



The Constitutive Content of the Crime of Refusal or Evasion from Collecting Biological Samples According to the New Criminal Code

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Abstract: The purpose and the objectives of the research consist of examining the constitutive content of the crime of refusal or evasion from collecting biological samples according to the New Criminal Code, thus presenting some recent examples of judicial practice that may be applied in terms of new regulations imposed by the entry into force of the New Romanian Criminal Code. The research results consist of examining the constitutive content referring to judicial practice, and highlighting the elements of distinction between the two regulations. The study can be useful for both theorists and practitioners of criminal law, and to any physical entity.

Keywords: the New Romanian Criminal Code; judicial practice; criminal law

1. Introduction

According to the Romanian law the offenses against traffic safety on the public road were not provided in the criminal codes, being mentioned in some special laws with criminal provisions.

Until the entry into force of the New Criminal Code, these offenses were provided in article 85-87 and 89-94 in G.E.O. (*Government Emergency Ordinance*) no. 195/2002, republished, with subsequent amendments.

With the entry into force of the new Criminal Code, the offenses of the special law were repealed, their contents being taken, with some modifications and provided in Chapter II (with the same marginal title) Title VII entitled “Crimes against public safety”.

The offense whose constitutive content is under review is provided for in article 337 of the New Criminal Code, its legal content being substantially altered, compared to the old law.

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2. The Current Criminal Code in Relation to the Old Law

The examined offense provided for in article 337 of the New Criminal Code has no correspondence in the Criminal Code of 1969; it was taken from the Government Emergency Ordinance no. 195/2002, republished.

This offense, without a marginal title was given in a different wording, in the provisions of article 87 paragraph (5) of the normative document referred to above.

After a comparative examination of the legal content of the two offenses there can be identified some elements of differentiation between the two regulations.

Firstly, we notice that in the New Criminal Code, in article 337, the offense from article 87 paragraph (5) G.E.O.no. 195/2002, republished, is called marginally “refusal or evasion from collecting biological samples”, a name that does not appear in the text of the previous law, the name being inspired from the legal content of the offense.

Besides the difference regarding the marginal name, we mention the following:

- within the New Criminal Code the active subject of the offense must be the driver of a vehicle for which the law provided the compulsoriness of owing a driving license, while the old law, the active subject of the offense was the driver of a vehicle or tram; it appears that in the New Criminal Code it has been expanded the scope to vehicle drivers active subjects, being here included those of cars and trams, being considered by the legislator as vehicles;
- in the New Criminal Code it is provided for the phrase “or in the presence of other psychoactive substances”, which replaces the phrase “in the presence of drugs, products or substances with similar effects”; the legislator of the New Criminal Code simplified the way of committing the crime, a positive issue, in our opinion, in accordance with the new European guidelines in the field;
- in the New Criminal Code, it is no longer provided the method of refusal for testing the exhaled air, as stated in the previous law, the legislator thus maintaining the orientation for determining the concentration of alcohol or other psychoactive substances only by scientific evidence, an also positive aspect, in line with modern European legislation in the field;
- in the New Criminal Code there are provided as normative ways the refusal or evasion actions, while the previous law in addition to these two methods it is

provided also the resistance; we believe that this change is beneficial, as the resistance can be interpreted as refusal;

- in the New Criminal Code it was replaced the term as “biological evidence” with the “biological samples”, the adopted solution being in our opinion as a positive one;

- in the New Criminal Code the penalties provided for are imprisonment from one to five years, while in the previous law the penalties are imprisonment from 2-7 years; we find a reduction within the minimum and maximum limits of prison sentences.

As elements of similarity of the contents of the two offenses, we specify the following: keeping this offense in the new legislation as well, and maintaining in the scope of active subjects of driving instructors and examiners. As a general conclusion it may be asserted that due to its legal content and marginal definition, the New Criminal Code provisions are superior to the existing ones.

3. The Constitutive Content of the Crime

The constitutive content of the crime examines the objective and subjective side.

3.1. Objective Side

From the structure of the objective side of the crime of refusal or evasion from collecting biological samples it belongs also the material element, some essential requirements, the immediate consequences and the causal connection.

The material element of the objective side is achieved by two different actions.

The first action is the refusal of the driver, the instructor or examiner to submit to the collection of the biological samples at the justified request of the ascertaining agent. The term “refusal” in the desired sense of the legislator we understand the attitude of the person concerned of not accepting, rejecting the request of a traffic police to extract biological samples.

No doubt that if we were to be in this situation, there should be an intended request, motivated by the official examiner, a request which in general should be completed also by presenting the consequences to which the involved person is exposed.

At the same time, the refusal must be expressed clearly, verbally, in writing or even tacitly.

The obligation of requesting the collection of biological samples by the police officer results from the provisions of article 88 paragraph (6) and (7) G.E.O. no. 195/2002, republished¹, as amended according to article 121 section 2 of Law no. 187/2012², which provides:

(6) A person who drives a vehicle on public roads for which the law requires having driving license, tested with an approved and verified metrological technical means and detected as having a concentration above 0.40 mg / l of pure alcohol in the exhaled air, is required to submit to the collection of biological samples, in order to determine alcohol's level of infiltration into the blood stream.

(7) A person who drives a vehicle on public roads for which the law requires holding driving license, tested in traffic with certified means indicating the presence in the body of psychoactive substances are required to collect biological samples.

From the interpretation of the above provisions, it results that following the traffic identification and testing with approved technical means, when the concentration is above 0.40 mg / l pure alcohol in the exhaled air or it is detected the presence of psychoactive substances in the body, biological sampling is required.

The refusal of the active subject is to submit testing with approved technical means, but accepting collecting biological samples, in both situations, it does not meet the constitutive elements of the examined offense.

In this respect, the jurisprudence has held that in order to achieve the material element of the objective side, the refusal must be expressly manifested (Ecris, 2011).

It has no legal relevance any grounds for refusal given by the person concerned.

Thus, in the judicial practice it was decided that the defense of the defendant, in that he has denied the collection of biological samples because he was not considered guilty of provoking the road incident, cannot be accepted.

The defendant drove a car on the street (...) which is part of open roads of the public traffic after he previously consumed a substantial amount of liquor. (Andreescu & Simonescu-Diaconu, 2012, pp. 186-187)

¹Published in the Official Monitor of Romania, Part I, no. 670 of 3 August 2006.

²Published in the Official Journal of Romania, Part I, no. 757 of 12 November 2012.

In another case of refusal of collecting biological samples in forensic practice it was decided that the offense for which the defendant is prosecuted has an alternative content, and the obligation of the police officers for leading him to the hospital for collecting biological samples is provided for in the article 193 of the Rules for the implementation of G.E.O.no. 195/2002 where it was found that the concentration of alcohol is higher than 0.40 mg / l of pure alcohol in the exhaled air. (Andreescu & Simonescu-Diaconu, 2012, pp. 193-194)

In the assessment of social danger of the crime of refusing to collect biological samples, in the judicial practice it has been decided that it is justified to apply article 18¹ of the Criminal Code against a defendant who was caught driving a car on the public highway, with a blood alcohol level of 0.70 mg / l in the exhaled air, refused the collection of biological samples for determining the alcohol level, determined the general practitioner to release a fake certificate showing that the person in question has allergy to the injection treatment, which then was used in defense of judicial bodies. (B.C.A., 2007, p. 70)

Also, it was decided in the judicial practice, that it represents a social threat of a criminal offense the act of the driver who refuses to submit to the collection of biological samples, in order to determine the alcohol level, after he was caught driving a car at night, on a national European highway, with a concentration of 0.85 mg / l of pure alcohol in the exhaled air and in the conditions under which the conduct of the defendant as driver was also recorded in the past as misconduct, having suspended twice the driver's license for driving drunk, and other two times more for other offenses. (ICCJ, 2008)¹

It is recommended, in our opinion, that in such situation the traffic police officer should proceed to the conclusion of a protocol in the presence of two witnesses stating the current situation.

If after the conclusion of a protocol the person reconsiders his decision and accepts the collection of biological samples, even requiring doing so, the inspector must comply and lead the person to a medical facility where biological samples will be collected. In this situation, if the laboratory examination indicates a blood alcohol level over the legal limit, it will analyze the legal classification of the offense or of the committed offenses. In other words, we encounter an examined offense (article 337 of the New Criminal Code), the offense provided for in article 336 of the New Criminal Code, or both in real competition.

¹ www.scj.ro.

We believe that in such a situation, it will retain only the offense under the provisions of article 336 of the New Criminal Code (driving a vehicle under the influence of alcohol or other substances)

We consider that the offense under article 337 of the new Criminal Code is consumed when there is clear expression of the refusal, the person reconsidering his original decision and accepting the collection of biological samples, which is a circumstance in which it cannot be considered the examined offense.

Collecting biological samples in order to determine blood alcohol will not be subject, under any circumstances, to a prior testing of the driver through other means.

In this respect, the jurisprudence decided that not being ratified the device that has been used for testing the alcohol concentration in the exhaled air does not justify the refusal to submit to the collection of biological samples in order to determine the alcohol level. (portal.just.ro., CA Craiova, 2006)

The second action of which the material element of the objective side consists is the evasion of the driver, instructor or examiner from collecting biological samples.

The term “evasion” means the action of the active subject of the offense to avoid, resist or evade in different ways to collect biological samples.

In the judicial practice it was decided that the drivers’ obligation to obey the collection of biological samples in order to determine alcohol level is required by the provisions of article 38 and article 88 G.E.O.no. 195/2002, which obligation, in the context of the facts of the present case was for the defendant as well who drove the car with suspended driving license and in terms of declaring false identity. (Ecris, C.A. Pitesti, 2011)

By “collecting”, in the legal sense, it means the activity of specialized bodies, to collect a sufficient amount of blood, urine or other human organic substances that are absolutely necessary for determining the presence of alcohol or psychoactive substances in the human body.

Having in regard the provisions of the law, the refusal or evasion from testing exhaled air, in order to determine the alcohol level in the blood, it is no longer a crime.

To complete material element of the objective side of the offense it is necessary to fulfill the following **requirements**:

- the driver should be identified on the public road, driving a vehicle for which the law requires having driving license, even if this essential requirement is not expressly stated in the text of the indictment, its existence is deduced from the interpretation of the phrase “the driver of a vehicle for which the law requires holding driving license”; in law, this phrase used by the legislator certifies the fact that such a driver may not be penalized unless he was driving a vehicle on public roads; the demand will no longer exist given that it was not proven that that driver drove on public roads;
- the driving instructors being in the training process, which involves driving the vehicle on public roads, either by the instruction or by the person who is preparing for obtaining the driving license; the absence of this requirement will lead to the lack of offense for the driving instructor, as he has the quality of driver of a vehicle (when he is identified in traffic as such);
- the examiner of the competent authority must be in the process of conducting practical test of the examination for obtaining the driving license; we should note that in the absence of this requirement, even if the examiner performed the action for refusal or evasion of collecting biological samples, it will not lead to the absence of the offense, as it should be taken into consideration his quality as the driver of a vehicle.

As a conclusion we find that in the case of this offense it is necessary to find each essential requirements, which is characteristic for each of the three categories of persons that may qualify the conditions of the active subject.

Note that the law does not condition the obligation of collecting the biological samples from the driver, instructor or examiner, for causing a traffic accident, which implies that obligation of these individuals, to submit to the collection of biological samples occurs at the moment of the express request of an employee of the traffic police.

The immediate result in the case of this offense is to create a state of danger for social relations regarding the public road safety.

Among the actions incriminated by law and the immediate consequence is the creation of a state of danger for traffic safety on public roads, it must be a **causal connection**, no longer to be proven, even resulting from the action of the active subject.

3.2. The Subjective Side

The form of guilt with which the active subject acts in the case of the examined offense is intent with both forms.

We will highlight the direct intent when the active subject of this offense provided that the result of his act consists of endangering the traffic safety of public roads and tracks its production by performing one of actions prohibited by law, i.e. the refusal or evasion from the collection of biological samples.

There will be indirect intent when the active subject of the offense provided the result of his act, which is to endanger the traffic safety on the public road and, although he does not seek it, he accepts the possibility of producing it, by executing one of the actions prohibited by law, namely refusing or evading from collecting biological samples.

For the existence of the crime, the motive and purpose have no relevance, the assessment is important within the process of individualization of punishment achieved by the court.

4. Conclusions

It is indisputable the fact that the offense provision whose constitutive content was examined (in this paper), in the chapter specifically established for this type of crime in the New Criminal Code, represents an absolute novelty for the Romanian Criminal Law. Besides this positive novelty, in our view, the legal content of the offense has many other items included in its constitutive content.

We may also state that such provisions exist in the law of other European countries with traditions regarding the protection of these values.

The offense examined in terms of its constitutive content incorporation, by presenting examples of the recent judicial practice, and emphasizing the elements of differentiation, was imposed amid the changes occurred in the Romanian Criminal Law.

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