THE APPROPRIATION OF A FOUND GOOD

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Abstract
The appropriation of a found good is an offense, as stipulated by Art. 216 of the Criminal Code in two normative modalities. According to the first one, the offense consists in the fact of not handing over of a lost and found good to the authorities or to the person who lost it thereof or in the fact of disposing of the respective good as of an own good. The "found" good is a good that has been lost, forgotten or wandered by another person. The lost good (wandered) can only be a movable good. Immovable goods cannot be wandered and therefore cannot be found. Furthermore, the authors are discussing, besides the juridical and material object, the subjects of the offence, the subjective aspects and the applicable sanctions, the theoretical analysis being complemented with comments on the jurisprudence.

Keywords*: appropriating, good, active subject, the moment of consuming, forms, sanctions.*

1. Concept

The appropriation of a found good is an offense, as stipulated by Art. 216 of the Criminal Code in two normative modalities.

According to the first one, the offense consists in the fact of not handing over of a lost and found good to the authorities or to the person who lost it thereof or in the fact of disposing of the respective good as of an own good.

According to the second modality, the same offense consists in the unlawful appropriation of a movable good that belongs to another person, but has reached the perpetrator's possession by mislead.

The text of Art. 216 in the Romanian Criminal Code reaches its correspondent in Art. 647 of the Italian Criminal Code.

Within the new Criminal Code, the offense is stipulated in the Special Part, Title II, Chapter III, Art. 243 under the denomination "The Appropriation of the Lost Good or of the Good That Reached by Mislead the Perpetrator's Possession".

2. Preexisting conditions

A. The object

a) The Special Juridical Object coincides with the general one, consisting in the social relations that assure protection to the person's patrimony.

b) The Material Object of the offense is given by the good found by the perpetrator (paragraph 1) or by the good that has reached the perpetrator's possession by mislead (paragraph 2).

The "found" good is a good that has been lost, forgotten or wandered by another person.

The lost good (wandered) can only be a movable good. Immovable goods cannot be wandered and therefore cannot be found.

Doctrine1 often underlines the fact that, in order to become the material object of this offense, the good shall be part of a person's patrimony, hence not to be "abandoned". The evidence of this

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fact is necessary because the abandoned goods (res derelictae) cannot constitute the material object of a patrimony related offense.

The question related to specifying when a good can be considered as "abandoned" yet arises. Of course, the issue is not related to goods that were left in private spaces (as taking a good from a private space constitutes, without any doubt, theft), but only to the situation when a good is found unattended in a public space. In this latter case, one cannot establish if the possessor's intention was to abandon the good or if the possessor left it there for other reasons (for instance, because he/she considered that no one will touch his/her good). Therefore, for avoiding risks, one should exclude the hypothesis of the respective good being abandoned and to consider the respective good as belonging to a person's patrimony, being eventually "lost" by the owner. In any case, the possessor's intention of abandoning the good cannot be presumed, but it must result from circumstances that reflect an undoubted intention in this respect – like, for instance, the circumstance that the possessor left the good in a place where waste or residues are normally deposited.

From here, a movable good left unattended in a public space has to be considered always as a "found good" and the offense stipulated by Art 216 of the Criminal Code subsists every time a person appropriates such a good.

Consequently, it has been wrongfully decided that the appropriation of a good temporarily left unattended or forgotten by the owner in a certain place, where he/she knows about the good, constitutes the offense of theft and not appropriation of a found good2.

Regarding the good that reached by mislead the perpetrator's possession, it has to be underlined that this one can be either a good handed over to the perpetrator , based on the error of the person who handed it over, either a good that the perpetrator has appropriated by him/herself, believing that the respective good is his/hers.

In case the mislead of the person who handed over the good has been provoked by the perpetrator, the fact shall constitute the offense of fraud.

B. Subjects

a) Active immediate subject of the offense can be any person, apt for criminal liability, as the text does not require any special quality on the part of the author.

Based on the dominant position of the doctrine3, the criminal participation is possible under all its forms for this offense. As far as we are concerned, we deem that this fact, as incriminated by Art. 216 paragraph 1 in the Criminal Code, cannot be committed by co-authors, since it is an omissive offense, with an unique author (the obligation of handing over a lost good is a personal obligation).

b) Passive subject is the natural or legal person who had lost a good or to whom the good that reached by error to the perpetrator belongs to.

3. Constitutive Content

A. Objective Aspects

a) The Material Element

Within the first normative modality (Art. 216 para. 1), the material element consists either of the fact of "not handing over" a found good, either of the fact of "disposing" of the found good.

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[1] D. Lucinescu, *Codul penal comentat şi adnotat, Partea specială*, vol.I, (The Criminal Code Commented and Amended). Special Part), Ed. Ştiinţifică şi Enciclopedică (Scientific and Encyclopedic Publishing House), Bucharest, 1975, p.328.

[2] T. S., dec.pen nr.184/1974, (Supreme Court Criminal Decision) in RRD nr.7, 1974, p.62; T. S., dec.pen.1571/1972, in *Repertoire I,* p.74 ş.a.

[3] D. Lucinescu, op.cit., p.328.

"Not handing over" implies the omission of delivering the found good to the authorities or to the person who had lost it (when the perpetrator knows this person). The text does not claim that the good to be handed over to a certain authority, hence the doctrine deemed that it can be handed over to any authority4 In fact, the good has to be handed over under evidence, which imposes that its delivery to be made to the specialized state services, organized and functioning according to law. The omission of handing over gets a criminal relevance only if 10 days have passed since the finding of the respective good. The expiry of this term leads to the legal presumption of appropriation related to that good.

The offense can be consumed even before the expiry of this 10 days term, if the perpetrator disposes of the good as of his/her own property. In this latter case, "to dispose" of the found good does not only mean legal acts enforcement towards the good (selling, renting etc.), but also the use, consumption or transformation of the good.

Under the legal practice, it has been decided that the same offense is being committed if a person, after finding such a good, denies towards the good owner the finding and the detention/ possession of the respective good. In motivating this solution, it has been evidenced that the 10 days term is granted only to the good faith finder; if the finder manifests the intention towards the good appropriation before the expiry of the term, the offense is deemed as consumed or terminated5.

However, this perspective has not been unanimously recognized. On the contrary, certain authors have criticized the solution, observing that the simple denial regarding a good found does not accomplish the material element of the offense, in none of its normative versions. As long as the term did not expire and the founder did not dispose of the found good as it was his/hers, one cannot apply Art. 216 of the Criminal Code. The contrary solution tends to sanction the simple appropriation intention, without considering that the text grants to the founder a time for reflexion and, before the expiry of the 10 days, he has the possibility to reevaluate his/her decision in appropriating the good and therefore in committing the offense.

This offense cannot be committed by the employee of a "lost and found" service, because in this case the appropriation of a good handed to him for conservation constitutes the offense of dilapidation.

In the second normative modality, the material element consists of the unlawful appropriation of a good belonging to another person, that has reached by mislead the perpetrator's possession.

Within the field literature, a proposal for amending Art. 216 para. 2 has been submitted and consisted of the establishment of a delivery term, just like in the case of Art. 216 para. 1 of the Criminal Code6, taking into account that there can be situations when the perpetrator immediately realizes who is the owner and keeps the good, but without endeavoring any disposition acts towards the latter one; or, in such a situation, there is an incertitude regarding the moment when the offense should be deemed as consumed.

As per our opinion, we consider as disputable the necessity of such an incrimination, in its both factual modalities.

On the one side, if the perpetrator takes, by mistake, a movable good belonging to another person (of course, without the owner's consent) the problem that arises is wether the theft felony has been committed or not and, for defending him/herself, the perpetrator has to make evidence that the purpose of the unlawful appropriation is missing, respectively that he/she took the object by mistake because of the similarities between his/her own good and victim's good.

On the other side, if the perpetrator appropriates a movable good belonging to another person and this person handed the good by mistake, the fact could constitute, without difficulty, the offense

[4] D. Lucinescu, op. cit., p.329.
[5] T.j. Braşov, dec.pen. nr.325/1970, în RRD nr.10, 1970, p.165.
[6] G. Antoniu, C. Bulai, op.cit., p.142.

in 216 Criminal Code, taking into account that by "found good" one can understand also a good that reached by mislead the perpetrator's possession.

In any case, the incrimination in para. 2 has an identical protection purpose with the incrimination in para. 1 of Art. 216 Criminal Code, namely assuring the accomplishment of the handing over obligation, hence its existence is not justified. In this case, the perpetrator, realizing the good does not belong to him/her, again omits to hand it over to the authorities or to the one from whom he/she has received it. Or, given the facts, the renunciation over the incrimination in para. 2 of Art. 216 would be imposed and eventually, the first paragraph would be completed, with the mention that the fact can have as its material object even a good that reached by mistake the perpetrator's intention.

b) Immediate consequence

The majority of authors assert that, for this offense, the result consists in a new situation, according to which "the good is unlawfully under the ownership sphere of the perpetrator"7.

On our perspective, such an assertion equals to the fact that the offense presents itself as a formal one, more exactly as a pure omission type of offense.

c) Causality Link result ex re, from the itself omission of handing over the good.

B. Subjective Aspects.

Subjective Element. This offense can only be committed by intention, despite the fact that, according to Art. 19 para. 3 of the Criminal Code, the fact consisting of an inaction is an offense no matter if it has been committed by intention or only by guilt, excepting the case when law sanctions its intention based accomplishment only.

This exception type solution has been explained by the fact that the denomination of this offense itself would exclude, in an implicit manner, the possibility of its accomplishment by guilt only. But, in reality, the text of Art. 19 para. 3, same as the text of Art. 19 para. 2 of the Criminal Code, assigns a falsehood – because there are no offenses, actions or omissions, committed "by guilt"; action is always a physically intentioned manifestation, oriented by a purpose.

The Mobile or Scope are not constitutive elements of the offense.

4. Forms. Sanctions

Preparatory Acts and Tentative are not being sanctioned.

The moment of the offense termination differs in relation with the modality in which the offense is being committed.

In principle, the offense is being consumed by the expiry of the 10 days term, calculated from the date of the good being found. When the expiry is a day on which the authorities have their services suspended, the handing over within the next day will be considered within the legal term. Within the 10 days period, the perpetrator can at all times hand over the good, without being held responsible of committing the offense.

An anticipate termination of the offense is limited to the situation when cert evidence is being given that, within the 10 days term, the perpetrator has disposed of the good as of its own. In other terms, when the material element consists of disposing of a good, the termination takes place together with the accomplishment of the material element.

This offense is sanctioned with detention from one month to three months or with penalty.

The court can dispose, according to Art. 90 of the Criminal Code, the replacement of the criminal liability.

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[7] Dumitru Lucinescu, *op. cit*., vol.I (1975), p.330.

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