The constitutive content of destruction or false signaling offense in the New Criminal Code

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***Abstract*:** *The adoption and entry into force of the New Criminal Code requires the amendment of certain texts of incrimination, in particular the constitutive content of certain offenses. Among the intervened changes there are also those involving offenses against traffic safety on the railway. In this context, within the paper it is examined the constitutive content of the destruction or false signaling offense provided in article 332 of the New Criminal Code. Within the analysis there were examined in comparison the current provisions in relation to the new law. There were also formulated some critical observations concerning the definition of railway accidents, as the only aggravated manner of this crime. The paper can be useful to practitioners in the field, academics and students of law faculties*.

***Keywords*:** *crimes against the security of railway traffic; destruction; false signaling; railway accident; critical comments*;

Introduction

In the New Criminal Code the destruction or false signaling offense is part of the offense group against railway traffic safety being provided also in the current Criminal Code (in the same group) as "destruction and false signaling".

It is noted that unlike the current provisions, in the New Criminal Code there are a series of differences, which consist of the marginal naming and also content.

Thus, the law in force, the name of the offense is the destruction and false signaling, unlike the New Criminal Code, where the marginal designation of the offense is amended by replacing "and" with "or".

The most important change occurs in the content of the offenses, the adoption of which being, in our opinion, decisively influenced by the doctrine [1].

The first change concerns the scope of passive subjects of offenses, which in the new provision was broaden a lot, given the structural changes that have occurred in the organization and operation of traffic system and railway transport as a whole.

Thus, according to the wording in a simple way provided in article 276 paragraph (1) of the Criminal Code in force, the passive subject may be only the company that manages/administrates the railway infrastructure i.e. the National Company "CFR/The Romanian railway" which owns the track and related facilities which can be destroyed, degraded or rendered into a disuse status or the two national companies of goods transport and passengers, in their capacity as managers / administrators of such resources when it is jeopardized the safety of their movement. Note that there were excluded other private legal entities, respectively cargo drivers or people and other state or private companies running maintenance, intervention or maneuver activities on the railway.

In the New Criminal Code, article 332 paragraph (1) the passive subjects' scope of the examined offenses was extended, belonging to this category the following legal entities: The National Company "C.F.R./The Romanian railway", the two companies for passengers and cargo transport owned entirely by the state, the private transport operators and other commercial companies owning the rolling stock.

In the case of the dispositions of article 276 paragraph (3) of the Criminal Code in force, the passive subject may be the legal entity who has legal ownership of rolling stock or the rail facilities.

In the New Criminal Code [article 332 paragraph (2)] the quality of the passive subject was also extended and there could be the following legal entities: employees of the National Company "CFR", employees of both passengers and cargo transport companies owned entirely by the state, employees of private transport operators or other companies that own the rolling stock.

Also note the presence of active subjects of legal entity, any of the offenses could be committed also by one of the legal entities conducting activities on the railway or other legal entity.

Another amendment (also specific to other offenses) regards the renunciation of two aggravated manners provided by the current Criminal Code, i.e. disorder in the transport activity by rail and rail disaster, and maintaining the only aggravating manner, the accident by rail.

In the New Criminal Code it was abolished the aggravated manner of the offense when being committed by an employee of the railway [article 276 paragraph (4) of the Criminal Code in force].

The last amendment refers to the minimum and maximum sentence for both ways through their mitigation. Thus the Criminal Code in force within the simple ways the penalty is imprisonment from 3 to 12 years, and in case of railway accident the imprisonment is from 10 to 15 years, while in the New Criminal Code the sentence with imprisonment for simple ways is from 2 to 7 years, and in the case of aggravated manners from 3 to 10 years and the prohibition of certain rights.

As elements of similarity, we point out the maintenance almost entirely of the actions through which it is achieved the material element of the objective side and of the active subject, which can be any legal or physical entity.

1. The objective side of destruction or false signaling offense

The objective side of the examined offenses is in its structure, a material element accompanied every time by an essential requirement, an immediate result that is specific for each of the two offenses and a causal link.

The material element of the objective side, is achieved through various actions, which consist of the destruction, degradation, rendering into a disuse status, placing obstacles on the track and false signaling.

Since these actions customize each of the two offenses, we will proceed in analyzing them separately.

A. We also mention that ***the first offense provided for in article 332 paragraph (1) of the New Criminal Code***, presents two normative ways.

a. ***In the first normative ways of the crime of destruction or false signaling***, provided in article 332 paragraph (1), the action of the active subject is done by three alternative ways, consisting of:

destroying, degradation or rendering in a disuse status of the track, rolling stock, railway facilities or those of railway communications, and any other goods or to the railway infrastructure.

Destruction means the action of the active subject through which *the object in question is destroyed, ruined, pulled down, broken* and so on, which *means that the asset could no longer be physically used for the purpose for which it was built*.

Degradation of the goods mentioned in the text *involves deterioration, damage to property, bringing it in a status in which it could no longer be used for the purpose for which it was built, at least for a period of time*.

Rendering in a disuse status is, according to the doctrine, *a breach of good's quality, of its using potential without repercussions on its substance*; therefore it means its abolishment or reducing the possibility of using the asset for its intended purpose, without though harming its substance, its essence [2].

As we can see the actions of destruction, degradation or rendering into a disuse status may be directed against certain categories of goods, all specific to the traffic system and railway transport.

In the first category there are included the assets related to railway infrastructure, namely: the railway, the rolling stock (which belongs to the national company or state cargo drivers owners) railway facilities (including the telecommunications) and other goods or facilities from the railway infrastructure.

In the second category there are included some goods that do not belong to the railway infrastructure or rolling stock, a phrase which includes state or private passenger and cargo transport means, means of intervention, track maintenance or maneuver, that can be the property of other private legal entities.

Regarding the railway line, which is referred to as the first material object in the legal content of the offense, no matter the location and its destination in the categories of means of transport that are to travel, it is composed of a variety of materials, i.e. rails, tracks, sleepers, rail fasteners (bolts, screws), etc.

In terms of the text's incidence it is irrelevant the track traffic category, i.e. whether it is built in one of the nominated marshaling yards network, between railway stations, entering or leaving a station or another, it is considered as being the main or secondary (taking into account the attended main line) and it is located at the ground's level or on a viaduct, etc.

It is important that the rail line in question to be running on the entire length of that section, or at least only on the portion where the destruction, degradation or rendering into a disuse status was produced.

We identify this offense when the active subject action has ascertained the destruction of the railway line through theft or explosion (on a certain distance) or using the mechanical action of a vehicle (bulldozer), when the active subject action establishes the dissolution and theft of bolts or screws which provides rail fastening tie (deterioration) or when there were performed unauthorized excavations near the railway which had the effect of destabilizing its embankment (rendering in a disuse status).

It does not fulfill the constitutive elements of the offense the act of a person that destroys or deteriorates or renders in a disuse status a railway track which is closed for various reasons: technical (repair and maintenance), economic and so on; as by this action it can not jeopardize the safety of railway traffic, so the essential requirement is not fulfilled.

In this regard, in the judicial practice it was decided that removing railway tracks that provides stability to railroad, followed by stealing them, meets both constitutive elements of the offense provided for in article 5, paragrapf (1) of Law no. 289/2005 consisting of destruction and rendering into a disuse

status the railway or its components and those of the offense provided for in article 6 paragraph (1) of the same law, regarding the theft of railway components, being in competition [3].

Also it does not meet the constitutive elements of the offense the act of a person who destroys, deteriorates or renders in a disuse status the track located inside a company that owns both the railroad and rolling stock (or only the rail line) as the essential legal requirement is not met; the same situation is encountered at the destruction of the railways under construction, which was not yet put into operation.

No doubt such actions meet the elements of other offenses such as destruction (article 253 of the New Criminal Code) and / or theft, article 229 paragraph (3) of the New Criminal Code [4].

The term "rolling stock" includes strict interpretation specific to railway transport system, all vehicles traveling on the railroad, including: locomotives, carriages, train crane, help train, trolley pantograph, intervention train, locomotive motorcar, etc.

Using the words *rolling stock* as material object of the action of destruction, degradation or rendering into a disuse status, the legislator included in addition to means of transport all vehicles traveling on the railroad.

For the existence of the offense, the action of destruction, degradation or rendering into a disuse status the rolling stock must be carried out during its stationing, i.e. when it is not in circulation, otherwise it will be assessed as aggravated manner, which means accident on the rail.

There are met the constitutive elements of the offense when the active subject removes certain parts of a locomotive or other railway vehicle, electronic components of the locomotive or other railway vehicle, electronics, communication stations on locomotives or other rail vehicle, etc. It does not matter the purpose of the perpetrator regarding the destination of the removed assets (most often the goal is to steal) the important element being the absence of parts of vehicle's gear, likely to make it unusable and thus endangering the railway traffic safety.

Regarding railway installations, communication or any other asset of railway infrastructure, they can also be destroyed, degraded or rendered into a disuse status in different ways.

So the rail traffic activity is performed using specific installation called ***fixed safety installation and operative leadership of railway traffic***. These installations are part of the concrete elements of the public railway infrastructure category including: the electro-dynamic centralization installation, the electro-mechanical interlocking installation, installation of semi-automatic and automatic line block, installation of electronic centralization, installation of automatic signaling of level crossing, with and without barriers, installations for melting snow and ice from switches, railway brake systems, etc.

Also, another special category of installations is the communication systems, through which it ensures the operational communication between operators providing railway traffic and also between them and the people providing safe traffic of railway vehicles.

Destruction, degradation or rendering into disuse status these facilities is usually achieved by removing and subsequently steeling the electrical or electronic components and communications.

Thus, in the judicial practice it was decided that steeling the coils that control electrically the presence of a train on a stretch of rail line meets the requirements of article 209 paragraph (3), letter f) of the Criminal Code, concerning the theft of safety installations and railway traffic control, and not the provisions of article 6 paragraph (1) of Law no. 289/2005 regarding the theft of railway components, as the coils that electrically control the presence of a train on a stretch of railway line represent safety installations and railway traffic control in the sense of article 209 paragraph (3), letter f) of the Criminal

Code, and the offense of destruction and false signaling provided in article 276 paragraph (1) of the Criminal Code, in competition [5].

Under the provisions of the New Criminal Code these facts meet the constitutive elements of the offenses provided for in article 332, paragraph (1) and 228, paragraph (3), letter f) both in real competition [article 38 paragraph (1) of the New Criminal Code].

In another older case it was decided that offenses against the security of railway traffic in their simplest form, are crimes of danger, in the sense that, in order to use them, there is no need to produce any harmful result, being enough to commit an action or inaction among those incriminated, so as to occur a dangerous situation for the social values protected by the law.

Through article 276, paragraph 1 of the Criminal Code there are incriminated - among other things – the destruction, degradation and rendering into a disuse status a railway or railway installations, if it would have endangered the safety of the railway transport. In the sense of this text, the safety of the transport means need not be direct and current, actually designed; it is sufficient an indirect, future danger likely to cause harm only under the conditions of additional new acts committed by the same or another person. This follows from the wording of the law, which uses instead of the phrase "if the act endangered", the phrase "could endanger" the traffic safety.

The act of the defendant, railway worker of the C.F.R., to have snatched from the underground the electric cable wire terminals, thereby to have removed from its operation the installations of electrodynamics' centralization of C.F.R. railway stations and the automatic line block installations that have not functioned in the absence of electric power - which is why nine trains were delayed, a total of 395 minutes and it has created a state of danger to traffic safety - is an offense provided for in article 276 paragraph 1 and 5 of the Criminal Code [6].

Under the provisions of the New Criminal Code, in the presented case, we are in the presence of an offense provided for in article 332 paragraph (1) since the destruction action has to actually, directly and effectively endanger the safety of railway traffic.

Regarding the destruction, degradation or rendering into disuse status the railway communications in the judicial practice it was decided that the defendants' act to cut copper wire from the C.F.R. telecommunication network, being caught by the police at the stage of being transported, meets constitutive elements of destruction and false signaling provided in article 276 paragraph (1) of the Criminal Code, and those of the offense of theft in the consumed form [7].

Remaining consistent to its jurisprudence, the High Court of Cassation and Justice (Criminal Division), in a similar case decided that the destruction, degradation or rendering into the disuse status of telecommunications circuits between the C.F.R. railway stations meets the constitutive elements of the offense against traffic safety on the railways referred to in article 276 paragraph (1) of the Criminal Code, whereas by the destruction, degradation or rendering into a disuse status the communication support between C.F.R. railway stations may endanger the safety of railway transport means and for the existence of destruction offense provided for in article 276, paragraph (1) of the Criminal Code; it is sufficient that through the committed act it has endangered the safety of the railway transport means [8].

In connection to the above mentioned decisions, we believe that under the application of the provisions of the New Criminal Code, this act is no longer an offense, as for the existence of the offense provided for in article 332, paragraph (1), it is necessary that the destruction action ***to endanger*** the safety of railway traffic, or in the present solved case, the court found that the act of destruction ***could endanger*** the safety of rail traffic.

Among other assets related to railway infrastructure, to which the legislator refers directly we mention:

- bridges, tunnels, viaducts and other works of art;
- geotechnical works for protecting and strengthening, the plantations for the protection of the railroads and the lands on which they stand;
- land in a safe area of the track;
- administrative buildings, depots, marshaling yards, etc.;

Destruction, degradation or rendering into the disuse status such goods can be achieved by different actions, customized by the existence and functionality of each separate item.

In the older judicial practice it was decided that a vehicle passing over a railway bridge - designed exclusively for this kind of movement, with warning and barriers - if by that the bridge was damaged and caused a disturbance in the transport rail, it represents the offense stipulated in article 276, paragraph (1) and (4) the Criminal Code. The defendant cannot claim that he was actually on fact error regarding the production of the above-mentioned consequence, because of the existence of the warning signs and barriers, he could and should have foreseen that, moving through it, he could degrade the railway material so that it may cause a disruption of railway traffic [9].

b. ***The second normative way of destruction or false signaling offense***, under article 332, paragraph (1) of the New Criminal Code is the action of the active subject of placing obstacles on the railroad.

For the existence of the offense it is necessary for the obstacle in question, through its size, weight and location of the settlement, represents a real danger that can lead to destruction, degradation or rendering into a disuse status of the track, rolling stock, railway installations or communications or any other property related to railway infrastructure. It is not necessary to produce the impact between a rail vehicle and the obstacle, i.e. is the rolling stock actually hitting the obstacle, the offense being committed when the offender has placed on the railroad that obstacle.

The incrimination of the action of setting obstacles on the tracks was previously achieved and maintained by the legislator of the New Criminal Code, for the criminal policy reasons; taking into account that the destruction, degradation, or rendering into a disuse status the values defended in this case by the law it can be achieved through this method as well.

In its essence, this action by placing obstacles on the railway is an attempted destruction offense, degradation or rendering into a state of disuse the protected values, however, the legislator has incriminated it as an offense.

In the jurisprudence it was decided that the offense will exist in this way when the perpetrator has placed repeatedly on the rail pillars wrapped in a ball of wire, causing the stop of four trains.

In the case where the impact between the moving rolling stock (a locomotive) and obstacle placed on the rail occurs, the result being the destruction, degradation or rendering into a disuse status the locomotive, then we have an aggravated manner of the offense, i.e. a railway accident.

B. ***A second offense***, is mentioned in article 332, paragraph (2) of the New Criminal Code and it consists of committing acts of false signaling or any other act that may lead to misleading the personnel which ensures traffic safety of the means of transport, maneuver or intervention during the execution of rail service.

Ensuring traffic and transport safety requires, besides other measures, regulating in a unitary way the signaling.

The importance of this activity with direct implications in ensuring traffic safety on railway led to the adoption of Order no. 1482 of 04.08.2006 for the approval of Signaling Regulation no. 004.

Signaling Regulation - 004, establishes several categories of signals, such as: fixed signals, mobile signals, signals given by agents with portable instruments, signals applied to trains, acoustic signals, signs and signaling indicator, indicators specific to contact line and so on. These signals are used for the normal railway traffic and they ensure railway traffic safety.

It can be said that the activity of signaling comprises a complex of activities aimed at setting into motion, moving with a certain speed, handling or stopping the rolling stock in maximum security conditions both in stations and on the road or maneuver.

Through ***the acts of false signaling*** we understand any indication contrary to the real factual situation established by the employee's job duties, having knowledge in the field, such as signaling the continuation of the path when in reality it should have been made a signal to stop the train.

The other acts likely to mislead the personnel that ensure the safety of the transport means, maneuver or intervention on the rail during job activities are not expressly mentioned by the legislator, which makes the nature and the used methods to be very diverse.

For the existence of one of the offenses, it is necessary to be met the ***essential requirement***, which is specific to each offense.

Thus, in the case of the offense of paragraph (1) the essential requirement consists of endangering the safety of traffic vehicles, maneuver or intervention by rail, while for paragraph (2) the essential requirement is creating a railway accident hazard.

The essential requirement is not met (and thus the offense will not exist), when the act of a person which destroys, deteriorates or renders into a disuse status a track that is not functional for various reasons (technical, economic, for repairs, etc.), as this act does not endanger road safety transport, intervention or maneuver on the railways; the same situation is valid for the destruction of rail lines under construction or destruction of a railway line from within an institution of a legal person entity (other than those nominated having a responsibility for rail traffic).

In all cases, the active subject's act of the offense meets the constitutive elements of the destruction offense (article 253 of the New Criminal Code).

Also, there will be no offense of signaling or false signaling when the acts of false signaling or any other act performed by a person were not taken into account by the concerned employee, which had performed specific tasks in normal conditions ignoring the false signaling. Note that in some circumstances it can also be accepted the attempt.

The ***immediate result*** of the action of the active subject, which is the material element of the objective side of the offense of destruction or false signaling, *consists of the emergence of a factual dangerous situation for transport safety, intervention or maneuver on the railway*. Note that, this time as well, establishing the existence of essential requirement in the structure of the objective side of the offense, i.e. the act endangered the safety of railway traffic, or has posed a threat of a railway accident, leads implicitly to the existence of the immediate effects.

The danger state created in simple manner differs from one offense to another, this state being when it endangered the traffic safety of vehicles, maneuver or intervention on track [in the case of paragraph (1)] or when ir posed a threat of a railway accident [in the case of paragraph (2)].

For the aggravated manner (when producing a railway accident), the result is different, consisting of the destruction or degradation of vehicles, rolling stock or railway installations in traffic.

Therefore, in order to ascertain the existence of the offense in the aggravated manner provided for in article 332, paragraph (3) of the New Criminal Code, it is not enough as immediate result to create a state of danger to road safety rail, requiring causing material damage, destruction or degradation of vehicles, rolling stock or installations on railway.

According to the doctrine, *in order to ascertain the existence of any criminal offense it is required that between the incriminated action or inaction and its result to be a* ***causal link***. Thus, in order to complete the objective side of the destruction offense, as well as the false signaling, it must be established that between the action of the active subject and the immediate consequence there is a causal link.

In the case of aggravated manner of article 332, paragraph (3) of the New Criminal Code it should also note the existence of a causal link between the action of the active subject and the consequence which consists of a railway accident.

2. The subjective side of destruction or false signaling offense

In the case of offense of destruction or false signaling, the form of guilt with which it acts the active subject is the intent and the fault with both their forms, and the exceeded intent as well.

It will be ***direct intent*** when the active subject of the offense, a legal or physical entity foreseeing the result of his act (of destruction, degradation or rendering into disuse status or placing obstacles on the rail or false signaling), which consists of endangering traffic safety of means of transport, intervention or maneuver on the railway, or the creation of a railway accident hazard, it acts in order to have this result.

Indirect intent will be when the active subject of the offense, foresees that the result of his act endangers traffic safety of means of transport, intervention or maneuver on the railway, or the creation of a railway accident hazard and although it does not pursue such results, it accepts the possibility of its achievement.

The exceeded intent will be deducted when the active subject of the offense of destruction or false signaling seeks endangering traffic safety of means of transport, intervention or maneuver on the railway, or the creation of a railway accident hazard, but due to unforeseen circumstances by the perpetrator, there was a railway accident. We take into consideration the case where the active subject placed an obstacle on the track, believing that the train driver will see the obstacle and will apply the brake before impact, something that did not happen, and therefore the result was the impact and implicitly the derailing of the locomotive and some wagons.

When it is found that the subjective element is identified with fault, the active subject of the offense does not foresee that by his action the traffic safety of means of transport was threatened, intervention or maneuver on the railway, or the creation of a railway accident hazard or a railway accident, although it should have and he could have this representation, or that although he is able to see the danger, he believes without reason that the accident will not occur.

In the aggravated manner the form of fault can be, in addition to guilt (mentioned above), the intent with both of its forms and preterintention (exceeded intent).

Motive and purpose have no relevance to the existence of the offense; they have a certain importance in the process of individualization of criminal law sanction which will be imposed by the court.

3. Critical observations

It is indisputable that the changes and additions brought to the legal content of the provisions of the New Criminal Code offense are likely to contribute to a stronger protection of the social values.

The content of the new regulation is superior to the current one, the legislator of the New Criminal Code considered (as previously mentioned) took into consideration also the critical remarks from the doctrine of the recent years.

However, we mention that the New Criminal Code provisions seem to be incomplete in terms of the aggravated manner of the offense, of defining the railway accident.

According to these provisions, the railway accident consist of the destruction or degradation of means of transport, rolling stock or railway installations during movement or transport maneuver, maintenance or intervention on the track.

A first observation concerns the material object that is identified by the legislator in means of transport, rolling stock and railway facilities. The legislator did not take into consideration the "rolling stock" in the strict sense of traffic and transport system, it means all vehicles traveling on rails, with electrical or mechanical propulsion (train crane, help train, trolley pantograph, intervention train, locomotive motorcar, etc.) or towed, as in the case of passengers and cargo wagons or other such vehicles.

We specify that the term rolling stock includes also means of transport, which determined the legislator to accomplish, unduly, a distinction between the terms "means of transport" and "rolling stock". In these circumstances we consider that it was not necessary to mention the phrase "means of transport".

A second observation concerns the exclusion from the scope of the material object of some extremely important values such as: rail, other elements of rail infrastructure, assets entrusted for transport, buildings and lands in the vicinity of the track.

A final observation concerns the absence of an amount of caused prejudice by an accident on the railway, an aspect which will create confusion in the delineation of the aggravated manner by the simple means provided in the content of article 332, paragraph (1) of the New Criminal Code.

Conclusions

The offense of destruction or false signaling is the most serious offense in the group of those concerning the railway traffic safety, given, of course, the social values protected by the rule of incrimination and the socially dangerous consequence that could occur.

The examination of the constituent content of this offense and the critical remarks are likely to contribute to the improvement of legislation in this area.

The transitional situations looming with the entry into force of the New Criminal Code will cause numerous discussions mainly related to more favorable criminal law enforcement, and the de-incrimination of both normative aggravated manners provided in the current regulation.

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