Driving a Vehicle without a Driving License in Romanian Law. The Characterization of the Offense and Comparative Examination in light of the New Envisaged Changes. Critical Opinions and de Lege Ferenda Proposals

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Abstract: In this paper we have dealt with the definition and examination of certain aspects concerning the driving offense on the public roads of a vehicle without a driving license. We have also proceeded to the comparative examination in the light of the envisaged amendments, with some considerations on the application of more favorable criminal law. Last but not least, we have formulated some critical opinions, and we made a few de lege ferenda proposals, which involves completing the text or eliminating some notions. The novelty brought by this paper is reflected in the conducted examination, as well as in the de lege ferenda proposals. The work may be useful to both the legislator who is supposed to operate the suggested changes, and for the academic environment and practitioners in the field.

Keywords: crime; concept; more favorable criminal law.

Introduction

The offense of driving a vehicle without driving license is part of the group of offenses against traffic safety on public roads, as provided for in Chapter II of Title VII of the Special Part of the Romanian Criminal Code, in art. 335.

The act provided in the text of art. 335 was also criticized in previous legislation, as the Romanian legislator considered that the driving action on public roads of a vehicle for which there is a requirement to hold a driving license by a person who does not fulfill this condition, represents a serious act which must be sanctioned by a rule of criminal law.

The gravity of this act results from the specificity of this type of activity, where the involvement of such a person in a traffic accident can lead to deaths, bodily injuries or the destruction of certain goods (most of the time these goods are limited to the vehicles involved in the accident).

At the same time, another special condition has to be emphasized that caused the legislator to incriminate this act, namely the need for the person driving a vehicle on public roads to have completed a special training course in this field.

Last but not least, the significant increase in crime in this area must be taken into account, with thousands of deaths and injuries occurring annually, as well as material damage caused by road users in the case of traffic accidents.

Regarding the rationale of incrimination, recent doctrine has found that “The existence of road traffic involves the introduction of a risk in society, namely the occurrence of accidents. However, this is a risk assumed, because it is assumed that the benefits of carrying out such an activity are greater than the possible damage. However, when activities are carried out by persons who do not know the legislation or have not acquired the necessary skills to drive a vehicle, the risks become major and the legislator has the right to sanction the driving of a vehicle without the authorization from the competent authorities, i.e. without obtaining a driving license” [1].

In another opinion it is considered that “The legislator considered that a person without a driving license must be presumed to be absolutely incapable of driving safely a motor vehicle or a tram. As a result,
the intention envisaged in this incrimination was to ensure the safety of traffic on public roads, through the driving interdiction imposed on persons who do not have a driving license” [2].

Also, “driving a vehicle on a public road without a driver's license, that is, those qualities, physical or psychological skills required and attested by possession of such a document, unequivocally presents a real danger to the safety of traffic on public roads” [3].

Last but not least, “road safety does not depend only on objective factors such as the technical state of the vehicle and the road, but also some subjective factors regarding the driver's knowledge of public roads rules, technical rules, having a driving license to prove the capabilities in the field [4].

I. Concept and Characterization

As we have mentioned above, being provided in the provisions of art. 335 Criminal Code, the examined offense is part of the group of offenses against traffic safety on public roads.

The first offense, provided in the provisions of art. 335 par. (1) Criminal Code, consists of the action of driving a motor vehicle, an agricultural or forestry tractor, or a tram, train as well as any other vehicle equipped with a propulsion engine by a person who does not have a suitable driving license.

The offense will also occur when driving a vehicle for which the law prescribes the obligation to hold a driving license by a person whose driving license is inappropriate for the category or subcategory to which that vehicle is part or whose the license was withdrawn or canceled or the exercise of the right to drive was suspended or not entitled to drive motor vehicles, trams or agricultural or forestry tractors in Romania (art. 335 par. (2) Criminal Code)

The last offense provided in paragraph (3) of the same article may be committed by a person who entrusts a vehicle for which the law provides for the obligation to hold a driving license for driving on a public road to a person known to be in one of the abovementioned situations (5).

With regard to the provisions of paragraph (1) of art. 335 Criminal Code, we make it clear that as it results from the way they are drafted, the offense will be detained only when driving a motor vehicle, an agricultural or forestry tractor, a tram, a train, as well as any other vehicle equipped with a propulsion engine by a person who does not have the appropriate driving license.

Undoubtedly, the legislator considers only those vehicles for which, in order to be able to travel on public roads, it is necessary to have an appropriate driving license by the driver.

Vehicle means any vehicle equipped with a propulsion engine commonly used for the carriage of persons or goods on the road or for towing vehicles used for the carriage of persons or goods on the road. Rail vehicles, called trams, as well as agricultural or forestry tractors are not considered to be motor vehicles. Trolleybuses are considered to be motor vehicles [6].

Vehicle means a mechanical system that travels on the road, with or without means of self-propulsion, currently used for the transport of persons and / or goods or for the performance of services or works (6)

Finally, according to the law, the term agricultural or forestry tractor means any motor vehicle running on wheels or tracks with at least two axles, the main function of which is its traction power, designed in particular to pull, to push, to transport or to operate certain equipment, machinery or trailers used in agricultural or forestry operations and whose use for the transport of persons or goods by road or for towing vehicles used for the carriage of persons or goods by road is only a secondary function. There are treated as agricultural or forestry tractor the for the purpose of performing services or works, referred to as self-propelled machinery [6].

We note that the terms of a motor vehicle and an agricultural or forestry tractor has been taken from Directive 2006/126 / EC of the European Parliament and of the Council of 20 December 2006 on driving licenses (reformed) [7] where they were expressly mentioned in the provisions of art. 4 par. (4).

These provisions have been transposed into the Romanian internal law (G.E.O. No. 195/2002 on the circulation on public roads), by art. I point 1 of the Government Ordinance no. 21 of 26 August 2014 [8]
II. Criminal Code in force in relation to Previous Regulations

Considering the original wording (from 01.02.2014), we make it clear that the driving offense of a vehicle without a driving license was not provided for in the 1969 Criminal Code, being taken over from G.E.O. no. 195/2002, republished, as subsequently amended and supplemented.

Therefore, this offense was provided in a similar wording, but without a marginal name in the provisions of art. 86 of the aforementioned normative act.

The comparative examination of the legal contents of the two crimes (provided in the initial drafting of the Criminal Code and G.E.O. No. 195/2002) allows us to identify the elements of differentiation and similarity between them.

Thus, in the new Criminal Code, the offense in art. 86 from G.E.O. no. 195/2002, republished, is marginally called art. 335, “Driving a Vehicle without a Driving License”, a name that does not appear in the old law.

While the provisions of paragraph (1) of the two texts are identical, including the limits of punishment, the provisions of paragraph (2) of the new Criminal Code are amended compared with the provisions of the same paragraph of art. 86 of the above-mentioned normative act, provided the driving of a vehicle on the public roads, not of a motor vehicle or of a tram, as provided by the old law.

The same changes were made by the legislator of the new Criminal Code and in the content of par. (3) of art. 335, while the minimum and maximum limits of the punishments were retained.

Also, in the content of par. (3) of art. 335 Criminal Code, there is no longer any criticism of the action of entrusting a vehicle to a person suffering from a mental illness, as it appeared in the content of art. 86 par. (3) of G.E.O. no. 195/2002.

In the provisions of art. 335 Criminal Code, as in the old law, there are three distinct offenses, each of them presenting several simple normative modalities.

In conclusion, we consider that the two regulations present the same crimes, the only elements of differentiation being those related to the marginal name and the replacement of the notions of motor vehicle or suburban with vehicle in the legal content of par. (2) and (3) [5] [9].

The comparative analysis of the provisions contained in the original wording from 01.02.2014 and the amending provisions of the text of art. 335 Criminal Code allows us to formulate opinions regarding the legal content of the two crimes.

Thus, in the provisions of par. (1) of art. 335 Criminal Code (with the expected changes), the driving of a motor vehicle, agricultural or forestry tractor, or a tram, train and any other vehicle equipped with a propulsion engine by a person who does not have a driving license while in the provisions of art. 335 par. (1) Criminal Code in its initial drafting, it was sanctioned to drive a motor vehicle or a tram on the public highway by a person who does not have a driving license.

We find that the law in force extended the liability to the driver of an agricultural or forestry tractor, train or any other vehicle equipped with a propulsion engine; in the previous law, only the driving of a motor vehicle or tram was taken into account.

Regarding the introduction of the criminal liability of the driver of the agricultural or forestry tractor, this change was due to the Constitutional Court Decision no. 224 of 4 April 2017 and Decision no. 11/2017 by the ICCJ, The Complaints Committee for Legal Matters.

Thus, by Decision no. 224/2017, the Constitutional Court upheld the objection of unconstitutionality and found that “the legislative solution contained in art. 335 par. (1) of the Criminal Code, which does not incriminate the driving on the public roads of an agricultural or forestry tractor without a driving license, is unconstitutional” (published in the Official Monitor of Romania, Part I No. 427 of 09.06.2017).

Also, by Decision no. 11/2017, the High Court of Cassation and Justice, the Law Enforcement Board decided that “in interpreting the notion of motor vehicle provided for in art. 334 par. 1 and art. 335 par. 1 of
the Criminal Code, referring to art. 6 point 6 and point 30 of G.E.O. no. 195/2002, modified and completed by G.O. no. 21 / 26.08.2014, the driving on the public roads of a non-registered / unregistered agricultural / forestry tractor according to the law or by a person who does not have a driving license does not meet the typical conditions of the offenses stipulated in art. 334 par. 1 of the Criminal Code, respectively, 335 par. 1 of the Criminal Code”.

However, the legislator's option to supplement the provisions of paragraph (1) with the inclusion of the two distinct categories of drivers, namely those of an agricultural or forestry tractor, is opportune, covering a shortcoming in the initial drafting of the Criminal Code.

The second change in the structure of this text aims at including other categories of vehicles in the category of criminally liable persons, and those driving on public roads, other categories of vehicles, a category which targets those equipped with propulsion engines. We appreciate that this change is also beneficial, being imposed by the evolution of crime and the improvement of such vehicles.

The last amendment in this paragraph concerns the inclusion in the category of persons punishable with criminal proceedings and persons driving a train.

As a similarity we retain the minimum and maximum limits of the penalties, which are identical.

Par. (2) art. 335 Criminal Code as amended and completed, also presents a number of amendments to the provisions of par. (2) of article 335 Criminal Code in its original drafting.

Thus, the amendments to which we referred above concern the introduction into the category of criminal punishable persons, in addition to drivers of motor vehicles and trams and agricultural or forestry tractors, or who do not have the right of driving in Romania.

As far as penalty limits are concerned, they are identical.

Par. (3) art. 335 has not changed.

III. The Enforcement of More Favorable Criminal Law

Having regard to certain specific elements concerning the incrimination, the offences referred to in art. 335 Criminal Code present certain peculiarities that require some different procedures in transitional situations.

These peculiarities generally concern the transposition over time of the incriminations, from G.E.O. no 195/2002, republished in the Criminal Code (in its initial drafting), after which the transposition, with the amendments and additions thereto, in the Criminal Code in force, stating that we consider only the provisions of par. (1) and (2), as the provisions of par. (3) has not undergone any changes (compared to the initial drafting).

On the other hand, it should be considered the special situation regarding this offence, in the sense that the application of the more favorable criminal law concerns three situations, namely:

- committing a crime before the entry into force of the Criminal Code, respectively, 01.02.2014, and judging from the entry into force of the Criminal Code, but pending the adoption of the Law amending the text of article 335 Criminal Code;
- committing an offense after the entry into force of the Criminal Code (01.02.2014), pending the entry into force of the recently-operated changes, and judging it after the entry into force of those amendments;
- committing an offense before the entry into force of the Criminal Code (01.02.2014) and judging it after the entry into force of the Law Amending and supplementing the incriminating text.

In the situations described above, for the identification and application of more favorable criminal law, first of all, the provisions in which the act was incriminated, there will be considered provisions which have been modified by the adoption of the two amendments.

Thus, if we refer to the original wording, we notice that as regards the content of the offense provided in the provisions of art. 335, par. (1) Criminal Code, it is almost identical to that in art. 86 par. (1) from G.E.O. no. 195/2002, republished, with the subsequent amendments and completions, the only
difference of form, being represented by the marginal name, which does not exist in the law in force (which in any case has no relevance in the transitory situations).

By establishing the identity of the legal contents, as well as the penalty limits, in the transitory situations, the court will have to apply the provisions of art. 5 (more favorable criminal law), with reference to art. 3 par. (2) of the Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code.

Given that one or more attenuating circumstances are observed, we consider that the more favorable criminal law is the old law, while in the event of aggravating circumstances, the more favorable criminal law will be the law in force.

If the court considers that for the commission of the examined offenses, there are incident the provisions of art. 80 or 83 Criminal Code (waiving punishment and postponing the punishment) it will apply the provisions of the new law that are more favorable.

Also, during the prosecution phase, the prosecutor may abandon the prosecution if he finds that the conditions provided in art. 318 of the Criminal Procedure Law, modified by the provisions of art. 210 of the Law no. 255/2013 and G.E.O. no. 18/2016.

As regards the offense provided for in art. 335 par. (2), we appreciate that the transitory situations will impose the same procedures, although the legal content of the new law differs from that of the previous law.

Instead, there is an issue related to the provisions of the new Criminal Code, which refers to the driving of a vehicle, to the provisions of the earlier law concerning a motor vehicle or a tram.

We note that the provisions of the law have extended the scope of the law, including all vehicles for which the requirement to hold a driving license is required, as opposed to the old law that included only motor vehicles and trams.

Taking into account the definition given to the vehicle and the motor vehicle in art. 6 points 6 and 35 of G.E.O. no. 195/2002, republished, we consider that no special problems arise because the tram and the motor vehicle are considered vehicles.

In situations where the person concerned is being sued for driving a motor vehicle or a tram on the public road, only the problem of identifying the more favorable criminal law is concerned, i.e. the provisions of art. 5 Criminal Code and of art. 3 par. (2) of the Law no. 187/2012.

The establishment and enforcement of more favorable criminal law will be based on the finding that the minimum and maximum penalties are the same, taking into account the observations made above and other circumstances that differ from one case to another.

If a car or tram is entrusted to drive on a public road, the act is not discriminated, and the more favorable criminal law is to be established in the circumstances explained for the offense under para. (1) of art. 335 Criminal Code.

Taking into account the changes envisaged in the content of par. (1) and (2) of art. 335 of the Criminal Code, we appreciate that, while the limits of punishment remained the same, the question of the application of the more favorable law does not undergo any significant changes in relation to the above examination.

The only change is to sanction the driver of an agricultural or forestry tractor or any other driver of a propulsion motor vehicle, categories of drivers were not provided for in G.E.O. no 195/2002 and in art. 335 par. (1) and (2) Criminal Code, in its original wording.

It is important to note that the more favorable criminal law identification and enforcement will be done by the court in view of the specificities of each case.

Conclusions, Critical Views and de lege ferenda Proposals

Through the examination we highlighted the necessity and the importance of incriminating such facts, the ultimate goal being to prevent and combat crime in this field.

In this context, we appreciate that the text resulting from the proposed changes is superior to both the original G.E.O. no. 195/2002, as well as to the text of its original wording in the Criminal Code.
Nonetheless, we appreciate the fact that the text also contains some critical provisions that can be improved.

Thus, in the content of par. (3) of art. 335 Criminal Code, there is no longer any incrimination of the action of entrusting a vehicle to a person suffering from a mental illness, as it appeared in the content of art. 86 par. (3) of G.E.O. no. 195/2002.

Lege ferenda proposal would be completing the provisions of paragraph (3) of art. 335 of the Criminal Code with incriminating the action of entrusting a vehicle to a person suffering from a mental illness.

One of the expected changes is to broaden the sphere of active crime subjects by including the person operating a train.

Beyond the unfortunate wording of the text (which incites the idea that the person who operates a train on public roads is sanctioned!!), we appreciate that this provision is inappropriate and completely erroneous.

The legislator did not have to include in this category also the train because this means of transport has a special regime, operating the train requires special training, and the activity itself has nothing to do with the safety of the traffic on the public roads, the activity being circumscribed to traffic safety on the railways.

Moreover, upon entering the service, the driver and his assistant are checked and tested for the consumption of alcohol or other psychoactive substances by the specialized personnel, so driving a locomotive carrying a train of persons or freight does not perform in a way similar to driving a vehicle on public roads.

Also, the wording is fundamentally flawed because a train means a convoy of railway wagons linked together and driven by a locomotive. [10].

On the other hand, we also take into consideration the fact that on the railway also circulate other vehicles than the locomotives with train, respectively, dredges, crane plows, etc.

The incrimination of operating a locomotive or other vehicles on the railway would have been more appropriate to appear in the structure of Chapter I of Title VII of the Criminal Code - Special Part.

In conclusion, de lege ferenda, we propose the urgent removal of the term “train” from the legal content of the offense provided in art. 335 par. (1) Criminal Code.

References
