

# Some Considerations Regarding the Crime of Thwarting Disease Control

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**ABSTRACT:** The Government of Romania adopted the Emergency Ordinance no 28 of March 18, 2020 for the amendment and completion of Law no 286/2009 on the Criminal Code, which amended art. 352 of the Criminal Code regarding the crime of thwarting the fight against diseases as it was considered necessary to intervene in the legislative field of criminal law by increasing on the one hand the penalties for acts already incriminated, as in our case the crime of thwarting the fight diseases, false statements, but also by incriminating new acts such as non-compliance with hospitalization or quarantine provisions, respectively distinct criminalization and harsh punishment of those who by their actions cause infection of other people seriously affecting health or causing the death of one or more people. The motivation for these measures was based on the evolution of the epidemiological situation at national and international level determined by the spread of coronavirus SARS-CoV-2 (COVID 19), as well as the declaration of the pandemic by the World Health Organization on March 11, 2020, which confirmed the seriousness and magnitude of this situation, and the authorities noted that since the beginning of March an increasing number of people against whom the institutionalized quarantine measure or the home isolation measure was ordered, did not comply with these measures.

**KEYWORDS:** crime, institutionalized quarantine, isolation, non-compliance with measures, pandemic

## Introduction

On March 11, 2020, the World Health Organization announced that the coronavirus epidemic is officially a pandemic, given that COVID-19 viral disease has wreaked havoc in 150 countries and killed more than 4,000 people. At the same time, the WHO called on countries to act through strong health policy measures, which could reduce the number of new infections. Thus, on March 16, 2020, the state of emergency was established by the President of Romania by Decree no 195. After 30 days this measure was extended by another month. During this period it was issued Military Ordinances no 12 which restricted some fundamental rights such as free movement, the right to education, the right to health etc. At the end of the state of emergency, the President of the country decreed the state of alert. The Romanian Constitution (as amended and completed by the Law no 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no 758 of October 29, 2003, republished by the Legislative Council) provides for a period of at least 3 days in which a law enters into force after it is promulgated by the president. As a consequence, a legislative vacuum of 3 days was created, during which no sanctions could be applied to those who did not comply with the measures taken by the authorities.

In the literature it has been shown that the measures regarding the prevention or control of infectious diseases, in the context of the pandemic, are provided by extra-penal norms, respectively Order of the Minister of Health no 414 of March 11, 2020 on the establishment of the quarantine measure for persons in international public health emergencies caused by infection with COVID-19 and the establishment of measures to prevent and limit the effects of the epidemic, published in the Official Gazette of Romania, Part I, no 201 of March 12, 2020, Order of the Minister of Health no 497 on March 25, 2020 for the amendment and completion of Order of the Minister of Health no 414/2020 on the establishment of the quarantine measure for persons in an international public health emergency caused by COVID-19 infection and the establishment of measures to prevent and limit the effects of the epidemic, in force since March 25, 2020, published in the Official Gazette of Romania, Part I, no 248 of March 25, 2020, Decree no 195 of

March 16, 2020 regarding the establishment of the state of emergency on the Romanian territory, published in the Official Gazette of Romania, Part I, no 212 of March 16, 2020, Decisions of the National Committee for Special Emergency Situations no 6-10 on the approval of additional measures to combat the new Coronavirus, Military ordinance no 1 of March 17, 2020 regarding some measures of first emergency which concern crowds of persons and cross-border movement of goods, published in the Official Gazette of Romania, Part I, no 219 of March 18, 2020, as well as Military ordinance no 2 of March 21, 2020 regarding measures of preventing the spread of COVID-19, published in the Official Gazette of Romania, Part I, no 232 of March 21, 2020.

Among other normative acts issued during this period is the Government Emergency Ordinance no 28 of March 18, 2020 for the amendment and completion of Law no 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania, Part I, no 228 of March 20, 2020. It was adopted because since the beginning of March 2020 there have been several cases of hospital escapes of people infected with the SARS-CoV-19 coronavirus, of people who did not comply with the isolation measures or who did not declare at the entrance in the country that they come from the red zones.

Crimes against public health are included in the Criminal Code of Romania, which entered into force on February 1, 2014, in Chapter V, Title VII on Crimes against public safety.

Thus, in that chapter are provided in addition to the crime of thwarting disease control in art. 352, next: Venereal contamination – art. 353, Transmission of the acquired immunodeficiency syndrome – art. 354, Spreading of diseases among animals or plants – art. 355, Water contamination – art. 356, Forgery or substitution of food stuff or of other products – art. 357, Sale of altered products – art. 358 and Trafficking in toxic products or substances – art. 359.

The structure of the regulation of crimes against public health indicates the most important facts that harm public health, as they seriously affect human values of social coexistence (Tănăsescu 2016, 785).

These crimes are based on the regulation of the public health field by Law no 95 of 14 April 2006 on health care reform, published in the Official Gazette of Romania, Part I, no 372 of April 28, 2006, republished in the Official Gazette of Romania, Part I, no 652 of August 28, 2015, with subsequent amendments. This law also provides for the measures, conditions and restrictions imposed in order to avoid the occurrence of the population's illness, with the mention that, in case of non-compliance with these provisions, criminal sanctions are applied.

Failure to comply with public health rules affects the social values that affect all members of society. The state ensures the health welfare of the population, because it has a special role in the activity of human coexistence (Tănăsescu 2016, 786).

Before the amendment of the Criminal Code of Romania, the crime regarding thwarting disease control provided in art. 352 had the following content:

*“(1) Failure to comply with the measures taken for the prevention and combating of contagious diseases, if this resulted in the spreading of such a disease, shall be punishable by no less than 6 months and no more than 2 years of imprisonment or by a fine.*

*(2) If the act set out in para. (1) is perpetrated out of negligence the penalty shall consist of no less than 1 and no more than 6 months of imprisonment or a fine.”*

Government Emergency Ordinance no 28 of March 18, 2020 for the amendment and completion of Law no 286/2009 on the Criminal Code, amended art. 326 – False statements, art. 352 - Thwarting disease control from the Criminal Code and at the same time introduced art. 352<sup>1</sup> - Failure to provide data.

Thus, art. 352 has been amended and now reads as follows: *”Art. 352 - Thwarting disease control:*

*(1) Failure to comply with quarantine or hospitalization measures ordered to prevent or combat infectious diseases is punishable by imprisonment from 6 months to 3 years or a fine.*

*(2) Failure to comply with the measures taken for the prevention and combating of contagious diseases, if this resulted in the spreading of such a disease shall be punishable with imprisonment from one to 5 years.*

(3) *The transmission, by any means, of an infectious disease by a person who knows that he suffers from this disease is punishable by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.*

(4) *If the act set out in para. (2) is committed through guilt, the penalty is imprisonment from 6 months to 3 years or a fine.*

(5) *If by the facts provided in para. (1) and (2) the bodily injury of one or more persons has occurred, the punishment is imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the penalty is imprisonment from 5 to 12 years and prohibition of the exercise of certain rights.*

(6) *If by the deed provided in para. (3) the bodily injury of one or more persons has occurred, the punishment is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 7 to 15 years and prohibition of the exercise of certain rights.*

(7) *If by the deed provided in para. (4) the bodily injury of one or more persons has occurred, the punishment is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 2 to 7 years and prohibition of the exercise of certain rights.*

(8) *The attempt at the crime provided in para. (3) shall be punished.*

(9) *Quarantine means the restriction of activities and the separation from other persons, in specially arranged spaces, of persons who are ill or suspected of being ill, in a manner that prevents the possible spread of infection or contamination”.*

The need to maintain adequate public health means adopting measures and establishing conditions for the prevention and control of communicable diseases, within organized social groups, but also between interpersonal relationships (Diaconescu and Duvac 2009, 931).

With regard to this crime, the doctrine did not pay special attention until the beginning of the pandemic. This legislative change was necessary in the context in which the old regulation was summary, incriminating only the non-observance of the measures regarding the prevention or control of infectious diseases and only if the deed resulted in the effective spread of such a disease - para. (1), and para. (2) sanction the same conduct, but committed through fault.

Crime of *Thwarting disease control* consists in non-compliance with measures aimed at preventing or combating infectious diseases for humans.

### *Defining some terms*

*Public health* is an important social value, a major social goal, because it ensures the physical and mental health of people and determines the good development of social coexistence (Tănăsescu 2016, 786).

The criminalization and punishment of behaviors likely to endanger public health as a protected social value is justified by the fact that this type of deed affects the most important rights such as the right to life, guaranteed by art. 22 of the Constitution of Romania, as well as the right to health care, guaranteed by art. 34 of the Constitution. Para. (2) of art. 34 of the Constitution provides that *”The State shall be bound to take measures to ensure public hygiene and health”*. Also, the obligation of the state to respect and guarantee this right results from other international normative acts to which the Romanian state has adhered: International Covenant on Economic, Social and Cultural Rights – art. 12 *”1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”*; Universal Declaration of Human Rights – art. 25; European Social Charter (revised) – art. 11: *The right to protection of health*.

*A pandemic* is the worldwide spread of a new disease (WHO 2010). A pandemic is defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people” (Last J.M., 2001 in Heath 2011, 540).

*Coronaviruses* are a large family of viruses which may cause illness in animals or humans. In humans, several coronaviruses are known to cause respiratory infections ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). The most recently discovered coronavirus causes coronavirus disease COVID-19 (WHO - Q&A on coronaviruses COVID-19, 2020).

*SARS-Cov-19* is the name of the coronavirus that caused the current epidemic, which can also be found under the name 2019-nCoV – “the new coronavirus”. SARS comes from severe acute respiratory syndrome, which is caused by the disease, CoV from coronavirus, and 2 shows that it is the second version of the virus. Clinically, SARS-CoV-2 causes a respiratory infection called COVID-19 (Coronavirus infectious disease - 2019). The time between initial exposure to the virus and the onset of symptoms (incubation period) is 2-14 days in 95% of cases, with an average of 5-6 days, indicating that a minimum quarantine period of 14 days is required to contacts (Linton et al. 2019).

*COVID-19* is the infectious disease caused by the most recently discovered coronavirus. This new virus and disease were unknown before the outbreak began in Wuhan, China, in December 2019. COVID-19 is now a pandemic affecting many countries globally (WHO - Q&A on coronaviruses (COVID-19), 2020). *COVID-19* is the name of the disease caused by SARS-CoV-2, coronavirus disease (*CO*rona *V*irus *D*isease), where *19* is the year of appearance.

*The prevention activity* consists in adopting precautionary measures in order to eliminate the possibilities of occurrence of infectious diseases, their prevention, but also to refrain from performing harmful actions that would prevent the prevention or control of diseases.

*The activity of combating infectious diseases* is represented by the adoption of severe measures for their elimination.

*Infectious diseases* are diseases that can be transmitted from person to person through pathogens, such as viruses that enter and grow in the body. They spread easily due to contamination, infection of healthy people.

*Quarantine* - according to art. 352 para. (9) is defined as “*the restriction of activities and the separation from other persons, in specially arranged spaces, of persons who are ill or suspected of being ill, in a manner that prevents the possible spread of infection or contamination*”. We can see that this definition does not include home isolation, as does the Order of the Minister of Health no 414 of March 11, 2020 on the establishment of the quarantine measure for persons in international public health emergencies caused by COVID-19 infection and establishing measures to prevent and limit the effects of the epidemic, amended and supplemented by Order of the Minister of Health no 497/2020: Art. 1 para. (1) “For the purposes of this order, quarantine means both the establishment of the institutionalized quarantine measure (in specially arranged spaces) and the establishment of the isolation measure at home.” The definition in the Order is applicable only in the matter that the order regulates, which means that, in criminal matters, the definition of quarantine may be different. Therefore, non-compliance with the measure of isolation at home, if it has not produced any consequences of making someone else ill, is not criminal. However, since home isolation is a measure to prevent and combat the disease, the refusal to comply with the measure could attract criminal liability from the perspective of para. (2), which represents the form of the crime in force at this moment.

According to art. 1 para. (2) of Order no 414/2020 institutionalized quarantine “is established for asymptomatic persons entering the territory of Romania coming from the areas with extended community transmission affected by COVID-19 (red zone), for a period of 14 days, in specially arranged spaces provided by the authorities local.”

As provided by art. 1 para. (2) of the same order, the measure of isolation at home “is established for the following categories of persons:

a) Persons who have traveled in the last 14 days to localities in the areas affected by COVID-19, other than those with extended community transmission (yellow zone);

b) Persons who have come into direct contact with persons with symptoms and who have traveled to areas with extended community transmission;

- c) Persons who have come into direct contact with persons who have been confirmed with coronavirus (COVID-19);
- d) Family members of a person who falls into one of the above situations.”

### **Pre-existing elements**

The incriminating legal provision presupposes the pre-existence of norms provided in the special law regarding the prevention or control of infectious diseases, whose violation, intentional or culpable, if it resulted in the spread of SARS-CoV-2 virus will determine the sanctioning of the active subject - Law no 95/2006 on health care reform.

By Military Ordinance no 2/2020 provides in art. 7 a series of prerequisite conditions that are relevant for verifying the fulfillment of the conditions for committing crimes against public health, namely:

*”(1) Isolated persons at home, as a measure to prevent the spread of COVID-19, who leave the place where they were placed, without the approval of the competent authorities, are considered persons at high risk of contagion and are led by law enforcement and placed in institutionalized quarantine, under guard.*

*(2) Quarantine persons, as a measure to prevent the spread of COVID-19, who leave the place where they were placed, without the approval of the competent authorities, shall be quarantined for a further period of 14 days.*

*(3) The measures ordered according to para. (1) and (2) do not exonerate the persons from contravention or criminal liability”.*

**The legal object** consists in the social relations on *public health*, in terms of compliance with special measures to prevent or combat infectious diseases as this type of disease spreads easily among the population, in our case combating the spread of SARS-CoV-2 coronavirus. Through the aggravating criminal variants provided in para. (5), (6) and (7) it seems that the legislator has extended the legal object to social relations that refer to the protection of the bodily integrity or health of each person against the facts that affect these attributes of the person. Thus, a complex legal object was created, on the one hand the main one, relative to the public health, and on the other hand, the secondary one, relative to the integrity of the persons.

### **The material object**

The deed of thwarting disease control it has, as a rule, no material object in its content (Tănăsescu 2016, 352). The doctrine considers that the crime has as its material object the things to be destroyed in order to prevent the spread of diseases (Dobrinou și colab. 2012, 859), disinfection of vehicles, burning of garbage (Dongoroz și colab. 1972, 529), destruction of outbreaks of infection (Diaconescu and Duvac 2009, 935).

### **Subjects of the crime**

*The active subject.* The deed incriminated by art. 352 para. (1) may be committed only by quarantined persons, as defined in para. (9) of the same article, or hospitalized for reasons of infectious disease.

In the case of the deed provided by art. 352 para. (2), the active subject is unconstitutional, therefore it can be any person who commits the criminal act.

In the situation of the crime provided in art. 352 para. (3) is qualified and can be committed by a person who knows that he suffers from an infectious disease.

The liability of the legal person arises as a result of dispositions, decisions or orders given by its permanent or provisional management, which are inappropriate or illegal, in relation to the main or secondary object of activity. For example, a restaurant that does not comply with the conditions imposed by the protection measures may be criminally liable.

*The main passive subject* of the crime of thwarting disease control is the state, based on the function of defending the rule of law.

*The secondary passive subject* is the person or person's beneficiary/beneficiaries of the social norms specially protected by the incriminating norm that have/have suffered the consequences of the transmission.

*Criminal participation* is possible, in the sense that, along with the perpetrator who intentionally commits the act, other participants may intervene, as co-perpetrators, accomplices or instigators, based on the cooperation agreement for committing the same act.

### **The constitutive content of the crime**

**The objective side** has as components: the material element, essential requirements, immediate follow-up and causation.

*The material element* of the objective side consists of an action or inaction which causes the measures established for the prevention and control of the disease to be disregarded and which leads to the spread of the infectious disease.

#### *Essential requirements*

The non-observance of the measures imposed by the competent Romanian state authorities can be carried out in any way and by any means, being able to materialize both through actions and inactions. Thus, for the existence of the crime of thwarting disease control, the rule of incrimination also requires a premise - the pre-existence of an infectious disease and/or measures, namely obligations imposed by the representatives of the competent authorities in accordance with the relevant legal provisions, or quarantine or hospitalization, or on the prevention or control of infectious diseases.

#### *The immediate result*

Thwarting disease control it presupposes that non-compliance with the measures ordered will produce a result. Consequently, the socially dangerous consequence consists in the creation of a state of danger by non-compliance with the quarantine or hospitalization measures imposed, but also involves the spread or transmission of an infectious disease.

In the event of a harmful outcome, the root cause of the spread of the disease will have to be identified, removing the confusion between the cause of the effects and the conditions conducive to the spread of the virus (Tănăsescu I, Tănăsescu C. and Tănăsescu G. 2010, 178).

#### *The causal link*

Both the refusal to comply with the preventive measures, although the special rule requires such conduct, and the acceptance of contact with other persons, although the special rule prohibits this attitude and leads to contamination of other persons, confirm the existence of the causal relationship, this resulting from the criminal activity itself. Therefore, if a person has been contaminated as a result of his presence in the area where the disease was known to be widespread, there will be no causal link between the action of the active subject and the contamination of that person, because it did not follow the recommended measures to avoid contamination and spread of the disease (Tănăsescu 2016, 352). In the regulation of the Romanian Criminal Code before being amended by G.E.O. no 28 of March 18, 2020, only the situation was incriminated in which it can be established beyond any reasonable doubt that non-compliance with measures regarding the prevention or control of infectious diseases resulted in the infection of another person, thus causing major impediments in terms of evidence for establishing the causal link between the act committed and the immediate consequence.

### **The subjective side**

*The subjective element.* Thwarting disease control in the variants provided in para. (1), (2) and (3) may be committed *intentionally*.

Failure to *comply* with the measures regarding the prevention and control of infectious diseases, if the deed resulted in the spread of such a disease, achieves the content of the attenuated variant, as it results from para. (4) in art. 352 of the Criminal Code.

The intervention of the *error* in the way of non-compliance with the measures regarding the prevention or control of the disease is not a cause of imputability, because the legal norm criminalizes the commission of the crime and *guilt* to guarantee that any person will fulfill the preventive measures, pre-existing the criminal activity, to prevent the spread of infectious diseases (Tănăsescu, 2016, 797). If the active subject acts *without guilt*, there will be no crime of thwarting disease control.

## Sanctions

As G.E.O. no 28 of March 18, 2020 amended art. 352 of the Romanian Criminal Code, the crime can be committed by committing one of the following actions:

1. *Failure to comply with quarantine or hospitalization measures.*
2. *Failure to comply with measures to prevent or combat infectious diseases.*
3. *Transmission, by any means, of an infectious disease.*

The amount of penalties for crimes against public health provided prior to the amendment of the Romanian Criminal Code by G.E.O. no 28 of 18 March 2020 were not such as to discourage criminal conduct in this matter.

### 1. *Failure to comply with quarantine or hospitalization measures*

Article 352 para. (1) of the Romanian Criminal Code provides that "*non-compliance with quarantine or hospitalization measures provided for the prevention or control of infectious diseases shall be punished by **imprisonment from 6 months to 3 years or with a fine***".

Article 352 para. (5) of the same code also criminalizes an aggravated form of this crime, consisting on the one hand in the bodily injury of one or more persons, as a result of non-compliance with quarantine or hospitalization measures (art. 352 para. (5) sentence I of the Romanian Criminal Code) and is punished with **imprisonment from 2 to 7 years and the prohibition on the exercise of certain rights**, and on the other hand, the death of one or more persons, as a result of non-compliance with quarantine or hospitalization measures (art. 352 paragraph (5), second sentence of the Romanian Criminal Code) is punishable by **imprisonment from 5 to 12 years and the prohibition on exercising certain rights**.

### 2. *Failure to comply with measures to prevent or combat infectious diseases*

According to art. 352 para. (2) of the Romanian Criminal Code "*Failure to comply with the measures taken for the prevention and combating of contagious diseases, if this resulted in the spreading of such a disease, shall be punishable with imprisonment from **one to 5 years***".

Article 352 para. (5) of the same code criminalizes the aggravated form of this crime. Its content is identical to that of the aggravated form of the crime of *non-compliance with quarantine or hospitalization measures* (art. 352 para. (2) of the Romanian Criminal Code) analyzed above.

As provided by art. 352 para. (4) of the Romanian Criminal Code, the crime may also be committed through fault: "*If the deed provided in para. (2) is committed through guilt, punishment is **imprisonment from 6 months to 3 years or a fine***". At the same time, it is introduced by para. (7) an aggravated form of the offense committed through fault, having a content identical to that of the aggravated form of the offense committed with intent. So, "*If by the deed provided in para. (4) the bodily injury of one or more persons has occurred, the punishment is **imprisonment from one to 5 years and the prohibition on exercising certain rights**, and if one or more persons have died, the punishment is **imprisonment from 2 to 7 years and the prohibition on exercising certain rights***".

### 3. Transmission, by any means, of an infectious disease

Article 352 para. (3) provides that "The transmission, by any means, of an infectious disease by a person who knows that he suffers from this disease is punishable by **imprisonment from 2 to 7 years and the prohibition on exercising certain rights.**" The aggravated form of this crime is given by para. (6), identical to the aggravated forms of the other two above offenses, and the high limits of the punishment **the prison is 3-10 years, respectively 7-15 years.**

*Attempt* this crime is punished, according to para. (8) of the code. Therefore, if a person tries to transmit the infectious disease, but the result does not occur, he will be able to be penalized within the limits halved for this crime, respectively **imprisonment from one year to 3 years and 6 months and the prohibition on exercising certain rights.**

### Procedural aspects

In the case of the crime of thwarting disease control, the criminal action is initiated *ex officio* because the crime affects public health. The criminal investigation is carried out by the investigative bodies of the judicial police. The notification of the court is made through the indictment by the prosecutor. The trial in the first instance is carried out by the court.

In the case of the crime committed with outdated intent (*praeterintention*), which resulted in the death of the victim, the competence to carry out the criminal investigation rests with the prosecutor, and the trial in court rests with the court.

### Conclusions

In the context of the current global crisis situation generated by the outbreak of the pandemic at international level, a series of measures have been taken in Romania to stop the scourge and to prevent the spread of the SARS-CoV-2 coronavirus.

The persons who disregarded and did not respect the measures ordered by the Romanian authorities, especially the measures of quarantine and isolation at home (and who continue to do so), committed the crime of Thwarting disease control. The deed is provided and punished by art. 352 Romanian Criminal Code, as shown in this article. Legislative amendments enacted by G.E.O. 28 of March 18, 2020 correspond to the current social need to combat behaviors that cause or are likely to cause the transmission and amplification of the pandemic.

Finally, we can say that although it is natural for the appearance of the pandemic to produce changes in the legislative field and to bring to the attention of the public opinion problematic legal aspects regarding criminal, contraventional, civil, administrative liability, etc. of certain people for behaviors associated with the phenomenon of infectious disease that the population is facing should have a balanced approach to the new challenges.

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