

THEORETICAL AND PRACTICAL CONSIDERATIONS ON THE CONCURRENCE OF OFFENSES

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Abstract: *The entry into force of the new Criminal Code brought back to the attention and discussion of legal practitioners and theoreticians the criteria that distinguish the continued offense from the concurrence of offenses. Although, subsequent to the Romanian Constitutional Court Decision no. 368/2017, it has practically returned to the existing regulation in the matter of the continued offense under the rule of the old Criminal Code, the concrete situations submitted to the attention of the courts continue to provoke theoretical controversies. This article aims to critically analyse the recent case law regarding the criteria considered by the courts when they delimit the existence of a concurrence of offenses or a single offense, in a continuous form.*

Key words: *continued offense, concurrence of offenses, recent case law;*

1. Introduction

The old Criminal Code provided the institution of the continued offense in a manner similar to the one existing in the new legislation, the main difference consisting of the introduction of a new condition of existence regarding this form of legal unity of offense, namely the unity of passive subject.

The following requirements that must be met cumulatively in order to have a continued offense, have been highlighted in the doctrine and the case law (Bodoronca, 2016, p.159-165) (Antoniou ş.a., 2015, p.359-371):

- The existence of a plurality of actions or inactions committed at different time intervals;
- Legal homogeneity of actions or inactions;
- Active subject unity;
- Criminal intent unity.

By the Decision no. 368/2017, published in the Official Gazette Part I no. 566 of July 17th 2017, the Constitutional Court accepted the constitutional challenge and found that the phrase "also against the same passive subject" within the provisions of art. 35 para. (1) of the Criminal Code is unconstitutional.

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Therefore, following the delivery of this decision by the constitutional contentious court, the regulation of the continued offense in the new criminal legislation has become identical to the one existing in the old Criminal Code.

Although both the literature and the jurisprudence have developed the criteria characteristic of the continued offense, mentioned above, the difference between this form of legal unity of offense and the concurrence of offenses still raises controversies in the case law.

This article aims to draw attention to and critically analyse a case solution by which the courts appear to be radically departing from traditional viewpoints, developed so far by doctrinal and jurisprudential means.

2. Continued Offense vs. Concurrence of Offenses. Practical Aspects

Through the indictment of the Prosecutor's Office attached to the Braşov Tribunal from March 15th 2018, the defendant R.A-I was sent to trial, among others, for committing 6 offenses of aggravated theft, provided by art. 228 para. 1, art. 229 para. 1 letter b, d, para. 2 letter b Criminal Code and 3 offenses of complicity in aggravated theft, provided by art. 48 para. 1 Criminal Code reported to art. 228 para. 1, art. 229 para. 1 letter b, c, d, para. 2 letter b Criminal Code, committed in real concurrence.

In essence, the defendant was charged with the fact that, between March 27th 2017-October 20th 2017, together with other persons, he broke into the premises of several companies whose object of activity was retail trade, from where he allegedly stole various goods (especially cigarettes) and sums of money from the cash registers.

During the first instance trial, the defendant requested the change of the legal classification of the 9 offenses of aggravated theft, respectively complicity in aggravated theft, for which he was sent to trial in a single offense of aggravated theft, in continuous form, whose content shall include 9 material documents.

Braşov Tribunal rejected this request, essentially retaining the following (Criminal sentence no.20/S 14th February 2020 Brasov Tribunal):

- „in order to have a continuous offense according to art. 35 of the Criminal Code, it is necessary to ascertain, outside the unity of active subject, the commission at different time intervals, but in the realization of the same intent, action or inaction that presents the content of the same offense, each one separately; (the unity of passive subject no longer represents a condition for the retention of a continued offense as a result of the pronouncement of the decision 368/2017 of the Constitutional Court),
- the legal homogeneity condition of the defendants' actions (committing actions or inactions that each present the content of the offenses of aggravated theft or concealment) is fulfilled, an aspect resulting from the factual situation set out above;
- the time intervals between the facts presented in points 1-20 of the indictment may be considered in some cases short enough to comply with the requirements imposed by art. 35 para. 1 of the Criminal Code, but by analysing as a whole the criminal activity of the defendants S., R. and G. in view of the interval between the first and last act, the court finds that the time periods are excessively long to outline

- the criminal intent unity; thus for the defendant S. L. C. the period is March 10th 2017 – October 20th 2017, for R. A. I the interval is March 27th 2017 –October 20th 2017, and for G. D. D. the interval is July 27th 2017 – October 20th 2017.*
- *the intent unity represents one of the most important conditions of existence of the continued offense and, at the same time, the main element of its delimitation compared to the real homogeneous concurrence of offenses and this condition is not fulfilled in this case; thus, in order to ascertain that the condition of the criminal intent unity has been fulfilled, it must be determined, prior to the commission of all actions, and maintained throughout the whole criminal activity.*
 - *In other words, it is necessary that each of the perpetrators, at the time of the decision, had the overall representation of the material object, the place, the way and the time of the acts; if the defendants had a contoured mode of operation and material object (packs of cigarettes, in most cases together with the shelves on which they were and sums of money, in some cases together with the drawers or safes in which they were stored) it cannot be stated that in March the defendants knew all the shops from which they were going to steal goods and the date or at least the time interval in which each theft action was to be carried out; even if the degree of determination of the criminal intent cannot be established with certainty, in order to retain the existence of the continued offense, it is necessary that the concrete criminal plan be drawn up at least in general terms.*
 - *An intent such as "we will steal goods whenever the right opportunity arises" or "whenever we have information and we are prepared" does not present the degree of determination specific to the legal unity of offense in the form of continued offense. The existence of an organized criminal group for the purpose of committing theft offenses does not automatically imply the conclusion that all thefts committed by members of the group would constitute a continued offense.*
 - *moreover, the telephone conversations intercepted on the basis of the warrants given by the judge of rights and freedoms show that the members of the group decided to participate or refuse to participate in committing an act of theft depending on the mood, the needs felt, the concrete possibilities to place the concealed goods in the case of the defendant L., aspect incompatible with the retention of the continued offense. In this respect, the discussions described in the description of the facts in the indictment at points 8 and 19 of the indictment are relevant."*

By the written arguments submitted in support of his appeal, the defendant, through his defender, criticized the reasoning given by the trial judge, arguing that the arguments put forward in the reasoning of the rejection solution for the legal classification changing demand were contradictory on the one hand and on the other hand in obvious contradiction with the constant position expressed in the doctrine and jurisprudence.

Therefore, by analysing the condition regarding the time intervals elapsed between the commission of the acts that may make up the legal unity of offense, the judge assessed the length of time between the first and last act retained by the indictment, considering it "excessively long" to outline a single criminal intent, but failed to analyse the length of time actually elapsed between the commission of each act which constituted, in the opinion of the defence, material acts constituting a single offense in continued form.

Thus, except for the act of March 27th 2017, the other 9 acts retained in the charge of the defendant R.A-I were grouped in an interval of 4 months, out of which the last 6 acts were committed in the interval of one month. It is also relevant that the members of the same group allegedly committed the acts notified by the indictment with a particularly high frequency between March and October 2017, as there were no long periods between the commissions of two successive acts.

By analysing the condition regarding the single criminal intent, the judge notes that „*it cannot be stated that in March the defendants knew all the shops from which they were going to steal goods and the date or at least the time interval in which each theft action was to be carried out.*”

This logical and legal reasoning exposed by the trial judge is diametrically opposed by the one unanimously accepted both by the doctrine and by the case law. In this regard, the courts have consistently held that in order for the single criminal intent to be retained, it is sufficient to have a general planning of the criminal activity and not a detailed planning.

The High Court of Cassation and Justice also ruled in this regard, pointing out that „*the criminal intent must be outlined generally, with the possibility of new circumstances characteristic of each action. Therefore, the unity of the criminal judgment presupposes the representation from the beginning of the material activity corresponding to the objective side of the offense, which means that, at the time of the judgment, the perpetrator must have had an overview of the acts he shall commit.*” (Criminal decision no. 850/March 21st 2012 of the High Court of Cassation and Justice)

In other words, the Supreme Court ruled that what is relevant is the specificity of the actions that are included to the material element of the objective side, and not the prior planning of the place and time of the commission of the acts.

Relating these jurisprudential considerations to the legal situation of the defendant R.A-I, it can be concluded that it would have been impossible to know exactly all the stores that were to be targeted by the perpetrators of the thefts, as well as pre-scheduling the execution dates of each action, being unanimously accepted that the moment of committing a premeditated act may be chosen on the basis of opportunity, without turning it into an offense committed spontaneously.

What is relevant about the existence of a single criminal intent is the fact that the stolen goods were always of the same kind (cigarettes and cash in cash registers in the shops concerned), the targets chosen by the perpetrators of aggravated theft were part of a certain pattern (small shops, located in small localities and where the risk of being caught was low) and the existence of a pre-established plan for capitalizing the stolen goods (through the defendant L.).

In addition to the existence of the single intent, each act, in turn, is accompanied by its own psychic position, which involves updating the initial psychic factors and the occurrence of new factors that accompany each action.

Thus, the choice of the store and the date suitable for committing a theft represented, according to the defence, the updating of the initial criminal intent, and not the beginning of a new distinct criminal activity.

In this sense, the following have been shown in case law (Criminal decision no.1113/July 8th 2019 of the Craiova Court of Appeal): „*The essential condition for having a continued offense is the unity of criminal intent which refers to the subjective*

binder that unites the actions or inactions committed in a certain criminal unity causing them to lose their status of independent offenses and at the same time constitutes the criterion for distinguishing the continued offense from the concurrence of offenses.

Therefore, the unity of the criminal decision presupposes the representation from the beginning of the material activity corresponding to the objective side of the offense, which means that at the time of the decision the perpetrator must have had the concrete image of the fact that he shall commit repeated actions or inactions, but they do not lead to the loss of the uniqueness of the intent if during the course of the criminal activity there is a change of the objective conditions that require taking certain measures to make possible the continuation of the illicit activity.

In the case of the criminal unity, the perpetrator has an overview of all the component acts and in relation to them he decides to commit the offense, this identical intent must be prior to the beginning of the criminal activity and persist throughout the offense, it must concern, at least in general, determined acts (in relation to the legal object with the manner of commission, with the means used, etc.).

The intent specific to the continued offense presupposes both an intellectual factor - the overall representation of the criminal activity, including its realization through actions - similar, repeated inactions, and its overall result - and a volitional one, - the will to gradually commit the actions - the component inactions of this activity."

In other words, in order to establish the existence or non-existence of a single criminal intent, the following elements must be analysed:

- the nature of the facts, of particular importance:
 1. the homogeneity of actions - perpetrators constantly commit identical offenses in terms of material element;
 2. the result pursued - the fact that each act concerns the same kind of determined goods;
- the frequency of committing acts;
- the concrete way of executing the acts - the same *modus operandi* proves a prior planning of the whole activity;

At the same time, given the fact that the defendant R.A-I was sent to trial and convicted in the first instance for the offense of forming an organized criminal group for the purpose of committing offenses of aggravated theft having as material object mainly packs of cigarettes, leads to the conclusion of the existence of a single criminal intent that was formed at the beginning of the analysed criminal activity, intent updated on the occasion of committing each theft act retained by the indictment.

The appeal court did not embrace these arguments and rejected the repeated request for a change of legal classification in the appeal, stating the following (Braşov Court of Appeal of July 15th 2020, given in the file no. 951/62/2018, p.42-43): "*The case law and legal doctrine have established and respectively proposed different ways and criteria to determine to what extent it is or it is not the same criminal intent. In order to determine whether the respective actions are committed in carrying out the same criminal intent, it is necessary to analyse concretely, from case to case, the facts charged to the defendants.*

Thus, from the way in which the facts allegedly committed by the defendants are exposed in this case, it is observed that the time interval at which some acts are committed is relatively small (two, three, six days); but numerous and more relevant from the point of view of the legal classification are the situations in which the allegedly

committed acts are located at large or very long intervals of time, incompatible with the retention of the same criminal intent.

For example, the defendant R.A-I is charged with committing an offense of aggravated theft on July 4th 2017 and the next offense of aggravated theft on August 20th 2017, then the next offense of aggravated theft on September 19th 2017. It is clear that the passage of a period of one month or, more, even a month and a half between the alleged acts does not reconcile with the retention of the same criminal intent, as it is hard to believe that the defendant had from the beginning, before committing the first theft, a sufficiently well-defined representation of the entire criminal activity retained in his charge. (...)

It is also important to emphasize that the nature of the stolen goods is not the same for all the facts retained in the charge of the defendants. Thus, it is noted that, although in most cases cigarette packs (sometimes the cigarette rack) were stolen, in some cases it is noted that money, safes, and even hunting cartridges were stolen.

Therefore, even from this point of view, a full homogeneity of the criminal intent cannot be retained in order to be able to proceed to the change of the legal classification of the facts in the sense requested by the defendants through their defenders.”

3. Conclusions

Although the doctrine and jurisprudence seemed to have strengthened the criteria delimiting the offense in continued form and the concurrence of offenses, this legal matter continues to provoke controversy in the case law.

We consider that an untimely reorientation of the jurisprudential perspective is likely to affect the predictability of the rule governing the institution of the continued offense.

Thus, we consider that it would be preferable for certain legal matters, which have been definitively settled in the legal doctrine and case law, over several decades, not to receive diametrically opposed interpretations, since in such a case, the persons to whom the legal rules in question are addressed could not adapt their behaviour to the legal prescriptions, in a reasonable manner.

In this sense, we hope that the solution presented above shall remain an isolated case in jurisprudence and not a new orientation, meant to fundamentally change the institution of the continued offense.

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