



## The Constitutive Content of the Crime of Refusal or Evasion from Collecting Biological Samples in the Romanian Criminal Law

Minodora-Ioana BĂLAN-RUSU<sup>1</sup>

**Abstract:** In the paper we have examined the constitutive content of the offense of refusal or evasion from collecting biological samples, with elements of similarity and differences between the current and the old law. The comparative examination is useful as it allows the identification and application of a more favorable criminal law, in the case where such an offense is committed under the influence of the old law and it is to be finally judged after the entry into force of the new law. This work continues and completes the monograph “*Offenses against traffic safety on public roads in the Romanian criminal law*”, published in 2014 (Universul Juridic). The work can be useful to judicial bodies responsible for law enforcement, and academics from law schools (teachers, students and master students). The innovations consist in examining the constitutive content and the elements of similarity and differences between the two regulations.

**Keywords:** the material element; judicial practice; more favorable criminal law

### 1. Introduction

Until the entry into force of the new Criminal Code<sup>2</sup>, the offense of refusal or evasion from collecting biological samples was provided in the Romanian law in article 87, paragraph (5) G.E.O. no. 195/2002<sup>3</sup> on public roads, republished, as amended and supplemented.

<sup>1</sup> Assistant Professor, PhD in progress, “Dimitrie Cantemir” University of Bucharest, Romania. Address: 176 Splaiul Unirii, Bucharest 030134, Romania, Tel.: +4021 330 8931. Corresponding author: oanarusu\_86@yahoo.com.

<sup>2</sup> Law no. 286/2009 on the Criminal Code published in the Official Monitor of Romania, Part I, no. 510 of 24 July 2009 and Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, published in the Official Monitor of Romania, Part I, no. 757 of 12 November 2012, in force since 01.02.2014.

<sup>3</sup> Republished in the Official Monitor of Romania, Part I, no. 670 of 3 August 2006.

The offense under consideration belongs to the group of offenses against traffic safety on public roads, as referred to in article 337 of the Criminal Code.

According to recent Romanian doctrine (Rusu & Balan-Rusu, 2014, pp. 169-170), this offense can be used against the active subject, only under the conditions where, as a driver, he is stopped and identified in the traffic, driving a vehicle for which the law requires the compulsoriness for owning a driving license and at the express request of the official examiner (an employee of traffic police) to submit the collection of biological samples, he refuses or evades in any way from the actual collection of biological samples.<sup>1</sup>

Also, this offense can be retained in the task of the driving instructor or examiner who refuses or evades from the collection of biological samples at the request of the official examiner.

In the above situations, the offense in question can exist only if the driving of the vehicle was done on a public road, as defined in the framework legislative act.

The fact remains that, depending on the peculiarities specific to each fact, under certain circumstances, this offense could be charged also in the case where the active subject is not actually stopped and identified on the public road, but according to the evidence in the case, that the charged offense (driving a car for which the law requires the compulsoriness of having a driving license) was performed on a public road.

The incrimination of this act is justified by the need to ensure criminal liability of drivers, who driving under the influence of alcohol, over the speed limit or under the influence of other psychoactive substances, refuses or evades from the collection of biological samples, considering firstly the danger of the act for other participants to traffic.

Given the new provisions of criminal law, in this paper we will examine the differences between the previous and the current regulation and the constitutive content of this offense; also we will have some critical comments and proposals *de lege ferenda*.

---

<sup>1</sup> The offense is examined in detail in the monograph “*Infracțiunile la regimul circulației pe drumurile publice în dreptul penal român/Offenses against traffic safety on public roads in the Romanian criminal law*, Universul Juridic Publishing, 2014.

## 2. The Current Provisions in Relation to the Previous Law

From a comparative examination of the rules contained in the Criminal Code in force and in article 87, paragraph (5) G.E.O. no. 195/2002, republished, we can say that there are the following distinguishing features:

- it is marginally entitled “refusal or evasion from collecting biological samples”, a title that does not appear in the text of the previous law;
- 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 in the old law, the active subject of the offense was the driver of a vehicle or tram; we notice that in the current law it was extended the active subjects’ scope to drivers of vehicles, being included in this phrase also the drivers of auto vehicles and trams;
- in the New Criminal Code it is provided for the phrase “*or in the presence of other psychoactive substances*”, while in the old law, it was provided the phrase “*in the presence of drugs, products or substances with similar effects*”; we therefore conclude that the legislator of the New Criminal Code uses a simplified expression, in accordance with the new guidelines in the field, a positive aspect, in our opinion;
- in the current law, it is no longer provided the method of refusal for *testing the exhaled air*, which justifies the legislator’s option to determine the concentration of alcohol or other psychoactive substances, only by scientific evidence, in accordance with the modern European legislation in the field;
- in the New Criminal Code there are provided as normative ways (actions by which it is achieved the material element of the objective side) the refusal or evasion, while in the previous law, in addition to these two actions, it was mentioned also the resistance action; we believe that this change is beneficial;
- in the current law it was mentioned the term “*biological samples*”, while in the old law it was the expression “*biological evidence*”, we may add that this change was required;
- as a last element of differentiation refers to the penalties limits, in the new law it is imprisonment from one to five years, while in the previous law it was provided an imprisonment penalty from 2-7 years.

The only similarity between the two elements of criminality regards the maintaining in the scope of active subjects of the offense the driving instructors and examiners. (Rusu & Balan-Rusu, 2014, pp. 168-169)

A comparative examination of the legal content of the two incriminations is useful in terms of identifying and applying the more favorable criminal law.

Thus, as example, we present the situation in which it is sued the driver of a vehicle who refused testing the exhaled air, in this case we find that this action by which the material element of the objective side from the old law is achieved, it is no longer incriminated in the new law, thus defending its discrimination. (Rusu, Boroï & col., 2014, p. 16).

As a general conclusion, we can say that, amid the operated modifications, the new regulation is superior to the previous one.

### **3. The Constitutive Content of the Examined Offense**

*The material element* of the objective side is achieved by two alternative actions, i.e. *refusal* or *evasion*.

The first action is the refusal of the driver, the driving instructor or examiner to comply with the collection of biological samples at the justified request of the official examiner, i.e. the refusal action and the action of evasion from collecting biological samples.

By the notion of *refusal* in the desired sense of the legislator, it is understood the attitude of that person of not accepting, rejecting a specific request of the official examiner (traffic police agent) to comply with the collection of biological samples in a hospital unit.

It should be noted that for this situation to be incident, it is necessary to have a specific request, motivated by the examining agent, a request that should include the manifestation of the consequences to which the person is exposed, in case of refusal (i.e. committing the examined offense).

At the same time, the refusal must be express, clear, expressed verbally, in writing or even tacit (Rusu & Balan-Rusu, 2014, p. 173).

In this sense, according to the applicable law, the refusal of the active subject to submit the test of exhaled air with an approved technical means, but accepting

collecting biological samples at a hospital does not meet the constitutive elements of the offense in terms of the objective side.

In the judicial practice it was decided that in order to achieve the material element of the objective side, the refusal must be expressly indicated.<sup>1</sup>

It has no legal relevance the reasons given by the active subject of the crime, by which it attempts to justify the refusal.

Thus, in the judicial practice it was decided that in the defense of the defendant it cannot be accepted the fact that he refused the collection of biological samples as he was not considered guilty of the road incident.

The defendant drove the vehicle on the street (...) which is part of traffic open to public roads, after he previously consumed a substantial amount of alcoholic beverages. (Andreescu & Simonesu-Diaconu, 2012, pp. 186-187)<sup>2</sup>

For the purpose of proving the refusal of collecting biological samples, it is recommended for the examining inspector to record the statement in a minute signed in the presence of two witnesses.

In the case where after concluding the document referred to above, the person concerned reconsiders his decision and accepts the collection of biological samples, even requiring doing so, the inspector agent must comply and lead the person to a medical facility where biological samples will be collected. In such situation, if the laboratory examination indicates a blood alcohol level over the legal limit, it will raise the issue of legal classification, meaning that it will retain the examined offense, as provided in article 336 of the Criminal Code (driving a vehicle under the influence of alcohol or other substances) or both in competition. In our opinion, such an assumption will retain the offense provided in article 336 of the Criminal Code. When the alcohol concentration in the blood will be below the legal limit prescribed by law, the act will be sanctioned as minor tacit offense. (Rusu & Balan-Rusu, 2014, p. 175)

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

---

<sup>1</sup> C.A. Pitesti, decision no. 502 of 3 May 2011, available on Ecris.

<sup>2</sup> C.A. Pitesti, decision no. 600 of 15 October 2009 (Juridex)

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

At the same time, by the term “*collecting*”, it is understood (in the desired sense of the legislator) the activity of specialized medical bodies of collecting 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.

Due to the changes in the legal content of the examined offense, refusing or evading testing the exhaled air, in order to determine the alcohol level, is not a crime.

In order to complete the material element of the objective side of the examined crime it is considered necessary to determine the fulfillment of the *basic requirements*, namely:

- The driver to have driven on a public road a vehicle for which the law requires holding a driving license; this requirement is to be met, regardless of the quality of the active subject (driver, driving instructor or examiner);
- Driving instructor to be in training, which means that the instructor personally drives the vehicle or is in the process of training; the absence of this requirement will not lead to the absence of the crime, as in another case, the instructor will have the quality of active subject of the offense, as the driver;
- The examiner of the competent authority must be in the process of conducting practical activity of the test in order to obtain a driving license; the above comments are current in this case as well.

The *immediate result* is to create a state of danger for social relations regarding the public road safety.

Between the actions incriminated by the law and the socially dangerous result there must be a *causal connection*.

As regards *the subjective side*, the form of guilt by which the active of the offense subject is acting, is the intention in both ways.

For the existence of the crime, the motive and purpose have no relevance, their determination is important in the process of individualization of criminal law sanction, which will be achieved by the court.

#### 4. Conclusions

After examining the constitutive content of offense of refusal or evasion of collecting biological samples, compared with the existing rules in the old law, it results that the differentiating elements to be taken into account when applying the criminal law are more favorable.

The conclusion that emerges is that the new regulation of this crime, unlike the previous one is more complete, presenting sufficient elements of great novelty, in view of the latest crime developments in this area.

#### 5. Bibliography

Andreescu, M. & Simonesu-Diaconu, R.-E. (2012). *Infracțiuni rutiere, Jurisprudență rezumată/Traffic offenses, Resumed Jurisprudence*. Bucharest: C.H. Beck.

Boroi, A. (coordinator), Rusu, I., Chirila, A.D., Goga, G.-L., Dumitrache Ionescu, A.-A., Balan-Rusu, M.-I. (2014). *Practica judiciară în materie penală. Drept penal. Partea specială/Judicial Practice in Criminal Matters. Criminal Law. The special part*. Bucharest: Universul Juridic.

Rusu, I. & Balan-Rusu, M.-I. (2014). *Infracțiunile contra siguranței circulației pe drumurile publice în dreptul penal roman/Offenses against traffic safety on public roads in the Romanian criminal law*. Bucharest: Universul Juridic.

\*\*\* C. A. Pitesti, criminal decision no. 502 of 3 May 2011, available on Ecris.

\*\*\* Government Emergency Ordinance no. 195/2002, republished with subsequent amendments.