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**BLACKMAIL OFFENCE PROVIDED BY ART. 13¹ OF LAW NO.
78/2000 FOR PREVENTION, DISCOVERY AND SANCTION OF
BANKRUPTCY FACTS**

Abstract

It is considered as a bankruptcy offence – certainly an assimilated one – the blackmail fact, having the contents of art. 194 Penal code, when it is committed by one of the persons provided in art. 1 of Law no. 78/2000 for the prevention, discovery and sanction of bankruptcy facts, namely:

a) who exercises a public position, irrespective by the way it was invested, within the public authorities or public institutions;

b) who accomplishes, permanently or temporary, according to law, a position or charge, as it participates to the taking up of decisions or may influence them, within the public services, autonomous controls, trading companies, national companies, national companies, cooperation units or of other economical agents;

c) who exercises control attributions, according to law;

d) who grants assistance specialized for the units provided at letters a) and b), as it participates to the taking up of decisions or may influence them;

e) who, irrespective by its quality, perform, control or grant specialized assistance, as it participates to the taking up of decisions or may influence them, with respect to: operations that train the capital circulation, bank operations, currency exchange or credit operations, placement operations, at burses, securities, in mutual placement or regarding the banking accounts and those assimilated to them, internal and international trading transactions;

f) who holds a managing position in a party or in a politic formation, in a trade union, in a patron organization or in an association without a working purpose or a foundation;

g) other natural persons than those provided at letters a)-f), under the circumstances provided by law.

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1. Notion and definition. According to art. 13¹ of Law no. 78/2000 for the prevention, discovery and sanction of bankruptcy facts, the infraction consists in the blackmail fact, provided in art. 194 Penal code, where it is implied a person of those provided in art. 1 of Law no. 78/2000, namely:

a) who exercises a public position, irrespective by the way it was invested, within the public authorities or public institutions;

b) who accomplishes, permanently or temporary, according to law, a position or charge, as it participates to the taking up of decisions or may influence them, within the public services, autonomous controls, trading companies, national companies, national companies, cooperation units or of other economical agents;

c) who exercises control attributions, according to law;

d) who grants assistance specialized for the units provided at letters a) and b), as it participates to the taking up of decisions or may influence them;

e) who, irrespective by its quality, perform, control or grant specialized assistance, as it participates to the taking up of decisions or may influence them, with respect to: operations that train the capital circulation, bank operations, currency exchange or credit operations, placement operations, at burses, securities, in mutual placement or regarding the banking accounts and those assimilated to them, internal and international trading transactions;

f) who holds a managing position in a party or in a politic formation, in a trade union, in a patron organization or in an association without a working purpose or a foundation;

g) other natural persons than those provided at letters a)-f), under the circumstances provided by law.

According to art. 194 alignment (1) Penal code, the blackmail offence consists in the constraint of a person, by violence or threatening, to give, to make or not to make or suffer anything, if the fact is committed to unjustly acquire a benefit, for himself or for the other, and according to alignment (2) of the same article, the constraint can be also exercised by the threatening of devolving a real or imaginary fact, compromising for the threatened person, for her husband or a close relative.

For the comprehension of the close relative meaning, we refer to the clauses of art. 149 Penal code, which, in the alignment (1) shows that "the close relatives are and ascendants or descendants, brothers and sisters,

children of them, as well as the persons became by adoption, according to law, such relatives".

In the alignment (2) of art. 149 Penal code, it is added that: "The provisions of penal law regarding close relatives, within the limits provided by the previous alignment, it is applied in case of adoption with full effects, to the adopted person, and, as well to his descendants and reported to the normal relatives; and in case of adoption with restrained effects, to the adopted person and his descendants, and reported to the relatives of the adopter".

The Romanian legislator considered that when the blackmail was committed by one of the persons mentioned in art. 1 of Law no. 78/2000 is more severe and implies a means of bankruptcy, a reason for which it included in the category of offences assimilated to the bankruptcy offences.

The offence provided in art. 13¹ of Law no. 78/2000 is and remains a blackmail, a fact in which it is implied one of the persons mentioned in art. 1 of the same normative act.

2. Special legal object. The blackmail offence has as main legal object the social relations regarding the moral freedom of persons, and as secondary legal object, either the social relations regarding the patrimony, if it is pursued a material benefit, or the social relations, regarding another interest of the victim, if the benefit pursued is not of material nature.

3. Material object. In principal, blackmail offence does not have a material object, as it is defended in principle by a personal right - psychic (moral) freedom of a person¹. However, if the person's constraint is made through physical violence, the offence has also a material object -but secondary -, consisting in the victim's body. Also, in the case in which the patrimony of the person injured is affected, by ceasing a good, through its destruction etc., the respective good represents the material object of the offence².

1. V.Dongoroz, S.Kahane, I.Oancea, I.Fodor, N.Iliescu, C.Bulai, R. Stănoiu, V.Roșca, *Explicații teoretice ale Codului penal român, Partea specială*, vol. III, IInd edition, Romanian Academy Publishing House and All Beck Publishing House, Bucharest, 2003, p. 306.

2. In this sense, to be seen, Gh. Diaconescu, *Infrațiunile în Codul penal român*, vol. I, Oscar Print Publishing House, 1997, p.262.

4. Active subject is qualified. Therefore, the offence can be executed by a person within the one provided at art. 1 of Law no. 78/2000. Letter g) a art. 1 of Law no. 78/2000 considers other physical persons than the one provided at letters a) - f), but in the conditions provided by law. So, it can not be interpreted that the active subject would not be circumstantial, but just that it may also be a physical person, but only when the law expressly provides this (for example, an officer). In change, it is being understood that the offence can not be executed by a legal person.

Penal participation is possible under all forms. It is not necessary that your participants have one of the qualities shown on art. 1 of Law no. 78/2000, although this is not excluded. As long as in art. 13¹ from Law no. 78/2000 it is being used the expression, in which it is implied" a person from the one provided in art. 1 of the same normative act, the incrimination norm considers not only the active not interfered subject (author), but also the instigator or accomplice. Insomuch, if one of the persons shown in art. 1 from Law no. 78/2000 instigates or helps another person, who is not in neither of the situations mentioned in this article, in her charge it will be retained the instigation or complicity for the offence provided on art. 13¹ from Law no. 78/2000, and in the author's charge, there will be retained only the offence provided on art. 194 from the Penal Code. There will be also retained the same framing, but, when the instigator or the accomplice is not in neither of the situations provided at art. 1 from Law no. 78/2000, and the author is. Although, it might be sustained that, whether the situation he might be, the participants will be sanctioned in the same way, according to the legal settlement, the solution can not be other; these situations will be considered, however, at the punishment's individualisation.

5. Passive subject is not circumstantial of penal law; therefore anyone may become a passive subject of the offence. Although, the legislator used, within the content of the incriminating norm, the expression, in which it is implied" a person from the one provided on art. 1 from Law no. 78/2000, we believe that it only considered the active subject of the offence and not the passive one.

It must be shown that the plurality of victims trains a plurality of offences, even when it is performed only one blackmail action¹.

6. Objective side. Material element. Blackmail offence presumes, first of all, according to art. 194 line (1) Penal Code, a constraint action, meaning an action through which a person is imposed to do or not to do something against its own will. This constraint must produce fear to the victim. The constraint must be exercised through violence, according to art.180 Penal Code or threat, according to art.193 Penal Code. Both violence acts provided in art.180 Penal Code, and threat actions are absorbed in the blackmail offence². If, through the use of violence, it is producing an injury or a serious injury, there is an offence contest between the offence blackmail and the one provided on art.181 Penal Code or on art.182 Penal Code.

Secondly, constraint, performed through violence or threat, must have as an object, the determination of the person to give, do, not to do or suffer from something. To give something means to perform a commitment act (to give a good, an amount of money etc.). to do something means to action in a certain way (to perform an act, to make a denounce etc.), and not to do something means to refrain from an action (to make a denounce, not to give a declaration etc.). By suffering of something means to bear a moral or material prejudice (to bear a humiliation action, to accept the destroying of a good etc.)³. It is not necessary to satisfy the claims of a perpetrator. If the constraint one satisfies the perpetrator's claims, difficulties may occur in what regards the delimitation of blackmail from robbery. The delimitation criteria of the two infractions is made by their own different essence, blackmail being an offence against moral freedom, and robbery, and offence against own patrimony. Thus, if the constraint one immediately satisfies the

1. V. Cioclei, *Drept penal. Partea specială. Infrațiuni contra persoanei*, Universul Juridic Publishing House, Bucharest, 2007, p.174. Usually, in the case of offences against person, if the same action or inaction is forwarded against some other persons, a plurality of offences are retained, except the cases in which law creates a duly offence able unit (for example, murder executed against two or many persons etc.)

2. In this sense, Timișoara Appellate Court, penal decision no. 21/2001, LEX EXPERT (blackmail offence is complex, containing as a constitutive element also threat offence. It will be performed anytime threat constitutes a middle offence, performed in the purpose of rightfully obtaining a benefit).

3. O. Loghin, A. Filipaș, *Drept penal român. Partea specială*, „Șansa” S.R.L. Publishing and Press House, Bucharest, 1992, p.66.

perpetrator's request, and this request refers to the commitment of a good, the act is interpreted as a robbery and not blackmail, because, mainly, it is infringed the person's property and not its moral freedom. In order to infringe the moral freedom, it is necessary that the constraint has produced a fear state which lasts for a certain period of time, on the other hand, that the satisfaction of perpetrator's request to be distanced in time from the constraint act¹. Blackmail offence exists in the hypothesis in which the

1. Ibidem, p.66-67. In the same sense, the Supreme Court of Justice, penal section, decision no.4266/1999, Penal Law Magazine no. 4/2001, p.157 (although between blackmail offence and robbery offence there are similarities, both having as a special judicial object, the relationships regarding person's freedom and regarding its patrimony, they being differentiated, in the case of blackmail are infringed, mainly, social relationships regarding the freedom of the person, when in case of robbery there are infringed, mainly, social relationships regarding its patrimony. In the case of blackmail, the offender uses violence or threat in order to further obtain an amount of money or other values, time in which robbery offence is usually characterized, by the simultaneity of violence or threats with the victim's act of giving, as in species, its good. Out of the respective administrated proves, resulted that the accused accosted victims asking them money and that, if they refused, he immobilized them and hit them, after which the injured parts either gave money for fear, either were disposed of by force the money. As a consequence, by threat, hitting activities and putting the injured parties in the impossibilities of defending themselves, acting towards them with the intention of disposing them of money, the accused committed the robbery offence for which, rightfully, has been convicted); Bucharest Appellate Court, IInd penal section, decision no.903/1997, Penal law magazine nr.4/1998, p.159 (the accused fact which, through violence and threats, has forced a bartender to serve alcoholic drinks, whose cost refused to pay, is a robbery offence –even if it may be consider an atypical form of offence–, and not a blackmail); Bucharest Appellate Court, II-nd penal section, decision no.440/2000, in T. Toader, A. Stoica, N. Cristuș, *Codul penal și legile speciale : doctrină, jurisprudență, decizii ale Curții Constituționale, hotărâri C.E.D.O.*, Hamangiu Publishing House, Bucharest, 2007, p.303; Craiova Appellate Court, penal decision no.577/2001, in T. Toader and its collaborators, *Codul penal și legile speciale : doctrină, jurisprudență, decizii ale Curții Constituționale, hotărâri C.E.D.O.*, quoted text, p.303 (the accused act which, under the threat of knife, obtained from the injured party 3 packs of cigarettes, constitutes a robbery offence, and not the blackmail one); the Supreme Court of Justice, penal section, decision no.1979/1998, LEX EXPERT (it is being noted that in the case of blackmail, according to the law text requirements to which it has made referring to, the injured party acts personally, subject to the constraint executed against him as an

victim, being constrained through threats with mutilations in order to give an amount of money, denounces the act of judicial bodies, and they organize a flagrant, during which the perpetrator is surprised in the moment in which he enters in the possession of the claimed amount of money².

According to art.194 align.(2) Penal Code, constraint can also be exercised through revealing a real or imaginary act, compromising for the threatened person, for its husband or a closer relative. Constraint is made, in this case, only by threat, and the object of threat is to reveal an act. It does not matter whether this act is real or imaginary. However it must be compromising for the threatened person, for its husband or for a closer relative. The offence is more serious because the intimidating force of the constraint is bigger, knowing the fact that is very hard, even impossible, to remove the consequences of a public compromising, whether its source is real or imaginary³.

It does not matter if husbands are practically separated, if they are in the middle of a divorce or not. It also does not matter the real relationships between the closer relatives. Offence is retained even if the relationship between husbands or between close relatives is not good.

The quality of husband or close relative must exist in the moment of committing the blackmail offence. If the husband quality has ended as a consequence of divorce, the offence will not retain. Also, in the case in which marriage has been cancelled or if husbands were united through a marriage declared void due to bigamy. As for the close relatives, it does not matter the kinship level in ascendant or descendant order. It does not matter the case of an in-law in straight line, nor the case in which persons - to which the perpetrator's threat refers to - finds together with the blackmail offence victim in natural obligations.

accused, time in which, in case of robbery, the accused action of entirely withdraw, which dispossess of goods without its consent. Thus, the accused act of taking the money and watch of the victim, by constraining it with threats, represents a robbery offence, for which it has been convicted, and the blackmail offence in which it has been asked for the change of the judicial framing).

2. Bucharest Appellate Court, IInd penal section, decision no.644/2004, quoted by V. Cioclei, text quoted, p.174-175.

3. O. Loghin, A. Filipaș, quoted text, p.67.

Immediate following consists in creating a fear estate. Immediate following is produced independently of the satisfying of the accused requests¹.

Causality joint results from the materiality of the act (*ex re*).

7. Subjective side. Blackmail is deliberately performed. Subjective side of the infraction includes also the scope of rightfully accomplishing a personal benefit or for another person. Benefit can be of any nature and can also be pursued by the accused from anyone. Law provides that obtaining the benefit to be unrightfully pursued. As a consequence, even if the benefit is rightfully, the act represents a blackmail, as it has been unrightfully pursued its performing². In the doctrine it has been expressed also the opinion that the benefit must be unrightfully. It will be considered an unrightfully benefit, any benefit not owed by the victim either in what regards the quantum (it has been obtained more than the victim owed or from a person who did not owe anything), or in what regards the term (it has been obtained before the falling due), or related to form (it has been obtained without the fulfilment of all necessary forms). If it is established that the victim effectively owed benefit grabbed by the author through constraining, the condition requested by law is not verified – the existence of an unrightfully benefit for the author– and as such, the blackmail offence will not exist, but we might be in the presence of the thread or hitting offence³. The first opinion is the correct one and the accused formulation

1. V. Dongoroz and its collabotaros, quoted text, p.309.

2. O. Loghin, A. Filipaş, quoted text, p.71. In the same sense, Bucharest Appellate Court, penal section I, decision no.1353/2002.

3. T. Vasiliu, D.Pavel, G.Antoniou, D.Lucinescu, V.Papadopol, V. Rămureanu, *Codul penal comentat și adnotat. Partea specială*, volume I, Scientific and Encyclopaedic Publishing House, Bucharest, 1975, p.194. In the same sense, Cluj Appellate Court, penal decision no.18/2002, in T. Toader and its collaboratos, *Codul penal și legile speciale : doctrină, jurisprudență, decizii ale Curții Constituționale, hotărâri C.E.D.O.*, quoted text, p.302 (the constraining action performed by the accused resulted in a fear estate of civil parts, meaning a limitation of their physical freedom of acting according to their own will, and between the accused action and the result obtained, there was a causality connection. The subjective side of the blackmail offence is performed, the accused acted with the belief that through its deed, there will be an indirect constraint against civil parts in order to determine them to offer the amounts of money asked for and pursued the performing of this result, in

provides no doubt for this. To sustain the contrary opinion means to indirectly admit each one's freedom of making justice, of valuing a right through the use of violence, constraint⁴. Benefit can be pursued by the accused for itself or for another person.

8. Offence forms. The attempt is punished (art. 15 from Law no. 78/2000). The offence is wasted in the moment in which the constraint action is performed, producing a fear estate of the constraint person.

9. Sanction. The offence is punished with prison from 7 to 12 years.

Bibliography

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4. LEX EXPERT - Informatics program performed by Neamt Informatics company.
5. O. Loghin, A. Filipaș, *Drept penal român. Partea specială*, Casa de Editură și Presă „Șansa” S.R.L. Publishing and Press House, Bucharest, 1992.
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order to obtain an unrightfully material benefit for itself, this not being owed to victims).

4. V. Cioclei, quoted text, p.175.