Jurnalul de Studii Juridice

Year XIV, No. 1-2, June, 2019, pp. 105-110

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DOI: <https://doi.org/10.18662/jls/45>

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Acquittal Solution. Unauthorized Reproduction of Computer Programs on Computation Systems

Calina Andreea GARDIKIOTIS¹

Abstract

By virtue of art. 396 paragraph 5 of the Criminal Procedure Code as related to art. 16 paragraph 1 letter c of the Criminal Procedure Code, the Appeal Court shall hereby acquit the defendant S.C. F. S.A. for the commitment of the crime relating to “unauthorized reproduction of computer programs on computation systems”, which is stipulated under art. 139 index 9 of Law no. 8 / 1996, as republished. The Court shall hereby deny the civil action filed by the civil parties Microsoft Corporation and Autodesk Incorporated.

Convicting the defendant S.C. F. S.A. cannot be done based upon suppositions and presumptions, instead it has to be based on certain and solid proof of guilt, which is missing within the present case file.

The prosecutor’s office has failed to conduct one complete and effective investigation within the meaning of collecting evidence able to prove, beyond reasonable doubt, the actual charges brought against the defendant.

The Court, in the absence of any certain and material evidence regarding the installation and use of the 14 design program of “AUTOCAD” range, belonging to Autodesk Incorporated, and of one Windows 7 Ultimate program belonging to Microsoft Corporation, may not engage the criminal liability of the defendant S.C. F. S.A., and the acquittal solution issued by the court of first instance is legal and grounded.

Keywords:

Acquittal solution; lack of solid proof of guilt; criminal liability of a legal entity.

The Defendant SC F. S.A. has been sent to trial, by virtue of the indictment from 16.06.2016 drawn up by the Prosecutor’s Office attached to Barlad Court within the case file no. 3327 / P / 2012, for the crime regarding the *unauthorized reproduction of computer programs on computation systems*, as stipulated under **art. 139 index 9 of Law no. 8 / 1996 regarding copyrights and related entitlements**, consisting of the fact that during the period 2007 – 2012, within the process of accomplishing its object of

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activity, the said company has installed and used for profit making purposes, without holding the due legal licenses in force, 14 design programs of the “AUTOCAD” range, belonging to Autodesk Incorporated, as well as one Windows 7 Ultimate programming belonging to Microsoft Corporation.

The court of first instance has ruled in favor of the acquittal of the defendant for the aforementioned crime (which is currently regulated under art. 195 of Law no. 8 / 1996, as republished in 2018, with the renumbering of the relevant articles), finding that the incidence belongs to the dispositions of art. 16 paragraph 1 letter c of the Criminal Procedure Code – *there is no evidence that a person has committed the crime.*

Having reviewed the entire evidence duly procured within the case file, the Appeal Court finds that the court of first instance has issued one legal and grounded solution, both in terms of the criminal law and the civil law as well.

The Court shows that, although the theoretical arguments brought by the prosecutor’s office in terms of the grounds for the appeal regarding the circumstances under which one may engage the criminal accountability of a legal entity, are fair and correct in principle, yet in the present case file, the same cannot fully apply given the specificity of the criminal charge brought against the legal entity – defendant (a crime on intellectual property), on the one hand, and the gaps of the criminal investigation conducted by the prosecutor’s office, on the other hand.

Thus, the primary obligation in terms of a legal entity within the process of running its business activity, shall be the obligation of the criminal prosecution body to conduct one full and complete investigation subject to the charges it files.

Whereas, within the case file subject to trial, the defendant S.C. F. S.A. is charged for having installed, without holding the due legal licenses in force, 14 design programs of the “AUTOCAD” range, belonging to Autodesk Incorporated, as well as one Windows 7 Ultimate program belonging to Microsoft Corporation, which it has also used for the purpose of accomplishing its object of activity (installing industrial machines and equipment)

In terms of the installing activity, without holding the legal licenses, for the 15 programs, the Court finds that the prosecutor’s office has failed to identify the persons having installed such programs on the computers belonging to the defendant S.C. F. S.A. Barlad or the persons based on whose orders and instructions the same have been installed by one or several such individuals, even if unidentified.

In the absence of identifying any such individuals, the prosecutor’s office has also failed to explain if and / or how exactly, following the

installation of such programs, the defendant legal entity, by its due representatives, has agreed upon the activity relating to the installation of such programs without holding a due license to that end.

It is true that the engaging of the criminal liability of a legal entity is not conditional upon the engaging of the criminal accountability, prior to, concomitant with or subsequent to the one of the natural person who is directly guilty of having committed the material deed, under the stipulations of art. 19 index 1 of the Criminal Code from 1969 (art. 135 paragraph 1 of the new Criminal Code), namely within the process of accomplishing the legal entity's object of activity, or to the latter's best interests or on its due behalf. However, in order to engage the criminal liability of a legal entity it shall be necessary that in-between the natural person's activity and the legal entity's will, by the latter's due representatives, there is one certain connection. Establishing such certain connection has to be made on evidence basis.

Just as also found by the court of first instance, the Appeal Court finds that within the present case file there is no evidence bringing proof as to the fact that it has been the result of the legal entity's order or that the latter has agreed upon one or several natural persons having or not a legal connection with the defendant legal entity, the latter has initiated the installation of 15 programs that the defendant held no legal licenses for on the 18 computers having been checked upon conducting the IT investigation.

In the absence of any evidence providing the court with an opportunity to check if the license – free installation of the programs (which is a certain fact having been proven in the case file), has been carried out with the due will or permission of the defendant legal entity, it shall not be possible to engage the criminal liability of the legal entity since one has failed to cumulatively meet the conditions for the latter's criminal liability.

Given the lack of evidence, one may establish the connection between the individuals having materially installed these programs, who have not yet been identified, and the will of the legal entity subject to the activity of such unidentified individuals, so that one can assess if such activity aimed at accomplishing the legal entity's object of activity or it has been actually done to the latter's best interest or on its due behalf.

The same goes also in terms of the activity relating to the use of license – free programs within the process of accomplishing the defendant legal entity's object of activity.

The court considers that the prosecutor's office has failed to submit any evidence regarding the material use by the defendant S.C. F. S.A. of the

15 license – free programs within the process of accomplishing its object of activity.

There is no material result deriving out of the case file as to which particular projects belonging to S.C. F. S.A. have been accomplished based upon such programs, one mentions no such project whatsoever, the file includes no writs containing any such projects.

Consequently, the Appeal Court shall hereby find that the prosecutor's office has only presumed that the defendant has used such programs, as held without a license, within the process of accomplishing its object of activity by the mere fact of the same being installed on its computers.

Whereas, the material element of the crime stipulated under art. 139 index 9 of Law no. 8/1996, in its alternative method of an unauthorized use of the programs, means the conducting of material actions of such use.

Convicting the defendant S.C. F. S.A. cannot be done based upon suppositions and presumptions, instead it has to be based on certain and solid proof of guilt, which is missing within the present case file.

The court also finds that within the process of running the criminal investigation, the legal representative of the legal entity S.C. F. S.A., who during the reference period 2007 – 2012 has held the position of a deputy manager, namely general manager, has failed to be questioned and heard in order to be asked for material explanations as to the charges brought against the legal entity. The latter has been heard for the first time by the court of first instance on 23.05.2017, 10 years back from the presumed onset of the criminal activity.

On such hearing, the witness H. T. has submitted the Decision no. 31/06.01.2009 to the case file, which decision he has issued in his capacity of general manager of S.C. F. S.A., by which he warned the company's employees on the fact that they did not have the agreement on the part of the plant's management to use IT programs that have no due license.

Within the grounds for the appeal, the prosecutor's office has claimed that the relevance of this address has been misinterpreted by the court of first instance, being taken as such, without being reviewed in relation with all the evidence procured within the case file. The prosecutor's office has also claimed that the issuance of one such internal disposition by which the employees were forbidden to use hacked programs without a due license in force stands for no proof as to the due diligence and efforts that the defendant company was under the obligation to make, since basically, on the one hand, it stands for an indication of the fact that one had knowledge of the said license – free programs being installed and used without a due license to that end, and on the other hand, because one such decision,

containing warnings and notifications, does nothing else but “transferring” the guilt and accountability to the company’s employees.

The court is unable to find such defense whereas the strictly procedural framework that the court has been invested with in terms of the deed imputed to the defendant S.C. F. S.A.

Decision no. 31 / 06.01.2009, as issued by the witness H. T. in his capacity of general manager of S.C. F. S.A., fails to have the value of a certain piece of evidence subject to the criminal charge within the present case file, instead it only provides a hint within the meaning that the company’s general manager issued a disposition, having more or less legal value and consistency, in terms of the issue relating to the use within the company’s business activity of those IT programs that the company appears not to hold valid license for.

Not even the indictment procured within the trial stage of the appeal has been able to remove the presumption of innocence of the defendant S.C. F. S.A.

More witnesses have been heard during the appeal, but not no such witness has been able to supply any details, material elements of fact regarding the criminal charge brought against the defendant S.C. F. S.A. The witnesses having been heard have told the same things they have also told before the court of first instance.

None of the witnesses having been heard have supplied any details on the individuals who might have installed the license – free programs considered within the present case file, or who would have issued the relevant instructions to this end, or who would have agreed, following their installation, upon the same being used for the purposes of accomplishing the company’s object of activity, so that one can establish a certain connection in-between these individuals and the accused company.

These witnesses have also failed to provide any information on any material projects that the defendant company would have accomplished by using the license – free programs, so that one can bring proof to the action of using the same within the process of accomplishing the legal entity – defendant’s object of activity.

The prosecutor’s office has failed to conduct one complete and effective investigation within the meaning of collecting evidence able to prove, beyond reasonable doubt, the actual charges brought against the defendant.

Thus, the Court shall hereby draw the conclusion that, in the absence of any certain and material evidence regarding the installation and use of the 14 design program of “AUTOCAD” range, belonging to Autodesk Incorporated, and of one Windows 7 Ultimate program belonging

to Microsoft Corporation, one may not engage the criminal liability of the defendant S.C. F. S.A., and the acquittal solution issued by the court of first instance is legal and grounded.

In terms of the solution relating to the defendant's being acquitted, the court has accurately and duly denied the civil action of the civil parties Microsoft Corporation and Autodesk Incorporated.

REFERENCES:

The Decision no.804/16.11.2018 of the Court of Appeal from Iasi, Case file No. 4025 / 189 / 2016 , unpublished decision