

PROCEDURAL AND METHODOLOGICAL ASPECTS REGARDING THE INVESTIGATION OF THE FRAUDULENT BANKRUPTCY INFRACTION

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ABSTRACT

The investigation of the fraudulent bankruptcy infractions implies the thorough knowledge of the penal procedural norms, because these infractions present a particular feature due to the way they are committed, extremely elaborated and sophisticated. The revealing of the bankruptcy infractions, the collection and administration of the evidences, the doers' identification and catching, the taking of the procedural measures and finally their holding responsible represent an activity that has to be carried on by observing the norms of the penal procedural law. The specialty authors pay more and more attention to the methodological elements regarding the criminalistic investigation of the infractions in the business domain, and it is talking about the „banditry of the business”.

§1. THE EVIDENCE ADMINISTRATION

Business is not always run by honest people, but mostly by dishonest people that make use of the law in order to get rich very fast. One of the infractions encountered in the practices of the penal juridical authorities is the fraudulent bankruptcy. The investigation of the fraudulent bankruptcy infraction implies a corresponding knowledge of the penal procedural norms. Just as with most of the infractions in the business domain, the fraudulent bankruptcy infractions presents a specific feature due to the way they are committed, extremely elaborated and sophisticated, based generally on a high technique and on knowing the weaknesses in the business law.

The revealing of the fraudulent bankruptcy infractions, the collection and administration of the evidences, the doers' identification and catching, the taking of the procedural measures and finally their holding responsible represent an activity that has to be carried on by observing the norms of the penal procedural law.

Establishing the existence of the penal conflict relation resulting from the committing of the fraudulent bankruptcy infraction gets some features determined by the way and the modalities used to commit this infraction. In many cases, the doers draw up false documents whose character is very difficult to be verified. Some other times, they conclude documents that are apparently legal, but that hide transactions defrauding the creditors. There are also cases when there are elements of foreign origin (foreign doers or documents made abroad). But, the cause that determines the greatest difficulties in the practice of the juridical authorities involved in the investigation of the infractions in the business domain is the existence of some huge quantities of accounting evidences and of some other documents that were drawn up for the purpose of „covering up” the committed infractions.

The specialty authors pay more and more attention to the methodological elements regarding the criminalistic investigation of the infractions in the

business domain¹ and it is talking about the „banditry of the business”². In the criminality theory, it is mentioned the possibility specific to the business domain that their punishable deeds are masked through complain. In this way it appears problems related to the precursory deeds that have the purpose of verifying the data held by the juridical authorities or of completing them in order to draw the conclusions corresponding to the beginning or ceasing of the penal pursuit. In many cases, it is needed accounting, graphic, criminalistic expertise that implies not only very well- trained human resources, but also very high expenses. A number of cases are notorious for their penal records that are based on tens and even thousands of volumes.

In order to avoid the beginning of the penal pursuit without the existence of enough elements that would reasonably lead to the conclusion that an infraction was committed and that the doer can be hold responsible, in doctrine, it was righteously suggested by the law the granting of some greater possibilities to the judicial authorities with regard to the drawing up of the documents precursory to the penal pursuit phase³.

One of the principles that especially has to be observed in the case of the infractions in the business domain is the principle of the efficiency, well- known with the bankruptcy infraction, in art. 148 of Law no. 85/2006. The fame in many cases is essential for the successful investigation of the infractions in the business domain, because the most important evidences, the debtors' documents, can be easily destroyed or hidden in order not to be found by the penal pursuit authorities.

The administration of the evidences in the domain of the business criminology seldom faces difficulties caused by: the involvement of some covering persons (influential persons from the political, economic or administrative point of view); trade agents that are in connection with the doers do not cooperate with the penal pursuit authorities for fear that their own illegalities might be revealed or because of the economic dependency; the complexity of the infractions (the large volume of documents, the large number of the participants, the existence of a rigorous organization etc.). After informing the penal pursuit authorities and carrying out the precursory deeds necessary for the investigation of the infractions in the business domain, if it is drawn the conclusion that an infraction was committed, the competent authorities will go forward with the procedural activity and will carry out other specific activities.

Next, it is noticed that the penal pursuit authorities need data or information that could help to solve the cases that have been reported. The data are given by the evidences. The evidences in the penal trial are factual elements with

¹ For the methodology of the infractions in the business domain, **E. Stancu**, *Tratat de criminalistică*, Ed. Actami, București, 2001, p. 613-640.

² **M. Le Clère**, *Manuel de Police Technique*, Ed. Police Revue, Paris, 1973, p. 1001; **E. Stancu**, quoted work, p. 613.

³ **I. Neagu**, *Drept procesual penal*. Tratat, vol. I, Ed. Global Lex, București, 2006, p. 525 and the next one.

informative relevance on the penal aspects of a penal trial⁴. According to art 64 of the Code of penal procedure, the evidence means through which it is found the factual elements that can serve as evidence are: the defendant's or the accused's statements, the injured party's, the plaintiff's statements and those of the person's civilly responsible, the witnesses' statements, the documents, the audio and video records, photographs, material evidence means, technical-scientific findings, the forensic findings and the expertise. Other evidence means or evidences illegally obtained have no relevance.

For the causes referring to the investigation of the fraudulent bankruptcy infractions, the expertise and the documents are the most important of the evidence means limitative stipulated by art 64 of the Code of penal procedure. Although these are encountered in most penal cases, we have in view the injured party's, the plaintiff's statements, those of the person's civilly responsible and the defendant's or accused's statements; these evidences do not usually have an important part. The defendant's or the accused's statements are very often misleading, because those that commit infractions in the business domain are people with experience in the relation with the state authorities.

The other parties' depositions are mostly subjective because these are mostly the source of the denunciations. We also mention that there are enough cases where the injured party makes use of penal procedural instruments in order to fix illicit problems of extra penal nature: for instance, certain disputes on the execution of some trading agreements. The witnesses' depositions are very important means of evidence within the fraudulent bankruptcy investigation, because in most cases the witnesses are objective and impartial⁵. In many cases that have as object the investigation of some infractions from the business domain, the witnesses are missing which means that the part of the purely technical evidences is very important. The evidences with documents, that through their content give shape to an act of thinking and will with relevance on the factual deeds or circumstances that enter the object of probation in a penal cause are very important in the domain of fraudulent bankruptcy. We have to mention that the documents that help to the finding of the truth in a penal case through their exterior aspect or due to the place where they were found are not considered documents, but evidence materials.

The minutes through which the competent authorities record findings, *ex propriis sensibus*, have a particular place within the evidence with documents in a penal trial. When we deal with a minute that does not reflect the personal findings of the public agent, but it records only the content of the witnesses' depositions, this is not considered a document as evidence means. In this case, the evidence means is represented by the witnesses' depositions recorded in a minute.

⁴ **I. Neagu**, quoted work, p. 357; **N. Volonciu**, *Tratat de procedură penală. Parte generală*, vol. I, Ed. Paideia, București, 1998, p. 331.

⁵ For the procedure of witness hearing and evidence value of the witnesses' statements, see: **N. Volonciu**, quoted work, p. 366 and the next one; **I. Neagu**, and the next one, p. 388 and the next one; **A. Ciopraga**, *Evaluarea probei testimoniale în procesul penal*, Ed. Junimea, Iași, 1979, p. 10.

Evidence means that is almost always present in the investigation of the infractions in the business domain is the expertise. An expertise type encountered in the causes that implies the investigation of the fraudulent bankruptcy infractions is the accounting expertise. Due to the special importance that they have in the evidence in the case of the investigations of the infractions in the business domain, the penal procedural law stipulates a series of rules that have to be observed when carrying out the expertise. As a rule, according to art 118 of the Code of penal procedure, the expert is appointed by the penal pursuit authorities or by the court of law. Each party has the right to ask that an expert recommended by it should take part to the carrying out of the expertise. When the penal pursuit authorities or the court of law order the carrying out of an expertise, they order a term on which the parties, as well as the expert should meet, whether this one was appointed by the penal pursuit authorities or the court of law.

On the set term, the object of the expertise and the questions to which the expert should answer are brought to the parties' and expert's knowledge and it is made clear that they can make any remarks with regard to these questions and that they can request their modification or completion. It is also brought to the parties' knowledge the fact that each of them has also the right to request the appointment of an expert recommended by them that should take part to the carrying out of the expertise. After the examination of their objections and of the requests made by the parties and experts, the penal pursuit authorities and the court of law draw the expert's attention to the term when the expertise is to take place and also that the parties take part to the carrying out of that expertise.

§2. SEARCH AND COLLECTING OF OBJECTS AND DOCUMENTS

A special situation in the criminalistic investigation of the fraudulent bankruptcy infraction is the collecting of objects and documents, because it is possible that certain objects and documents that can be used as evidence in the penal trial could be in the possession of some persons, cases when the juridical authorities have to collect them in order to use them at the solving of the penal causes.

The objects and documents that can be used at the finding of the truth can be divided into more categories, such as:

- objects and documents that used or were assigned to be used at the committing of an infraction. For instance, invoices, accounting books, shareholder register, correspondence, payment instruments, etc.;
- objects and documents that represent the product of the infraction. For instance, account statement or credit cards;
- objects and documents that bear traces of the infractions. For instance, forged documents;
- any other objects and documents that serve to the finding of the truth in the penal trial, such as those that bear digital traces or any other type of traces.

According to art. 96 of the Code of penal procedure, the penal pursuit authorities or the court of law have the obligation to collect the objects and documents that can serve as an evidence means in the penal trial. According to art. 97 of the Code of penal procedure, any person in whose possession it is an object or a document that can be served as evidence means is binding to present it and to hand it over as evidence to the penal pursuit authorities or to the court of law at their request. If the penal pursuit authorities or the court of law consider that even a copy of the document can serve as evidence, it will keep only the copy. In case the object or the document has a classified and confidential character, its presentation or handing over is made in conditions that should assure the keeping of the secrecy and confidentiality.

At the prosecutor's suggestion, during the penal pursuit, the court of law can order that any post office or transportation unit should hold and hand over the letters, telegrams and any other correspondence, or the objects sent by the defendant or accused or addressed to it, either direct, or indirect. If the requested object or document is not willingly handed over, the penal pursuit authorities or the court of law orders its forced collecting (art. 99 of the Code of penal procedure). The procedure of collecting the objects and documents is similar to that existing in the case of the search. The search is an investigation procedure that assures the acquisition of some evidences indispensable or unique for the solving of the penal cause. The procedure for the carrying out of the search is stipulated in art. 100-111 of the Code of penal procedure, and it could be body search, house search and search on vehicles.

§3. TAKING OF PROCEDURAL MEASURES

During the penal trial that has as object the holding responsible of some persons for having committed the fraudulent bankruptcy infraction, the juridical authorities can take certain procedural measures. The procedural measures are coercion institutions that can be ordered by the juridical authorities for the good carrying out of the penal trial and the assuring of the carrying out of the object of the actions exercised in the penal trial.

In the Code of penal procedure, many categories of procedural measures are regulated, as follows: remand measures, protection and safety measures; assuring measures; restitution of the objects and the recovery of the situation before the committing of the infraction.

As for the remand measures and the protection and safety measures, in the case of the fraudulent bankruptcy, these are only occasionally encountered, except for the obligation not to leave the locality and not to leave the country. But, on the contrary, the other procedural measures can be encountered more often in the penal trials that have as object the bankruptcy infractions, especially the insuring measures, that is levy and its two special forms: registration of mortgages and deduction. The insuring measures are taken during the penal trial by the prosecutor or by the court of law and consist of the unavailability by distaining upon the assets and the liabilities, for the purpose of the special

confiscation, of compensating the damages caused through the infraction, as well as the guarantee of the execution of the fine.

§4. INVESTIGATION DOCUMENTATION AND PLANNING

The beginning of the activity, with regard to the fraudulent bankruptcy investigation, is that of the documentation referring to the specific of the economic agent in connection with whom the infraction was apparently committed.

Given the fact that most of the fraudulent bankruptcy infractions are committed in connection with at least a trading company, it is considered in the specialty theory that before any other activity, the juridical authorities have to proceed to the documentation on the trading company where the infraction was committed and being able to record the following data⁶:

- nature of the company, and setting between production and trade, delivery conditions of the goods to the beneficiaries etc.;
- supplying model and places with raw materials; relations with the suppliers, discharge of the expenses etc.;
- conditions on which the internal financial control is carried out, the last verification and the taken measures;
- security system;
- the normative acts that regulate the activity of the company.

Of course, the documentation referring to the above- mentioned data has an orientative character and can be completed with other data based on the circumstances of the cause. Because the bankruptcy is not at present exclusively related to a trading company, in the case of other natural persons or dealers, the juridical authorities have to document by taking into consideration their particularities.

We notice that it is difficult to set a type frame, but it has to be taken into consideration the fact that the investigation in the business domain implies determination, patience, tenacity and insight. The juridical authorities have to take into consideration the fact that many of those that commit infractions in the business domain are clever, experimented, and rich and well- connected.

On these conditions, the planning of the investigations has a very important part, especially that the volume of work is very large and the problems that have to be solved are so many, and the complexity is so high. The investigation plan has the purpose to assure a judicious marking of the work, the setting of the priorities in carrying out some activities, the pursuit of the probation dynamics etc., within which it should be found all the problems that are to be set clear and the activities that have to be carried out for the elucidation of the circumstances when the infraction was committed.

⁶ Bercheșan V., Grofu N., *Investigarea criminalistică a infracțiunilor de evaziune fiscală și bancrută frauduloasă*, Ed. Little Star, București, 2003, p. 199.

One of the important problems in planning the investigation of the fraudulent bankruptcy infraction is the elaboration of the versions that can regard: the normative modality, participants, the modality and means of committing etc.

§5. METHODOLOGY OF THE OBJECT AND DOCUMENT VERIFICATION AND COLLECTION

In the case of investigating a fraudulent bankruptcy infraction, among the objects and documents that can be collected are also: the constitutive deeds of the legal entity and the potential additional deeds; certificates and operation approvals; the economic agent's records; titles that grant certain rights; shareholder/ associate registers; registers of the general assemblies; registers of the meetings and the deliberations of the surveillance, management and control authorities etc.

Some of the objects and documents necessary for the investigation of the infraction can be collected from the defendants or from certain authorities. For instance, certain documents, such as the constitutive deeds of the trading companies can be asked from the Trading Register Office. By observing the legislation in force, the judicial authorities can obtain the documents also from the credit institutions. According to art. 114 of Emergency Government Ordinance no. 99/2006 regarding the credit institutions and the adequacy of the capital, the credit institutions are bound to provide information regarding the nature of the banking secret, after the proceeding of the penal pursuit against a client at the request of the prosecutor or of the court of law or, if it is the case, of the penal pursuit authorities with the prosecutor's approval. According to art. 116 of the same normative act, the competent persons to request and/ or receive information of the nature of the banking secret are bound to keep their confidentiality and to use them only for the purpose for which it was requested or provided to them according to the law.

The collecting of the objects and documents has to be carried out prompt and by observing the procedural norms analyzed in the previous section.

§6. METHODOLOGY OF THE SEARCH CARRYING OUT

In many cases, the success or the failure of the investigation activity depends on the way the search is carried out and organized. In the case of the bankruptcy infraction, it is considered that the search has to have as a purpose⁷:

- the finding of the debtor's evidences;
- the finding of the documents that certify the placing of the assets in certain accounts or the placing of some goods in certain deposits, not registered in the debtor's documents;
- the finding of some documents out of which it results the giving away of the elements of assets. For instance, sale- purchase contracts, exchange, donation contracts, invoices, waybills etc.;

⁷ V. Bercheșan, N. Grofu, op. cit., p. 203; V. Bercheșan, *Cercetarea penală. Criminalistica – teorie și practică*, Ed. Icar, București, 2000, p. 272-284.

- the finding of some documents that were used at the committing of the infraction. For instance, tickets for commissioning raw materials and consumables, taking delivery minutes, documents certifying the double book-keeping etc.;
- the finding of some documents that could be connected to the infraction submitted for investigation. For instance, book notes containing certain data about the committing of the infraction, computer memories, credit cards etc.

The searches can be made both at the doers' residence, as well as at the residence of other persons with whom they have very close relations, as well as at the registered offices of the business partners of those under investigation.

§7. METHODOLOGY OF THE TECHNICAL- SCIENTIFIC FINDINGS AND OF THE EXPERTISE

The investigation of the fraudulent bankruptcy implies the carrying out of some expertise or technical- scientific findings. The expertise is a probation means very often used in the probation of the fraudulent bankruptcy. According to the conditions of the Code of penal procedure (art. 112-113), the technical- scientific findings can also be ordered when it is the danger that some evidence means cold disappear or that some factual situations could be changed and it is necessary the urgent clarifying of some facts or circumstances of the cause.

The technical- scientific findings are usually carried out by specialists or technicians that operate within or with the institution to which the penal pursuit authorities belong. It can be carried out also specialists or technicians that operate within other bodies. When, in order to clear some facts or circumstances of the cause for finding the truth, it is necessary the knowledge of an expert, the penal pursuit authorities or the court of law orders, at the request or automatically, the carrying out of an expertise.

The technical- scientific findings are expertise that can be ordered in the trials that have as object the investigation of the fraudulent bankruptcy. These can be:

- technical- scientific findings or graphical expertise;
- financial- accounting expertise.

The main objectives of the graphical expertise (generally of the hand writing) are: the establishing of the authenticity of the hand writing; the identification of the author of the hand writing; if the hand writing was or not an imitation; the age of the hand writing etc. The financial- accounting expertise has to answer questions, such as:

- establishing the turnover value of certain goods;
- establishing the persons that had the obligation to draw up or keep the insolvent debtor's evidences;
- establishing the value of the assets in the insolvent debtor's patrimony;
- establishing the value of the patrimony liabilities;
- establishing the fraudulent modalities that lead to the insolvency state;

- establishing the prejudice caused to the injured persons;

In doctrine, it is considered that the questions addressed to the expert should be clear, concrete, that they should contain all the data of the cause, be in a logical sequence and within the expert's competences. The expert does not have the competence to deal with the legal frame of the deed or other aspects regarding the applicability and interpretation of the law.

§8. TACTICS OF THE WITNESS HEARING

The domain of the persons that can be heard as witnesses in the trials regarding the investigation of some fraudulent bankruptcy infractions contain: employees of the insolvent debtor or of some business partners of this one; persons that appear in the debtor's documents or in other acts of this one (such as, the persons on whose names the fictive documents were drawn up, but without being accomplice to the committing of the bankruptcy); persons in the circle of those that factually and righteously managed or surveyed or controlled the debtor's activity that can not make payments; doers' business partners.

The witnesses have to answer questions such as:

- who and how embezzled, destroyed or forged the debtor's evidences;
- who and how hid the insolvent debtor's assets;
- who and how gave away the assets of the debtor now in insolvency;
- who and how determined, enabled or helped to the committing of the deed;
- what the value of the amount resulting from the fraudulent transactions is;
- if there are also other persons that know the details and circumstances of the cause;
- where the objects and documents that can help to the finding of the truth in the cause are etc.