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The Embezzlement Crime: in View of the Case of Cassation Provided by art. 438 Paragraph 1 Point 7 Code of Criminal Procedure

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Abstract

The notion of „act that is not provided by the criminal law" inserted in the case of accommodation provided by the provisions of art. 438 paragraph 1 point 7 Code of criminal procedure concerns both abstract criminal incrimination, respectively if a certain conduct is provided by any rule of incrimination, as well as the conditions of objective typing, respectively the identity between the actual conduct and the elements of the content of the incrimination in terms of the objective side (but not in terms of the subjective side, the lack of subjective typing constituting a distinct thesis provided by art.16 letter b of the Code of Criminal Procedure and which was not taken over by art.438 paragraph 1 point 7 of the same Code). Through this study we seek to subject to the analysis the jurisprudential interpretation given by the High Court of Cassation and Justice regarding the elements of objective typing of the crime of embezzlement, which may be subject to analysis by the court, from the perspective of the case of cassation expressly provided for by the provisions of Article 438 paragraph 1 item 7 of the Code of Criminal Procedure.

Keywords: embezzlement, appeal in cassation, case law High Court of Cassation and Justice.

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Preliminary remarks

An appeal in cassation is an extraordinary remedy designed to ensure a balance between the principles of legality and respect for res judicata, and concerns only the legality of certain categories of final judgments and only on grounds expressly and exhaustively provided for by law. The provisions of Article 433 of the Code of Criminal Procedure explicitly regulate the purpose of the appeal in question, stating that the appeal in cassation is intended to submit to the High Court of Cassation and Justice the judgment, under the conditions of the law, on the conformity of the contested judgment with the applicable rules of law. Since it is carried out within the framework strictly regulated by law, the legality analysis of the appeal court is not exhaustive, but limited to violations of the law deemed serious by the legislator and regulated as such, expressly and restrictively, in Article 438(1) of the Code of Criminal Procedure.

As such, the grounds for annulment relied on must relate to the factual situation and to the elements which circumscribed the criminal activity, as established by the court of appeal, on the basis of the analysis of the evidence adduced in the case, in the judgment under appeal, since in this extraordinary appeal only aspects of law are examined, the High Court not being able to proceed to the evaluation of the evidentiary material or to the reassessment of the factual situation.

The notion of "an act which is not provided for by criminal law" inserted in the case of invalidation provided for in Article 438(1)(7) Code of Criminal Procedure concerns both the abstract incrimination, i.e. whether a certain conduct is provided for by any incriminating rule, and the conditions of objective typicality, i.e. the identity between the conduct itself and the elements of content of the incrimination from the objective point of view (but not from the subjective point of view, as the lack of subjective typicality is a separate sentence provided for by Article 16(b) of the Code of Criminal Procedure and has not been taken over by Article 438(1)(7) of the same Code) (Decision no. 78/RC/2015).

In the jurisprudence of the Supreme Court, it has been ruled that the ground for cassation provided for by Article 438, paragraph 7 of the Criminal Procedure Code concerns "those situations in which there is no complete correspondence between the act committed and the legal configuration of the respective type of offence, either because the act for which the defendant was definitively convicted does not meet the elements of typicality provided for by the incriminating norm, or because of the decriminalisation of the act (regardless

of whether it concerns the regulation as a whole or the modification of some elements of the constitutive content)" (Decision nr.442/R/2017).

Therefore, the appeal in cassation based on the case of cassation provided for in Article 438(1)(7) of the Code of Criminal Procedure can only be analysed in relation to the objective typicality of the offence. In this study we aim to analyse the interpretation of the case law given by the High Court of Cassation and Justice regarding the elements of objective typicality of the offence of embezzlement, from the perspective of the notion of "act not provided for by the criminal law" inserted in the case for annulment expressly provided for in Article 438 (1) (7) of the Code of Criminal Procedure.

Aspects of objective typicality circumscribed to the case of cassation provided for by Article 438 (1) (7) Criminal Procedure Code

The offence of embezzlement – active subject

Embezzlement is criminalised in the Criminal Code as a service offence, in Article 295 of the Criminal Code, in a standard variant, an aggravated variant and a mitigated variant, common to both variants.

The standard variant, Article 295(1) of the Criminal Code, consists of the appropriation, use or trafficking by a public official, for his own benefit or for the benefit of another, of money, assets or other property which he manages or administers and is punishable by imprisonment for a term of two to seven years and disqualification from holding public office. Similarly, the aggravated variant, Article 295(1) in conjunction with Article 309 of the Criminal Code, is carried out when the embezzlement described in the standard variant has produced particularly serious consequences, i.e. has caused damage exceeding 2,000,000 lei.

The mitigated variant (Article 295 in conjunction with Article 308 of the Criminal Code) is committed when the acts described in the variants are committed by or in connection with persons who exercise, permanently or temporarily, with or without remuneration, a duty of any kind in the service of a natural person among those referred to in Article 175(2) of the Criminal Code or in any legal person.

An analysis of the content of the incrimination of the basic form provided for in Article 295 of the Criminal Code shows that the structure of the offence of embezzlement is made up of intrinsic conditions (objective and subjective

aspects) and extrinsic, pre-existing conditions, which supplement the conditions in which the act is incriminated (the capacity of public official of the active subject).

Thus, the requirement in the incriminating rule that the active subject, the term of the offence, must have a certain quality means that this quality becomes a condition for the existence of the offence, a circumstantial element of the incrimination.

Similarly, for the attenuated version, which extends the scope of the active subject to persons who perform, permanently or temporarily, with or without remuneration, a task of any kind in the service of a natural person referred to in Article 175(1)(a), the following applies (2) of the Criminal Code or within any legal person does not change the nature of the circumstantial element, namely the status of the active subject, which is a condition for the existence of the offence in the attenuated version.

The material object of the offence of embezzlement consists, inter alia, of the money which the perpetrator actually manages or administers, and the active subject, the perpetrator of this offence, may be only a public official (proper or assimilated) or a private official.

According to Article 1 of Law No 22/1969, the manager is the person whose main duty is to receive, keep and release goods under the administration, even temporarily, of the establishment in which he is working; an active subject of the offence of embezzlement may also be a de facto manager, i.e. an employee who actually performs the main duty of a de jure manager (according to Article 31 of Law No 22/1969).

In the case-law of the Supreme Court, with strict reference to the special nature of the active subject of the offence of embezzlement, it has been held that the constituent elements of that offence are satisfied by the defendant's act of drawing up annexes to payment orders, which, after being approved by the Director of the Human Resources Directorate and the official responsible for preventive financial control, were sent to the Director of the Economic Directorate. The payment order was issued on the basis of these and contained only the total of the salaries to be paid to employees who had an account with a particular bank. After the payment order had been sent to the bank, the defendant drew up a table, an electronic file, which he sent to the bank by email, listing the employees to whom the money was to be transferred, the amounts due to each employee and the related accounts.

As such, the activity of the defendant (who appropriated the money in the manner described) was decisive in the operation of the payment of salaries to the employees of the company, he initiated the procedure for the payment of salaries by making the annexes (which were the product of the offence of intellectual forgery in continuous form, provided for in Article 321 of the Criminal Code, with the application of Article 35 of the Criminal Code) and completed the procedure by sending the document to the bank, so that the money could be deposited in the accounts of the employees.

Even though the defendant did not have the power to issue payment orders (an act by which the money actually left the assets of the civil party), by sending the file in electronic format to the bank, he released the money in the administration of the civil party, a circumstance which falls within the notion of de facto manager (Decision no. 596/RC/2022).

It has also been held in judicial practice, in another case decision, that the President of the Chamber of Commerce and Industry may also be an active subject of the offence of embezzlement. The status of 'official' required by law for the active subject of the offence of embezzlement is fulfilled both under Article 308 of the Criminal Code, as a person who temporarily performs, with or without remuneration, a task of any kind within a legal person, and under Article 147(2) of the Criminal Code, as a person who performs, with or without remuneration, a task of any kind within a legal person. (2) of the previous Criminal Code, as any person who temporarily exercises, with any title, regardless of how he was appointed, a task of any nature, with or without remuneration, in the service of a legal person other than public authorities, public institutions, institutions or other legal persons of public interest. Both conditions laid down by law are met for a person to be considered a civil servant within the meaning of the criminal law because: the person is carrying out an activity in the public interest within an institution of public utility (a condition met by the Chamber of Commerce and Industry of Romania and its president), and the institution is invested in its activity by a public authority (the Romanian Parliament, in this case).

In relation to the express powers laid down in Article 39 of Law No 335 /2007, the President who is one of the governing bodies of the Chamber of Commerce and Industry has the following main duties: a) represents and engages the National Chamber in relations with natural and legal persons, both in the country and abroad; b) concludes, amends and terminates, under the law,

the employment contracts of the employees of the National Chamber; c) ensures the implementation of the decisions of the general assemblies, the college and the board of directors; d) ensures the implementation of the income and expenditure budget of the National Chamber, approved by the general assembly; e) convenes the general assembly (...); f) convenes and conducts meetings of the Bureau and the Governing Board; g) performs any other duties laid down by the General Assembly and the Governing Board (Decision no. 574/RC/2022).

A particular feature of the active subject of the offence of embezzlement is also the special status of bank official, in relation to which the High Court of Cassation and Justice of Romania – Pannel competent to resove law issue (Decision no. 26/2014) has ruled that the concept of "public office" is related to the concept of "public interest", both of which seek to satisfy needs in the general interest, on the basis of constitutional prerogatives, which make the public interest prevail over the private interest, so that the public official carries out his activity with a view to achieving the public interest and, as such, in the exercise of his function, he has a duty to consider the public interest above personal interest.

In the same sense, the High Court of Cassation and Justice of Romania – Pannel competent to resove law issue (Decision no. 20/2014), established that: "are included (in the category of civil servants assimilated, according to Article 175 para. (2) of the Criminal Code) [...] private individuals who receive the management of a national or local public, economic or socio-cultural service, thus becoming of public utility. These are individuals who operate within the framework of private profit-making legal persons: commercial companies which, by means of administrative contracts, exploit public goods and services in the interests of the national or local community, as the case may be".

A wholly privately owned bank (credit institution) carries out an activity in the public interest, i.e. banking, which is defined in the provisions of Article 7(7) of the Treaty. (1) point 1 of Government Emergency Ordinance No 99/2006 as "attracting deposits or other repayable funds from the public and granting loans for own account; "The nature of the activity carried out by wholly privately owned banks (credit institutions) goes beyond the sphere of private interest and falls within the sphere of public interest, as they are included in the framework of legal persons exercising a service of public interest. In this regard, in the recitals of Decision No XIII/2006, the United Sections of the High Court of

Cassation and Justice held that “banking activity, although carried out by legal persons governed by private law, is undeniably in the public interest”.

The condition laid down in Article 175(1)(b) of the EC Treaty is that the public sector must be a public undertaking. (2) of the Criminal Code is fulfilled only when a public authority can entrust or supervise/control the activity of the person performing a public service. Basically, the public official must have a connection with the state authority and, as expressly stated in the Explanatory Memorandum to the new Criminal Code, Art. 175 para. (2) “concerns those persons who, although not properly civil servants, exercise powers of public authority delegated to them by an act of the competent state authority and are subject to its control, which justifies their assimilation to civil servants”.

A bank official, who is an employee of a bank (credit institution) wholly owned by private capital, does not satisfy the condition that he be entrusted by the public authorities with the exercise of a service in the public interest.

The employment contract concluded between the wholly privately owned bank (credit institution) and the bank official does not have the meaning of an appointment to perform a service in the public interest.

Similarly, in the appeal in cassation, the case-law of the Supreme Court assessed the fulfilment of the conditions of the active subject by reference to the alleged capacity of manager, as long as the defendant was performing the duties of a cook.

On the basis of previous case law which shows that an official, whether de jure or de facto manager, is an active subject of the offence of embezzlement, the High Court found that the defendant was a civil servant, initially as de facto manager, and later as de jure manager. In that regard, it was held that the defendant had been employed by individual employment contract as a cook and, subsequently, by decision of the company's administrator, he had been employed as manager of a work point, taking over the management of the shop, taking cognisance of and signing in that regard. It was also pointed out that the job description signed by the defendant stated that the post he held was that of a management worker.

As a result, the High Court found that the appellant was correctly held to have been a civil servant within the meaning of the criminal law, being a manager in fact, and subsequently in law, throughout his employment with a company (Decision no. 392/RC/2018).

Also, from the point of view of the active subject of the offence of embezzlement, the appeal in cassation assessed the capacity of manager of a locomotive driver, an employee of SNTFC CFR SA, who constantly recorded, on the locomotives which he serviced, unjustified consumption, totalling 305.6 kg of diesel, creating damage to the assets of the civil party in the amount of 2 218 lei, by appropriating the fuel using several means of misappropriation.

In the extraordinary appeal, the defendant argued that he did not have the status of manager required by the rule of the offence.

The Supreme Court, assessing the appeal in the light of the case of cassation provided for in Article 438(2)(a) of the EC Treaty, held that (1), item 7 of the Code of Criminal Procedure, held that the concept of manager is not limited to the definition given by Article 1 of Law No. 22/1969, Article 31 of the same act extending the scope of liability to de facto managers, namely to "the employee who receives, keeps and releases goods without being a manager within the meaning of Article 1".

In this regard, it was held that the defendant appellant had received diesel fuel as an employee of S.N.T.F.C. C.F.R. S.A. in the position of mechanic, having the obligation to keep and use it according to its destination and for the purpose of carrying out the object of activity of the economic agent. For these reasons, fuel received by an employee for the performance of his duties is recorded in his management, it being of no importance that the asset is consumable, in which context the employee also acquires the status of de facto manager within the meaning of Article 31 of Law No 22/1969 (Decision no. 603/RC/2022).

Another approach to the offence of embezzlement in the appeal in cassation was in relation to the notary public's capacity as administrator or manager in the case of sums of money withheld by him by way of tax from the transfer of real estate, in respect of which he is obliged to transfer them to the state budget.

In order to make a complete assessment of this situation, it is necessary to recall the incidence of the legal rules and the development of case law in the light of the decisions handed down in the event of the notary's failure to transfer the sums received by way of tax on legal acts transferring property.

Thus, Article 6 of Law No 241/2005 on the prevention and punishment of tax evasion criminalises the act of withholding and wilful non-payment, within 30 days of the due date, of amounts representing taxes or contributions withheld at source.

By Constitutional Court Decision no. 363 of 07.05.2015, published in the Official Gazette, Part I, no. 495 of 06.07.2015, it was found that the provisions of Article 6 of Law no. 241/2005 for the prevention and punishment of tax evasion are unconstitutional, considering that a subject of law cannot be required to comply with a law that is not clear, precise, predictable and accessible, since he cannot adapt his conduct according to the normative hypothesis of the law.

In this regard, the case-law of the High Court, subsequent to Decision no 363/2015 of the Constitutional Court, has consistently held that the tax evasion offences provided for in Article 6 of Law No 241/2005 have been decriminalised (Decision no. 307/A/2015, Decision no. 330/A/2015 and Decision no. 6/A/2016, finding the unconstitutionality of the criminalization rule provided in art. 6 of Law no. 241/2005, by Constitutional Court Decision no. 363 of May 7, 2015, has the effect of decriminalizing the act provided for in art. 6 of Law no. 241/2005, with the consequence of the acquittal decision, according to art. 16 para. (1) lit. b) thesis I and art. 396 para. (5) from the Criminal Procedure Code).

In this case, following the decision of the Constitutional Court and the finding that the offence provided for in Article 6 of Law no. 241/2005 had been decriminalised, in the case of the acts committed by notaries public consisting in the failure to remit taxes on income from the transfer of real estate property, a committal for the offence of abuse of office was ordered.

Initially, after the Constitutional Court Decision no. 363 of 7 May 2015, the case law of the Supreme Court ruled that the notary's act is circumscribed to the crime of abuse of office, holding, in majority, that the obligation of the notary public, established by Law 541/2003 to calculate, collect and remit that tax is a duty that derives directly from the laws, the requirement established by Decision no. 405/2016 of the Constitutional Court being satisfied, and the failure to do so may constitute a material element of the crime of abuse of office (Decision no. 358/A/2017).

At the same time, in a separate opinion, it was held that the collection and remittance of tax on income from the transfer of real estate is not part of the duties of the notary's office, since the performance of the notary's duties in this respect, contrary to the law, has no effect on the proper performance of notarial activity, but only on the efficient collection by the State of the taxes due by taxpayers (Decision no. 358/A/2017).

The High Court held in the appeal in cassation that the notary public's failure to transfer to the State budget the tax collected on the income from the

transfer of real property, in accordance with the Tax Code, does not meet the constituent elements of the offence of abuse of office provided for in Art. 297 of the Criminal Code, since, in the case of the notary public, the duties of the service to which the provision of Article 297 of the Criminal Code refers are within the scope of the duties specific to the notary's activity as a service in the public interest which the notary is entrusted with performing. Consequently, the offence of abuse of office provided for in Article 297 of the Criminal Code may be committed by the notary public in the exercise of his duties relating to the performance of notarial acts and procedures and not to the performance of fiscal transactions, even if these are provided for in primary legislation (Decision no. 407/RC/2018).

As a result of this development in case law on the acts committed by notaries public, consisting in the failure to remit taxes on income from the transfer of real estate property, it has recently been ordered that they be detained and prosecuted for the offence of embezzlement.

In the case under consideration, it was stated that the offence of embezzlement consisted in the fact that, in his capacity as a notary public, he received, in the period from 1.01.2013 to 31.12.2014, by way of tax from the transfer of real estate, the sum of 117,865 lei, which he appropriated for his own benefit.

Contrary to the opinion of the court of appeal, it was held in the appeal in cassation that, from the point of view of the active subject of the offence of embezzlement, it is doubly circumstantial, as it can only be the person who, at the time of the commission of the offence, has the capacity of a civil servant and of administrator or manager. In this regard, it has been pointed out that not all public officials, as defined in Article 175 of the Criminal Code, can also be managers or administrators. Thus, persons who perform a service of public interest for which they have been appointed by the public authorities or who are subject to their control or supervision with regard to the performance of that public service are not managers or administrators.

With regard to the concept of “de facto manager”, which was enshrined prior to the amendments made by Law No 140/1996 amending and supplementing the Criminal Code, it was considered that, under the current rules, the status of “de facto manager” does not confer the status of active subject of the offence of embezzlement, since Article 175 of the Criminal Code expressly provides that the public official must perform the public function “permanently or temporarily”.

Thus, in relation to the provisions of Article 175 of the Criminal Code and Article 1 of Law No. 22/1969 on the employment of managers, the provision of guarantees and liability in connection with the management of the property of economic agents, authorities or public institutions, by reference to the rule of criminality circumscribed by the provisions of Article 295 of the Criminal Code, the notary public can meet neither the condition of administrator nor that of manager (Decision no. 149/RC/2021).

As far as we are concerned, we consider that the notary public's failure to transfer, within the time-limit laid down by law, the sums received by way of tax from the transfer of immovable property may give rise to criminal liability for the offence of embezzlement from the point of view of the active subject.

If, as regards the capacity of manager or administrator, certain discussions are necessary, we consider that the notary public has the capacity of civil servant, within the meaning of the provisions of Art. 175 para. 2 of the Criminal Code, which states that a person is considered a public official, within the meaning of the criminal law, who performs a service of public interest for which he has been appointed by the public authorities or who is subject to their control or supervision with regard to the performance of that public service.

In this regard, we recall that according to Article 3 para. 1 of No. 36/1995, Notaries Public and Notarial Activity Act, republished, the notary public is entrusted with the performance of a service in the public interest, has the status of an autonomous function and is appointed by the Minister of Justice.

The explanatory memorandum of the new Penal Code explains the significance of the function thus exercised: “An important change has also been made with regard to the content of the notion of civil servant. In the proposed legislation, in line with the solutions in this area in other legislation, the concept of civil servant will designate the person who exercises, permanently or temporarily, powers enabling him/her to take decisions, to participate in taking decisions or to influence the taking of decisions, within a legal person carrying out an activity that cannot be subject to the private domain. At the same time, the draft has opted to assimilate natural persons exercising a profession in the public interest, for which a special authorisation by the public authorities is required and which is subject to their control, such as notaries, bailiffs, etc., to civil servants (Lefterache L.V., 2016).

Moreover, the case law of the High Court itself has attested to the fact that the notary public fulfils the quality required by Article 175 of the Criminal

Code. Thus, the court ordered the conviction of the defendant T.M., notary public, for the offence of abuse of office against the interests of persons and intellectual falsehood (Decision no. 171/A/2015); ordered the conviction of the defendant D.P., notary public, for the offence of negligence in office (Decision no. 235/A/2015); ordered the conviction of the defendant S.M., notary public, for committing the offence of abuse of office (Decision no. 358/A/2017); ordered the termination of the criminal proceedings following the lapse of the statute of limitations on the criminal liability of the defendant O.C.R., notary public, for committing the offence of abuse of office(Decision no. 231/A/2019).

Moreover, the Constitutional Court held that "(...) according to the provisions of Articles 2 and 3 of Law 36/1995, notarial activity is carried out by notaries public through notarial acts and notarial legal consultations, under the conditions of the law, the notary public being entrusted to perform a service of public interest. ... The fact that the notary exercises public authority results from the nature and content of the activity which he performs, as an agent of the State, beyond any qualification of the law (paragraph 19) ... However, since the notary public is a 'public official', the persons occupying this position exercise the powers and responsibilities laid down by law for the purpose of exercising the prerogatives of public authority with which they are entrusted' (paragraph 20) (Decision no. 7/2018).

With regard to the status of manager, we note that the concept of manager is defined in Article 1(1) of the Staff Regulations. 1 of Law no. 22/1969 as an employee of a legal person whose main duties are the receipt, keeping and release of goods under its administration, use or possession, even temporarily. For the purposes of the legal provisions governing management, in particular Law No 22/1969, as amended by Law No 54/1994, the status of manager by operation of law derives directly from the official's main duties, is acquired in the context of the legal employment relationship and confers on the holder rights and obligations which he exercises in the context of direct and material contact with the goods.

Manager is the person who has, as main duties, receiving, keeping and releasing goods. Legal manager is the person who performs the activities specific to the de facto manager.

We believe that the public notary is vested to perform a service of public interest within and with the status of an autonomous function, context in which he receives the amounts paid by the taxpayer with the title of income tax from

the transfer of properties, which he keeps for the period provided by law and then transfers them to the state budget.

We remind you that the provisions of the Fiscal Code impose on the notary the obligation to calculate and collect the tax before authenticating the act or, as the case may be, drawing up the finalization of the succession, so that this tax is paid (transferred to the state budget) by the 25th inclusive of the month following the one in which it was collected. In consideration of these provisions, we appreciate that the obligation imposed on the notary public to collect the sums of money related to the income tax from the transfer of real estate properties, to keep them and later, to transfer them to the state budget within the term provided by law, gives the notary the quality to manage these amounts. This legal obligation rests with the notary as a result of the imperative provisions imposed by the Fiscal Code, being assumed at the time of entry into the profession, along with all of his professional obligations. His duties give the notary the capacity to manage sums of money, sums that do not enter into his patrimony, but, from the moment of receipt, belong to the state, the notary owning them, by virtue of the law, for the purpose of transfer to the state budget. The law imposes on the notary public the obligation to collect and transfer, subsequently, the sums of money collected as income tax from the transfer of real estate properties, turning him into a precarious holder of these assets and, implicitly, in managing them, until the moment of transfer to the state budget.

Moreover, although the payment amounts are incumbent on the taxpayer as income tax from the transfer of real estate properties, the legal obligation of collection and transfer, imposed on the public notary by the provisions of the Fiscal Code, transforms the latter into a manager of the sums of money received. The fact that the legal obligation generates attributions related or only tangential to the actual notarial activity appears to be irrelevant in relation to this quality.

In this sense, we appreciate that the withholding of the sums of money collected as tax from the income from the transfer of real estate properties, for a period of time, respectively until the 25th inclusive of the month following the one in which it was withheld, amounts paid and owed by taxpayers as tax, transforms the public notary into a manager of sums of money until the moment of their transfer to the state budget, and under this aspect, the public notary can acquire the quality of active subject of the crime of embezzlement, in the previously mentioned case.

The previously mentioned jurisprudence supports the existence of a criminal offense within such crimes. Offenses with the same factual basis were assessed as tax evasion, according to art. 6 of Law 241/2005, until the moment of declaring the criminalization rule as unconstitutional, the illegal activity was then characterized as abuse of office, so that later the accusations were directed towards the crime of embezzlement. In this sense, contrary to the opinion retained in the cassation appeal, we consider that in the presented situation, the public notary can be an active subject of the crime of embezzlement, having both the capacity of an official and that of a manager.

From a similar perspective, the question arises whether the bailiff can commit the crime of embezzlement if he appropriates the sums of money from the enforcement procedure due to the creditors.

We consider that in this case too, the bailiff fulfills the capacity of an active subject and can incur criminal liability for the crime of embezzlement in the case of the obligation imposed on him to collect and dispose of the amounts transferred to the recording account, in the event that the amounts of money, which were to be transferred, in the forced execution procedure, the creditors were appropriated in their own interest.

Contrary to the opinion of the supreme court which supported the non-meeting of the constitutive elements of the crime from the perspective of the active subject as a result of the fact that the bailiff does not fulfill either the condition of administrator or that of manager (Decision no. 228/A/2023), we appreciate that the bailiff fulfills the double quality required by the incrimination norm, both as an official as well as a manager.

Similar to the public notary, it cannot be argued that the bailiff does not have the capacity of an official within the meaning of the provisions of art. 175 of the Criminal Code. The jurisprudence of the supreme court certified the fact that the bailiff fulfills the capacity imposed by the law.

In this sense, the High Court ordered the conviction of the defendant D.C.R, bailiff, for committing the crime of abuse of office (Decision no. 312/A/2020); ordered the conviction of the defendant G.N., bailiff, for committing the crime of abuse of office (Decision no. 272/A/2021); ordered the conviction of the defendant D.M., bailiff, for committing the crime of abuse of office (Decision no. 14/A/2022); it was decided to convict the defendant P.D., bailiff, for committing the crime of abuse of office (Decision no. 471/A/2015).

Regarding the quality of manager, we consider that in the sense of the legal provisions that regulate the matter of management, mainly art. 1 paragraph (1) and art. 31 of Law no. 22/1969 amended, the quality of manager derives directly from the official's main job duties, being acquired within the legal employment relationship and confers on its holder rights and obligations that he exercises in the context of direct and material contact with goods.

The provisions of the Code of Civil Procedure and the Statute of the National Union of Judicial Executors and the profession of judicial executor impose on the executor the obligation to manage the money from the recording account in order to distribute it to creditors. The sums of money collected by the executor from the debtors, in the enforcement procedure, are released only on the basis of the decision of the bailiff or the enforcement court. Thus, the bailiff is empowered to perform a service of public interest within an autonomous function.

The legal reports created in a foreclosure file are premised on the attributions or specific functional powers of the executor regarding the sums of money transferred to the recording account and the legal obligation to hand over the money to the creditors. The bailiff exercises powers of collection of the sums of money owed to the creditors and disposes of these goods, exclusively in their interest. The sums of money collected in the foreclosure procedure are released only on the basis of its disposition or the enforcement court. On these sums, which do not belong to him, the bailiff disposes limitedly, respectively only in favor of the creditors, an aspect that creates in his charge a management attribute within some reports born from the instrumentation of the forced execution file. The preliminary report is replaced by the specific reports generated by the assumption of the execution file within which a fee will be charged for the service provided.

In this context, we appreciate that the appropriation of the sums of money that should have been transferred to the creditors in the foreclosure procedure, represents an illegal conduct of the bailiff and imposes criminal liability for the crime of embezzlement.

The supreme court did not evaluate the conditions for incurring criminal liability for the crime of embezzlement in this particular case of the bailiff in the cassation appeal, and the opinion expressed in this approach was shared only on the occasion of formulating a separate opinion of a decision pronounced by the High Court as a court of appeal.

The crime of embezzlement – aspects of objective typicality

According to the provisions of art. 295 of the Criminal Code, the crime of embezzlement consists in the appropriation, use or trafficking by an official, in his own interest or for another, of money, values or other assets that he manages or administers.

So, from the objective point of view, embezzlement is a comissive crime, and the type of conduct incriminated is indicated by the verbum regens.

The material element of the objective side can be realized through three alternative ways, namely appropriation, use or trafficking of money, valuables or other goods, in personal interest or for another, all of which constitute ways of evasion.

By "appropriation" is meant the removal of an asset from the possession or custody of a legal entity and its transfer into the ownership of the perpetrator, so that he can dispose of it through consumption, use or alienation.

Therefore, in the case of appropriation, first of all there must be an act of theft of the asset from the patrimony protected by law, and secondly, an act of passing the asset into the possession of the author of the embezzlement, possession which he must have, from the point of view of view of the perpetrator, definitive character. The perpetrator behaves as an owner in relation to these goods, definitively passed into his possession. The circumstance that this transfer of the good into the possession of the perpetrator can be achieved "in his interest or for another" does not change the meaning of the term "appropriation" in the content of art. 295 of the Criminal Code. Even if it is carried out for or in the interest of another person, any operation or effect in favor of a third party must be preceded by the appropriation of the asset by the perpetrator of the crime of embezzlement, respectively by the removal of the asset from the possession or detention of the injured person and its passing into the possession of the perpetrator. The phrase used by the legislator in the content of art. 295 of the Criminal Code "in his own interest or for another" is circumscribed to the subjective side of the crime, and not to the objective one, and reflects the intention of the legislator to criminalize the act regardless of whether the appropriation was made in the personal interest of the perpetrator or in the interest of another person.

"Usage", as a normative way of achieving the material object of the analyzed crime, consists in the initial removal of an asset from the possession of

a legal entity and its use, for the benefit of the perpetrator, followed by the return of the asset to the patrimony from which it was removed.

"Trafficking", in the sense of the same criminalization rule, consists in removing an asset from the patrimony of a legal person and using it by the perpetrator in order to obtain a profit, in a speculative manner.

The immediate consequence consists in the creation of a state of danger for social relations related to the economic activity of the legal entity in question, by removing the asset that forms the material object of the crime from the patrimonial sphere in which it was originally located and using it in the interest of the perpetrator or another person (Decision no. 461/2016).

Therefore, the premise situation consists in the case of this offense in the existence of administration or management relations between an institution, public authority or legal person, on the one hand, and a public official or a private official, on the other hand, having as object tangible goods that have an economic value, i.e. "money, securities or other goods".

In its jurisprudence (Decision no. 177/RC/2022), the High Court held that the constitutive elements of the crime of embezzlement are met, from the perspective of the material element, when the goods under the administration of the defendant, in his capacity as sole administrator of the company, are the very buildings that were the subject of the sales contracts -purchase. She, as the administrator appointed in the general assembly of 25.08.2004, had the authority to conclude disposition documents regarding the company's assets, even if the exercise of the right to dispose was conditioned by taking some decisions in the general assembly.

It was assessed that the circumstance that the defendant did not participate in the decision-making regarding the sale of the real estate is irrelevant, in the context where the decision itself is not the object of the accusation, but the fact that the sale was made at a much undervalued price, which was likely to generate a damage to the patrimony of the managed company, the transmission of the property operating in the exclusive interest of the buyer.

The practice of the supreme court is not uniform, however, in terms of meeting the elements of objective typicality, when the crime of embezzlement was committed in the form of appropriation for another. Relevant in this sense is the contradictory jurisprudential interpretation of the High Court regarding the notion of "appropriation for another" inserted in the contents of art. 295 paragraph 1 of the Criminal Code.

In a first opinion, it was appreciated that appropriation involves an illegal action of removing from the possession or detention of a person sums of money, values or other goods under the management or administration of the author and passing them into his possession, so that he can order of them as their own property. Appropriation can also be achieved by passing into the effective possession of another person, as a result of the author's illegal activity, it is not necessary for the asset to be initially taken into possession by the perpetrator and only later to be passed on to another person.

The literal interpretation of the phrase "in his interest or for another", excludes such a conclusion in the consideration of the disjunctive conjunction "or" which reveals the regulation of two distinct alternatives. In the absence of an express legal provision, the principle of legality opposes a jurisprudential interpretation that would reduce the two alternative requirements to one. In the situation where the will of the legislator would have been that the appropriation would have always assumed the passing of the good into the possession of the perpetrator, the thesis "second time for another" appears to be meaningless, the reasoning being contrary to the legal provision.

Therefore, in practice, it was held that the manner in which the defendants acted, namely that by concluding the sales-purchase contracts, the real estate was removed from the company's patrimony, to the detriment of the company and in the interest of other people, as long as the price was much undervalued, even derisory in relation to the real market value and, moreover, it was even returned to the buyer in a short interval, in the form of rents paid by the company for their use, is circumscribed to the material element in the alternative version of appropriation (Decision no. 177/RC/2022).

It was also appreciated, in another case decision, that the facts retained in the charge of the defendant to conclude, as a representative of SC F. SRL and SC I. SRL, between January 2005 and June 2006, fictitious service contracts services between SC G. SA and the two companies it administers, not pursuing the provision of real services, but the appropriation of the amount of 2,997,000 RON from the patrimony of SC G. SA, meets the constitutive elements of the crime of complicity in embezzlement with particularly serious consequences , in continuous form. The action of the defendant who helped the executive management of SC G. SA to create the appearance of a legal activity by signing and appropriating some works that were carried out by the defendant D. and later "placed" the

sums of money obtained from the concluded contracts, including in the relations of business conducted with defendants E. and D (Decision no. 121/RC/2018).

At the same time, in the jurisprudence of the supreme court, the meeting of the constitutive elements of the crime of embezzlement in the form of embezzlement and the act of the defendant, mayor, having in administration the sums of money belonging to the town hall and exclusive management of the fuel cards used by the Town Hall for fuel supply and designed a mechanism by which to remove from the sphere of control of the passive subject the goods that it administers/manages, which, in reality, consist of the sums of money affected by the municipality for the purchase of this product (Decision no. 378/RC/2022).

Equally, it was found that the act of the defendant, an employee of the company S.C.P.SRL, a company whose object of activity was the practice of gambling, having the function of cashier to credit the roulette with points to allow the defendant BRG to continue the game, without but to pay their value, but with the promise to bring him the money later, meets the constitutive elements of the crime of embezzlement in the variant of appropriation for another (Decision no. 563/RC/2021).

The second opinion outlined by the jurisprudence of the supreme court, minority, regarding the alternative version of appropriation reveals a different perspective, appreciating that first of all there must be an act of theft of the property from the patrimony protected by law, and secondly, an act of passing the good into the possession of the author of embezzlement, possession which must have, from the perpetrator's point of view, a definitive character. The perpetrator behaves as an owner in relation to these goods, definitively passed into his possession. The circumstance that this transfer of the good into the possession of the perpetrator can be achieved “in his interest or for another” does not change the meaning of the term “appropriation” in the content of art. 295 Criminal Code. Even if it is carried out for or in the interest of another person, any operation or effect in favor of a third party must be preceded by the appropriation of the asset by the perpetrator of the crime of embezzlement, respectively by the removal of the asset from the possession or detention of the injured person and its passing into the possession of the perpetrator. The phrase used by the legislator in the content of art. 295 Criminal Code “in his own interest or for another” is circumscribed to the subjective side of the crime, and not to the objective one, and reflects the legislator's intention to criminalize the act

regardless of whether the appropriation was made in the personal interest of the perpetrator or in the interest of another person.

In consideration of these aspects, in a case decision it was ordered to acquit the defendants motivated by the fact that the documents of the file do not reveal that they appropriated any amount of money for themselves or for another, but that as a director and member of the committee of credits of a bank, based on prior agreements with certain individuals, improperly exercising his duties, approved and subsequently signed 38 credit contracts with individuals and legal entities, in violation of banking regulations, knowing that the documentation is is incomplete, has flaws, or contains unreal documents (service contracts, rental contracts, financial statements, supporting documents), causing damage to the civil party in the amount of 19,352,522.25 lei and obtaining undue benefits both for himself (consisting in the benefits that were to be received following the granting of credits), as well as for the defendants beneficiaries of the approved credit contracts (consisting in the provision of sums of money for the payment of outstanding installments) (Decision no. 437/RC/2022).

In the relevant jurisprudence of the supreme court, it was held that the appropriation constitutes one of the material elements specific to the crime of embezzlement and is integrated into the objective side of the crime, while the purpose of the appropriation is an element that belongs to the subjective side and indicates whether the appropriation was made in the personal interest of the perpetrator or in the interest of another person. Consequently, the two are distinct constitutive elements of the crime of embezzlement and must be analyzed separately, each having to meet specific requirements (Decision no. 64/RC/2019).

Thus, from the perspective of the appropriation action, the elements of objective typicality will not be met if the material object of the crime of embezzlement ended up directly in the patrimony of a third party, even if this happened as a result of the exercise of the official duties by the perpetrator, as long as the latter did not take possession of the material object for a moment.

As far as we are concerned, we agree with the minority opinion and appreciate that appropriation as a way of stealing an asset consists in removing that asset from the possession or custody of a person and passing it into the possession of the perpetrator who can dispose of it, that is, can consume it, use it or dispose of it.

Or, even in the variant of appropriation for another, it is necessary that the act of the perpetrator of the crime constitutes a removal by him of the asset from the patrimony of the injured person, the action of “appropriation” implies a possession of the perpetrator with the asset, in the sense that, together with the action of appropriation, he will act towards the good as if he were their owner.

As a result, if the definitive removal of money from the patrimonial sphere of the injured person and the causing of damage is not preceded by an action to appropriate the amount of money by the defendants, such an act does not correspond to the pattern of incrimination of the crime of embezzlement.

The literal meaning of the word is to make it one's own, the term “appropriation” from the content of the crime of embezzlement translates the idea of making one's own an asset belonging to the owner's property (Toader T., Antoniu G, 2015).

Conclusions

The presentation of this table of the solutions pronounced by the supreme court in the matter of the appeal in cassation regarding the typical conditions of the crime of embezzlement, aimed to know the adjacent arguments, with the insertion of the objective and subjective aspects considered in the legal interpretation carried out on the case of annulment provided by the provisions of art. 438 paragraph 1 point (7) of the Code of Criminal Procedure. Although, the non-unitary judicial practice generated by a different interpretation of the norm of criminalization can lead to divergent solutions and susceptible to criticism, still the jurisprudence remains an “open book”, the most expressive and relevant form of objectification of “law in motion”, being the first benchmark of the quality of the law susceptible of application to various legal situations that have reached a conflicting state.

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