

THE OFFENSE OF VIOLATION OF PROFESSIONAL HEADQUARTERS IN THE ROMANIAN CRIMINAL LAW

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Abstract: In this paper we have examined the crime of violation of professional headquarters, newly introduced into the Romanian criminal law. During the examination we have considered the pre-existent elements, the constitutive content, forms, ways, sanctions, linked to other crimes, some procedural aspects and previous legislation. The innovations consist of the conducted examination, with reference to recent doctrine promoted by specialists in the specialized literature. The work can be useful to law students in the country, and practitioners from the perspective of understanding and interpreting the text in question. This paper is part of a book called Criminal Law, The Special Part, to be published at Universul Juridic Publishing House, later this year.

Keywords: pre-existent elements; the constitutive content; forms; proceedings; penalties

1. Introduction

Considering the provisions of art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that *everyone is entitled to respect his private and family life, his home and his correspondence*, their interpretation and the case law of the ECHR in the sense that these provisions regard also the residence (the headquarters) of the legal person, the Romanian legislator has incriminated the offense of violation of professional headquarters.

According to the recent doctrine, "in the jurisprudence of the European Court it is considered the home where a natural or legal person carries out their professional or commercial activity, the headquarters of a company, its agencies or its professional headquarters, the office of a lawyer [1]. Thus, in *Kopp c. Switzerland* [2] the European Court found that the business premises, such as the offices of the attorneys (in this case the office of attorneys Kopp and associations), are part of the person's home, ranging implicitly the notion of private life. Similarly, *Niemietz v. Germany* [3] applicant (attorney Niemietz) complained that the search carried out by judicial authorities at his law office is a violation of art. 8 of the European Convention, which damaged his cabinet clientele and reputation as a lawyer. The German government denied the existence of interference, arguing that art. 8 defines peremptorily between private life and home, on the one hand and business premises, on the other hand. On the English word "home" contained in art. 8, the European Court showed that in some Contracting States, including Germany, it is admitted that it is extended to business premises. Moreover, this exegesis comes in full agreement with the French version of the text, as the term "domicile" has a connotation wider than home and may include, for example, the office of a person engaged in a profession, such as that of a lawyer. Also, the European Court noted that, in general, to interpret the words "private life" and "home" as including certain professional or business activities or premises would answer the objective and the key purpose of art. 8. That is, business premises may fall within the concept of "home" within the meaning of art. 8, the European contentious Court of human rights considered being ignored these conventional rules. Subsequently, *East Société Colas et al c. France* [4] the European Court extended the protection of art. 8 of the European Convention beyond the limits of headquarters

where the business activity operates by recognizing the right of the company to respect its premises, staff or his business premises” [5].

The same author believes that “after a period of hesitation (6) C.J.U.E. followed the European Court [6] of the causes *Société Colas Est and others c. France and Niemietz c. Germany*, extending the protection conferred by the right to respect the domicile and on the premises of businesses in cases concerning undertaking searches at the premises of these companies during investigations in the matter of competition law by the EU Commission. The development of C.J.C.E. jurisprudence aimed at ensuring also in the EU law the effective protection against arbitrary or disproportionate interventions by public authorities in the sphere of private activities of natural or legal persons” [7].

In the Romanian law the violations of professional headquarters consists in a person who enters without right, in any way, in any premises where a natural or legal person conduct their professional activity or refusal to leave at the request of the entitled person.

The act is punished more severely when committed by gunmen overnight or by using false impersonations.

The examined crime was not provided for in the Criminal Code of 1969.

2. The Pre-existent Elements

2.1. The Legal Object

The Legal object is represented by the “social relations whose security is conditioned by the insurance of the personal freedom of a person to have a place where they can work safe from external abusive interference and decide freely upon those who wish to receive or not in any of the spaces in which their professional activity is conducted” [8].

Assuming that on the occasion of the commission of the crime of violation of professional headquarters, the perpetrator injures or harms other criminally protected social relations (beating the victim, destruction, etc.), there will be a series of offenses.

2.2. The Material Object

The material object is represented by the violated professional office, whether it was or not damaged due to penetration action. Whether there were destroyed goods or were hit other people, the material object can consist also of goods destroyed or the bodies of victims.

2.3. The Subjects of the Offense

a) The active subject of the crime may be any person with criminal responsibility.

We also appreciate that the active agents may even be the owner of a space, which he rented for use as professional office (medical, law office, etc.), and then brake into that office, without right or refused to leave it at the request of the entitled person.

The criminal participation is possible in any of its forms: co-authorship, incitement, complicity.

b) The passive subject of the crime is considered the person holding the professional office, “entitled to be protected and to oppose entering or remaining in the business premises without consent, unless prescribed by the law” [8].

Also, the passive subject may be an entity that is in the use or ownership of a certain space with the established office and therefore he has the right to allow or refuse the entry or stay in this area.

It is of no legal relevance the existence of the offense if the space is a head office, branch, business unit, etc., it can be any property; it is also irrelevant whether the injured person has professional office under legal title or not.

3. The Structure and the Legal Content of the Offense

3.1. The Premise Situation

According to the doctrine, “the violation of professional office cannot be committed without the prior existence of an establishment in which the natural or legal person conducts his professional

activity. The professional headquarters means the space where the authorized natural or legal persons conduct their professional activity” [8].

3.2. The Constitutive Content

3.2.1. The Objective Side

The material element of the objective side is achieved by two alternative actions, similar to those provided for the offense of trespassing, namely: *entering without right, in any way any premises where a legal or natural person carries out his work and the refusal to leave at the request of the entitled person.*

Regarding the first action, in the doctrine it was expressed the view that “the act is not typical in the case where the perpetrator only enters on land or in any other surrounded place belonging to the professional headquarters (for example, if a person passes a tennis court that is the professional headquarters of a natural or legal person in order to arrive more quickly at a bus stop)” [5].

For this way, *the essential requirement* of the material element presupposes that the penetration is achieved *without right, without the consent of the person who uses the professional office.*

In the legal practice it shall retain the act as the presumed lack of consent until proven otherwise, and the *essential requirement* will exist also in the case where the perpetrator exercises improperly the right granted by the law.

Also, “when the person entering into a professional office bases its action on a legal basis, the act of violation of professional headquarters will not be typical even if the person entitled to use the space opposes penetration; the act is not typical if the perpetrator enters into a professional office used by more natural or legal persons only with the consent of one of the people who use the office” [5].

The second action by which it is achieved the *material element of the objective side* consists in *refusing to leave the professional premises* who entered with or without the consent of the entitled person, upon request, and it requires for the perpetrator to be already in professional headquarters of the injured person and at its specific request, he refuses to leave.

Also with good reason, in the doctrine it was held that “refusal of leave must be explicit and preceded by an express request from the person who uses the space in the sense of leaving it (the error of fact will be of the perpetrator); the request to leave the premises can be made not only by the registered holder of the professional office (shareholder, member of the Board of Directors, authorized person etc.) but also by any person who uses the professional office or representing the natural or legal person holding the professional office (e.g. attorneys collaborators of the person who owns the professional office, the employees of the legal person, etc.)” [5].

According to recent doctrine, “the violation of professional office cannot be committed without the prior existence of an establishment in which the natural or legal person conducts his professional activity. The professional office space means the authorized natural or legal person conducting his professional activity. The new Civil Code uses the name “professional domicile” in art. 96 (the section on domicile and residence of the physical entity), establishing that “the person operating a company has domicile also at the place of that enterprise.”

In accordance with art. 227, par. (1) of the new Civil Code, if the legal entity is established according to the act of establishment or statute in headquarters, and in par. (2) it shows that, depending on the activity, the legal person can have several secondary headquarters, territorial representatives and working sites. So as to be a premise situation, there is a prerequisite, it is necessary that the natural or legal person, the legal owner of the right to use the mentioned premises. In art. 229 of the new Civil Code [par. (1)] it shows that the relationships with third parties, the proof of name and headquarters is part of the particulars mentioned in the public register

or record for the legal entity concerned. As shown above, there is no need to be the owner, but the use must be free, legitimate and effective” [5].

The *essential requirement* presupposes for the refusal to leave to be *without right*.

In the case where the active subject after entering in the professional office, he refuses to leave, it will retain as being committed a single offense.

The *immediate result* consists in producing a state of danger due to violation of the inviolability right of a person's professional headquarters.

The causality link results in the *ex re*.

3.2.2. The Subjective Side

As for the form of guilt, the offense is committed intentionally, which can be direct or indirect.

In the situation where in the same building the victim has both the professional office and home, it is necessary for the judicial bodies to carefully consider the intention with which the perpetrator acted, i.e. to violate the professional office or the home of the victim; we consider that in the intention of the perpetrator it was that to violate both the professional office and home of the victim, acting for this purpose, there will be held two concurrent offenses.

4. Forms, Ways, Sanctions

4.1. Forms

Although the possible *preparatory acts* are not sanctioned by the law, and the attempt in the refusal way of the refuse to leave the business premises is not possible; the possible attempt (in the way of penetration) is not punishable by the law.

The examined crime *is consumed* at the moment when it is produced the really dangerous results, the result is mistaken when it was breached the privacy of the victim (the moment of penetrating or refuse to leave the premises).

In the case where the presence of the perpetrator on the premises where the person or legal entity conducts his professional activity prolongs, the offense becomes continuous, in which case it runs out at the moment of leaving the violated professional office.

4.2. Ways

The examined crime presents in par. (1), art. 225 of the Criminal Code, the two simple legal ways, i.e.: *entering without right, in the headquarters of a legal or physical entity in which he carries on his activity and refusal to leave at the request of the entitled person*.

Under par. (2) of the same article there are provided *three aggravated legal ways*, which will be retained under the following circumstances:

- *the offense was committed by an armed person;*
- *the offense was committed during the night;*
- *the offense was committed using false impersonations.*

For the first aggravated normative way referred to in art. 225, par. (2) Thesis I, which is the act committed by an armed person, the perpetrator must have clearly a weapon when entering or refusing to leave the professional premises or commit the crime using an assimilated weapon, in accordance with art. 179, par. (2) of the Criminal Code.

In the legal sense, by weapon it is understood any device whose function determines throwing one or more projectiles and explosives, ignited or lightened, incendiary mixes or spreading of harmful irritating or neutralization gases, to the extent there can be found in one of the categories provided in the Annex.

According to the depositions of art. 179, par. (1) of the Criminal Code, the weapons are instruments, the devices or declared parts mentioned by the law; at the same time, according to par. (2) thereof, there are assimilated to the weapons any other objects to be used as weapons and which were used for the attack.

As for the objects that can be assimilated as weapons, we note that this may be only those contusive objects that were used against the injured person (a piece of iron, a wood, a board, etc.).

The second aggravated legislative way established in art. 225, par. (2) Thesis II consists in committing the act during the night, which will be deducted when the act was committed after the darkness appeared before dawn, the court will consider the astronomical criteria, providing the month, day and time where the offense was committed.

The third and final aggravated normative way it is stated therein the art. 225, par. (2) Thesis III and it will be retained when the offense was committed by using false impersonations.

According to the doctrine, “*the quality of lying* is the untrue quality (whether it is or not an official capacity) that a person invokes or assigns to another person to induce or maintain the fault of the injured person to enter into the business premises thereof or to refuse to leave it (e.g. the presentation under the quality of construction inspector to enter into the professional premises)” [5]. The false quality used by the perpetrator must be credible to the victim; the legal practice can retain the contest with the crime of usurpation of official qualities (art. 258 of the Criminal Code).

4.3. Penalties

In the simple legislative ways referred to in art. 225, par. (1) of the Criminal Code the penalty provided by the law is imprisonment from 3 months to 2 years or fine, and in the case of the three aggravated ways, the criminal sanction is imprisonment from 6 months to 3 years or fine.

5. Additional Explanations

5.1. The Connection to other Crimes

The examined crime has many elements of similarity with the crime of trespassing, namely: the active subject, the material element of the objective side, the normative simple ways, the aggravated legislative ways, the penalty limits and procedural aspects related to the initiation of the criminal proceedings.

As differentiation elements we mention the legal object and sometimes the physical object.

5.2. Some Procedural Aspects

In the case of this offense the prosecution is initiated upon prior complaint from the injured party, including for the aggravated legislative ways.

Typically, the jurisdiction of the first instance court belongs to the court in whose jurisdiction the crime was committed, and the prosecution is conducted by the prosecutors of the territorially competent judicial police under the supervision of the prosecutor.

If the prosecution was conducted by D.I.I.C.O.T. or D.N.A. the jurisdiction court of first instance belongs to the notified court.

Considering the quality of the active subject at the time of the offense (the competence according to the quality of the person) the jurisdiction of the first instance court can belong, in accordance with art. 38 letters c) -g) Criminal Procedure Code, art. 39 letter c) and d) Criminal Procedure Code, and art. 40, par. (1) Criminal Procedure Code, to the court of appeal in whose jurisdiction the crime was committed, the military court of appeal and High Court of Cassation and Justice.

6. Previous Legislation and Transitory Situations

6.1. Previous Legislation

In the offenses of trespassing of art. 496 of the Criminal Code of Carol the IInd it was sanctioned also the act of a person who, *through violence, threat, burglary, escalating, use of lying keys, cunning or clandestinely entering in the (...) business office (of a person)*; we can say that the legislator of the time has incriminated also the violation act of violation of professional office, without a marginal call in this way, the act being included practically in the infraction called *trespassing*.

The observations formulated on the examination of the crime of trespassing remain valid; a reason for which we believe it does not require further clarification.

6.2. Transitory Situations. Applying the More Favorable Criminal Law

Any acts committed before the entry into force of the new law are not punishable.

7. Conclusions

The incrimination of these acts was imposed amid the need to harmonize the Romanian legislation with the EU legislation, but also due to the need to protect the professional headquarters of the legal person by the same tools as in the case for protecting the physical entity's home.

The carried out examination has highlighted the concern of the Romanian legislator in order to ensure the effective protection of corporate headquarters located on the Romanian territory.

As one general conclusion we consider that the current incrimination can ensure an adequate protection of the professional office of any legal person in Romania.

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[2] See: ECHR, Judgment of 25 March 1998 in *Kopp v. Switzerland*, par. 50, 62-75.

[3] See: ECHR, Judgment of 16 December 1992 in *Niemietz v. Germany*, par. 23, 26, 27, 30-33.

[4] See: ECHR, Judgment of 16 April 2002 in *Société Colas Est v. France*, par. 41.49; J.-F. Renucci, *Traité de Droit Européen des droits de l'Homme/Treaty of European Law of Human Rights*, LGDJ, Paris, 2012, p. 322.

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