

Case Law Controversies Regarding Natural Absorption Following the Implementation of Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 in Romanian Criminal Law and the Analysis of the Criteria Proposed by the Doctrine for Retaining This Form of Natural Complexity of the Offence

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Abstract

Following the implementation in the Romanian criminal law of Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019, possession for fraudulent use of a non-cash payment instrument appropriated through an offence was criminalized for the first time in Romanian criminal legislation under art. 250¹ of the Criminal Code. This legislative novelty has led to divergent case law opinions on the proper classification of the action of the perpetrator who holds the bank card and uses it after having unlawfully taken possession thereof, and subsequently carrying out cash withdrawal operations without the consent of the cardholder, a withdrawal action that was previously already criminalized under the Romanian criminal law according to art. 250 of the Criminal Code. One opinion was to the effect that there is a concurrence of offences, while on the contrary, it is considered that there is only one offence, the possession, immediately followed by the use, being absorbed by the offence that incriminates the cash withdrawal operation, there being a form of natural complexity by absorption, a form of offence with tradition in the Romanian criminal law system, recognized both by the specialized literature and by the case law. The purpose of the study is to make an opinion on the correct legal classification of such unlawful actions, analysing the legal norms of the Directive in question and their enactment in the national law, presenting the case law, analysing the conditions for considering the legal complexity of the offence to fulfil this goal, why they are not applicable and the natural complexity, the analysis criteria proposed by the recent doctrine to be able to retain the natural complexity of the offence and their application in concreto in such situations as those that produced the case law dispute.

Keywords: *natural absorption; natural complexity; Directive (EU) 2019/713; holding for fraudulent use of a non-cash payment instrument.*

JEL Classification: K14, K33

1. Introductory considerations

By Law no. 207 of 21 July 2021³ the Romanian criminal law criminalized several actions, art. 250¹ entitled illegal transactions with non-cash payment instruments

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³ Law no. 207 of 21 July 2021 amending and supplementing Law no. 286/2009 on the Criminal Code, as well as for providing transposing measures of Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, published in the O. J. no. 720 of 22 July 2021.

being introduced in the Criminal Code.

According to art. 250¹ (1) of the Romanian Criminal Code, *the holding for fraudulent use of a non-cash payment instrument acquired by committing one of the acts provided in art. 228, art. 229, art. 233-236, art. 238, art. 239, art. 243, art. 244 and art. 295 shall be punished by imprisonment from 2 to 7 years*⁴.

This new criminalization in the Romanian criminal law system came as a normal reaction considering that previously in European law Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA was implemented.

Under art. 3 (a) of the Directive, the fraudulent use of non-cash payment instruments, Member States must take the necessary measures to ensure that the following act, when committed intentionally, is punishable as an offence, *that is, the fraudulent use of a non-cash payment instrument that has been either stolen, appropriated or otherwise obtained illegally*.

Article 4 of the Directive, entitled offences related to the fraudulent use of non-cash payment instruments, states in letter c) that Member States shall take the necessary measures to ensure that the following act, when committed intentionally, is punishable as a criminal offence, i.e. *the possession for fraudulent use of a non-cash payment instrument, stolen or otherwise illegally appropriated, or counterfeit or falsified*.

At the time of the amendment of the Romanian criminal code for the implementation of Directive (EU) 2019/713, the Romanian criminal code criminalized under art. 250 para. (1) entitled fraudulent performance of financial operations, *performing a cash withdrawal operation, upload or download of an electronic money instrument or transfer of funds, monetary value or virtual currency, by using, without the consent of the holder, a non-cash payment instrument or the identification data allowing its use*.

Following these changes, prosecutions of defendants for a multitude of offences were put in practice, given that sometimes the acts presented a relatively low social risk, with little prejudice, but with severe criminal consequences for the defendants, perhaps even too severe in relation to the actual situations being held.

Thus, most of the time, the defendant, following a theft or the finding of a lost debit/credit card, uses the card often making small payments to purchase food or alcohol. However, these offences lead to an extremely severe legal classification in Romanian law, the defendant being prosecuted for no less than 4 separate crimes.

The first one is the theft (art. 228 of the Romanian Criminal Code), aggravated theft (art. 229. of the Romanian Criminal Code) or the appropriation of the asset found or by error reaching the perpetrator (art. 243 of the Romanian Criminal Code), depending on the circumstances of each cause.

The second offence, the conduct of fraudulent financial operations incriminated by art. 250 para. (1) of the Criminal Code; third, illegal transactions with non-cash

⁴ Art. 228 Criminal Code – theft; art. 229 Criminal Code – aggravated theft; art. 233 Criminal Code – robbery; article 234 – aggravated robbery; article 235 – piracy; article 236 – robbery or piracy resulting into the death of the victim; article 238 – abuse of trust; article 239 – abuse of trust by fraud of creditors; article 243 – appropriation of the property found or arrived by error at the perpetrator; article 244 – deception; article 295 – embezzlement.

payment instruments, according to art. 250¹ para. (1) of the Criminal Code, while the last and fourth is the one of illegal access to a computer system, as provided by art. 360 para. (1) of the Criminal Code.⁵

If the case-law initially showed an inertia in the analysis of the merits of the conviction for all these four offences, it has recently started to look more closely at the possibility of a natural absorption, in certain cases, of the offence of illegal transactions with non-cash payment instruments, as provided at art. 250¹ para. (1) of the Criminal Code, to fraudulent financial operations incriminated by art. 250 para. (1) of the Criminal Code.

This study will further present distinct actual situations and how the courts settle such disputes.

2. Case law under analysis

By the crim. S. no. 308 of 28.06.2024 the Constanta County Court ordered the acquittal of the defendant E.M. for committing the offence of illegal transactions with non-cash payment instruments, provided at art. 250¹ para. 1 of the Criminal Code, considering that the act is not provided by the criminal law.

At the same time, it ordered his conviction for the offence of aggravated theft according to art. 228 para. (1) – art. 229 para. (1) let. b) of the Criminal Code, illegal access to a computer system (3 material acts) provided at art. 360 para. (1) and para. (3) of the Criminal Code with the application of art. 35 para. (1) of the Criminal Code and the fraudulent execution of financial operations (3 material acts) provided at art. 250 para. (1) of the Criminal Code with the application of art. 35 para. (1) of the Criminal Code, to a sentence of 3 years and 5 months imprisonment under execution regime.⁶

It was held against the defendant that on the evening of 22.03.2024, around 22:40, while he was at the home of the injured person R.I., taking advantage of the act that the injured person was asleep, he absconded the bank card issued by Raiffeisen Bank, and, at around 23:05, he fraudulently used it to withdraw, by three transactions, the total amount of lei 650 from the X Bank ATM in the Mun. of Medgidia, County of Constanța.⁷

In the judgment, the court considered that the offence referred to in art. 250¹ (1) of the Criminal Code is naturally absorbed by the offence referred to in art. 250 (1) of the Criminal Code, given that the latter offence, the conduct of financial operations fraudulently, cannot be consumed without the previous offence referred to in art. 250¹ para. (1) of the Criminal Code, the possession for the fraudulent use of a non-cash payment instrument, when the perpetrator who holds the non-cash payment instrument

⁵ Art. 360 of the Romanian Criminal Code. *Illegal access to a computer system.* (1) The access, without right, to a computer system shall be punished by imprisonment from 3 months to 3 years or by a fine. (2) The act provided in para. (1), committed for the purpose of obtaining computer data, shall be punished by imprisonment from 6 months to 5 years. (3) If the act referred to in para. (1) was committed in respect of a computer system to which, by means of procedures, devices or specialized programs, access is restricted or prohibited for certain categories of users, the punishment shall be imprisonment from 2 to 7 years.

⁶ Art. 35 of the Romanian Criminal Code, *Unity of the continued and complex offence.* (1) The offence is continued when a person commits at different time intervals, but in making the same resolution and against the same passive subject, actions or inactions that, individually, have the content of the same offence.

⁷ The equivalent in euro of 650 lei is about 130 euros.

subsequently uses it for operations such as those provided in the text of art. 250 para. (1) of the Criminal Code.

The court also considered that only if the person holding a non-cash payment instrument for use had not been able to use it before he was detected or the person holding a non-cash payment instrument, which he handed to another person for the purpose of carrying out the operations criminalized by art. 250 para. 1 of the Criminal Code, may be liable for the offence provided in art. 250¹ para. 1 of the Criminal Code.

In relation to these considerations, but also to the previously presented actual situation, the court considered that the act included in the provisions of art. 250¹ para. (1) of the Criminal Code is not stipulated by the criminal law, lacking the objective type of the crime.

In this case, an appeal was lodged by the Public Ministry, who considered erroneous the opinion that the offence provided at art. 250¹ para. (1) of the Criminal Code would be naturally absorbed by the offence provided in art. 250 para. (1) of the Criminal Code.

It was noted that art. 250¹, para. (1) erroneous was introduced by art. I, item 4 of Law no. 207/2021, and in the statement of reasons accompanying the bill of law, item 10 - 11, the legislator pointed out the following:

*„Considering that the non-cash Directive requires the criminalization of certain acts **not provided by the Romanian criminal law in force**, art. 250¹ aims to sanction the possession for the fraudulent use of a payment instrument appropriated by committing one of the acts provided at art. 228, art. 229 (...), as well as the acquisition for oneself or for another, including by receipt, appropriation, purchase (...)*

[...]

Thus, art. 250¹ (1) ensures the transposition into national law of the provisions of art. 4 let. (c) of the non-cash Directive (“possession for fraudulent use of a non-cash payment instrument, stolen or otherwise legally appropriated”) and of art. 5 let. (c) (“possession for fraudulent use of a non-material non-cash payment instrument obtained by illegal means, by counterfeiting or falsification, at least where the illegal origin is known at the time of possession of the instrument”).

*According to the bill of law, the act **shall be sanctioned, similar to the one in art. 250 of the Criminal Code**, by imprisonment from 2 to 7 years given its danger, resulting from the commission of a precondition crime against the property and the perpetrator’s intention to use fraudulently the non-cash payment instrument thus obtained”.⁸*

It is therefore easy to see that:

1. the intention of the legislator is to distinctly sanction the holding for fraudulent use of a non-cash payment instrument, since such actions were “**not provided for by the Romanian criminal law**” at that time;

2. the phrase “the act **shall be sanctioned similarly to art. 250 of the Criminal Code**” is worded in an imperative manner, which clearly shows that the legislator has also considered the existence of a previous text of the law and thus imposes, in addition, a concurrent of offences when we are *fraudulently conducting financial transactions and holding for fraudulent use a non-cash payment instrument*.

⁸ Statement of reasons, pp. 10-11 – see: https://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=19271, accessed on 25 November 2024.

Moreover, even for reasons of legislative technique, if the legislator wished that the *possession for fraudulent use of a non-cash payment instrument* should be included in the constitutive element of the criminal offence provided at art. 250, para. (1) of the Criminal Code, it would have made the amendment in that article, without feeling the need to introduce a new text of law.

Moreover, if the constitutive element of the offence provided at art. 250¹ para. (1) of the Criminal Code was introduced in 2021, by way of chronological interpretation, it is obvious that it could not have been absorbed in an offence criminalized by a previous text of law.

The grounds of appeal further detailed that if the court's reasoning were correct, that the act provided at art. 250¹ para. (1) of the Criminal Code would be absorbed in art. 250 para. (1) of the Criminal Code, then it would mean that this latter offence would be a complex one. However, following the thread of this reasoning, namely the absorption of the act and the subsequent conclusion of the non-provision by the criminal law of the absorbed offence, means that the absorbing offence actually lacks an element, namely the absorbed offence, which is nonsense.

Per a contrario, the legal doctrine states the following: “if one of the absorbed acts cannot be proved, the court will change the legal classification and either retain the other absorbed offence, while finding that it cannot retain the existence of a complex offence, or retain the tempted form of the complex offence.”⁹

Therefore, we also consider that the court could call into question the possible change in the legal classification of the acts, which is the correct procedural way, and not to proceed with *their legal classification*.

For all these reasons, we consider:

- that *the fraudulent execution of financial transactions and the possession for the fraudulent use of a non-cash payment instrument* are distinctly criminalized (we attach to this request for appeal the statement of reasons of the legislator referred to above);

- that it was not necessary the acquittal of the defendant for committing the offence of illegal transactions with non-cash payment instruments, provided by art. 250 ind. 1 para. (1) of the Criminal Code;

- and, in the alternative, that at least the parties were required to discuss the change in the legal classification of the acts, and not to proceed directly to their legal classification, thus depriving the parties of the possibility of presenting, under contradictory conditions, their legal arguments for or against”.

By the crim. s. no. 295 of 21.06.2024 of the Constanta County Court was ordered the acquittal of the defendant C.G. for committing the offence of illegal transactions with non-cash payment instruments, provided at art. 250¹ para. 1 of the Criminal Code.

Instead, he was convicted of committing the offence by conducting financial operations fraudulently, in continuous form (9 material acts) provided by art. 250 para (1) of the Criminal Code, with the application of art. 35 para. (1) of the Criminal Code, and for the offence of illegal access to a computer system in continuous form (9 material acts) provided at art. 360 para. (1) of the Criminal Code with the application of art. 35 para. (1) of the Criminal Code to the penalty of 1 year and 8 months of imprisonment,

⁹ Mihail Udriou, *Drept penal. Partea generală*, 5th edn., C.H. Beck Publishing House, Bucharest, 2018, p. 236.

sentence to be served.

The defendant C.G. was on trial because on 21.06.2022 he held and used without the consent of the injured person R.G., a bank card issued by X Bank, that he had found on the street and made 4 (four) fraudulent financial transactions, by contactless method, with the trader R.B.M. SRL and 5 (five) fraudulent financial transactions with the trader L.S. SRL, causing a total damage of lei 745, recovered.¹⁰

The Court's reasoning that the offence referred to in art. 250¹ para. (1) of the Criminal Code is naturally absorbed by the offence referred to in art. 250 para. (1) of the Criminal Code was largely identical to the one presented above, the grounds of the appeal drafted in the case being identical with the previous ones presented.

By the bill of indictment no. 103/P/2023 of the Prosecutor's Office attached to the Constanta County Court, the defendant T.R. was sent to trial for the offences of appropriating the asset found or that has reached the perpetrator by mistake, provided at art. 243 para. (1) of the Criminal Code, illegal transactions with non-cash payment instruments, referred to in art. 250¹ para. (1) of the Criminal Code, performing financial operations fraudulently, in continuous form (12 material acts) according to art. 250 para. (1) of the Criminal Code, with the application of art. 35 para. (1) of the Criminal Code and illegal access to a computer system, in continuous form (12 material acts), according to art. 360 para. (1) of the Criminal Code with the application of art. 35 para. (1) of the Criminal Code.

The defendant T.R. was accused that on 14.02.2023, between 05:14 and 07:00 and on 15.02.2023, around 00:00, he made 12 unauthorized cash withdrawal operations from X Bank and Y ATMs in Techirghiol Locality, using the debit card of SC A.E. SRL, in the possession of G.R. and causing a damage of lei 14,000.¹¹

In this case, a change of legal classification was requested by the defence, which considered that there are two offences, one of result, provided and regulated by art. 250 of the Criminal Code, which consists in carrying out a cash withdrawal operation, and the offences provided at art. 250¹ of the Criminal Code, which is an offence of danger that criminalizes only the possession of a payment instrument. It was considered that the manner in which the offence was committed, according to art. 250 of the Criminal Code absorbs the offence in art. 250¹ of the Criminal Code.

Following the examination of the application, the court considered it well founded, for the following reasons:

According to art. 250¹ of the Criminal Code, the holding for fraudulent use of a non-cash payment instrument acquired by committing one of the acts provided in art. 228, art. 229, art. 233-236, art. 238, art. 239, art. 243, art. 244 and art. 295 shall be punished by imprisonment from 2 to 7 years.

It is thus noted that the material element of the offence in art. 250¹ of the Criminal Code is represented by the mere possession of a non-cash payment instrument, obtained by committing one of the listed offences, the immediate consequence being the state of danger created for the property of the injured person, the causal link being obvious. Subjectively, the offence is committed with direct intention, aggravated by purpose, that of fraudulently using the payment instrument.

According to open sources (the website of the National Bank of Romania), non-

¹⁰ The equivalent in euro of 745 lei is about 150 euros.

¹¹ The equivalent in euro of 14000 lei is about 2800 euros.

cash payment instruments are credit transfer, direct debit, payment card, check, bill of exchange, promissory note.

With regard to the offence referred to in art. 250 para. (1) of the Criminal Code, it is presented as carrying out a cash withdrawal, loading-unloading of an electronic money instrument or transfer of funds, monetary value or virtual currency by using, without the consent of the holder, a non-cash payment instrument or the identification data allowing its use, which is punishable by imprisonment from 2 to 7 years.

The Court considers that the material element of the offence provided at art. 250 para. (1) of the Criminal Code is represented by any of the alternative actions provided by the legal text, including by the execution of non-cash payment transactions, the immediate consequence being the change of the financial reality of the injured person, in order to produce a damage. Subjectively, the court considers that this offence is also committed with direct intention, aggravated by purpose.

The court considers that the offence provided at art. 250¹ of the Criminal Code is a predicate offence, necessary to commit the offence in art. 250 para. (1) of the Criminal Code and therefore it is absorbed by it.

3. Criteria for the analysis of legally complex offences and natural complex offences in contemporary Romanian law

We will begin the analysis of natural absorption in the Romanian literature by mentioning that this form of complex offence does not have a definition or legal criteria codified in the Romanian criminal norms, although art. 36 para. (2) of the Romanian Criminal Code stipulates that *“the offence is complex when it includes, as a constituent or aggravating circumstantial element, an action or inaction which by itself constitutes an act provided by the criminal law.”*

However, this definition is not about natural complex offences, but only about legal complex offences.

It has been found in the doctrine that the conclusion of this definition may be that the structure of complex offences includes the content of another offence, which, in this legal synthesis, loses its criminal autonomy, the complex offence bearing being called an absorbing offence while the one included in its content is called an absorbed offence.¹²

We mention, however, that most of the time the complex offence is a subspecies of the legal unit of the offence, because the legislator makes the decision to include another offence in the typicity of an offence.¹³

The doctrine also noted that when creating a complex offence, it is necessary to have certain objective and subjective links between the acts that form the content of the complex offence, i.e. one of the offences serves as a means for the realization of the other, which is the purpose of the criminal activity of the perpetrator.¹⁴

But the literature has rightly observed that a natural complexity can also be

¹² Alexandru Boroi, *Drept penal. Partea generală*. 5th edn., C.H. Beck Publishing House, Bucharest, 2022, p. 250.

¹³ Florin Streteanu, Daniel Nițu, *Drept penal. Partea generală, vol. II*, Universul Juridic Publishing House, Bucharest, 2018, p. 61.

¹⁴ Alexandru Boroi, *op.cit.*, p. 251.

found in the criminal law, that essentially represents a natural absorption in the content of an offence of the material element characteristic to another offence, mostly the absorbed offence, less serious being a lower stage in the conduct of more serious criminal activity.¹⁵

The classical Romanian doctrine on criminal law, however, tried to provide a definition of natural complex offences by stating that it is encountered when *the objective elements of an offence are contained, by the nature of things, in the content of another offence*.¹⁶

In order to be able to retain the existence of a legal complex offence, by absorption, it was considered necessary to fulfil three conditions, namely *the necessity of the absorption, the determined or determinable nature of the absorbed offence and the social danger difference between the two acts*.¹⁷

The first condition, that of the necessity of the absorption, implies in practical terms that the complex offence can never be committed without the absorbed offence. However, it is considered that this need of absorption is not analysed *in concreto* with reference to the act committed by the person concerned, but *in abstracto*, the offence in question being generally considered.¹⁸

It has been clarified, however, that the need of the absorption must be a consequence of the incrimination of an offence and not of the intrinsic nature of the act, in the latter case being a matter of natural complexity, not legally covered by the criminal rule in art. 35 para. (2) of the Romanian Criminal Code, as an example, the murder that absorbs bodily injury or the rape that absorbs deprivation of liberty illegally as long as the deprivation of liberty has not exceeded the time necessary to commit the rape.¹⁹

The second condition is that of the determined or determinable character of the absorbed offence, which implies the need for the legislator to unambiguously individualize the crime that is absorbed by the complex act. It has been pointed out that where the offence being absorbed is of a specific nature, the scope of the acts likely to be integrated into the content of the complex offence cannot be extended by interpretation. On the other hand, when an offence other than that provided by the law is committed as content of the complex offence, even if it is of the same nature, there will

¹⁵ Florin Streteanu, Daniel Nițu., *op. cit.*, pp. 61-62.

¹⁶ Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, *Explicații teoretice ale codului penal român. Partea generală. Vol. I*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1969, p. 292.

¹⁷ Florin Streteanu, Daniel Nițu., *op.cit.*, p. 63 - 66.

¹⁸ *Idem*, p. 63-64. Examples have been given to the offence of blackmail, which absorbs violence or threat, because it can never be committed without one of these two acts, burglary theft absorbing the offence of destruction of the closing system, because it is impossible to commit burglary theft without destruction or theft committed by breach of domicile or professional premises, which means that the breach of the home or professional premises was committed according to the situation. It has been mentioned that there are cases in which the existence of concurrent offences can be retained, when the analysis of the legal norms would result *in abstracto* that the acts can be committed separately without the existence of an objective link. The example given was a perpetrator who wanted to steal a statue surrounded by a marble fence. In order to abscond the object, it is necessary to destroy the fence, otherwise it is not possible to abscond the good. Even if *in concreto* the theft cannot be committed without the offence of destruction, it is not possible to retain the legal complex offence because the legal drafting of the offence of theft in art. 228 of the Romanian Criminal Code, there is *in abstracto* no impediment for a theft to be committed without having previously committed the offence of destruction.

¹⁹ *Idem*, p. 64.

be concurrent offences.²⁰

Finally, the third condition is that of making the difference between the social danger of the two acts, namely that the complex offence that absorbs another act is clearly characterized by a higher legal social danger than that of the absorbed offence. The legal social danger is reflected by the special penalty limits by which the two offences are sanctioned.

If the seemingly complex offence is sanctioned with a penalty lower than the one provided for the absorbed offence, the two acts will be concurrent.

These criteria proposed by the specialized literature devoted to the assessment of the existence of the legal complexity were criticized, being considered that the natural complexity cannot be applied as well.

Considering the first criterion, that of the necessity of the absorption, which we mentioned above, on a practical level this means that the complex crime can never be committed without committing the absorbed offence, being assessed that in some situations the necessity link cannot be established.²¹

It has been stated that, for example, the threat of a person, followed by his hitting in the same space-time interval, would not be recorded on a necessity report, as a person can also be hit or killed without being previously threatened, in the same circumstances and as such, the threat is only incidental and arises on a case-by-case basis.

It was specified by the same author that, unlike in the case of legal absorption, where the assessment of necessity is a must for the determination of legal complexity, starting from the way the incriminating legal norm is formulated, in case of natural absorption, in many cases, the empirical rather than the purely legal connection between crimes is important, the criterion of necessity being unpredictable.²²

As regards the second criterion for the analysis of the existence of legal complexity, namely the determined character, it has been mentioned that because legal absorption does not operate by the effect of the law, but by *the nature of things*, one cannot prioritize the crimes that might be absorbed.²³

Finally, on the second condition of legal complexity, i.e. the differentiation of the social danger between the two acts, realized *in abstracto*, comparing the limits of punishment, it was rightly considered again that it does not apply to natural complexity, as well, being accepted in the doctrine and jurisprudence that in case of violence offences, the length of deprivation of liberty necessary for the act of hitting is not retained, and the limits of punishment from deprivation of liberty require the punishment of the offence by imprisonment from one to 7 years while physical aggression in the standard form is punished with 3 months to 2 years or with a fine.

Consequently, it was considered necessary to propose separate criteria for the analysis of the existence of the natural complexity of the offence.

Five of these are the following: *the existence of two offences, the objective unity of actions, the unity of the manifestation of the will, the unity of the passive subject, the difference of dangerousness between the acts, appreciated in concrete terms, namely the*

²⁰ *Idem*, p. 65.

²¹ George-Cristian Ioan. "Absorbția naturală a infracțiunilor în dreptul român". *Caiete de drept penal* no. 4/2019, Ed. Universul Juridic, p. 45.

²² *Idem*, p. 45.

²³ *Idem*, p. 46.

*minimal damage to the social value protected by the absorbed offence.*²⁴

The first condition, that of the existence of two offences, involves the analysis of the existence of the link between the two acts, because the idea of natural absorption implies an almost symbiotic relationship at the level of the offences committed, being necessary, of course, that the two committed acts meet all the elements of objective and subjective typicality imposed by the criminalization rules. The situation in which one of the acts does not constitute a criminal offence leads to the absence of an absorption and natural complexity, provided that only one of the acts is criminally sanctioned.²⁵

The second criterion, the objective unity of actions involves a spatial-temporal unity of the acts of execution and a link between the two offences, demonstrated by a particularizing element, two sub-criteria considered as rather indicative for establishing the existence of a link, without being axiomatic in nature.²⁶

With regard to the first sub-criterion, i.e. the objective unity of actions, it was expressed the opinion that the acts of execution must take place within as much unitary time and space as possible, and the absence of this unity will lead to concurrent offences.²⁷

The link between the two offences, the second proposed sub-criterion, has been specified to be able to operate in cases where the offences are different in nature and that, given the way in which the acts of execution are committed, it is necessary to establish the link between the two acts.²⁸

The assessment was made that, even if the two offences can take place at different moments, it is necessary that those acts of execution take place within as much unitary time and space as possible, and the absence of this unity will lead to concurrent offences.²⁹

The third criterion is that of the unity of the manifestation of will of the perpetrator, for example, it is necessary to commit acts of the same form of guilt. Even if it is not necessary for him to realize from the outset that he will commit two offences which have a characterizing link between them, it is considered necessary that he foreshadows this possibility, incorporated into a generic plan for his entire mode of action.³⁰

The fourth condition which is also considered essential by the author who proposed these criteria *is the unity of passive subject.* It was considered essential and even if there is a natural connection and a difference of dangerousness between the two offences, the injury of a passive subject cannot attract within its scope and remove from detention an offence committed against another passive subject, no matter how serious it is and no matter how closely related to another violation of the criminal law. The protection conferred by the legislator in criminal matters cannot be excluded from a certain passive subject merely because another has been harmed in a more severe way.³¹

Finally, the fifth and last criterion proposed is that of the difference of

²⁴ *Idem*, p. 47 – 53.

²⁵ *Idem*, p. 47.

²⁶ *Idem*, p. 48.

²⁷ *Idem*, p. 48.

²⁸ *Idem*, p. 49.

²⁹ *Idem*, p. 49.

³⁰ *Idem*, p. 50.

³¹ *Idem*, p. 51.

dangerousness between the acts, appreciated in concreto. This analysis cannot be abstract, starting only from the limits of punishment incriminating de acts, it is necessary to take into account all the circumstances of the act to assess the danger of the whole actions.

4. Applicability of the natural complexity existence criteria to the concerned offences.

A priori, we mention that we agree with the statement that the facts presented in the literature as criteria for analysing the existence of legal complexity are not applicable to natural complexity and consequently it was imperative to formulate distinct criteria to help identify the possibility in concrete cases if we are dealing with a natural absorption or not, of one offence by another.

Based on the criteria proposed in the recent doctrine, that we have briefly listed and presented, we will assess whether they are applicable to the particular situation presented in this study identified in the doctrine, namely the problem of the absorption of the criminal offence provided at art 250¹ of the Romanian Criminal Code by the one incriminated under art. 250 of the Romanian Criminal Code.

The first condition, that of the existence of two offences is found to be fulfilled, having even a relationship of relative dependence between them, art. 250¹ of the Romanian Criminal Code incriminating *the possession for the fraudulent use of the non-cash payment instrument appropriated by committing an offence* while the offence provided at art. 250 para. (1) of the Criminal Code punishes *the execution of a cash withdrawal operation, loading or unloading of an electronic money instrument or transfer of funds, monetary value or virtual currency, by using, without the consent of the holder, a non-cash payment instrument or the identification data allowing its use.*

We therefore find that one offence criminalizes the possession for fraudulent use while the second offence criminalizes the fraudulent use without the consent of the holder of a non-cash payment instrument.

In view of the above, we consider that the first condition is fulfilled, as we mentioned above, being a dependency relationship between the two offences, most of the time being impossible to use the bank card without holding it in possession.³²

The second condition, that of an objective unity of actions involving a spatial-temporal unity of the acts of execution and a proven link between the two offences by a particularizing element is obviously fulfilled in the case, the bank card being stolen or acquired as a result of the loss, held and then used within a relatively short time and the connection between the two offences is undeniable, considering how the acts of execution were committed, namely, as mentioned above, the possession and subsequent use of the bank card within a short timeframe.

Further on, the third criterion of the unity of the perpetrator's manifestation of will is also met, in such situations the perpetrator acting with intent, in the vast majority

³² Please note that there is, however, the possibility of carrying out a cash withdrawal operation without actually holding the card. As long as a person has certain information written on the card, they can shop online without actually owning the card. That is why we consider the analysis of legal complexity, namely that of the necessity of absorption not applicable to the analysis of the incidence of the natural complexity of the criterion set out.

of cases there is not only a simple foreshadowing of the link between the two offences, but he realizes from the very beginning, from the moment of possession, that he will use it, aiming to do so.

We consider that the fourth criterion is also met, as we have a unity of passive subject in the case, namely the bank card holder, initially having held the cardholder's property and then fraudulently using it without his consent.

Finally, the fifth criterion, that of the difference of danger between deeds, appreciated *in concreto*, is fulfilled, *in concreto* even if not *in abstracto*, both offences being punished by imprisonment from 2 to 7 years, thus being demonstrated in our opinion the necessity to evaluate *in concreto* and not *in abstracto* the difference of dangerousness between the acts.

However, we consider an *in abstracto* assessment of the two offences as being equal to be curious, as it is obvious that the use of a bank card is more dangerous than simply holding it, even for the purpose of using it.

5. Conclusions

In conclusion, we consider that we are dealing with a case of natural complexity of the offence and consequently an absorption of the offence provided at art. 250¹ of the Romanian Criminal Code by the offence provided at art. 250 of the Romanian Criminal Code.

However, in view of the criteria proposed by the literature to assess whether or not the natural complexity of the offence exists, an *in concreto* analysis of their applicability by the prosecution bodies in each individual case is necessary.

As regards the opinion of the Public Ministry in the grounds of appeal, namely that the offence in art. 250 of the Romanian Criminal Code existed before the incrimination provided at art. 250¹ of the Romanian Criminal Code, and the legislator stated that this act will be sanctioned similarly to art. 250 of the Criminal Code and, as such, the existence of a previous text of law was taken into consideration and thus requires, in addition, the retention of a concurrent offences, we consider that this is not a strong enough argument to assess that there is no natural complex offence by absorption in these cases.

The mere previous existence of an offence, followed by a new incrimination does not lead to the finding of a concurrence, being necessary, as we said, to evaluate certain criteria *in concreto* to the factual situations that arise in case law.

It is also erroneous the opinion that if the court's reasoning is correct, namely that the offence provided by art. 250¹ para. (1) of the Romanian Criminal Code would be absorbed into art. 250 para. (1) of the Romanian Criminal Code, then it would mean that the latter offence would be a complex one and given that the acquittal was ordered for the offence under art. 250¹ para. (1) of the Romanian Criminal Code because the act is not provided by the law, the absorbing offence would in fact lack an element, namely the absorbed offence itself, to establish the existence of the offence for which he was convicted, namely art. 250 para. (1) of the Romanian Criminal Code.

We observe an error of logic, since this is a natural complex offence and not a legal one, by merger or absorption, where the non-existence of the absorbed offence would lead to the non-existence of the absorbing offence.

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