

## **The Constitutive Content of the Offense of Leaving the Scene of an Accident, Modifying or Removing Trails in the Romanian Criminal Law. Implications of the New Provisions of Legal Assistance in the European Union**

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**Abstract:** Taking into consideration the entry into force of the new Criminal Code, where besides the new element it is incriminated also the offense of leaving the scene of the accident, modification or removing trails, within this paper we have examined its constitutive content, according to the new regulations. The paper continues other studies in this area and it can be useful to law students, academics and anyone who wants to improve their knowledge in this area. The innovations consist of examining the subjective and the objective side of this offense, with reference to some implications in terms of providing assistance in criminal matters, where the offense is committed by a Romanian citizen in another Member State of the European Union.

**Keywords:** the objective side; the subjective side; the material element; intent

### **1. Introduction**

The offense of leaving the scene of an accident, modifying or removing its trail is provided in article 338 of the new Criminal Code having no counterpart in the Criminal Code in 1969, being taken from the Government Emergency Ordinance no. 195/2002, republished. This offense, without a marginal name, was provided in a different wording in article 89 of the mentioned regulation. The comparative examination of the legal content of the two crimes allows us to identify the elements of differentiation and the similarity between the two regulations. Thus, the new Criminal Code, in article 338, the offense is called marginally “leaving the scene of the accident, modifying or removing its trail”, a denomination which does not appear in the law in force.

Regarding other elements by which the two offenses are distinguished we mention the following:

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- in the new Criminal code, the action of leaving the scene of the accident must be achieved without the consent of the police or the prosecutor, while the old law mentions only the approval of the police carrying out on-site investigations, but not the prosecutor;
- in the new Criminal Code the action consists of leaving the scene of the accident, while in the old law it is provided leaving the scene of the accident after an accident that resulted in death, bodily injury or health of one or more persons, or where the accident occurred as a result of an offense;
- in the new Criminal Code it was introduced another cause for lack of punishment (which does not appear in the old law), which consists of the act of leaving the site of the accident which resulted in only property damage.

As elements of similarity in the content of the two offenses, we mention:

- the active subjects of the offenses are the same;
- keeping in the incrimination text two distinct offenses, namely after the action of leaving the scene of the accident, modifying or removing traces of the accident;
- the same legal content in the case of the modifying or removing traces of the traffic accident offense;
- the minimum and maximum sentences provided in both texts are identical, namely imprisonment for 2-7 years.

Unlike other such offenses, in the case provided for in article 338 paragraph (3) of the new Criminal Code provided for several cases of impunity, causes mentioned in the old law in the article 89 paragraph (3) - (5) E.G.O. No. 195/2002, republished. After a comparative examination of the causes of impunity under the two laws, we find identical provisions regarding cases referred to in article 338 paragraph (3) letters b), c) and d) of the new Criminal Code and the article 89 paragraph (3), (4) and (5) E.G.O. No. 195/2002, republished. The distinction element, as mentioned above, consist of the provision in article 338 paragraph (3), letter a) of the new Criminal Code, which is not mentioned in the previous criminal law.

## **2. The Objective Side**

From the structure of the objective side of the offense leaving the accident site, modifying or removing traces there will be examined the material element, the essential requirement, the immediate consequence and the causality connection.

**The Material element** of the objective side is achieved by three different actions, namely those leaving, modifying and removing traces of the offense.

In the case of the modality provided in the provisions of article 338 paragraph (1) the material element of the objective side is achieved by an action which consists of leaving the site of the accident by the driver involved in such road accident. Leaving the scene of the accident can be achieved in two ways, namely, by an act of commission that involves the actual departure from the scene of the accident and the act of omission which consist of not coming back to the place of the accident of the person which he left legally, under the provisions of article 338 paragraph (3), letters b) or c) or failure to stop at the scene of the accident.

By leaving the scene of the accident it is understood the action of driver of a vehicle who, after his involvement in a traffic accident, leaves, departs from that place. Also, leaving the scene of the accident may consist of the action of a vehicle driver after being involved in such an event, he does not stop the vehicle and he basically runs from the area, the aim being that of escaping from the criminal liability.

Leaving the scene of the accident is not conditioned by the guiltiness of the driver, meaning that even if it is later determined that he was not responsible for the accident, he will be responsible for the act of leaving the place. The judicial practice has shown that in all cases leaving the scene of the accident is determined by the commission of other offenses of this kind, namely driving a vehicle on public roads under the influence of alcohol or other substances, driving a vehicle without driving license or the entry into service or driving an unregistered vehicle.

In this regard, in a case before the court it was decided that the defendant, after drinking alcohol, drove a vehicle on the public road, after losing the control of the vehicle he entered with the car in the wall of the house causing a lot of damage to the wall and the vehicle, after that he left the scene of the accident. In these circumstances, the defendant committed the offense of leaving the scene of the accident provided by article 89, paragraph (1) second thesis of E.G.O. No. 195/2002, the act being the result of committing the offense of driving with a blood alcohol concentration (BAC) above the legal limit (Andreescu & Simonescu-Diaconu, 2012, pp. 282-283).

In another case, it was decided that the road accident in which the defendant was involved was due to an offense, that is driving a vehicle on public roads without proper driving license. Under these circumstances, the removal of the defendant from the scene of the accident, in order to lose the trails, makes the constitutive content of the offense provided for in article 89, paragraph (1), E.G.O. No. 195/2002, the defendant acknowledging and accepting the consequences of his act (Andreescu & Simonescu-Diaconu, 2012, pp. 286-287).

In some other situations, in order to justify leaving the site there are invoked some cases that eliminate the criminal nature of the act or causes of non-imputability as they are called in the new Criminal Code, such as moral constraint.

In such a case, the court ruled that the existence of a conflict does not justify the crime of leaving the scene of the accident by the defendant, subject to a so-called moral constraint.

This is, as the above situation, it does not show the inevitability of the danger to which the defendant would have been exposed, under the conditions where it would have adopted this conduct of breaching the Road regulation (C.A. Pitesti, Criminal Decision no 111/R-2011 Ecris). In another case in which it would have been invoked the error of fact, the court ruled that even if the defendant felt that it passed over an obstacle, to which it gave no attention, accepting the possibility of injury to a person, and that he was warned about a possible impact of a citizen who was on the road, the defendant has continued his path without returning to the scene of the accident and without having the police approval. Therefore, there are not applicable the provisions of article 51 of the Criminal Code on the error of fact. (Andreescu & Simonescu-Diaconu, 2012, pp. 270-273)

**The Material Element** of the objective side for the second normative way provided in article 338, paragraph (2) is achieved by two alternative actions consisting in the state change of the traffic accident scene or removing the trails of the accident.

“The site of the committing the road accident” means the segment of public road traffic where the accident was committed and the surrounding areas, where there are identified traces of the accident. In the legal sense, the site of committing the traffic accident is identified with the place of committing the crime, a scene which is subject to complex research activity onsite, an activity performed by judicial bodies empowered by the law. The action of changing the status of the site of the accident can be achieved in practice by several ways specific to each case. Thus, this action can be achieved usually by: moving the body in a position other than that resulting from the accident, moving the position of the vehicle involved in the event, moving other objects or goods (bicycles, carts, etc.), etc.

The judicial practice shows that, as a rule, these activities are carried out until the presentation of the first policeman at the scene, which has the main responsibility (apart from saving the victims, the identification of the perpetrators, witnesses, etc.) to secure the scene and prohibit the entrance of other people at the scene of the crime. Removing the trails of the accident consists of the action of a person to cover, to remove some traces of the accident. Although the legislator has used the term “removal of traces”, we consider that the destruction of these trails, it can hold the removal proceedings, as by the removal of those marks they are also destroyed. Practically these traces can be eliminated by the following ways: cleaning the braking trails, hiding objects, transporting and hiding the corpse, deleting traces of blood or other material traces, etc.

Between leaving the site of the accident and the alteration or removing traces of the accident there is a series of fundamental distinctions, there are some differences arising from the interpretation of the three phrases achieved above. In this respect, the jurisprudence has decided that the deed of the defendant of leaving the scene of the accident, abandoning the vehicle, it meets the constitutive elements of the offense provided for in article 89, paragraph (1) and not those of modifying the state of the site or removing the traces of the accident that resulted in murder, bodily injury or health of one or more persons without the approval of the research team arrived on site. (Andreescu & Simonescu-Diaconu, 2012, pp. 257-258)

As the **essential requirements** specific to this offense there are different from one way to another, we will proceed in examining them separately.

Thus, in the case of normative ways provided in paragraph (1), for the existence of the crime, it is necessary to cumulatively fulfill the following requirements:

- to have occurred an accident; it is irrelevant whether there were casualties, being important for the event to qualify for road traffic accidents as defined by the legislator;
- the driver to be involved in a traffic accident, with or without guilt;
- the act of leaving the accident site to be carried out without the consent of the police or prosecutor conducting on-site investigations.

It was not mentioned the requirement “public road” as by definition, the traffic accident can only take place on a public road. In the judicial practice it was decided that according to article 89, paragraph (1) E.G.O. no. 195/2002, a vehicle driver, engaged in an accident is bound not to leave its place, without the consent of the police authority, among other things, and in the case where after the accident it resulted in a bodily injury or health of any person. (Andreescu & Simonescu-Diaconu, 2012, pp. 298-300)

In another case it was considered that the acts of the minor driver represents social threat of some offenses, given that he drove the car of his father on a high-traffic street in the city, having a blood alcohol level above the legal limit, without possessing a driving license, colliding with another car parked in a parking lot; after that, he refused to await the arrival of the police, and he continued driving on roads covered with snow, he crashed into the indicator meaning “right of way” skidded and collided with a metal fence placed on the curb, after the impact the vehicle had stopped and it was later found by the police officers (C.A. Iasi, criminal decision no. 81 of 6 November 2008 - portal.just.ro).

In certain circumstances determined in particular by the subjective element, there are situations in which the offense of leaving the scene of the accident will not be retained by the offender, being acquired by another more serious offense, namely murder or attempted murder. They will be incident situations when the perpetrator acts with the intent to kill a person, as a driver. In this respect, the jurisprudence

decided that hitting someone with a vehicle with the intent to kill, followed by leaving the crime scene, represents attempted homicide, and not leaving the crime scene.

This latter offense does not subsist of hitting the victim due to the perpetrator's intention of harassing it, since the accident means producing unintentional injury or health of a person, or death; in this respect, by the alternative versions of the offense provided for in the final article 38 of Decree no 328/1966, namely that accident is a criminal offense or it is produced as a result of a crime, meaning the traffic offenses on public roads, and no other crimes, such as murder committed by harming the victim with a vehicle (SCJ criminal decision no. 2878 of 5 June 2001, BJ 2001, p. 234). Please note that the text of article 38, paragraph (1) of Decree no. 328/1966 were retrieved and provided in article 89, paragraph (1). E.G.O. No. 195/2002, republished, in the new law is changed. Thus, in the provisions of article 338, paragraph (1) of the new Criminal Code, it is no longer provided the alternative variant "if the accident occurred as a result of an offense." However, the Supreme Court's decision remains valid and under the new regulations as well.

Meanwhile, the offense can exist if the driver although leaves the scene of the accident, in a first stage in the legal conditions set out in paragraph (3), he does not perform the other requirements required by law. For the existence of the crime in this way there should be met other **essential requirements**, namely:

- after leaving the scene of the accident for transporting the victim to a medical institution for medical care, the driver does not return immediately to the scene of the accident;
- the driver with a priority other than the traffic regime does not announce immediately the police about his involvement in a traffic accident or although it announces the police, he does not present himself at the premises of the police, in order to draft the documents after completing the mission;
- the driver does not report to the police, in the case where the victim left the scene of the accident.

In relation to the first requirement, in judicial practice it was decided that even if the legislator does not quantify the time period in which a person has produced a traffic accident and transporting victims to a medical institution must return to the scene; it is used the word "immediately", which can be assessed in relation to the specific circumstances of the case (Andreescu & Simonescu-Diaconu, 2012, pp. 273-276). In this case the defendant was convicted for leaving the scene of the accident, although it was invoked the cause of non-punishment mentioned in paragraph (3), article 89, E.G.O. No. 195/2002, republished, the text being provided in article 338, paragraph (3), letter b) of the new Criminal Code, a after transporting the victim to the hospital, it has been drinking and went to the crash site after a period of one hour and five minutes.

In judicial practice there have been and there will always be situations where the driver involved in a traffic accident leaves the accident scene without the consent of the police or the prosecutor, and he, although not included within the provisions of paragraph (3), will not be criminally liable. Here we consider the case in which, after such a traffic event, the driver is physically abused by other people, resulting in bodily or health injury or the possibility of creating such results or some other serious consequences. This requirement is not met when the person is submitted to verbal violence.

In this regard it was decided:

1. Under the aspect of the subjective side, the offense of leaving the scene of the accident involves the intention of the perpetrator, who realizes that by leaving the scene of the accident site it is created a state of danger to road safety, also it blocks or makes difficult the activity of the judicial authorities in connection to the accident. There is no intention of leaving the scene of the accident where the defendant left the spot because it was determined by the physical violence of others to which he was submitted.

2. There is no social threat of a criminal offense the act of the defendant, having alcohol in the blood stream above the legal limit, who drove a van just a few meters, with the intention of moving it as the smoke from the engine was annoying, and previously the defendant asked the driver to stop the engine when he had parked his car, but he refused, leaving the engine running (ICCJ, Criminal decision no. 3449 of 2 June 2005 - [www.scj.ro](http://www.scj.ro)).

Likewise, it was decided that, in terms of the subjective side, the offense of leaving the scene of the accident involves the perpetrator's intention to leave the scene of the accident in order to thwart the investigations and taking the necessary action. There is no subjective side of this offense in the case where the defendant left the spot after agreeing with the injured party car driver in order to move along to the traffic police for reporting the event and preparation of documents required by the law (ICCJ, Criminal decision no. 3506 of 24 June 2004 - [www.scj.ro](http://www.scj.ro)).

In the above case, according to the new regulations it will be governed by the provisions of article 338 paragraph (3), letter a) when there are no casualties, only property damages.

For auto instructor or examiner of the competent authority, in addition to the first three requirements which are to be met cumulatively, it must be fulfilled another **requirement**, namely that where the instructor or examiner at the time of the accident was in training or examination process of a candidate in order to obtain a driver's license. In this situation actually it does not matter who was driving the vehicle involved in the accident, i.e. the candidate, the auto instructor or the examiner.

In the case of the normative manner provided in paragraph (2), for the existence of the offense the following **essential requirements** need to be met:

- a traffic accident has occurred;
- the accident has resulted in the murder or bodily or health injury of one or more persons;
- modifying the state of the site of the accident or removing trails without the consent of the investigation team on the spot.

It is worth mentioning that for the existence of the crime it is not relevant the quality of the active subject, it may be any physical or legal entity sometimes, including the driver of the vehicle involved in the accident or the company that insures the maintenance of the public road.

The **immediate result** in the case of this offense is to create a state of danger for the social relations related to traffic safety on public roads, relations protected by the incrimination regulation. Among the actions or inactions incriminated by the Law and its immediate consequence there must be a causality connection, which must not be proven, as it results from the materiality of the act.

### **3. The Subjective Side**

The form of guilt with which the active subject acts within the examined crime is the intent with both forms. It will remain direct intent when the active subject of this crime foresees the result of his action and he seeks its occurrence by the execution of one of the actions prohibited by law (or inaction) i.e. leaving the scene of an accident, modifying or removing trails of the accident. There will be indirect intent when the active subject of the offense provided the result of his act, although he does not seek it, he accepts the possibility of producing it, by executing one of the actions (inactions) prohibited by law, as mentioned above. 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. Implications of the New Provisions on Legal Assistance in the EU**

The examined offense in terms of objective and subjective aspects, presents certain features in insuring legal assistance in the case where a Romanian citizen leaves the scene of a traffic accident committed on the territory of another Member State of the European Union. The first feature concerns the execution of a request for judicial assistance which regards the identification of a Romanian citizen who left the scene of a traffic accident in which he was involved, on the territory of another Member State. Under this circumstance the judicial authorities of the requesting State will require first the Romanian judicial authorities to identify the person who

drove the vehicle in question, then his hearing, conducting of a technical-auto expertise, hearing the witnesses and such other activities specific to this phase of the criminal trial, including collecting and preserving the evidence (here we consider the vehicle that was involved in the accident).

We note, however, that generally, all these activities are determined by the consequences, only if from the accident it resulted a dead or wounded person or property damage. After identifying the author of the accident and the communication of his civil status, the competent judicial authorities of the requesting State will have more options for action. In a first variant, which in our opinion is the best option, the judicial authorities of the requesting State shall require by an international rogatory commission to conduct a technical-auto expertise, hearing the suspect, witnesses, collecting and preserving evidence, etc. In this situation the habilitated Romanian judiciary authorities (the competent prosecutor) will proceed to the execution of the international rogatory commission and it will submit all the evidence means to the judicial body of the requesting state. In another variant, the judicial authorities of the requesting State, also by an international rogatory commission shall require the appearance of the suspect, witness or even the expert before them, for their hearing. We believe that, in all circumstances, the expertise of the vehicle involved in traffic accident will be executed in Romania by an authorized expert, due to several reasons, upon which we will not insist.

In the practical example shown above, the only activity that goes beyond the framework of judicial assistance in criminal matters is represented by the identification of the person who committed the accident, in the case where that activity involves the execution of specific police activities. In this circumstance we believe that it is necessary, first, to identify the person requesting for police assistance by an application, an application which will be made by the police authorities of the requesting state and it will have to be sent for execution to the International Police Cooperation Centre of the Romanian Police.

After the verification and identification of the person involved in the commission of the accident, the competent judicial authorities of the requesting State shall proceed to request legal assistance through the rogatory commission mentioned above. This procedure is required to be executed, since the provisions of the European and internal legislative acts do not provide special statements, and on the other hand, as the activity of identifying a suspicious person, unknown, it involves the performance of specific activities of police authorities and not the ones of the court (prosecution or the court floor).

## **5. Conclusions**

The offense of leaving the scene of the accident or modifying or removing traces provided in Article 338 of the new Criminal Code is part of group crimes against road traffic safety.

The examined offense consists of the action of leaving the scene of the accident, without the consent of the police or the prosecutor conducting the on-site investigation, the driver of the vehicle or the driver instructor, being in the training process, or by the examiner of the competent authority, being there during the tests of practical examination for obtaining the driving license, involved in a traffic accident, or the action of any person to modify the status of the place or to remove trails of the traffic accident that resulted in the killing, bodily or health injury of one or more persons without the approval of the investigating team on the spot.

For the existence of the offense provided for in article 338, paragraph (2), it is required for the action of modifying the status of the place or removing trails to take place after an accident that resulted in the killing or injury of corporal integrity or health of one or more persons. As it results from the legal content in article 338, there are two distinct offenses, namely after leaving the scene of the accident and modifying the crime scene or removing the trails of the traffic accident. Besides the driver of the car or any other person, the active subjects of this offense can be a driving instructor or examiner of the competent authority, both being in the exercise of attributions specific for the job, first referring to the training process and the second one the examination for obtaining the driving license. No doubt amid certain objective or subjective factors, on the public roads there are numerous traffic accidents, some with very serious consequences, which consist of killing or serious bodily injury or health of people, and in many cases, the urgent transportation of the victim to the nearest hospital, can result in saving its life. Due to its consequences, the crime of leaving the scene of the accident or modification or removal of trails is one of the most serious crimes in this group, the social danger of the crime resulting from the action of the active subject and the immediate result that occurs. In the event of a traffic accident with or without casualties, but with important property damage, the investigation activity on spot is a complex, scientific one, of the scene of the event, an activity which finally materializes in a report in which it is presented the exact location of the accident, sketches, photographs, videos, etc. The importance of this work consists in the fact that after the scientific examination of the investigation report on spot, the prosecution establishes the mechanisms of the accident and the guilty persons. Due to these considerations, the modification or removal of trails at the crime scene which resulted in the killing or bodily injury or health of one or more persons is a serious action, sanctioned as such by the legislator, which may lead to other conclusions of the road event than the real ones (and therefore the involvement of other responsibilities).

In such conditions, the examined crime violates besides the social relations specific to the domain also those referring to the rights and freedoms of individuals, or those concerning the need to identify the people and vehicles involved in any traffic accident on public roads. If modifying or removing traces from the crime scene is not permitted under any circumstances (until the end of the investigation on site), however, leaving the scene of the accident is allowed under certain circumstances, certain categories of persons, under some conditions imposed by the situation. The International judicial assistance in criminal matters in the case of the commission of such an offense by a Romanian citizen in another Member State involves requesting assistance through the international rogatory commission and sometimes, depending on the specificity of each individual case, the request for identifying the suspicious person through a request for police assistance.

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