

Contributions to the analysis of the offence of infringement provided in art. 38 of law no. 16/1995, as amended by law no. 187/2012 for the application of law no. 286/2009 on the criminal code

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Abstract

This study reviews the amendments made to Law no. 187/2012 for the application of Law no. 286/2009 on the Criminal Code to the offence of infringement of the topography of a semiconductor product regulated by art. 38 of Law no. 16/1995.

The author identifies the amendments and tries to convey the reasons for the amendment of the analysed offence. The connections of incriminations from the reviewed law with the laws related to the rights breached by the offence regulated by the special law are highlighted.

It should be noted that the study is circumscribed to the tangent judicial institutions mentioned in the Criminal code in force, for example, the reconciliation – the cause for removal of the criminal liability. The author reviews the doctrinal opinions in this field and conveys sensible opinions that, without being heuristic, open the way for fertile debates aimed to remove the ambiguities in the application of the incriminatory norms examined.

Keywords: *topography of a semiconductor product; infringement; days – fine system; reconciliation.*

1. Brief introductory statements. Object of the matter

The offence of infringement of the topography of a semiconductor product is regulated by art. 38 of Law no. 16/1995 on the protection of topographies of semiconductor products [1] hereinafter called Law. This offence was amended by art. 50 of Law no. 187/2012 for the application of Law no. 286/2009 on the Criminal Code.

Prior to this amendment, the content of the offence was: “Art. 38. (1) Within the meaning of this law, the unauthorized commercial exploitation or production of a protected topography or semiconductor product embedding a protected topography or a circuit element embedding such a semiconductor product, as far as said element still contains a topography, shall constitute the offence of infringement. (2) The acts mentioned under paragraph (1) shall be deemed to be considered as an infringement when committed after the date of publication of the topography registration in the National Register of Topographies and shall be punishable with imprisonment from 3 months to 2 years or with a fine from 10,000 to 30,000 lei. (3) The criminal action shall

be initiated ex officio. (4) For the prejudice caused to him, the owner shall be entitled to damages, according to the common law, and may require to the competent jurisdiction to order the seizing or destroying of the counterfeited products, as the case may be; said provisions shall also apply to the equipment used directly for committing the infringement offence.”

After the said amendment, art. 38 had the following content: “Art. 38. (1) Within the meaning of this law, the unauthorized commercial exploitation or production of a protected topography or semiconductor product embedding a protected topography or a circuit element embedding such a semiconductor product, as far as said element still contains a topography, if the act was committed after the date of publication of the registration of the topography with the National Register of topographies, shall constitute the offence of infringement shall be punishable with imprisonment from 3 months to 2 years or with a fine. (2) The reconciliation removes any criminal liability.”

By confronting these two incriminatory texts, we can easily find the amendments made by the law-maker. These refer to:

- The merger of par. (1) and par. (2) of the old regulation, the reformulation of the incriminatory text included in these paragraphs and of the punishment with fine;
- the removal of par.(3) regarding the circumstances in which the criminal action is initiated ex officio;
- the removal of par. (4) related to the fact that the owner of the protected topography is entitled, for the prejudices caused, to damages and may require to the competent jurisdiction to order the seizing or destroying of the counterfeited products and equipment used directly for committing the infringement offence;
- the introduction of a new paragraph – par. (2) – establishing a cause for the removal of the criminal responsibility, namely reconciliation.

Below we will analyse the amendments made to the incriminatory text and, in the end, we will draw a few conclusions.

1.1. Amendments to the offence of infringement. 2.1. A first amendment is, as shown, the merger into one paragraph of the first two paragraphs of the incriminatory articles and the reformulation of the punishment with the fine.

The last part of the amendment retains our attention, namely the reformulation of the punishment with the fine. Therefore, the formulation from the old regulation according to which the offence is punished with “imprisonment from 3 months to 2 years or with a fine from 10,000 lei to 30,000 lei” was replaced with: “imprisonment from 3 months to 2 years or with a fine”. The non-specification of the value of the fine in the new regulation is not accidental. The formulation adopted by the law-maker is consistent with the new system for establishment of the punishment with fine adopted by the current Criminal Code, namely the days-fine system [2].

This stipulates that the punishment with fine does not take the form of a sum of money, but the form of a number of days – fine, and the amount corresponding to one day – the fine will be established by the court of law between certain limits provided by the law [3]. With this mechanism of establishment of the fine rate, there is a better identification of the punishment applied, in terms of proportionality as well as in terms of efficiency [4], since the value of a day –fine is determined by taking into account the material situation of the person sentenced and its legal obligations towards its dependant persons.

The criminal code [5] stipulates that if the law stipulates the punishment of the fine alternatively with the punishment of imprisonment of no more than two years, as is this case, the special limits of days-fine are between 120 – 240 days of fine.

The criminal code [6] also stipulates that the amount corresponding to one day-fine is between 10 lei and 500 lei. Therefore, based on this data, after a simple calculation, it follows that in the case of the offence of infringement analyzed, the special limits of the punishment with fine may be between 1200 lei (120 days X 10 lei) and 120.000 lei (240 days X 500 lei).

We notice that compared to the previous regulation, the special lower limit of the fine was reduced (from 10,000 lei to 1,200 lei) while the special upper limit was increased (from 30,000 lei to 120,000 lei). Moreover, these limits, in certain conditions, can be increased with a third [7]. It applies when the aim of the offence was to obtain a material benefit, perfectly possible in this case, and the punishment provided by the law is only the fine or the court rules for the application of the said fine.

A special procedure applies when the individual sentenced to the fine punishment must execute this sentence. The procedure we refer to is regulated by Law no. 253/2013 on the execution of punishments, educational measures and other non-custodial measures ordered by the judicial bodies during the criminal trial [8]. Pursuant to art. 22 of the law mentioned, the person sentenced must pay fully the fine "within 3 months from the date the sentence becomes final and to communicate the proof of payment within 15 days from the execution of the payment to the judge delegated with the execution. When the sentenced cannot fully pay the fine within the legal term, the judge delegated with the execution, at the request of the sentenced, may dispose, by resolution, the breakdown of the fine settlement in monthly instalments, for a term of maximum 2 years. The breakdown decision shall contain: the sum of the fine, the number of monthly equal instalments of the fine breakdown and the deadline of payment. If the fine punishment is executed by the sentenced, fully or partially, within the legal term, the delegated judge shall inform the court of execution. This court shall order the following measures:

- a) the execution of the fine by non-remunerated community work, unless the sentenced cannot work, for health reasons, if the non-execution is not attributed to the sentenced;
- b) the replacement of the fine with imprisonment – if the non-execution is not attributed to the sentenced and he/she does not agree to provide non-remunerated community work;
- c) the replacement of the fine with imprisonment – if the non-execution is not made in bad faith.

If the sentenced considers that the execution is not imputable to him/her, the delegated judge can inform the court before the expiry of the deadline for the settlement of the fine. The community work shall be provided within 2 years from the definitive decision of execution of the fine and can terminate by payment of the fine corresponding to the non-executed fine-days.

The matters conveyed regarding the fine punishment are valid when the active subject of the offence of infringement is an individual. When the active subject of the

offence is a legal entity, then the fine punishment is subject to other special regulations set out in the Criminal Code.

In the second circumstance, the fine punishment is also determined by the days-fine system but the number of fine-days differs as well as the fine-days amount [9]. Therefore, the amount corresponding to one day – fine is between 100 and 5,000 lei [10], and the special limits of fine days (if the offence we review is committed by a legal entity) are between 120 and 240 fine-days [11]. Consequently, by multiplying the amount corresponding to one day of fine we obtain the special limits of the fine: 12,000 lei (100 lei X 120 days of fine) the lower limit and 1,200,000 lei (5,000 lei X 240 days of fine) the upper limit.

Whilst if the infringement was committed by a legal entity with the purpose of obtaining a patrimonial benefit, which is customary in most cases, since we are talking about a legal entity, whose purpose is to obtain profit, the special limits of the days of fine can be increased with a third, but not exceeding the general maximum of the fine [12].

In practice, obstacles can emerge, sometimes insurmountable, when there is the issue of execution of a criminal fine. This is the reason why we present below the legal provisions aimed to provide solutions to such situations. We refer to Law no. 253/2013 on the execution of punishments, educational measures and other non-custodial measures ordered by the judicial bodies during the criminal trial that we have already referred to. The execution of the punishment of criminal fine applied to legal entities is regulated by art. 25 of this law. By the meaning of the said law, the legal entity that the fine is applied to must fully settle the value of the fine within 3 months from the date the criminal resolution becomes final and to communicate to the judge delegated with the execution, within 15 days from the date of settlement, its proof.

If the legal entity cannot fully pay the fine within the legal term (3 months), the judge delegated with the execution, at the request of the legal entity, can order, by decision, the breakdown of the settlement of the fine in monthly instalments, for a period of no more than 2 years. The breakdown decision must specify: the value of the fine; the number of monthly equal instalments of breakdown of the fine and the deadline for payment.

Where the deadline for full settlement of the fine or of a monthly instalment is not observed, the provisions of G.O. no. 92/2003 on the Fiscal procedure code shall apply. In this case, the tax executors must inform the judge delegated with the execution, on the date of full execution of the fine, that the payment was made and to convey any circumstance that might prevent the execution [13].

2.2. The second amendment made to the offence of infringement of the topography of a semiconductor product refers to the removal of the paragraph stipulating that the criminal action shall be initiated *ex officio*.

The reason for removing this specification is given by the circumstance that as long as it is regulated by the principle of official nature of the Romanian criminal trial, the preservation of the removed provision would have been superfluous. Therefore, art. 3 par. (2) of the Criminal procedure code stipulates that judicial functions are initiated *ex officio*, unless it is otherwise regulated by the law.

Similarly, pursuant to art. 7 par. (1) of the Criminal procedure code, the prosecutor is obliged to initiate and to exercise the criminal action *ex officio*, when there is evidence pointing to an offence committed and there is no legal cause of prevention. Therefore, the rule stipulating that the criminal action can be initiated *ex officio* for every offence would have been a stereotypical, irrational measure that would have uselessly burdened the incriminatory texts. Only the exceptions to this principle are explicitly mentioned in these offences.

2.3. The third amendment of the offence aims at the removal of par. (4), regarding the circumstance that the owner of the protected topographies shall be entitled to damages, for the prejudices caused, and may require to the competent jurisdiction to order the seizing or destroying of the counterfeited products and of the equipments used directly for committing the infringement offence.

This paragraph was also removed from the incriminatory text precisely to avoid the redundant repetition of a similar provision. For instance, the entitlement to damages of the damaged person is regulated by art. 1381 of the Civil Code. Pursuant to this text of law, any prejudice gives the right to damages, a right that emerges from the date of the prejudice, although this right cannot be immediately exploited.

Moreover, according to the Criminal Code [14] the goods produced as a result of the act committed and the goods used, in any manner, or meant to be used for committing an act set forth by the criminal law are subject to seizing. The law also regulates the manner of execution of the seizing (special and external) and the destruction of the seized goods [15].

2.4. Finally, the last amendment aims to insert in the incriminating text a new paragraph - par. (2) – by which the criminal liability for the offence of infringement of a protected topography can be removed by reconciliation.

This insertion is more favourable for the suspect or person charged with the offence, since, in the old law, the criminal liability for infringement of the topography could not be removed by reconciliation.

Moreover, as regards the reconciliation, the case that removes the criminal liability, a few considerations must be retained. The first one refers to the fact that the institution of reconciliation is incidental only for offences for which the initiation of the criminal proceeding is made *ex officio* and only if this is explicitly stipulated by the incriminatory text. These conditions are fulfilled by the analysed offence.

The second matter related to the reconciliation refers to the formulation of par. (2) of the analysed offence, a formulation related to the institution of reconciliation. The formulation “Reconciliation removes criminal liability”, is correct as it appears in the amended legal text or the law-maker should have adopted the phrasing “reconciliation of the parties (s.n. – B.F.) removes the criminal liability”?

Is it justified the absence of the term “parties” from the content of the regulation or is it an error of the law-maker? The answer is that the phrasing of the incriminatory text is correct, since it is compliant with the provisions of the Criminal procedure code in the matter of the parties of the criminal action. Therefore, pursuant to art. 32 par. (2) of the Criminal procedure code, the parties of the criminal proceeding is the defendant, the public party, and the publicly liable party. We notice that the damaged party is not part of the criminal proceeding. However, the reconciliation within a criminal proceeding occurs between the suspect or person charged and the damaged party.

Here is why the correct phrasing is “the reconciliation removes any criminal liability” and not “the reconciliation of the parties removes any criminal liability”, the

damaged party while not being part of the criminal proceeding is entitled to be subject to the reconciliation: *Quod erat demonstrandum*.

The third matter is that in order for the reconciliation to be valid, it must be complete, unconditional and final. Therefore, the criminal proceeding must completely end with a reconciliation, without any condition and irrevocably .

Finally, if a legal entity has committed the offence of infringement of protected topographies, the reconciliation with the damaged person does not mean also the reconciliation of the latter with the individuals who participated in the offence. The reconciliation is made by the authorized representative of the legal entity or, in its absence, by a chosen or appointed attorney. If the legal entity and its authorized representative are suspects or charged, the damaged party (the owner of the topography) can reconcile either with the legal entity or only with its statutory representative, or with both infringers. The reconciliation with the legal entity is made with the chosen or appointed attorney, on account of the legal entity, and the reconciliation with the authorized representative of the legal entity is made on its own behalf.

3. A few conclusions

The amendments made to the offence of infringement of a protected topography regulated by art. 38 of Law no. 16/1995 are welcome. They are part of the steps for which legal specialists plead [16], the simplification and increase of the efficiency of law. The simplification of regulations contributes to the removal of the excessive and redundant formalism of laws to ensure the efficient implementation.

References:

- [1] Republished in the Official Gazette of Romania, Part I, no. 824 of October 6, 2006. The republication was made in accordance with art. III of Law no. 337/2005 for the amendment and supplementation of Law no. 16/1995 on the protection of the topographies of integrated circuits, published in the Official Gazette of Romania, Part I, no. 194 of December 5, 2005 and the texts were renumbered.
- [2] The days-fine system was adopted in the Austrian, Finnish, German, Swedish laws etc.
- [3] See art. 61 of the Criminal Code.
- [4] See C. Voicu, A. S. Uzlău, R. Moroşanu, C. Ghigheci, Noul Cod penal. Ghid de aplicare pentru practicieni, Editura Hamangiu, Bucureşti, 2014, p. 102.
- [5] See art. 61 par. (4) let. b) Criminal Code.
- [6] See art. 61 par. (2) Criminal Code.
- [7] See art. 61 par. (5) Criminal Code.
- [8] Published in the Official Gazette of Romania, Part I, no. 513 of August 14, 2013.
- [9] A se vedea art.137 Cod penal.
- [10] A se vedea art.137 alin. (2) Cod penal.
- [11] A se vedea art.137 alin. (4) lit. b) Cod penal.

[12] The general maximum value of the fine is 3,000,000 lei (5000 lei X 600 days of fine). See art. 137 par. (2) 2nd thesis of the Criminal Code

[13] See L. V. Lefterache, Răspunderea penală a persoanei juridice, în G. Bodoroncea, V. Cioclei, I. Kuglay, L. V. Lefterache, T. Manea, I. Nedelcu, F.-M. Vasile, Codul penal. Comentarii pe articole, Editura C. H. Beck, București, 2014, p. 305.

[14] See art. 112 par. (1) let. a) and b) of the Criminal Code.

[15] See art. 574 of the Criminal procedure code.

[16] See the Romanian Academy, „Acad. Andrei Rădulescu” Legal Research Institute, Simplification – an imperative of modernization and improvement of the quality of law, Communications presented at the Scientific Session of the Institute for Legal Research Institute, April 17, 2015, Bucharest.