

## **IMPLICATIONS OF GOOD FAITH REGARDING DECEPTION OFFENSES (ARTICLE 244 OF THE NEW CRIMINAL CODE)**

**Mirela Carmen DOBRILĂ**

Faculty of Law,  
Alexandru Ioan Cuza University of Iasi  
Iasi, Romania  
*mirela.dobрила@uaic.ro*

**Abstract:** *This paper aims at capturing the connections between deception and good faith underlying the trust between people and which requires compliance with certain requirements for the proper conduct of normal patrimonial relations, which should be governed by a fair and honest behavior, with no intention to deceive. The deception offense in Article 244 of the New Romanian Criminal Code is regulated as a novelty in this code in the section on offenses against property by disregarding trust. Although it has been traditionally reviewed in the legal literature as part of the offenses against property committed by fraud, the choice of the Romanian legislator to regulate the misinterpretation in this chapter shows us, even from the initial stage, that there is a connection between perpetration of deception attracting criminal liability and the good faith, as a notion that has a moral content with applications also in the criminal law.*

**Keywords:** *deception offenses, Article 244 of the New Romanian Criminal Code, good faith.*

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### **1. INTRODUCTION. GENERAL CONSIDERATIONS**

Looking at the new systematization of crimes against property in the New Romanian Criminal Code (NCP, Law no. 286/2009) in force since 1 February 2014 (structuring promoted also in other European criminal codes, eg. French, Italian, German or Spanish Criminal Code, but also in the Romanian Criminal Codes of 1864 and 1936), the deception offense appears in the chapter dedicated to crimes against property by disregarding trust.

Good faith is a notion which includes within its field moral values having implications also in the field of criminal law. Good faith is a general principle of the entire system of Law, operating also in the criminal law (Boier, 2005). Good faith embodies morality into the legal space and has the role of a standard for behavior (Ruen, 2011).

The deception offense is part of the crimes against property through disregard of confidence, where the protection of patrimonial social relations is aimed. Forming and developing these relations involves a minimum of trust that participants to these relations

must grant each other but also respect (Pascu in Antoniu et al, 2013), trust which is based on good faith.

Committing certain acts that violate the requirements of a behavior based on good faith conduct may have sometimes consequences in terms of criminal liability, that may be held as misrepresentations in Article 244 NCP in case they affect the social patrimonial relations, which must be based on trust and the good faith of the parties in order to operate normally.

## **2. CORRELATIONS BETWEEN GOOD FAITH AND THE OFFENSE OF DECEPTION**

To ensure trust and good faith the patrimonial social relations must rely on and in order to protect the damage that can be caused to a person through misrepresentation by another person, the legislature has regulated misrepresentation in the Article 244 paragraph (1) NCP which consists in misleading a person by presenting a false fact as being true or by presenting the true facts as false facts in order to obtain for oneself or for another material gains unfairly even if it has caused a damage.

Thus, in the case of deception, the legal subject lies in the patrimonial relationships which must be based on the mutual trust and good faith of the participants, aiming at the protection of patrimonial interest and the prevention of injury to the participants in these relationships by fraud or deception (Toader, 2012; Dobrinoiu in Dobrinoiu et al, 2014; Boroi, 2014; Medeanu in Dungan et al, 2012; Pascu in Antoniu et al, 2013; Pocora, Pocora, 2014).

The aggravated form of the deception offense is regulated by Article 214 paragraph (2) NCP consisting in the deception committed by the use of false names or qualities or any fraudulent means. It is noted that the legislature did not maintained from the previous regulation the second aggravated form of the deception offense (deception had serious consequences).

Good faith is a complex concept that originated in certain psychological facts, which fall within the framework of moral norms and acts in terms of social relations, producing effects in various areas of law (Gherasim, 1981).

Good faith is based on a set of universal moral values applicable to social relationships and they embrace all legal relationships as a legal concept of good faith (Gherasim, 1981).

By determining certain misrepresentations, induced by various misleading acts to the real state of facts, people of good will transfer their goods to other people of bad faith, the transfer of goods being determined by deception, ie by vitiating the consent of the persons in the first category (Diaconescu, Duvac, 2009). The danger in the deception offense is given by the fact that the victims in good faith are determined by crafty offenders to surrender the goods in an apparently voluntary way, although their behavior in good faith is in contrast to that of the offenders that are characterized as animated by the desire to achieve a certain property, without taking into account the fact that they produce damage to a person, showing, thus, a behavior characterized by bad faith.

Good faith is based on the conformity of certain psychological facts of moral conscience with the outward manifestations in the form of words and commitments therefore honesty, a component of good faith, is a manifestation of conscience in the moral norms, based on loyalty, prudence, order and temperance (Gherasim, 1981).

To defend their interests in the property relationships, each party must exercise extreme care, however, that must be doubled by a spirit of good faith and mutual trust in any transaction of property matters. For this reason, the criminal law seeks to ensure good faith and mutual trust between the parties in order to guarantee the normal formation and development of patrimonial relationships (Gorgăneanu, 1993).

The material element of the objective side is performed by an action of misrepresentation, perpetrated by presenting false facts as true and true facts as false, a behavior contrary to good faith, thus the perpetrator creating for the person aggrieved a false representation of reality.

The fraudulent, distorted or altered presentation of reality must be able to capture good faith and the trust of the victim in order to mislead the victim (Stoica, 1976; Dobrinoiu in Dobrinoiu et al, 2014).

For the existence of deception offence it is not enough the existence of a misleading action but it is enough that the deceived person to be misled by the agent's conduct, a circumstance which the court must practically assess by taking into consideration the circumstances of the offense and the credulity of the victim (Bogdan, 1999). In the French criminal law for deception it is not sufficient only the use of the means of deception, but the victim must also be convinced of the existence of an inaccurate fact (Rassat, 2009).

For the deception offense, the perpetrator uses some ingenious and diverse means of deception, closely linked to the imagination and fantasy of the scammer and to the victim's vulnerability and naivety (Dobrinoiu in Dobrinoiu et al, 2014; Dobrilă, 2014). Unlike the previous regulation, the legislature's choice of regulating in the same way in Article 244 NCP the deception in agreements and deception with cheque notes should not be seen in the sense that these special forms of deception have lost their relevance or they are out of date, but that they will be considered as misrepresentation under Article 244 NCP, if the requirements provided there are fulfilled (Dobrilă, 2014).

It is an apparent non incrimination of the deception in agreements or deception with cheque notes, because the reduction of the offense of cheating in the first two paragraphs of the previous reglementation (the basic form of deception and initial aggravated deception) is based on the legislature's intention to simplify the rule of incriminating deception, but these facts will still constitute factual ways of committing the offense of misrepresentation according to Article 244 paragraph (1) or (2) NCP as it does not relate to a non incrimination of such acts (Duvac, 2013; Pocora, Pocora, 2014; Udrioiu, 2014; Kuglay in Bodoroncea et al, 2014; Medeanu in Dungan et al, 2012; Pascu Antoniu et al, 2013). Furthermore, the content of the deception in agreement is partly found in that of the abuse of trust by defrauding creditors (Pascu in Antoniu et al, 2013). The new Criminal Code is claimed to have created a single rule that covers both the non-contractual deception and that which occurs within a contractual framework, on the occasion of a conclusion or execution of a contract, waiving deception by issuing the

checks being also considered welcome, as there are no clear reasons which should justify a separate incrimination of this deed (Bogdan et al, 2014).

There is the opinion in that the occupation of keeping in error (specific to deception in agreements from the previous regulation) cannot attract criminal liability for the deception because it operated a non incrimination of deception in agreements by keeping in error (Bogdan et al, 2014). Furthermore, it is considered that the omissive non compliance with the legal obligation to inform the other party on an issue will in fact be sanctioned only by the contractual liability under civil law (Kuglay in Bodoroncea et al, 2014). We consider this fact questionable, and the way in which Article 244 NCP is drafted we do not believe that the legislature intended to achieve a comprehensive rule, without having in view such distinctions (Dobrilă, 2014).

In terms of the subjective side, the offense of fraud is committed with direct intent because the perpetrator realizes that he acts in a misleading way and that through this act he produces a loss, a consequence which he follows, the text referring to the purpose of obtaining an unjust patrimonial benefit – intention qualified by purpose. (Dobrinioiu in Dobrinioiu et al, 2014; Udrioiu, 2014; Boroi, 2014; Kuglay in Bodoroncea et al, 2014). For the existence of deception it is not necessary that the material benefit to be actually achieved. Another opinion held that the offense of willful deception can be direct or indirect (Bogdan et al, 2014).

According to Article 245 paragraph (1) NCP, this offense of insurance deception consists in the act of destroying, deteriorating, making unfit for use, concealing or transferring property insured against destruction, deterioration, wear and tear, loss or theft, in order to gain for himself or another, the insured amount. In the embodiment of paragraph (2) the offense consists of the fact that a person who, for the purposes set out in the preceding paragraph, simulates, causes damages or aggravates injuries caused by an insured risk.

The special legal subject of the insurance deception consists of social relations related to good faith and mutual trust of participants in the property relationships regarding insurance matters and also the protection of the property interests of the insurers against the fraudulent acts committed by the insured (Neagu in Dobrinioiu et al, 2014; Boroi, 2014; Răducanu in Toader et al, 2014; Dungan et al, 2012; Duvac in Antoniu et al, 2013; Pocora, Pocora, 2014).

Insurance deception is a new offense introduced whose necessity results from the development of the insurance market and the increasing acts by which some individuals seek to unlawfully obtain the insured amount (Răducanu in Toader et al, 2014; Kuglay in Bodoroncea et al, 2014). There is the point of view which considers unjustified the introduction of these activities in the field of criminal illicit because it allows a premature intervention of the criminal law in what regards the preparing of a future deception (Bogdan et al, 2014).

The explanation for introducing these offenses in the chapter against property offenses by disregarding trust and the fact that it is a variant of the deception is that the social value protected is the trust and the good faith that must govern the relations in the insurance field (Răducanu in Toader et al, 2014).

In both versions the insurance deceptions are committed with direct intention qualified by the purpose aimed by the perpetrator and expressly provided for in rule; for the existence of the offense the perpetrator does not need to obtain the sum insured, it is sufficient to act with this purpose (Răducănu in Toader et al, 2014; Boroi, 2014; Neagu in Dobrinioiu et al, 2014; Udroi, 2014; Medeanu in Dungan et al, 2012; Duvac in Antoniu et al, 2013). Insurance deception offense has certain features compared to the deception offense and it is a dangerous offense because it was intended to prevent the offense of deception in Article NCP 244 (Duvac in Antoniu et al, 2013).

### 3. CONCLUSIONS

The legal order and the stability of social relations is based on the good faith of people who behave with honesty in the legal relationships, being motivated by sincerity and loyalty, and the entire system is based on trust and fairness and not on the deceiving intent (Gherasim, 1981).

Good faith is constituted as a fundamental principle and is always presumed and protected, regardless of the legal relationship which refers to it, and in the legal relations the legal subjects are always presumed to be animated by the sincere intention to behave honestly and in accordance with the law (Pungă, 2000).

In order to define the notion of good faith in all its complexity we must consider all its legal aspects and all consequences that may occur in different areas of law (Gherasim, 1981).

The statistical analysis for offenses against property in the recent years, focusing on crimes of deception (Dobrilă, 2012), come to show that the situation is alarming in this plan, requiring effective solutions for fighting crime in this area. We believe that the size of the deception is closely connected with the way good faith is perceived nowadays and the way its requirements start to be increasingly less respected in the social property relations, this sometimes leading to detrimental consequences to the participants in these relationships.

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