the case of lending, accounting

documents forged without which the bank would not have granted the credit of 3 billion lei requested by the defendant under these fraudulent means, misleading the bank, it is the offense of deceiving and not a presentation, in bad faith, of false data on economic conditions of the company of which he was the manager.

The High Court of Cassation and Justice has found on this situation that an offense under article 271, point 1 of Law no. 31/1990, republished, has as special legal object the social relations in connection with acknowledging generally by the public – the people regarded as undetermined, generically - of data and information on companies - constitution and economic conditions thereof.

In this case, the defendant committed the offense means - forgery of private documents under private signature - to achieve the conditions of committing the offense, purpose – deceiving/deception, which goes beyond simply misleading the public about the economic conditions of the company.

It is clear that a particular banking institution does not constitute as being “public” within the meaning of art. 271 pt. 1 of Law no. 31/1990, republished, and the fact that the false documents were not a general purpose, were not addressed to the “public” in general, but were called for a banking institution and that their presentation is not seeking a general purpose of unreal information, but a specific purpose, namely misleading the banking institution in order to obtain a loan through circumvention of conditions known by the defendant in the conduct of previous contracts.

The concrete way of conceiving and executing criminal activity reveals the intention of the defendant of misleading the banking institution, i.e. the direct intent in the sense of art. 19, point 1, letter a) of the Criminal Code.

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