

# The Criminalisation and Investigation of the Crime of Misappropriation of Funds in Romanian Law

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**ABSTRACT:** The article presents and analyses the main issues related to the criminalization of the crime of misappropriation of funds in Romanian legislation. The offence of misappropriation of funds is stipulated by the Article 307 of the Romanian Criminal Code, while Article 18<sup>2</sup> of the Law no. 78/2000 for the prevention, detection and sanctioning of corruption provides the offence of misappropriation of funds, obtained from the general budget of the European Union or from the budgets administered by it or on its behalf. The crimes are incriminated both in the Romanian Criminal Code and in the Law no. 78/2000, in a standard variant, in an assimilated variant and in an aggravated variant. At the same time, the article presents and analyzes some aspects related to the forensic investigation of the crime of misappropriation of funds.

**KEYWORDS:** misappropriation, funds, forensic, criminal investigation, Romanian Criminal Code, the Law no. 78/2000

## Introduction

The misappropriation of funds is criminalized in Article 307 of the Romanian Criminal Code in a standard version and in an assimilated version. The standard variant contained in the Article 307 (2) of the Romanian Criminal Code consists in changing the destination of funds or material resources allocated to a public authority or public institution, without complying with legal provisions. The assimilated variant contained in the Article 307 (2) of the Romanian Criminal Code consists in changing, without complying with the legal provisions, the destination of the funds coming from the financings obtained or guaranteed from public funds. The Article 309 of the Romanian Criminal Code provides an aggravating circumstance for several office offences, including misappropriation of funds, if they have produced particularly serious consequences.

Each public authority or institution is allocated funds or material resources to fulfill the objectives or tasks for which it has been invested.

Within the Article 18<sup>2</sup> of Law no. 78/2000 for the prevention, detection and sanctioning of corruption is incriminated the misappropriation of funds which has as object the funds obtained from the national budget of the European Union or from the budgets administered by it or on its behalf. This deed is incriminated as in the Romanian Criminal Code in a standard version, in an assimilated version and in an aggravated version. The standard variant is provided by Article 18<sup>2</sup> (1) of Law no. 78/2000 and consists in changing, without complying with the legal provisions, the destination of the funds obtained from the general budget of the European Union or from the budgets administered by it or on its behalf. The assimilated variant is provided by Article 18<sup>2</sup> (2) of Law no. 78/2000 and consists in changing, without observing the legal provisions, the destination of an obtained legal benefit, if the deed results in the illegal diminution of the resources from the general budget of the European Union or from the budgets administered by it or in its name. The aggravating variant is provided by the Article 18<sup>2</sup> (3) of the Law no. 78/2000 and refers to the situation when the deeds from the previous paragraphs produced particularly serious consequences, the special limits of the punishment being increased by half.

Therefore, the offence stipulated by Article 18<sup>2</sup> (1) of Law no. 78/2000 is a special variant of the crime of misappropriation of funds, differing from it in terms of the source of funds obtained from the budgets of the European Union. With regard to the offence provided by Article 18<sup>2</sup> (2) of Law no. 78/2000, we mention the fact that this crime is a distinct one, referring to the damage of incomes.

At European Union level, some of the most important legal instruments in the field of combating fraud affecting the financial interests of the European Union are the following: The Convention on the protection of the European Communities' financial interests from the year of 1995 and the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

According to Article 1(a) of the 1995 Convention on the protection of the European Communities' financial interests, the fraud affecting the European Communities' financial interests shall consist of, in respect of expenditure, any intentional act or omission relating to:

the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities; non-disclosure of information in violation of a specific obligation, with the same effect; the misappropriation of such funds for purposes other than those for which they were originally granted.

According to Article 1(b) of the 1995 Convention on the protection of the European Communities' financial interests, the fraud affecting the European Communities' financial interests shall consist of, in respect of revenue, any intentional act or omission relating to:

the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities; non-disclosure of information in violation of a specific obligation, with the same effect; misappropriation of a legally obtained benefit, with the same effect.

The criminal offences with regard to fraud affecting the European Union's financial interests are stipulated in the Articles 3 and 4 of the Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

Therefore, according to Article 3 (2)(a) from the Directive 2017/1371, the following deeds shall be regarded as fraud affecting the Union's financial interests in respect of non-procurement-related expenditure, any act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; non-disclosure of information in violation of a specific obligation, with the same effect; the misappropriation of such funds or assets for purposes other than those for which they were originally granted.

Article 3 (2)(b) from the Directive 2017/1371 stipulates that the following deeds shall be regarded as fraud affecting the Union's financial interests in respect of procurement-related expenditure, at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; non-disclosure of information in violation of a specific obligation, with the same effect; the misappropriation of such funds or assets for purposes, other than those for which they were originally granted, which damages the Union's financial interests.

Article 3 (2)(c) from the Directive 2017/1371 stipulates that the following deeds shall be regarded as fraud affecting the Union's financial interests, in respect of revenue other than revenue arising from VAT own resources referred to in point (d), any act or omission relating to: the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf; non-disclosure of information in violation of a specific obligation, with the same effect; misappropriation of a legally obtained benefit, with the same effect.

Article 3 (2)(d) from the Directive 2017/1371 stipulates that the following deeds shall be regarded as fraud affecting the Union's financial interests, in respect of revenue arising from VAT

own resources, any act or omission committed in cross-border fraudulent schemes in relation to: the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; non-disclosure of VAT-related information in violation of a specific obligation, with the same effect; the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

Article 4 (1) of the Directive 2017/1371 stipulates that there are other criminal offences affecting the Union's financial interests, such as the crimes of money laundering, as described in Article 1(3) of the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, involving property derived from the criminal offences covered by the Directive 2017/1371, constitute criminal offences in the regulation of the Directive 2017/1371.

Moreover, we emphasize that Article 4 (2) of the Directive 2017/1371 stipulates that the other criminal offences affecting the Union's financial interests also include the corruption offences.

In accordance with the provisions of Article 4 (3) of the Directive 2017/1371, the notion of *misappropriation of funds* means the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests.

### **The pre-existing conditions**

*The special legal object* of the crime of misappropriation of funds provided by Article 307 of the Romanian Criminal Code is represented by social relations regarding the proper conduct of the activity of a public authority or public institution, which is conditioned by compliance with financial discipline that requires the use of funds and resources. materials in accordance with the legal provisions governing this matter. *The special legal object* of the crime of misappropriation of funds, provided by Article 18<sup>2</sup> of Law no. 78/2000 is constituted by the social relations regarding the financial discipline within the European Union, the observance of which requires the use of funds and of the legally obtained benefits in accordance with the legal provisions in force (Hotca, Gorunescu, Neagu, Pop, Sitaru & Geamănu 2019, 517).

*The material object* of the crime of misappropriation of funds provided by Article 307 of the Romanian Criminal Code has as material object, in the case of the standard variant, the funds or material resources that have been allocated to a public authority or public institution, and in the case of the assimilated variant, the funds from the financing obtained or guaranteed from public funds. *The material object* of the crime of misappropriation of funds provided by Article 18<sup>2</sup> of Law no. 78/2000 is constituted by the money funds or the legally obtained benefits that were misappropriated by the committed deed.

*The active subject* of the crime of misappropriation of funds provided by Article 307 of the Romanian Criminal Code refers to the civil servant who manages these funds and material resources allocated to a public authority or public institution and who has the obligation not to change their destination. In the case of the assimilated variant of this crime, we mention that the active subject can also be the person who has the competence to use the funds coming from the financings obtained or guaranteed from the public funds and who change this destination without observing the legal provisions (Dobrinouiu, et al. 2014, 589).

Criminal participation is possible in all its forms: co-author, incitement and complicity. We also consider that the co-perpetrators of the crime of misappropriation of funds can only be persons who have this quality and who have the opportunity to change the destination of funds or material resources.

*The active subject* of the crime of misappropriation of funds provided by Article 18<sup>2</sup> of Law no. 78/2000 can be any person, and the criminal participation is possible in all its forms. We mention that an active subject of the crime can also be a legal person, which is criminally liable if

the deed was committed in carrying out the object of activity, in the name or interest of the legal person, with the form of guilt provided by the criminal law.

*The passive subject* of the crime of misappropriation of funds provided by Article 307 of the Romanian Criminal Code is the state as the holder of the budget and which has been harmed by acts of misappropriation of funds or material resources committed by the active subject of the crime. We also highlight the fact that the passive subject may be any legal person, to which funds or material resources have been allocated that have been misappropriated without complying with the legal provisions. *The passive subject* of the crime of misappropriation of funds provided by Article 18<sup>2</sup> of Law no. 78/2000 is the European Union as the holder of the budget and which has been harmed by the commission of the act.

### **The constitutive content of the offences**

The material element of the *objective side*, in the case of the crime of misappropriation of funds provided by Article 307 of the Romanian Criminal Code, consists in carrying out an action to change the destination of funds or material resources allocated to a public authority or public institution to other objectives than those established by the state budget, as well as the destination of funds from funding obtained or guaranteed from public funds (Dobrinou, *et al.* 2014, 589).

In order for the action to change the destination of funds or material resources allocated to a public authority or public institution or to change the destination of funds from funding obtained or guaranteed from public funds to be the material element of the crime of misappropriation of funds, it is required that it to be carried out without observing the legal provisions, that is those provisions that regulate the possibility of a change in the destination of these funds.

Regarding the *immediate consequence*, once the incriminated actions have been carried out under the conditions described in Article 307 of the Romanian Criminal Code, a state of danger will be created regarding the normal development of the activity of the public authority or public institution whose funds or material resources have been misappropriated by violating legal provisions (Dobrinou *et al.* 2014, 590).

There must be a *causality link* between the action that changes the destination of funds or material resources and the immediate consequence.

The material element in the case of the crime of misappropriation of funds provided by Article 18<sup>2</sup> of Law no. 78/2000 consists in the action of changing the destination of the funds or of a legal benefit obtained, in their use for a purpose other than the established one. We are of the opinion that the crime of misappropriation of funds provided by Article 18<sup>2</sup> of Law no. 78/2000 exists only in the situation when the change of the destination of these funds or benefits is made without observing the legal provisions (Hotca, Gorunescu, Neagu, Pop, Sitaru & Geamănu 2019, 519). We also consider that the funds or benefits should be obtained initially in accordance with the legal provisions. Unlike the offence of misappropriation of a legally obtained benefit, we note that the offence of misappropriation of funds does not expressly require that such funds be legally obtained.

Assuming that the same person first obtained these European funds illegally by presenting or using in bad faith false, inaccurate or incomplete documents or statements, we consider that this person also committed the crime of illegally obtaining European funds, provided by Article 18<sup>1</sup> of the Law no. 78/2000. Therefore, our opinion is that the perpetrator will be investigated and sent to trial for committing the crime of illegally obtaining European funds, provided by Article 18<sup>1</sup> of the Law no. 78/2000, as well as for committing the crime of misappropriation of funds obtained from the budget of the European Union, provided by Article 18<sup>2</sup> of the Law no. 78/2000, these funds being used, after obtaining them, for purposes, other than those for which they were granted.

The commission of the crime of misappropriation of funds creates a state of danger for funds and material resources from the general budget of the European Union or from the budgets administered by them or on its behalf. For the offence of misappropriation of a legally obtained benefit, the change of destination of the legal obtained benefit must result in the unlawful reduction of resources in the general budget of the European Union or in the budgets administered by it or on its

behalf. For the aggravated variant provided by Article 18<sup>2</sup> (3) of the Law no. 78/2000, we note that it is required that the change of destination of the European funds to produce particularly serious consequences (Hotca, Gorunescu, Neagu, Pop, Sitaru & Geamănu 2019, 524).

There must be a *causality link* between the activity of the offender and the consequence that results from the materiality of the crime.

On the subjective side, we emphasize that the crime of misappropriation of funds provided by Article 307 of the Romanian Criminal Code and the crime of misappropriation of funds obtained from the budget of the European Union, provided by Article 18<sup>2</sup> of the Law no. 78/2000 are committed with the form of guilt of both direct and indirect intention.

### **The forms of the offences**

*The preparatory acts* are possible, but they are not criminalised and thus they are not punishable.

*The attempt* is possible and is punished according to the Article 307 (3) of the Romanian Criminal Code and according to the Article 18<sup>4</sup> of the Law no. 78/2000.

The offence of misappropriation of funds provided by Article 307 of the Romanian Criminal Code *is consumed* when the change of destination of the funds, of the material resources allocated to a public authority or public institution or of the funds coming from the financings obtained or guaranteed from public funds takes place, without observing the legal provisions.

The offence of misappropriation of funds, provided by Article 18<sup>2</sup> (1) of the Law no. 78/2000 is consumed when the perpetrator's action occurs, which may jeopardize the funds and the material resources of the general budget of the European Union or of budgets administered by it or on their behalf.

The offence of misappropriation of funds, provided by Article 18<sup>2</sup> (2) of the Law no. 78/2000 is consumed when the resources from the general budget of the European Union or from the budgets administered by it are illegally diminished.

The offence of misappropriation of funds, provided by Article 18<sup>2</sup> (3) of the Law no. 78/2000 is consumed when particularly serious consequences occur.

### **Procedural and forensic investigation aspects**

In case of committing the offence of misappropriation of funds. provided by Article 307 of the Romanian Criminal Code and the offence of misappropriation of funds, provided by Article 18<sup>2</sup> of the Law no. 78/2000, according to the provisions of Article 288 paragraph 1 of the Romanian Criminal Procedure Code, the competent criminal investigation bodies, the Prosecutor's Offices in addition to the County Courts, the National Anticorruption Directorate must be notified in the following ways: complaint or denunciation, by the documents concluded by other ascertaining bodies provided by law or notified *ex officio* (Moise & Stancu 2017, 204).

In case of committing the offence of misappropriation of funds provided by Article 307 of the Romanian Criminal Code the criminal investigation stage is carried out by the Prosecutor's Offices attached to the Courts. We also mention that, in case of committing the offence of misappropriation of funds provided by Article 18<sup>2</sup> of the Law no. 78/2000 the criminal investigation stage is carried out by the National Anticorruption Directorate from the Prosecutor's Office attached to the High Court of Cassation and Justice.

The jurisdiction to judge the offence of misappropriation of funds, provided by Article 307 of the Romanian Criminal Code and the offence of misappropriation of funds, provided by Article 18<sup>2</sup> of the Law no. 78/2000 belongs in the first instance to the Courts.

The special forensic techniques for investigating the offences of misappropriation of funds are found in the Romanian Criminal Procedure Code, both in Chapter IV, entitled *Special methods of supervision or investigation*, and in the classic criminal investigation acts, which are performed for the administration of evidence (Buzatu 2012, 289).

According to the provisions of Article 138 of the Romanian Criminal Procedure Code, the following are considered special methods of supervision or investigation, which are used in the investigation of the offences of misappropriation of funds: interception of communications or any type of remote communication; access to a computer system; video, audio or photography surveillance; location or tracking by technical means; obtaining data on a person's financial transactions; seizing, handing over or searching postal items; use of undercover investigators and collaborators; authorized participation in certain activities; supervised delivery; obtaining traffic and location data processed by providers of public electronic communications networks or providers of electronic communications services intended for the public (Buzatu 2013, 130).

The classic criminal investigation acts, which are carried out in the field of criminal investigation of the offences of misappropriation of funds for the purpose of administering evidence are the following: searches (home; body; computer; vehicles); picking up objects and documents; hearing witnesses, suspects or defendants; findings and expertises; flagrant; on-site research; re-enactment; supervision of bank accounts; preservation of computer data (Moise & Stancu 2017, 205).

The National Anticorruption Directorate is authorized to hold and use adequate means for obtaining, verifying, processing and storing information regarding the acts of corruption provided in Law no. 78/2000, with subsequent amendments, in accordance with the law. Any information with an operative value of another nature is immediately transmitted to the authorities empowered by law, for its verification and capitalization (Palmiotto 1994, 185).

The Anti-Fraud Department has an important role in the process of forensic investigation of the offences of misappropriation of funds, provided by Article 18<sup>2</sup> of the Law no. 78/2000, which represents an institution subordinated to the Romanian Government that acts on the basis of functional and decisional autonomy, independent of other public authorities and institutions. The Anti-Fraud Department ensures, supports and coordinates, as the case may be, the fulfilment of Romania's obligations regarding the protection of the European Union's financial interests, in accordance with the provisions of Article 325 of the Treaty on the Functioning of the European Union. We emphasize that the Anti-Fraud Department is the contact institution with the European Anti-Fraud Office within the European Commission, having in Romania the role of anti-fraud coordinator.

## Conclusions

We remark that the provisions of Articles 3 and 4 of the Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law and the provisions of Article 1 (a)(b) of the 1995 Convention on the protection of the European Communities' financial interests were transposed into the Article 307 of the Romanian Criminal Code and into the Article 18<sup>2</sup> of the Law no. 78/2000, which refer to the offences of misappropriation of funds.

We also highlight the role of the Anti-Fraud Department in the criminal investigation process of the offences of misappropriation of funds.

In accordance with the Article 325 of the Treaty on the Functioning of the European Union, DLAF ensures the protection of the financial interests of the European Union in Romania, as follows: coordinates, at national level, adopts legislative, administrative and operational measures to combat fraud and any illegal activity affecting the financial interests of the Union. These measures must be similar to those adopted to combat fraud affecting national financial interests; cooperate with the authorities of the Member States, the European institutions or other European financial institutions in order to protect the financial interests of the European Union; elaborates, in cooperation with other national institutions, and sends Romania's contribution to the Annual Report of the European Commission regarding the measures adopted for the implementation of the provisions of Article 325 of the Treaty on the Functioning of the European Union.

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