

E-COMMERCE OFFENCES IN THE CURRENT FINANCIAL CRISIS - A ROMANIAN REALITY

Ioniță Gheorghe-Iulian*

Abstract

Technological progress and the opportunities provided by the Internet have triggered transformations in the entire society, influencing all walks of the economic, social and cultural life.

At the same time, these facilities also benefited those who aim to reach a high living standard by avoiding the legal means necessary to do so.

Infringements related to the issuing and use of electronic payment instruments and the use of identity data for financial operations tend to become a routine, and this situation has a negative impact upon customers' confidence in electronic payment instruments and e-commerce

This study presents the trends of this phenomenon and of the field legislation.

Keywords: e-commerce, electronic payment instruments, offences, legislation

JEL Classification: G01, G20, H20, H26, K14, K20, K42

1. Introduction

E-commerce has appeared in Romania relatively recent, but it has continually expanded. Even if we are still in a transition period and we have to overcome the financial crisis accompanying it, „the Romanian e-commerce market reveals encouraging signs of improvement” (Underclick.ro, 2010).

During the last few years, for young persons (usually) who use the Internet intensively, online shopping has become a habit.

Unfortunately, not all such persons comply with the rules that govern these relations and the infringement thereof is increasingly frequent, which turns thus into a genuine phenomenon.

Under the circumstances, there are serious concerns, which are fully justified, as regards the confidentiality of personal data, the safety of transactions etc.

2. Trends of e-commerce offences in Romania

According to the data supplied by the Directorate for Investigating Organized Crime and Terrorism of the Prosecutor's Office attached to the High Court of Cassation and Justice (DIOCT, 2011, p. 37-38), the assessment of disorganized criminal groups operating in the field revealed a number of features, such as:

- a general specialization, but also the micro-specialization of groups with independent cells meant to carry out specific criminal activities (e.g. in order to design skimming devices, “specialists” in plastic materials, molding, electronics, item

* Ioniță Gheorghe-Iulian is Assistant Professor of Law at the Romanian American University in Bucharest. E-mail: ionita.gheorghe.iulian@profesor.rau.ro

procurement, the procurement of original items as models, special encryption software, credit card data uploading/downloading, processing, “runners”, “financers” are used).

- the recruitment by leaders of traditional criminal groups of young people skilled in using new computers and technologies;

- the transnational character, either given by the location of the offences or the localization of the victims;

- recruitment through increasingly sophisticated “arrows” and through the specialization thereof so as to suit the needs (opening bank accounts, the transport of various amounts etc.);

- the set up of money laundry networks made of Romanian and foreign citizens.

As regards the areas with criminal potential, the counties Olt, Prahova, Bacău have known a development of infringements related to the issuing and use of electronic payment instruments and the use of identity data for financial operations, as compared to the counties Argeş, Vâlcea, Teleorman, which are known for offences against data confidentiality, integrity and availability. The counties Vâlcea, Argeş, Constanţa, Teleorman, as well as Bucharest, continue to make themselves known for both categories of offences.

As opposed to the previous years (DIOCT, 2010, p. 28-36), the novelty in 2010 was an orientation of criminal groups towards the forgery of electronic payment instruments on Romania’s territory, with IT support ensured by other criminal organizations operating outside national borders.

3. Registered and investigated casuistry in Romania during the last years

In order to sketch an overview of this phenomenon, it is necessary to emphasize some of the important causes already solved during last year by the Directorate for Investigating Organized Crime and Terrorism of the Prosecutor’s Office attached to the High Court of Cassation and Justice (DIOCT, 2011, p. 40-45).

I. Under public prosecutor’s charge no. 267/D/P/2009 (DIOCT - Central structure) decided on the arraignment of C.N. s.a. accused of the offences of setting up an organized criminal group, as stipulated at art. 7 and art. 2 letters a and b point 18 of Law no. 39/2003, the forgery of electronic payment instruments as stipulated at art. 24 paragraph 1 of Law no. 365/2002, the circulation by any means of false electronic payment instruments or the possession thereof for the purpose of using them as stipulated at art. 24 paragraph 2 of Law no. 365/2002, the manufacturing or possession of equipment, including software or hardware, for the purpose of forging credit cards and making cash withdrawals, through the use of electronic payment instruments (cards) without the consent of the account holders.

The case was sent for settlement to the Court of Bucharest.

II. Under public prosecutor’s charge no. 252/D/P/2009 (DIOCT - Constanţa Territorial Division) decided on the arraignment of a number of 9 defendants, for offences stipulated at Law no.39/2003, Law no.161/2003 and Law no. 365/2002 on

fraudulent financial operations with POSs belonging to banks in Romania and installed throughout Constanța.

Through the criminal sentence no. 426 of 22.12.2010 given by the Court of Constanța in file 14220/118/2010 the defendants were punished with imprisonment, the execution of which was suspended conditionally or under probation.

III. Under public prosecutor's charge no. 123/D/P/2009 (DIOCT - Craiova Territorial Division) decided on the arraignment with detention under remand of defendants T.D.R. s.a., for the offences stipulated at art. 7 point 1 of Law 39/2003, art.42 paragraphs 1, 2 and 3 of Law 161/2003, Title III, art. 26, Criminal code and art. 46 paragraph 1 letters a and b of Law 161/2003, Title III, art. 24 paragraphs 1 and 2 of Law 365/2002.

In fact, the defendants were gathered in an organized criminal group coordinated by T.D.R., whose purpose was the artisanal manufacturing of skimming devices, their installation on ATMs abroad, especially in Italy, the forgery of electronic payment instruments and fraudulent withdrawals from ATMs both in Romania and in Italy, France and Germany.

The electronic part of the skimming equipment was made by the defendants in Bucharest and the mechanical part was made in Craiova, being used both directly by the defendants and sold to other persons outside the organized criminal group.

The damage was Euro 32,265.67 and RON 53,614.82.

The case was sent to be solved by the Court of Dolj.

IV. Under public prosecutor's charge no. 23/D/P/2009 (DIOCT - Ploiești Territorial Division) decided on the arraignment of 14 defendants, out of which 11 in detention under remand for the offences of setting up an organized criminal group, illegal access to information systems, possession of equipment for the forgery of electronic payment instruments, the forgery and circulation of electronic payment instruments, illegal cash withdrawals.

In fact, in the period 2008-2010, the members of the above-mentioned organized criminal group acted on the territory of several EU countries and Australia and, using illegal devices for the copying of electronic data, came into the possession of a significant number of data they recorded on magnetic media of blank cards and made illegal cash withdrawals, the amount of the incurred damage being approximately Euro 600,000.

The group was coordinated by the defendant B.N., one of the lieutenants of I.C. and M.N.C.

The case was solved with the help of the competent judicial authorities in the Czech Republic, the Netherlands, Belgium, Greece, Portugal and Australia.

With a view to recovering the damage incurred by the European and Australian customers, the insurers applied distraint upon property (buildings and plots) and luxury vehicles and significant amounts were thus recovered.

The case was sent to be solved by the Court of Prahova.

4. The practice of Romanian courts of law

According to the decision no. 5288 of September 15th, 2006 of the High Court of Cassation and Justice - The Criminal Section (HCCJ, 2006),

I. the fact of installing on an ATM a device used to read card magnetic bands is an offence of illegal access to a computer system by breaching the security measures stipulated at art. 42 paragraphs (1) and (3) of Law no. 161/2003, since the ATM is a computer system in the meaning of art. 35 paragraph (1) letter a) of this law, and the installation of the device of magnetic band reading breaches the ATM security measures, which aims to ensure the secrecy of the account number and operations performed, as well as the prevention of the fraudulent use of the cards.

II. the deeds of forging electronic payment instruments, such as cards, to possess such false instruments and to withdraw cash with the help thereof are the offence stipulated at art. 24 paragraph (1) of Law no. 365/2002 referring to the forgery of the electronic payment instruments stipulated at art. 24 paragraph (2) of the same law referring to the circulation of false electronic payment instruments or the possession thereof for circulation purposes, since the circulation of false electronic payment instruments may be done by withdrawing cash and it is not necessary to transmit the possession of false electronic payment instruments to other persons.

To motivate its decision, the supreme court retains:

“Criminal sentence no. 21/2006 of the Court of Hunedoara sentenced the defendants C.C., G.M., T.I. and I.F. for offences against the confidentiality and integrity of electronic data and systems stipulated at art. 42 paragraphs (1) and (3) of Law no. 161/2003, for the offence of forging electronic payment instruments stipulated at art. 24 paragraph (1) of Law no. 365/2002, the offences of forging electronic payment instruments stipulated at art. 24 paragraph (2) of Law no. 365/2002, the offence of making fraudulent financial operations as stipulated at art. 27 paragraph (1) of Law no. 365/2002 and the offence of aggravated theft stipulated at art. 208 paragraph (1), art. 209 paragraph (1) letters a) and e), Criminal Code, all with the application of art. 41 paragraph (2), of art. 33 letters a) and b) and of art. 34 paragraph (1) letter b), Criminal Code.

The Court retained that, in May 2005, the defendants C.C., G.M., T.I. and I.F. agreed to use readers of card magnetic bands and a minicamera which they had purchased before in order to obtain the data necessary to clone several cards and to withdraw cash.

For this purpose, in the case of several data, the defendants went to various cities, installed magnetic card readers and the minicamera on several ATMs and obtained the data from the cards used with these ATMs which they downloaded and stored in a computer at the residence of the defendant I.F.

After all data were stored in the computer, the defendant purchased blank cards and stuck on each of them a self-sticking label where they wrote the PIN code or codes previously read by the minicamera, the computer of the defendant I.F. being equipped with an electronic marking device, with the help of which the defendant

G.M. marked the magnetic band of each blank, with the account previously copied corresponding to the PIN written down on the label.

On June 28, July 7, July 8, July 11 and July 21 2005, the defendants withdrew cash with the help of cards cloned from the ATMs of several banks.

Through decision no. 197/A of June 22nd, 2006, the Alba Iulia Court of Appeal, the criminal section, accepted the defendants' appeals, changed the legal category of the offences stipulated at art. 27 paragraph (1) of Law no. 365/2002 and art. 208 paragraph (1), art. 209 paragraph (1) letters a) and e) of the Criminal Code, with the application of art. 41 paragraph (2) of the same code, into one offence stipulated at art. 27 paragraph (1) of Law no. 365/2002, with the application of art. 41 paragraph (2) of the Criminal Code convicted the defendants based on these texts of law and reduced the punishments applied to them.

The appeal declared, among others, by the defendant C.C., where he invoked the cassation file stipulated at art. 385⁹ paragraph (1) point 12 Criminal procedure code, is ungrounded.

As regards the request of the defendant C.C. under which he asks for his acquittal based on art. 11 point 2 letter a) as compared to art. 10 paragraph (1) letter d) of the Criminal procedure code, for the offences stipulated at art. 42 paragraphs (1) and (3) of Law no. 161/2003 with the application of art. 41 paragraph (2) of the Criminal code and art. 24 paragraph (2) of Law no. 365/2002, in the variant of the circulation of forged electronic payment instrument, with the application of art. 41 paragraph (2) of the Criminal code, is deemed ungrounded.

The provisions of art. 24 paragraph (1) of Law no. 365/2002 stipulate that the forgery of an electronic payment instrument is sanctioned with imprisonment from 3 to 12 years and the interdiction to enjoy any rights, and art. 24 paragraph (2) of the same law incriminates the circulation, by any means, of forged electronic payment instruments or the possession thereof for circulation purposes.

The objective analysis of these facts reveals that there are two distinct offences, the former on the forgery of electronic payment instruments and the latter, the circulation or possession for circulation purposes of forged electronic payment instruments.

The circulation of electronic payment instruments was possible through cash withdrawals, since it was necessary to transmit the possession of false cards to other persons.

But the deeds of the four defendants who, under the same criminal sentence, forged approximately 200 electronic payment instruments, are deemed an offence of forging electronic payment instruments, as stipulated in art. 24 paragraph (1) of Law no. 365/2002, with the application of art. 41 paragraph (2) of the Criminal code.

The deeds of the defendants who, under the same criminal sentence, held for circulation purposes and used forged electronic payment instruments, meet the elements of the offence of forging electronic payment instruments, as stipulated at art. 24 paragraph (2) of Law no. 365/2002, with the application of art. 41 paragraph (2) of the Criminal code.

The provisions of art. 42 paragraph (1) of the Law no. 161/2003 incriminate the illegal access to a computer system, which is punished with imprisonment from 3 months to 3 years or with a fine, and paragraph (3) of the same article stipulates that, if the deed at paragraph (1) is made by breaching any security measures, the punishment is imprisonment from 3 to 12 years.

It is worth mentioning that the ATM is a means to collect, process and transmit electronic data, represented by the holder's account number, which is stored on level 2 of the black magnetic band.

On the other hand, the installation of the reader of the card magnetic band („skimmer”) in the ATM where the card is inserted and the magnetic band of each card is read, storing the information thus obtained, breached the security measures which aimed to ensure the secrecy of the account number and the operations performed, as well as the defense against usage of such cards by another person for fraudulent purposes.

But the file evidence reveals that the defendants accessed a computer system illegally, breaching thus the security measures.

Therefore, the deeds of the defendants who, under the same criminal sentence, installed on various ATMs a device for reading the card magnetic band, as well as a minicamera, accessing thus illegally, through breach of the security measures, the ATMs which are an electronic system under the law, meet the elements of the offence of confidentiality and integrity of electronic data and systems, as stipulated at art. 42 paragraphs (1) and (3) of Law no. 161/2003, with the application of art. 41 paragraph (2) of the Criminal code.

Since, in this case, the deeds of the defendant C.C. meet the elements of the offences stipulated at art. 42 paragraphs (1) and (3) of Law no. 161/2003, with the application of art. 41 paragraph (2) of the Criminal code and art. 24 paragraph (2) of the Law no. 365/2002 on e-commerce in the variant of the circulation of forged electronic payment instruments, with the application of art. 41 paragraph (2) of the Criminal code, there are no grounds for his acquittal in this meaning”.

For these reasons, the defendant's appeal was rejected.

5. Analysis of the infringements related to the issuing and use of electronic payment instruments and the use of identity data for financial operations, both applying and to be enforced

A. Forgery of electronic payment instruments

According to Article 24 („Forgery of electronic payment instruments”) of the Romanian Law no. 365/2002,

„(1) The forgery of electronic payment instruments shall be punished with imprisonment from 3 to 12 years and the banning of rights.

(2) The same punishment shall be applied for issuing on the market, in any way, of forged electronic payment instruments or owning them in order to put them into circulation.

(3) The punishment shall be imprisonment from 5 to 15 years and the prohibition of rights if the facts mentioned on paragraph (1) and (2) are carried out by a person who, by virtue of his/her job:

a) performs technical operations necessary to issue electronic payments instruments or to perform the

types of operations mentioned on Article 1 point 10; or

b) has access to the security mechanisms involved in issuing or using electronic payment instruments;

or

c) has access to the identification data or the security mechanisms involved in carrying out the types of operations mentioned on Article 1 point 10.

(4) Any attempt shall be punished”.

According to Article 311 „The forgery of credit titles or payment instruments” ***of the future Criminal Code***

“(1) The forgery of credit titles, titles or instruments used to make payments or any other similar titles and values is punished with imprisonment from 2 to 7 years and the interdiction to exercise any rights.

(2) If the deed stipulated at paragraph (1) concerns an electronic payment instrument, the punishment is imprisonment from 3 to 10 years and the interdiction to exercise any rights.

(3) Attempts are also punished”.

B. Owning equipment for the forgery of electronic payment instruments

According to Article 25 („Owning equipment to forge electronic payment instruments”) ***of the Romanian Law no. 365/2002***,

„The manufacturing or the owning of equipment, including hardware and software, to be used to forge electronic payment instruments shall be punished by imprisonment from 6 months to 5 years”.

According to Article 314 (“Holding instruments for the forgery of values”) ***of the future Criminal Code***

“(1) The manufacturing, reception, possession or transmission of instruments or materials for the purpose of forging the values or titles stipulated at art. 310, art. 311 paragraph (1) and art. 312 are punished with imprisonment from one to 5 years.

(2) The manufacturing, reception, possession or transmission of equipments, including hardware and software, for the purpose of forging electronic payment instruments are punished with imprisonment from 2 to 7 years.

(3) The person who, after committing any of the deeds stipulated at paragraph (1) or (2), before the discovery thereof and the beginning the forgery, hands over the possessed instruments or materials to the judicial authorities or informs such authorities on the existence thereof, is not punished”.

C. False statements in view of issuing or using electronic payment instruments

According to Article 26 („False statements in view of issuing or using electronic payment instruments”) *of the Romanian Law no. 365/2002*,

„The inaccurate declaration, made by a bank, credit or financial institution or any other legal person authorised, under the conditions of the law, to issue electronic payment instruments or to accept the types of operations mentioned by Article 1 point 10, in order to issue or use an electronic payment instrument, for himself/herself or another, when, according to the law or the circumstances, the declaration serves to issue or use that instrument, shall be punished with imprisonment from 3 months to 2 years or with a fine”.

According to Article 326 (“Misrepresentation”) *of the future Criminal Code*

“Misrepresentation of the truth made to a person such as those stipulated at art. 175 or to a unit where such person performs his activity with a view to producing a legal consequence, for oneself or for another, when, according to the law, the statement helps produce the said consequence, is punished with imprisonment from 3 months to 2 years or with a fine”.

D. Performing financial operations fraudulently

According to Article 27 („Performing financial operations fraudulently”) *of the Romanian Law no. 365/2002*,

„(1) The carrying out of one of the operations provided in Article 1, point 10, by using an electronic payment instrument, including the identification data that allow its use, without the consent of the owner of the respective instrument, shall be punished with imprisonment with 1 to 12 years.

(2) The same punishment shall be imposed upon performing one of the operations mentioned in Article 1, point 10, to the unauthorised use of any identification data or by using false identification data.

(3) The same punishment shall be imposed to the unauthorised use, by another person of any identification data in order to carry out any of the operations mentioned in Article 1, point 10.

(4) The punishment shall be imprisonment from 3 to 15 years and the prohibition of the rights if the facts mentioned in paragraphs (1) - (3) shall be carried out by a person who, by virtue of his/her job:

a) performs technical operations necessary to issue electronic payment instruments or to perform the types of operations mentioned on Article 1 point 10;

or

b) has access to the security mechanisms involved in issuing or using electronic payment instruments;

or

c) has access to the identification data or the security mechanisms involved in carrying out the types of operations mentioned on Article 1 point 10.

(5) Any attempt shall be punished”.

According to Article 250 (“Fraudulent financial operations”) ***of the future Criminal Code***

“(1) The performance of any operation of cash withdrawal, uploading or downloading an electronic instrument or fund transfer through the use, without the holder’s approval, of an electronic payment instrument or identification data is punished with imprisonment from 2 to 7 years.

(2) The same punishment is applied to any of the operations stipulated at paragraph (1), for the illegal use of identification data or false identification data.

(3) The unauthorized transmission to another person of any identification data with a view to performing any of the operations mentioned in paragraph (1) is punished with imprisonment from one to 5 years”.

According to Article 313 (“The circulation of forged values”) ***of the future Criminal Code***

“(1) The circulation of forged values stipulated at art. 310-312, as well as the reception, possession or transmission thereof for circulation purposes is sanctioned with the punishment stipulated by the law for the offence of forgery.

(2) The offence of using the forged values mentioned at art. 310-312 made by the author or a participant to the forgery offence is sanctioned with the punishment stipulated by the law for the offence of forgery.

(3) The recirculation of any of the values stipulated at art. 310-312 by a person who noted, after entering the possession thereof, that it is forged, is sanctioned with the punishment stipulated by the law for the offence of forgery, whose special limits are reduced by half.

(4) Attempts are also punished”.

E. Accepting financial operations performed fraudulently

According to Article 28 („Accepting financial operations performed fraudulently”) ***of the Romanian Law no. 365/2002***,

„(1) Accepting any of the operations mentioned in Article 1, point 10, knowing that it is performed by using a forged electronic payment instrument or using an electronic payment instrument without the consent of the owner, shall be punished with imprisonment from 1 to 12 years.

(2) The same punishment shall be given for accepting one of the operations mentioned in Article 1, point 10, knowing that it is performed by the unauthorised use of any identification data or by using unreal identification data.

(3) Any attempt shall be punished”.

According to Article 251 (“Acceptance of fraudulent financial operations”) ***of the future Criminal Code***

“(1) The acceptance of an operation of cash withdrawal, uploading or downloading an electronic payment instrument or fund transfer, knowing that it is

carried out through the use of an electronic payment instrument forged or used without the holder's consent, is punished with imprisonment from one to 5 years.

(2) The same punishment applies to the acceptance of any of the operations stipulated in paragraph (1), knowing that it is carried out through the unauthorized use of any identification data or the use of false identification data”.

Conclusions

As can be noted, such incrimination provisions stipulated in the special law have been processed more or less faithfully as well in the future Romanian Criminal Code.

The core problem is not settled yet, since the existence of a legal framework is not capable to ensure what is needed, namely the confidentiality of personal data, the safety of transactions and the increase of confidence in electronic payment instruments and e-commerce.

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