UDC 336.74(043.2)

Korošec D., Doctor of Law, Full Professor
Šetinc M., Faculty of Law, University of Ljubljana, Slovenia

OBTAINING SERVICES BY DECEPTION

It is undoubtedly safe to state that dishonest obtaining of another's services is - at least in contemporary criminal legislatures and theoretical works - not given a proper amount of attention. Especially in contrast to occasional hairsplitting attentiveness, given to other criminal acts against property, such as theft, embezzlement or fraud, this legal gap becomes even more obtrusive. That being said, it should also be noted that the so-called theft of services is not a rare occurrence in everyday life, one that would only appear at irregular intervals in time. Yet the absence of empirical background makes this statement wanting. Therefore, one should not be at least surprised that the main argument in favor of this ominous gap in criminal legislatures around the world refers to the non – significance of social harmfulness, which theft of services allegedly represents.

We shall closely examine the characteristics, postulated by the German criminal legislature (StGB) and confront them with basic principles of the modern criminal law, as well as with other possible legislative solutions. Questions regarding to the (non)significance of social harmfulness will also constitute an integral part of our thought.

It is important to understand the difference between theft of services and fraud, due to some significant similarities between these criminal acts. This is primarily explicitly exhibited in the German criminal legislature (StGB), which incriminates theft of services within the chapter titled "Betrug und Untreue". It is therefore necessary to conclude that pursuant to StGB, both fraud and theft of services are solely crimes against the wealth of another. The offender, who dishonestly obtains the services of another, may as well harm his privacy or intellectual rights, yet the German legislature makes it clear that the discussed dimension of the perpetrator's act shall not fall within the scope of the incrimination of theft of services.

A probable reason for the approach described above may be derived from the conclusion, that plenty, if not a majority of theoretically possible examples of dishonest acquisition of another's services may be qualified as fraud. It should bear no difficulty whatsoever to imagine a costumer, who (dishonestly) fails to disclose his actual intentions about paying for the e.g. hairdresser's services.

The divergence between both criminal acts however principally lies both in the offender's act, as well as in the prohibited consequence of that act. While the former is intrinsic to the nature of the theft of services as an independent crime (it is wise to emphasize once more that this statement is not applicable to the mere act of an dishonest acquisition of another's services), the latter is more

dependent on the rationale of the concrete legislator.

The offender of the discussed criminal act surmounts the obstacles, which prevent free access to the area where the service is to be utilized. It should be evident that he makes no false representation of any objective circumstance at any instance and that it is therefore impossible to qualify his act as fraud. Surmounting certain obstacles is therefore an integral part of the discussed criminal act, as is their sole presence. It follows that their absence makes it objectively impossible for the offender to commit the theft of services. On the other hand, the perpetrator's failure to acknowledge the existence or even the mere meaning of the obstacles excludes his criminal liability, due to the absence of fault.

The scope of the incrimination and the questions regarded to its prohibited consequence are, as mentioned above, in a discretion of the concrete legislator, who is confined exclusively by the main principles, embodied by the contemporary criminal law. The incrimination of the discussed crime in StGB for instance consists of one manifested and one non-manifested act – the offender commits the criminal act when he surmounts certain obstacles with an intent to avoid payment for the service. Two conclusions, which are easily derived from the previous statement, are: 1) the dishonest utilization of another's services doesn't fall within the scope of incrimination and 2) it is not necessary that the harm on another's wealth is manifested for the criminal act to be committed. Therefore, in accordance with StGB, theft of services merely endangers - not harms - the wealth of another.

It would mean an impossible task to ponder about all the possible reasons, which lead the German legislator to incriminate the discussed crime in the described manner. It should however be clear that the incrimination as it is, flawlessly reflects both objective and subjective dimension of the criminal act. It is also simultaneously pursuant with a political standpoint of making the criminal prosecution as swift as possible, while legitimate at the same time. A requirement for an infringement on another's wealth for the criminal act to be committed, or in other words, an engulfment of the utilization of the service to the scope of incrimination would be futile, yet theoretically possible.

As already stressed above, the good, safeguarded by both of the discussed incriminations is that of another's wealth. However, one must not substitute the good, shielded by the incrimination with its object. The object of theft of services is, as opposed to that of fraud, a bit narrower than the good, which it endangers. Pursuant to abstract claims that the service must be regularly offered on the market and that it needs to be one that recipient provides payment for, StGB taxonomically lists various services and events which fall within the scope of the incrimination. These are: services of a machine, telecommunications network serving public purposes, means of transportation, event and institution. A small portion of simplification enables one to distinguish between three forms of the object of the criminal act, as postulated by StGB: a service, an institution and an event.

It should suffice to define service as a work or a job, completed for someone who, in return, provides a payment (e.g. a drive with a bus). An event on the other hand is characterized by limitation in time, public nature and a feature of artistic or cultural value (e.g. a show in the opera). Lastly, an institution is described as a broad surface, which consists of lined up objects or persons (e.g. parking lot).

Within the classification of diverse forms of services, one should bolster his attention regarding services of a machine, since its specific type can be of paramount importance for the correct qualification of the offenders act.

German literature is attentive in discerning between machines, which offer anything of material nature, machines, which offer services, and machines, which share characteristics of the first two types. It becomes apparent that it is impossible to commit theft of services by taking advantage of a machine, which offers certain objects in return for a provision of payment. In such a case, it is an object that takes the position in the forefront and not a service, which may be viewed merely as means for passing the object to the recipient. A perpetrator therefore commits a crime of theft or one of its special or qualified forms.

Another quintessential example for the vital importance of machine's features for a proper qualification of the offender's act is to be found in machines, which offer telecommunication services. Slovenian criminal legislature is – in this consideration – unique, for it establishes a fiction, which states that *"movable property shall mean any form of energy generated or accumulated for the purposes of lighting, heating, radiation, drive, locomotion or transmission of voice, picture or text across distances".* Whosoever takes advantage of such a machine, due to this fiction commits a dishonest acquisition of another's movable property, and therefore the crime of theft. German legislature is on the other hand unfamiliar with the types of approach described above, and by doing so incriminates the discussed act within the incrimination of theft of services.

The divergence with fraud is once again worth stressing in light of a comprehensive display of boundaries between theft of services and other crimes. For in the context of public transport, whether individual or collective, a dishonest acquisition of another's services by inducing an error in another human being comes in play once more. It is a necessity to point out that if a control of the access to a certain public vehicle is of an objective nature, a commitment of theft of services is – pursuant to legal demands – entirely possible. However, if the control of proper using the vehicle is carried out by a subject, the offender would commit theft of services only so far as he would not make a false representation of a certain objective fact and would therefore induce an error on the supervisor.

We should conclude with encompassing circumstances, which may accompany the commission of theft of services in praxis and due to which the discussed crime may represent a higher degree of social harmfulness (aggravating circumstances). It is also sensible at this instance to point out that

the degree of harmfulness, which the crime of obtaining services by deception bears is at least as high as that of larceny or misappropriation, when the value of the stolen or misappropriated property is of low value. This ascertainment undoubtedly speaks in favor of incrimination of theft of services within contemporary criminal legislatures around the world.

As already noted above, the discussed crime is, pursuant to StGB, committed when the offender surmounts certain obstacles and simultaneously acts with an intent not to provide a payment for the service. His criminal act beyond question bears a higher degree of social harmfulness when he 1) surmounts larger obstacles, 2) fails to provide a payment of a higher value or 3) utilizes a service or attends an event of unique cultural value. The significance of social harmfulness is also related to the nature of a certain incrimination, for a criminal act bears a less significant portion of social harmfulness if its perpetrator merely endangers the good of another. It therefore follows that the theft of services is, in accordance with StGB, less harmful. Yet the logical basis of the mentioned approach regarding the discussed incrimination can hardly be refuted, as has already been elaborated above.

Incriminating the act of surmounting the obstacles of a larger nature as an aggravating circumstance is a legislative approach, most frequently associated with the crime of (grand) theft. It is however on solid grounds to state that the previous solution may also be applicable to theft of services when searching for its potential aggravated circumstances. Certain obstacles may bear the connotation of a larger nature due to their physical size or height, their complexity or their numerousness. One would be sensible when accentuating that defeating the barriers with one of the stated features undoubtedly represents a higher degree of social harmfulness, for the exertion of the perpetrator, invested in the commission of the criminal act, is via facti more considerable.

The second and the third scale of determining the nature of the obstacles, which the offender surmounts, are intrinsically intertwined. The unique cultural value may be namely reflected in the height of the payment, which a potential recipient of the service is to provide. At any rate, the criteria of property value is certainly within the most commonly featured ones when specifying the aggravated circumstances of the crimes against property or commerce. Therefore, no reason for the legislator to intentionally overlook it when incriminating the theft of services is to be found. In addition, there should be no reluctance to postulating the described scale, despite the fact that the offender merely endangers the wealth of another. The actual, harmful nature of his act and the efficiency of the criminal prosecution should not be put aside.