TAX EVASION. A CRIME THAT REQUIRES A MATERIAL RESULT OR ONLY A STATE OF DANGER?

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Abstract

Although tax evasion has been incriminated as a crime in Romania for almost 100 years, in the doctrine and judicial practice there are still presented contradictory points of view regarding the requirement result as constituent element of crime. The present study aims to carry out an in-depth analysis that provides an answer to the question of whether the crime of tax evasion require a material result or only a state of danger.

The study is divided into three sections, starts with an overview of the concept of tax evasion, of the line between lawful and illegal evasion and the history of legislation regarding tax evasion.

The next section presents various concepts and theories about the material result or the state of danger as constituent elements of crime, presented in national and international doctrine. The section continues with a presentation of the consequences of the classification of offenses, by reference to the result they produce.

In the last part of the study is presented an analysis of all variants of tax evasion, based on the theories and concepts set out in previous sections, which concludes that the tax fraud, apparently a crime that require a material result, is in fact a crime that require only a state of danger.

Keywords: *tax evasion, tax fraud, white-collar crimes, crime result, history of legislation regarding tax evasion, theories regarding the result of crime, concept of tax evasion, types of tax evasion crime.*

1. General considerations on tax evasion

1.1. The concept of tax evasion

In Romania, one of the main causes for economic problems is the size of the underground economy, representing a significant percentage of the gross domestic product.

The large size of the underground economy can be explained by the weak reaction of the authorities, and the evasion of taxes is caused by the pressure of taxation and by the fluctuation of law in the field of taxation.

The word "evasion" comes from the Latin "evasio, -onis" and from the French word "évasion", referring to the act of avoidance or evasion.

In a broad sense, the concept of tax evasion involves evading the fulfilment of one"s tax obligations, and it has either legal or illegal forms.

According to the literature[1], "both forms represent components of tax evasion, the evasion punishable by law, the fraudulent evasion is the illicit tax evasion;

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[1] Olteanu Doina-Simona, Pascu Loredana-Mihaela, *Evaziunea fiscală şi corupţia – fenomene complexe ale societăţii româneşti*, WorkingPapers *ABC-ul lumii financiare*, nr. 5/2017 available at *http://www.fin.ase.ro/ABC/fisiere/ABC5_2017/18.pdf.*

the legal tax avoidance is only a way of exploiting some "loopholes" in the law. Theoretically, the delimitation of the two seems simple; in practice there is a thin line between the two, an area so-called "avoision" (avoidance + evasion), which means the ability of an individual to manage his business in the sense of minimising their taxes, but doing it in an unclear way, a way in which it is difficult to distinguish between tax evasion and tax avoidance".

The modality in which authorities understood to combat this phenomenon varied from fiscal amnesties to administrative penalties/sanctions, the repressive measures culminating in criminal penalties/sanctions with high punishment terms and the adoption of a strategy to combat tax evasion, a matter of national security, by C.S.A.T. Decision from 69/2010.[2]

1.2. History of tax evasion incriminations

The crime of tax fraud was incriminated for the first time in the form of a closed form crime[3] in Romania by Law no. 661/1923 for the unification of direct contributions and for the establishment of the global income tax, being defined as any evasion from the payment of the tax, and was punished with a fine and a corrective punishment from 6 months to one year. Subsequently, in the content of Law no. 88/1933 for the unification of direct contributions and for the establishment of the global income tax, the term tax evasion was used for the first time, and in chapter VI were regulated measures against tax evasion and sanctions, which were divided into simple and aggravated administrative offences.

During the communist era, by Decree no. 202/1953 for the amendment of the Criminal Code of the Romanian People"s Republic, the non-payment of taxes or fees by those who have the possibility of payment, or evading such payment by concealing the excisable or taxable object or source, or destroying mandatory records were incriminated as tax offenses and punishable by correctional imprisonment for up to one year.

After the fall of the communist regime, the first regulation of tax evasion in the criminal area was made by Law no. 87/1994, when different forms of the crime were incriminated, respectively evading the payment of taxes, fees and contributions due to the state by not registering activities, by not declaring the taxable income, by concealing the taxable object or source, and by not registering the revenues in the accounting documents, or by registering expenses not based on taxable operations.

At present, Law no. 241/2005 is the seat in the field of combating and sanctioning tax evasion. The crime of tax evasion is regulated as a crime with alternative content, so that committing several different forms provided in the criminalisation norm does not generate concurrent offences and does not affect the unity of the crime.[4]

[2] By CSAT Decision no. 69/2010 on preventing and combating tax evasion, *not published in the Official Gazette*, the Interinstitutional Working Group for preventing and combating tax evasion was set up at a strategic level.

[3] Acording to F. Streteanu, D. Nițu, *Drept penal. Partea generală*, vol. I, Universul Juridic Publishing House, Bucharest, 2014, p. 282, in the case of closed form crimes, the legislator establishes a certain form, out of the possible actions likely to infringe the protected value, that the typical action must take, and in the case of free form crimes it is sufficient that the action be "causal" in relation to the expected result.

[4] In this regard, see Decision no. 25/2017 by which the Supreme Court resolved in principle the legal issue "if the actions listed in art. 9 (b) and (c) of Law no. 241/2005 are distinct normative modalities for committing the crime of tax evasion or alternative variants of the material element of the single crime of tax evasion ".

In order to carry out a scientific analysis of the immediate result in the case of the crime of tax evasion, it is necessary to first make an analysis of the immediate result of the crime requiring a material result and the crime requiring a state of danger / the crime of danger and the result crime.

2. Concepts and theories on the immediate result of crimes

2.1. Establishing the immediate result of the crime as a constitutive element

In the Italian criminal doctrine of the early 1970s there were two traditional views based on which the result/ prosecution of the crime was established. "According to the naturalistic view, the result/consequence is a natural effect of human behaviour, criminally relevant and linked to it through causation. Thus, the result/consequence is characterised by two elements: it is a modification of the external world and it is provided by the criminal law as a constitutive or aggravating element of the crime.

It follows that for a consequence of an action or inaction to be the immediate result, it must meet two conditions: it should change the external reality and it should be provided by the criminal law. The immediate result/consequence is a concept delimited by the action or inaction as an element of the crime, by delineating from the same temporally and spatially.

According to this view, the result/consequence does not exist in the case of any crime, but only in the case of those acts provided by the criminal law which have the ability to change the external reality, the change being susceptible to being perceived and evaluated. Starting from this assumption, the crimes can be classified as result crimes, in which case there is a result in the naturalistic sense, and pure conduct crimes in which case this result is missing.

The legal concept defines the result as an infringement of the interest protected by the criminal norm, materialised in the damage or endangerment of the protected social value. As the crime necessarily presupposes an infringement of the legal object, this distinction does not justify the distinction between conduct crimes and result crimes, because the result exists in the case of both categories of crimes"[5].

This same views have been maintained by the modern Italian criminal doctrine[6], but slightly nuanced. In the naturalistic view, the immediate result is the result or consequence of the action or inaction provided by the criminal norm. The change of the external world is: a) related to the action or inaction and to causation, but it is an entity different from the two from a logical and chronological point of view b) provided by the criminal law as a constitutive or aggravating element of the crime. The naturalistic view distinguishes between: 1) crimes of pure conduct, for which law requires the simple fulfilment of the action or inaction 2) material crimes, for the existence of which law requires that the action produce a determined change of the world. The first category includes most of the administrative penalties and offences/misdemeanours provided in the Italian Criminal Code, *tax evasion*, clandestine entry into military compounds, and the second category the most serious crimes, murder, bodily harm, blackmail, fraud.

According to the legal view, the immediate result is the harmful effect of the conduct, represents the damage of the

[5] F. Antolisei, *Manuale di diritto penale*, Mvlta Pavcis Publishing House, Milan, 1969, p. 229.
[6] F. Mantovani, *Diritto Penale*, CEDAM Publishing House, Florence, 2015, p. 178.

interest protected by the criminal norm, and is logically linked to causation. The connection is a logical one and is not related to the temporal succession, if in the case of certain crimes the immediate result occurs at a certain time interval from the commission of the action or inaction, in the case of other crimes the damage of interests occurs simultaneously with the criminal action or inaction.

In the Romanian criminal doctrine, among the first authors who defined the generic content of the crime as being composed of an objective element, the consequences of the activity, the causation, was Mr. Vintilă Dongoroz in 1939. The established author was the first to have a complex vision on the generic content of the crime and managed to structure it in three parts, introducing in the Romanian criminal doctrine *the concept of activity consequences.*

In the opinion of the established author[7], any crime involves *an evil*, and one of the constitutive elements of the crime is the consequence of the criminal activity. The result may consist of a state, which is the natural consequence of the dynamic process, i.e. the transfer of physical energy from one position to another, thus of the existence of physical activity itself, or of a result which is a substantial achievement of the dynamic process, ie a material transformation brought to the object on which the physical activity befell. The crimes where it is sufficient for the consequence to consist in a state are called formal crimes or crimes of attitude, while the offenses in which the consequence must consist in a result are called material crimes or result crimes. In order to differentiate, the author pursued aspects related to the way in which the criminal act was incriminated, respectively if the consequence consists in a state, it is not necessary to provide it in the content of the incrimination, and when the consequence consists in a result, the legislator must always indicate such a result, in an explicit or implicit manner.

The current Romanian criminal doctrine[8] has embraced the theory according to which the result of an act under the criminal law may consist of a material result, which is a perceptible change in reality or a state of danger for the value protected by the rule of incrimination, without a material consequence being caused. Based on this theory, the crimes were classified, according to the consequence produced, in result crimes and crimes of danger.

In the Romanian doctrine[9], the notions of material crime are usually used for result crimes, and formal crime for crime of danger. The use of these notions of material crime, formal crime respectively, is made in relation to the existence or non-existence of a material object as a constitutive element of the crime. If these terms were accepted, the theory according to which the result crime has always a material object would be accepted, and the crime of danger, having a formal character, has in no case a material object.

In reality, crimes of danger involving the existence of a material object have been identified, for example destruction and false signalling provided by Art. 332 (1) C.C.. and the disturbance of public order and tranquillity provided by Art.370 C.C. are crimes of danger - the immediate result consists in a state of danger for the safety of the railway traffic, the public order respectively, but they, however, have a material object. At the same time, there are

[7] V. Dongoroz, *Drept penal (reeditarea ediției din 1939)*, Asociația Română de Științe Penale Publishing House, Bucharest, 2000, p. 178.

[8] F. Streteanu, D. Nițu, *op. cit*., p. 294.

[9] M. Udroiu, *Sinteze de drept penal – Partea generală*, C.H. Beck Publishing House, Bucharest 2020, p. 133.

result crimes which create a definite change in the outside world, but have no material object, as is the case of forgery[10].

Crimes of danger have been divided into crimes of abstract danger, when the state of danger for the protected value is presumed by the legislator, it being sufficient that the action or inaction provided by the criminalisation norm be committed, and crimes of concrete danger, when it is necessary that the state of danger provided by the incrimination norm effectively occur.

2.2. Consequences of classifying crimes as crimes of danger and result crimes

First of all, it is important that an offense fall into one of the two categories in order to determine when the offense is committed. In the case of result crimes, the crime is committed at the time of the actual change of reality, in the case of crimes of abstract danger, at the time of the action or inaction provided in the incrimination norm, and in the case of crimes of concrete danger, at the time of occurrence of the actual danger provided by the norm of incrimination.

Determining whether a crime is in the form of a committed crime or attempted crime is of particular significance, as there are consequences related to the sanctioning regime.

The moment of committing the crime is also relevant in order to determine the more favourable criminal law, the beginning of the prescription of criminal liability, the application of the criminal liability regime to the minor.

The inclusion of a crime in the category of crimes of danger or result crimes is also relevant with regard to the establishment of injured parties, passive subjects and with regard to the exercise of civil action.

In the opinion of some authors[11], the civil action cannot be exercised in the criminal procedure when the object of the case is a crime of danger.

We do not agree with this opinion, contradicted even by legal practice and we are of the opinion that civil action can be exercised in case of crimes of danger, for example threat, home invasion, blackmail, etc. In order for civil action to be exercised in criminal proceedings, it is not necessary for the crime brought before the court to produce a material result, but it is necessary for the damage to have been caused by committing the act provided by criminal law, even if the immediate result is a state of danger. Consequently, the state of danger produced by committing the action or inaction provided by the criminal law can cause moral damage, and even material damage in some cases.

In order to answer the question whether the crime of tax evasion is a crime of danger or a result crime, we shall proceed to analyse the immediate result by reference to each alternative variant.

3. Analysis of the forms of tax evasion crime in relation to the immediate result

3.1. The crime of tax evasion provided by Art. 9 (a) of Law no. 241/2005

The material element of the crime is represented by *the act of concealing the asset or the excisable or taxable source*. The action of concealment implies a concealment in the legal sense, which can take different forms, respectively the failure to register in accounting documents,

[10] Please also see: F. Streteanu, D. Nițu, *op. cit.*, p. 294.

[11] A.Weisman, *Despre oportunitatea exercitării acţiunii civile în cadrul procesului penal*, *https://www.juridice.ro/119482/despre-oportunitatea-exercitarii-actiunii-civile-in-cadrul-procesului-penal.html.*

drawing up false documents regarding the origin, ownership, or circulation of the asset. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

In legal practice[12] an example of hiding the goods is represented by the act of ordering the company"s accountant to record in the accounting records as deductible expense the value of unstamped cigarettes that had to be destroyed upon the imposition of the obligation to stamp such goods.

The immediate result of the act is the creation of a state of danger regarding the collection of tax obligations to the state budget. Considering the naturalistic view, it can be concluded that the development of the action provided by the incrimination norm does not produce a determined material change of the external world, a state of danger regarding the full collection of tax obligations to the state budget being created instead. It is not relevant for the constitutive elements of the crime if, by concealing the asset or the taxable source, a damage to the state budget is caused. Given that the rule of criminalisation provides that actions must be taken in order to evade the fulfilment of tax obligations and it is not necessary for the evasion to actually occur, the immediate result is not influenced by causing material damage consisting of legally due and unpaid tax obligations to the state budget.

However, even if it is a crime of danger, the state will be able to become a civil party with the tax obligations it has to recover, because for the exercise of civil action, the requirement is that material or moral damage be caused by committing the crime, which damage shall be recovered as a result of incurring legal liability based on tort.

As a consequence, the crime of tax evasion provided by Art. 9 (a) of Law no. 241/2005 is a crime of abstract danger, the state of danger being presumed by the legislator, and is consumed/effective at the time of committing the act provided by the incrimination norm, but can produce a material result as, by the concealment of the excisable or taxable asset or source, material damages to the state may be caused, consisting in the tax obligations legally due and not collected.

However, the material damage is not a constituent element of the crime, the latter is consumed regardless of whether or not the damage is caused.

3.2. The crime of tax evasion provided by Art. 9 (b) of Law no. 241/2005

The material element of the crime is represented by an inaction, respectively by the non-registration, in whole or in part, in the accounting documents or in other documents of the commercial operations performed, or of the revenues. The essential requirement attached to the material element is that the inaction be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place. The non-registration may consist in the non-preparation of supporting documents for the revenues or the non-registration of supporting documents in the accounting registers or in other supporting documents. In legal practice[13], a defendant was convicted for tax evasion because she did not record in the company"s registers the invoices with which she had bought certain products, and subsequently she did not

[12] Romanian Soupreme Court of Justice, criminal section, decision no. 253/2003, unpublished.
[13] Ploiesti Appeal Court, criminal section, decision no. 610/2002, unpublished.

record the revenues obtained from the sale of such products.

The immediate result of the act is represented by the state of danger regarding the collection of tax obligations to the state budget. Considering the naturalistic view, it can be concluded that the occurrence of the inaction provided by the incrimination norm does not produce a determined material change of the external world, a state of danger being created regarding the full collection to the state budget.

As a consequence, the crime of tax evasion provided by Art. 9 (b) of Law no. 241/2005 is a crime of abstract danger, the state of danger being presumed by the legislator, and the crime is consumed at the time of committing the inaction provided by the incrimination norm. It is not relevant for the constitutive elements of the crime if the failure to register in the accounting documents of the financial operations causes a damage to the state budget. Given that criminalisation rule provides that the inaction must be undertaken in order to evade the fulfilment of tax obligations and it is not necessary for the evasion to actually take place, the immediate result is not influenced by causing material damage consisting of legally due and unpaid tax obligations to the state budget.

However, even if it is a crime of danger, the state shall be entitled to become a civil party with the tax obligations it has to recover, because in order to exercise the civil action the requirement is that, by committing the crime, a material or moral damage is caused, which should be recovered by incurring legal liability based on tort, but the resulting outcome is not a constitutive element of the crime.

3.3. The crime of tax evasion provided by Art. 9 (c) of Law no. 241/2005

The material element of the crime is represented by the *act of recording in the accounting documents or in other legal documents some expenses that are not based on real operations, or of recording fictitious operations*. The registration of expenses that are not based on real operations means the preparation of false supporting documents for expenses not made, or recording fictitious operations in order to reduce tax obligations. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

A well-known modus operandi is recording fictitious invoices in the accounting records, or simulating commercial transactions by interposing shadow companies, with huge debts to the general consolidated budget and which include/involve formal Managing Directors and homeless persons as members, having a precarious material situation, recruited by those who actually control the companies. The Supreme Court pointed out that "recording expenses that are not based on real operations means the preparation of false supporting documents for supporting expenses, and based on such false supporting documents unreal expenses are also operated in other accounting documents, with the consequence of decreasing income and implicitly, the tax obligation to the state" [14].

With regard to retaining as concurrent offences the crime of tax evasion prov. by Art. 9 (c) of Law 241/2005 with the crime provided by Art. 43 of Law no. 82/1991, the

[14] Romanian High Court of Cassation and Justice, criminal section, criminal decision no. 1113/2005, available online at https://legeaz.net/spete-penal-iccj 2005/decizia-1114-2005.

relevant decision is Decision no. 4 of January 21, 2008, by which the appeal in the interest of the law declared by the General Prosecutor of Romania was admitted; it has been established that the act of omission, in whole or in part, or the recording in the accounting documents or other legal documents of commercial operations performed or of revenues, or the recording in the accounting documents or in other legal documents of the expenses not based on real operations, or the recording of other fictitious operations constitutes the complex crime of tax evasion, provided by in Art. 9 (1) (b) and (c) of Law no. 241/2005. The High Court of Cassation and Justice retained that the examination of the content of the legal texts by which the two crimes are currently criminalised thus shows that the social values protected by them are at least complementary and have a common final purpose, as long as by the provisions of Art. 9 (1) (b) and (c) of Law no. 241/2005 aims to ensure the establishment of real tax situations, which should ensure a correct collection of taxes, fees, contributions and other tax obligations incumbent on taxpayers, and by Art.43 of Law no. 82/1991 aims at preventing any acts likely to prevent the correct reflection in the accounting records of the data regarding the incomes, expenses, financial results, as well as of the elements that refer to the assets and liabilities in the balance sheet. The comparative analysis of the component elements of the tax evasion crimes, provided by Art. 9 (1) (b) and (c) of Law no. 241/2003 and intentionally false statement, provided by Art. 43 of Law no. 82/1991, imposes, therefore, the conclusion that all these elements overlap, in the sense that the acts referred to in the last text of the law are found in the two ways of circumventing the tax obligations incriminated in the first crime, of tax evasion. As a result, the omission, in whole or in part, of recording in the accounting documents or other legal documents of the commercial operations performed or of the revenues, or recording in the accounting documents or in other legal documents of expenses not based on real operations, or recording other fictitious operations constitutes the complex crime of tax evasion, provided by Art. 9 (1) (b) and (c) of Law no. 241/2005 [former Art. 13 and, then, Art. 11 (c) of Law no. 87/1994], the provisions of Art.43 (former Art.40 and then Art. 37) of the Accounting Law no. 82/1991, in conjunction with Art. 289 C.C. (1969), such activities being included in the constitutive content of the objective side of the tax evasion crime.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that by the action provided by the incrimination norm, there is not a determined modification of the external world, but a state of abstract danger presumed by the legislator. Although following the recording of the expenses that are not based on real operations in the accounting documents or other legal documents, or the recording of other fictitious operations, a material damage to the state budget is caused by not collecting tax obligations, this result not being a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

3.4. The crime of tax evasion provided by Art. 9 (d) of Law no. 241/2005

The material element is alternate and may consist of three alternative actions of *alteration*, *destruction or concealment.* Destruction of accounting documents, memories/records of electronic tax registers or cash registers or other means of data storage means their abolition in order to

evade tax obligations. Alteration means degradation so that the data contained in the accounting documents, memories/records of electronic tax registers or cash registers can no longer be read. Concealment involves physical or legal shelter so that it cannot be found or identified by the competent authorities. The essential requirement attached to the material element is that the acts provided by the incrimination norm be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

This crime is a special variant of some destruction crimes provided by the Criminal Code and will not be retained as concurrent with them, being retained only the variant provided by tax evasion provided by special law, according to *lex specialis derogat legi generali*.

There are several opinions in the doctrine regarding the immediate prosecution of this crime. Some voices[15] consider that the immediate result consists in altering, destroying or concealing the accounting documents, memories/records of electronic tax registers or cash registers or other means of data storage, and from this point of view the crime is classified as a result crime. Other authors[16] consider that the immediate result is represented by the state of danger determined by the failure to ensure the full collection of tax obligations from taxpayers.

In this case, by carrying out the action provided by the norm of incrimination, the alteration destruction or concealment of the accounting documents or the means of data storage, two immediate results occur, a main and a secondary one.

The main result consists in the state of danger for the collection of tax obligations to the state budget. The result is categorised as the main one, as the purpose of the norm is to prevent and combat tax evasion. The main "evil" produced by the commission of the crime is represented by the state of danger for the collection of tax obligations to the state budget and not by the destruction or alteration of the accounting documents or storage means.

On the other hand, in addition to the state of danger, there is a result, a change in external reality, if the material element consists in the act of alteration or destruction.

As a consequence, the crime of tax evasion provided by Art. 9 (1) (d) of Law no. 241/2005 is a crime of danger, by reference to the main immediate result.

Even if, as a result of the alteration, destruction or concealment of the accounting documents or the means of storage, a material damage to the state budget is caused by not collecting the tax obligations, this result is not a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

3.5 The crime of tax evasion provided by Art. 9 (e) of Law no. 241/2005

The material element of the crime is represented by the action of execution of double accounting records, an official one which is presented to the control bodies, and the other an occult accounting which represents the real accounting. The organization of double accounting records

[15] Al. Boroi, M. Gorunescu, I.A. Barbu, B. Vîrjan, *Dreptul penal al afacerilor*, C.H. Beck Publishing House, Bucharest, 2016, p. 177.

[16] E.Crişan, R.V. Nemeş, N. Nolden, *Ghid de bune practici în domeniul combaterii infracţiunilor de evaziune fiscală*, Patru Ace, Bucharest, 2015, available online at: *http://www.inm-lex.ro/fisiere/d_1443/Ghidul%20combatere%20infractiuni%20de%20evaziune%20fiscala.pdf*.

means the preparation and execution of such records in parallel with the official ones. The essential requirement attached to the material element is that the action of execution of double accounting records be performed in order to evade the fulfilment of tax obligations, but is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that the action provided by the incrimination norm does not produce a determined modification of the external world, but a state of abstract danger presumed by the legislator. Even if, following the execution of double accounting records, a material damage to the state budget is caused by not collecting the legally due tax obligations, this result is not a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

The crime of tax evasion provided by Art. 9 (e) of Law no. 241/2005 is a crime of danger, by reference to the immediate result produced.

3.6. The crime of tax evasion provided by Art. 9 (f) of Law no. 241/2005

The material element of the crime may consist either in a *fictitious or inaccurate declaration action regarding the main or secondary registered offices, or in an inaction of non-declaration*. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements, if the evasion actually took place.

The relationship between this crime and that of false statements is a relationship from genus to species and cannot be retained as concurrent when committed in the same circumstance.

With regard to the immediate result of the crime, some authors[17] consider that the consequence of the illicit action is of a material nature, consisting in the perpetrator evading from the financial, tax or customs verifications.

We do not embrace this opinion, as a result is material in nature when it produces a change in external reality, while the act of evading financial, fiscal or customs checks does not have a material existence.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that by the action or inaction provided by the incrimination norm, no determined modification of the external world is produced, but a state of abstract danger presumed by the legislator.

It is not relevant for the constitutive elements of the crime, if by the action of evading the fiscal, financial or customs verifications in the modalities provided by the incrimination norm, a prejudice to the state budget occurs.

In order to fulfil the constitutive elements of the crime from the point of view of the subjective and objective side, it is necessary that the evasion from financial, fiscal or customs verifications take place, and the actions or the inaction provided by the criminalisation norm must be undertaken in order to evade the fulfilment of tax obligations, and it is not necessary that the evasion actually took place, the immediate result is not influenced by causing a material damage consisting in the tax obligations legally due and unpaid to the state budget.

[17] Al. Boroi, M. Gorunescu, I.A. Barbu, B. Vîrjan, *op. cit.*, p. 178.

3.7. The crime of tax evasion provided by Art. 9 (g) of Law no. 241/2005

The material element of the crime is alternative and may consist in *the action of substitution, degradation or alienation of the seized goods in accordance with the provisions of the Fiscal Procedure Code and the Criminal Procedure Code*. Substitution means the replacement of the legally seized good with one that has similar characteristics. Degradation involves affecting the good so that it loses some of its characteristics. Alienation means the transfer of the ownership or possession over the good to another person. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

In the present case, by carrying out the action provided by the norm of incrimination for degradation or alienation of the seized goods, two immediate results occur, one main and one secondary.

The main result consists in the state of danger for the collection of tax obligations to the state budget. The result is categorised as the main one, as the purpose of the norm is to prevent and combat tax evasion. The main "evil" produced by committing the crime is represented by the state of danger for the collection of tax obligations to the state budget and not by the destruction of the seized goods. On the other hand, when the material element consists in the action of destroying the seized goods in addition to the state of danger, there is also a result, a change of the external reality, and this is a secondary result.

As a consequence, the crime of tax evasion provided by Art. 9 (1) (g) of Law no. 241/2005 is a crime of danger, by reference to the main immediate result.

3.8. The aggravating variants provided by Art. 9 (2) and (3) of Law no. 241/2005

The legislator provides two aggravating variants of the crime of tax evasion, respectively in case by the acts provided in paragraph (1) there was a damage higher than Eur 100,000, the punishment terms are increased by 5 years, and if there was a damage exceeding Eur 500,000, the punishment terms are increased by 7 years.

In this case, there is no transformation of a crime of danger into a result crime.

The occurrence of a result can be both a constitutive element of and an aggravating element a crime. In the case of aggravated tax evasion, causing the damage is not the essence of the typicality of the crime, in case the damage is not caused, the crime is still typical, but the aggravated form is no longer retained.

Professor Antolisei stated that the result is characterised by two elements: it is a change in the outside world and is provided by criminal law as a constitutive or aggravating element of the crime.[18] In the aggravated tax evasion, causing a damage higher than the amount of Eur 100,000 or Eur 500,000 is a consequence of the crime which constitutes an aggravating element of the crime.

Causing a damage higher than the amount of Eur 100,000 or Eur 500,000 does not influence the typicality of the act, the immediate result as a constitutive element of the aggravating crime representing the state of danger for the collection of tax obligations to the state budget.

We consider that causing a damage exceeding the amount of Eur 100,000 or Eur

[18] F. Antolisei, *op. cit.*, p. 229.

500,000 represents an aggravating element of the crime of tax evasion, not a constitutive element of the aggravated variant, since it does not have an autonomous form.

In order to establish whether causing the damage is a constitutive element of the aggravated autonomous crime or a circumstantial element of the aggravating form, it is necessary to establish in advance whether Art. 9 (2) or (3) of Law no. 241/2005 regulates two autonomous crimes or an aggravated form of the basic variant regulated by Art. 9 (1) of Law no. 241/2005.

In the process of criminalising certain acts of conduct, the legislator regulates the content of the crime objectively and subjectively and provides the applicable punishments. A crime can have a standard, basic variant and mitigating and aggravated variants, which do not represent autonomous crimes, depending on the basic variant.

The norm provided in Art. 9 (1) of Law no. 241/2005, which incriminates the crime of tax evasion in its basic form is a complete norm, being composed of disposition as well as sanction and includes all the objective and subjective conditions that must be met cumulatively for the act to constitute a crime.

Unlike the provisions of Art. 9 (1), the text of Art. 9 (2) and (3) of Law no. 241/2005 does not provide typical conditions and does not draw a line of conduct, but only provides an aggravating circumstantial element, namely causing damage in excess of the amount of Eur 100,000 or Eur 500,000.

By the regulation modality, the provisions of Art. 9 (2) and (3) do not define a standard, independent crime, since the structure of the norm does not describe a distinct act, with its own configuration, but refers to the provisions and punishments contained in Art. 9 (1) of Law no. 241/2005, which regulates the crime of tax evasion in its basic version.

In addition, other arguments supporting the thesis that Art. 9 (2) and (3) of Law no. 241/2005 does not regulate autonomous crimes would be that the texts of law do not provide an alternative material element to the basic variant, do not protect different values, and Art. 9 (2) and (3) is in conjunction with Art. 9 (1) of Law no. 241/2005, not the other way around.

As a consequence, the norms contained in Art. 9 (2) and (3) do not regulate autonomous crimes, the mentioned articles of law do not incriminate any reprehensible act, and the references in paragraphs (2) and (3) to the provisions criminalising tax evasion in standard form make them dependent on it.

Also, the variants provided in Art. 9 (2) and (3) cannot be considered causes for the increase of the punishment, as they also provide for an aggravating circumstantial element, respectively causing a damage superior to the amount of Eur 100,000, Eur 500,000 respectively.

Consequently, considering that Art. 9 (2) and (3) of Law no. 241/2005 regulates aggravating variants of the crime of tax evasion, causing damage is not a constitutive element of the crime, but an aggravating circumstantial element.

4. Causes of reduction of punishments and impunity regulated by Law no. 55/2021 on the amendment and completion of Law no. 241/2005 for preventing and combating tax evasion

On April 1, 2021, Law no. 55/2021 on the amendment and completion of Law no. 241/2005 for the prevention and combating of tax evasion was published in the Official Gazette, which regulates two special causes of reduction of punishments and a cause of impunity.

The main legislative amendments concerned chapter III of Law 241/2005

"*Causes of reduction of punishment, prohibitions and revocations*", the other amendments having an accessory character and being necessary for the correlation of the legal provisions. A mandatory cause of reduction of punishment, an optional cause of reduction of punishment, and a cause of impunity were regulated.

The compulsory cause of reduction of the punishment regulated by the legislator in paragraph (1) the final thesis of Art. 10 of Law no. 241/2005, implies the application by the court of the penalty consisting of a fine, when by committing the crime of tax evasion a damage of up to Eur 50,000 was caused, which was covered before the court ruled a decision of conviction.

The legislator regulated three conditions that must be met cumulatively for the mandatory application of the penalty of fine, respectively it is necessary that the damage caused by committing the crime be up to Eur 50,000, the damage be fully recovered before the final conviction, and the perpetrator should not have committed a tax evasion offense for which he has benefited from this special cause of reduction within 5 years from the commission of the act. The process of judicial individualisation will consist only in the court establishing the number of fine-days and the amount corresponding to a fine-day.

The second cause for reduction of sentences, optional, assumes that the court has the option to apply either the fine or imprisonment.

The legislator regulated three conditions that must be met cumulatively for the court to be able to apply the penalty of the fine, respectively it is necessary that by committing the crime there was a damage of up to Eur 100,000, the damage must be fully recovered before ruling the final conviction decision, and the perpetrator has not committed an offense incriminated by Law no. 241/2005 for which you have benefited from this special cause of reduction within 5 years from the commission of the act.

In order to establish the damage caused, only the tax obligations will be taken into account, and not the interests or penalties.

In paragraph (1) of Art. 10 of Law no. 241/2005 which regulates the special causes for reduction of punishments, the legislator used the phrase "*damage caused*", resulting without a doubt the intention to refer only to the actual damage caused by non-payment of tax obligations, without taking into account interest and penalties. On the contrary, in paragraph (11) of Art.10 of Law no. 241/2005, the seat of the case of impunity, the legislator expressly mentioned that the damage caused by committing the act must be recovered, increased by 20% of the calculation basis, to which interests and penalties are added.

Consequently, from the theological and grammatical interpretation of the text of the law, it results that for the application of the fine punishment it is necessary to recover the damage actually caused by committing the crime, without taking into account the interests and penalties.

When the cause of the special optional reduction is present, the individualisation process takes place in two stages. In a first stage, the court determines the type of the main punishment, either the prison sentence or the fine, and in the second stage it establishes the duration / amount of the punishment.

Regarding the application of the more favourable criminal law, the causes of reduction and impunity are applied retroactively only for crimes under trial, but do not apply in criminal proceedings in which a final conviction decision was pronounced prior to the entry into force of Law no. 55/2021.

However, the special case of reduction of sentence shall also take effect after the final judgment of the case, when the offense of tax evasion for which a conviction has already been ruled and a prison sentence has been applied, has caused damage to up to Eur 50,000, fully covered during the criminal investigation or trial.

In this sense, pursuant to Art. 6 (3) of the Criminal Code, regulating the application of the more favourable criminal law after the final judgment of the case, the applied prison sentence shall be replaced by a fine, which shall not exceed the maximum provided in the new law. In view of the term executed from the prison sentence, the execution of the fine will be eliminated in whole or in part.

The amendments to Law 241/2005 regulated also a special cause of impunity, which operates regardless of the amount of damage caused by committing the crime. In order to benefit from the cause of impunity, it is necessary to fully recover the damage caused by committing the act, increased by 20% of the calculation base to which the interests and penalties are added. If only one of the participants covered the damage, the cause of impunity will benefit all participants, even if they did not contribute to the damage coverage.

The legislator regulated only one condition to operate the special case of impunity, respectively the damage caused by committing the act should be fully covered before the final conviction, increased by 20% of the calculation basis, plus interest and penalties.

It is irrelevant if the perpetrator previously benefited from this special cause of impunity, as the legislator stipulates that only the special causes of reduction of the punishment regulated by paragraph (1) of Art.10 of Law 241/2005 do not apply if the perpetrator has committed another crime of tax evasion for which he benefited from the cause of reduction. This condition is not valid for the cause of impunity, as provided in paragraph (11) of Art.10.

Through this cause of impunity, the legislator regulated a form of civil sanction[19], so that the one who affected the integrity of the public budget will have to pay the damage actually suffered by the state budget, increased by 20%, to which interest and penalties shall be paid. This increase is a form of civil punishment which punishes deviation from the rules of law. Thus, given the nature of the violated social relations, namely those involved in fiscal finance, the legislator has a wide margin of appreciation in identifying the most appropriate solutions both in combating the evasion phenomenon and in recovering the damages suffered.

Even if, following the constitutionality examination, the constitutional court rejected the criticisms of intrinsic and extrinsic constitutionality invoked regarding the provisions of Law 55/2021, we cannot refrain from noting that the regulation of special cases of reduction of punishments and impunity can give rise to discriminatory situations. By way of example, an offender who has committed the crime of tax evasion by causing damage of EUR 100,001 and who does not objectively have the material means to cover the damage caused, shall be punished by imprisonment from 7 years to 13 years. However, another perpetrator who committed a tax evasion offense causing damage of EUR 10,000,000 and covering the damage caused by committing the act, increased by 20% of the calculation basis, to which the interest and penalties are added, will not be punished.

Given that the two crimes infringe on the same social values, creditworthiness and financial possibilities of the perpetrators,

[19] Romanian Constitutional Court, decision no. 101/2021 (published in the Official Gazzette no. 295 of 24 March 2021), paragraph 107.

there are no objective justifications for applying such a different penalty treatment.

5. Conclusions

Following the analysis carried out in the previous sections, we can conclude that the crime of tax evasion, apparently a result crime, in all alternative forms is a crime of danger, a conclusion reached also by the Italian doctrinaires who categorize the crime of „*evazione fiscale*" as one of danger.

In order to meet the elements of typicality in terms of the subjective and objective side in the case of all alternative variants, it is necessary that the actions or inactions provided by the criminalisation rule be committed in order to evade the fulfilment of tax obligations. It is not the essence of typicality if the evasion is actually carried out, but it is necessary that the actions be committed for the purpose of evasion.

In certain forms of alternative variants, the development of the action provided by the incrimination norm may have two immediate results, a main one consisting in the state of danger for the collection of tax obligations to the state budget and a secondary one consisting in the destruction or alteration of accounting documents or storage means, or the degradation of seized assets.

By committing the crime of tax evasion, a material damage can be caused, consisting in the non-payment of the legal tax obligations due to the state budget, but the crime is consumed independently of the causing of damage.

The causing of damage can be a criterion of judicial or legal individualization of the punishment, and in some cases, if higher than the amount of Eur 100,000 or Eur 500,000, it is an aggravating circumstantial element.

Given the way in which the legislator described the verbum regens of the crime of tax evasion, not specifying in the content of the crime that it is necessary to cause material damage, we can conclude that the crime of tax evasion is a crime of danger, unlike the tax crime regulated by Decree no. 202/1953 for the modification of the Criminal Code of the Romanian People"s Republic whose material element consisted in the non-payment of taxes or fees by those who had the possibility of payment, and which automatically presupposed causing a patrimonial damage.

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