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**The Constitutive Content on the Offense of Leaving Post and Working  
under the Influence of Alcohol or other Substances according to the New  
Criminal Code**

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**Abstract:** Within the paper it is examined the constitutive content of the offense on leaving post and the presence to work under the influence of alcohol or other substances according to the new criminal code entered into force on 01.02.2014. The novelty consists in the examination performed in the light of the new amendments and completions to the law, and the comparative analysis with the old law, considering the transitional situations involving the more favorable application of the criminal law. The paper can be useful to law students, academics and practitioners in the field, and all those interested in the new legislative amendments occurred in the Romanian criminal law, in this area.

**Keywords:** offense; the objective side; the subjective side; Romanian Criminal Law

## **1. Introduction**

The Criminal Code of 1969 included offenses against the security of railway traffic in a separate chapter under Title VI, with the marginal title “*Crimes that are detrimental to some activities of public interest or other activities regulated by law.*”

In the New Criminal Code, these offenses are contained in Chapter I with the same title, within the Title VII marginally called “Crimes against public safety”.

One of the offenses specific to safety domain for traffic and rail transports provided in the mentioned chapter of the new Criminal Code it is the offense of “leaving post and the presence to work under the influence of alcohol or other substances”, an incriminated offense in the content of article 331. Amid some critical observations from the Romanian doctrine in the recent years (Rusu, 2009, p. 420), the marginal title of the offense provided for in the Criminal Code of 1969 was amended.

Also, due to other critical opinions (Rusu, 2010, p. 51), in the new law there were introduced changes regarding the active and passive subjects of the offense, widening their scope, according to the regulations in this area.

In addition to the critical opinions the legislative changes were imposed also due to the significant changes that have occurred in the last years regarding the structure, the organization and functioning method of the circulation system and the railway transport as a whole.

Therefore, the new settlement brings a series of additions and significant changes in the constitutive content of the examined offense.

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## **2. The Constitutive Content of the Offense**

As in the case of other offenses within the constitutive content of the offense we will examine the objective and subjective side.

### **2.1. The Objective Side**

As other offenses in this group, the objective side of the offenses referred to in article 331 of the new Criminal Code has as components a material element complemented by an essential requirement, immediate result and the causation connection.

**The Material element** of the objective side is achieved through various actions, which consist of either leaving post during working hours or the presence to work under the influence of alcohol (with a certain concentration in the blood) or other psychoactive substances.

Regarding the offense referred to in paragraph (1) of article 331 of the new Criminal Code (leaving post), the action consist of the employee, with direct responsibilities in the safety of railway traffic, leaving his post unjustifiably in any way or form. For the existence of material element it has no importance the reasons for leaving the post, which can be diverse, namely: to rest or have fun, to run other external activities of his duties, willful abandonment of the post without cause, resignation, etc. It also does not matter the time the post was left unguarded by the employee in question, or other reasons invoked by the person. The circumstances that determined the action of the active subject of leaving the post are in their essence only general individualization criteria for deciding on the punishment provided in article 74 of the new Criminal Code, criteria that need to be considered by the court.

Our doctrine admitted that “the action of leaving the post can be committed either by an act of willingness (leaving the post at a time when the employee's presence was required) or by omission, not returning to the post in due time. (Dongoroz, 1972, p. 311)

We disagree entirely with this interpretation, since the first case cannot exist in its materiality in all circumstances, as according to the rules of organization and functioning of the transport system, there are certain posts, where the permanent presence of the employee is required. In other words you cannot infer the existence of moments in which the presence of certain employees is not required at their posts (in these circumstances). Even if for some reason, the employee concerned leaves his post, but returns, the leave, as the return to post are specific job's tasks (in the case of the signalman, who has the task of signaling the train leaving the station, his work is achieved by leaving the movement office and going on the station platform, then he returns to his office, where he performs other tasks specific to his job). In conclusion the station in question cannot be left at a time when the presence is necessary, because the presence on the job is necessary permanently, due to the tasks specific to the job, functions that are executed only by the occupant of the post and not by another person, regardless of his quality and qualifications.

We mention, however, that there are situations when leaving the station, my lead to the non-fulfillment of the essential requirement, these situations are rare, and as such the employee shall not be charged for the offense of leaving the post. But we totally agree with the interpretation according to which the employee can perform the action by omission, i.e. not returning to his post, at the place destined for the execution of tasks specific to the job. (Diaconescu & Duvac, 2009, p. 639)

In this case, we present the example of the signalman who left the movement office to give the signal of departure of a train from the station (an activity that is included in the job's responsibility), but it does not return to the office as soon as he achieved this activity, moving to another place. In this case the existence of the offense, in addition to the action of the active subject, is conditioned by the establishment of fulfilling the essential requirement.

The material element of the objective side for the offense provided in paragraph (2) thereof, is in action by the employee with specific competences and duties of traffic safety, exercise these tasks with an infiltration into the blood stream of over 0,80 g/l of pure alcohol and he exercises them by being under the influence of other psychoactive substances.

In the first case, we note that achieving material element is conditioned by the existence of the limited alcohol content of exhaled air below which there is no question of the existence of the offense. Thus, under the conditions where the employee exercises the job with an infiltration into the blood stream of over 0,80 g/l of pure alcohol or less, there is no question of the existence of this crime. At the same time, if the employee is executing his duties alcohol content of exhaled air of 0.81 g /l of pure alcohol in the blood, it will be held criminally responsible.

For the existence of the crime it is necessary that the alcohol's level of infiltration into the blood stream established by the legislator to be found at the time of the offense, the collection of biological samples to be examined in the laboratory. A possible establishment of the alcohol level of the employee by an alcohol test or other such devices that measure the alcohol concentration in the exhaled air is not likely to lead to the finding of infringement.

In the second case it is necessary to establish that the employee in question exercises his working tasks under the influence of psychoactive substances. As the legislator did not mention the substances or their quantity, it results that regardless of the consumed or injected amount, the offense will remain, the essential condition, although not mentioned by the legislator, being that the effect of these substances is much like alcohol regarding the conduct and behavior of the employee.

For the existence of the crime it is required the collection of biological samples and their analysis in the laboratory in the case of these substances as well. (Hotca, 2012, p. 753)

**The essential requirements.** In order to complete the material element of the objective side, it is necessary that the act of leaving the station by employee with direct responsibilities in ensuring traffic safety on the railways [referred to in article 331 paragraph (1) of the new Criminal Code] meets several essential requirements, the first of them costing in endangering traffic safety.

As supported in the literature by many authors (Kahane, 1972, p. 312; Diaconescu Duvac, 2009, p. 639; Rusu, 2009, p. 218), this requirement is a qualitative prerequisite of the act of violating the office duties, by leaving the post, i.e. a potentiality, a possibility, and not a result.

The essential requirement will be satisfied whenever the examination of the circumstances of the commission of the offense will result by the action of leaving the post which determined the endangering of the railway traffic safety.

In the situation where by the incriminated action it is found that it could have been endangered the safety of railway traffic, and in fact it did not put in danger this value protected by law, there will be no offense. It is understood that in such a case the employee concerned will bear other consequences, which in their essence exceed the criminal liability, being though particular situations as well, where the employee concerned is criminal liable for other offenses.

We will be in the above mentioned situation (lack of criminal liability), when a signalman executing his activities on a railway station located on a side section, leaves the post for a period of about 30 minutes, while the next activity circumscribed to his competence of ensuring traffic safety, will be exercised over two hours after leaving the station. In such a case, although the post is classified as being in the category of those responsible for ensuring traffic safety, the signalman will not have a criminal liability, as due the act of leaving the station did not endanger the safety of traffic, thus not fulfilled the requirement key.

For the existence of the offense provided for in the provisions of paragraph (2) of the same article, alcohol content of exhaled air of over 0.80 g /l of pure alcohol in the blood or being under the influence of other psychoactive substances, represents the conditions for the existence of the material element of the objective side, conditions that implicitly acquire the character of essential alternative requirements. In this case, it is no longer necessary finding the action that constitutes the material element of the objective side of endangering traffic safety of vehicles, intervention or maneuver on the track, as the legislator considered that the mere presence at work under the influence of alcohol (within the incriminated limits) or under the influence of other substances would endanger traffic safety.

**The immediate result.** For the existence of one of the two offenses (or sometimes both, in competition), it is necessary that their immediate result (incriminated actions) consist of creating a fact situation dangerous to the safety of railway traffic. (Pascu & Gorunescu, 2009, p. 483)

Finding immediate results is achieved at the same time as the finding of the offense of leaving the post or the performance of activities under the influence of alcohol (within the limits of the law) or other psychoactive substances.

For the existence of the offense provided for in article 331 paragraph (1) of the new Criminal Code, it is not sufficient to establish that by the incriminated actions it could have endanger the safety of railway traffic [as article 275 paragraph (1) of the Criminal Code in force], it is necessary that these actions effectively put into danger the traffic safety of transport means, intervention or maneuver on the railways.

It is important to establish and with direct consequences in the assessment of the immediate result the following circumstances:

- the importance of post in the railway station in question;
- the importance of the activities that need to be executed while the active subject left the station;
- activities specific to road safety that needed to be performed in the period of time that the active subject was absent from his post, the direct effect of their non-performance in the context of traffic safety in the area;
- if in the period of absence from his post, the activities that needed to be performed by the active subject were carried out by another person, were not executed and so on;
- what was the actual activity of endangering traffic safety in the area etc.

In the case of the offense provided for in article 331 paragraph (2) of the new Criminal Code it is not required finding the immediate result, the legislator considered that it exists at the moment of establishing the physical situation in which the employee is in, i.e. under the influence of alcohol (within the incriminated limits) or other psychotropic substances.

In the aggravated way provided in article 331, paragraph (3) of the new Criminal Code, the immediate result is supplemented by another special result, which becomes circumstantial element of the simple ways and it consists in producing a railway accident.

We conclude that for the existence of the crime in the aggravated way, it is not sufficient that by the incriminated action to endanger the safety of railway traffic, it is necessary to produce a material damage, that consists of bodily destruction or damage of vehicles, railway rolling stock or installations rail.

**Causation connection.** To complete the objective side of the offense to leave the post or the exercising of their duties under the influence of alcohol (within incriminated limits) or other psychoactive substances, it is necessary to establish a causal connection between action that constitutes the material element and immediate result. The lack of causation connection leads to the lack of the offense.

If in the case of the offense provided for in article 331 paragraph (2) of the new Criminal Code, the causation connection results in *ex re*, the offense provided for in article 331 paragraph (1) of the new Criminal Code should be investigated, following a finding of its existence.

## **2.2. The Subjective Side**

In the case of offenses such as leaving the post or presence at work under the influence of alcohol (within the incriminated limits) or other psychoactive substances, the form of guilt, with which the active subject acts, is the intention of both forms, namely direct and indirect.

There will be direct intent when the active subject of the offense, an employee with responsibilities of ensuring traffic safety on the track, leaves his post or executes his duties under the influence of alcohol or other substances, foreseeing the result of his act that consists of endangering traffic safety of transport means, intervention or maneuver on the railways and he acts in order to produce this result.

Indirect intention will exist when the active subject of the offense, executing one of the incriminated actions (or both) foresees the result of his act that consists of endangering the safety of transport means, intervention or maneuver on the track, and although that result is not intended, he accepts the possibility of its occurrence. Also, both forms of the intent will exist each time, in the case of the offense provided for in article 331 paragraph (2) of the new Criminal Code.

In the aggravated way of the offense the active subject will act with direct intent, when he leaves the post or working under the influence of alcohol or other substances, foreseeing the result of his act which may consist of an accident on the railway and he acts in order to produce such result.

The examined offense can be committed in its aggravated way and with direct intent when leaving the post or working under the influence of alcohol or other substances, the active subject can predict the outcome of his act, which may consist in causing a railway accident, and although he does not pursue this result, he accept the possibility of its occurrence.

Besides the intent, the offense in its aggravated way may be committed also with exceeded intention (*praeter intentionem*) when the active subject intentionally leaves his post or works under the influence of alcohol or other psychoactive substances with the intent to endanger the safety of railway traffic, and the result is a railway accident; the worse result that he had foreseen, he has not accepted considering the baseless that it will not produce, or a result that he had not foreseen, even if he could have or should have foreseen it.

In conclusion, we find that under the subjective aspect, this offense can be committed with direct or indirect intent and with exceeded intent (*praeter intentionem*).

As mentioned previously, this offense can be committed by a **legal entity**, which carries out activities specific to railway, circumscribed the safety of the transport means traffic, intervention or maneuver on the railways.

In general, the guilt forms of the legal person are identical to those of physical entities, but not absolutely necessary for the existence of the crime, there are situations in which for guilt form of the active subject, the legal entity does not coincide with the form of guilt of the physical entity.

As in the case of other offenses of this kind, in the case of attracting criminal liability of the legal persons, they will be criminally charged some employed physical entities of the responsible legal entity. This applies to the rule where there will be criminal liability of two different categories of physical entities. In the first category there are included the physical entities who have actually performed the action or inaction that endangered the safety of means of transport, intervention or maneuver on the railways and it represents the material element of the objective side; in the second category are the person /the persons from the legal entity's management who gave the order against the law.

In all cases the individual active subject in the management of the legal person ordered the execution of an action by which it was performed the material element of the objective side, the form of guilt of a physical entity will be the same as a legal entity, the act being interpreted as executed in order to achieve the activity object, in the interest of or on behalf of the legal entity.

We exemplify the case where a person in an organization, responsible for the management of a carrier demands to a wagon maneuverer to leave his post in order to use him in another activity, even for the benefit of the legal entity. In that event wagon maneuverer left his post, although he foresees the result of his act, namely endangering the safety of rail traffic, it is not in his intention to have this result, but he accepts the possibility of its occurrence (the form of guilt in this case is indirect intent). Both the physical entity from the management of the legal entity, and the legal entity will be criminally liable for committing the offense provided for in article 331 paragraph (1) of the new Criminal Code, the same form of guilt, i.e. indirect intent.

The offense provided for in article 331 paragraph (2) of the new Criminal Code can be committed by a legal entity, when an individual from its management, demands the execution of service by a driver or other employee with direct responsibility in railway traffic safety (a demand that it is executed), although the employee shall inform that the person in question has used alcohol beyond the permissible limit of the law.

While there may exist in principle to determine their existence, the motive and purpose, they have no relevance to the subjective content of each of the two offenses, the importance of their establishment during criminal trial being necessary in order to individualize the criminal sanctions that will be applied to the author(s) of this offense, and in particular the sentence.

### **3. Conclusions**

As mentioned changing the legal content of this offense was determined by the critical opinions made in the recent years in Romanian doctrine amid the reorganization of traffic system and railway, something which has considered taking activities from this segment of economic activity by the private system.

As expected, with the change of the legal content of the offense, changes have occurred in its legal content.

The main changes to which we refer in our examination cover: the introduction of a new alternative action in the content of the objective side consisting of the action to fulfill the duties under the influence of other substances with a similar effect to alcohol, the introduction of a maximum limit of alcohol of not exceeding 0.80 g /l of pure alcohol in the blood, and the need of finding another result, namely that of endangering the safety of railway traffic.

All these changes, expressly required in the doctrine, aim at contributing to improving the legislation, as well as helping to prevent crimes of this kind.

As a general conclusion we consider that the new legislation, rooted in the general socio-economic realities of the current Romanian society, is intended to make an important contribution to preventing and combating crime of this kind.

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