LEGAL CONSIDERATIONS REGARDING THE OFFENSE OF DRIVING UNDER THE INFLUENCE OF ALCOHOL

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Abstract

Article 336 of the Criminal Code criminalizes the act of driving a vehicle on public roads for which the law provides for the possession of a driving license by a person who, at the time of taking biological samples, has an alcohol content of more than 0.80 g/l pure blood alcohol.

In the legal doctrine and in the judicial practice there is a controversy regarding the effects of the legal disposition provided by art. 78 para. 2 of GEO. no. 195/2002, regarding the presumptive establishment of the blood alcohol value.

Thus, in a first opinion, it is considered that in order to be able to retain the meeting of the constituent elements of the crime of driving a vehicle under the influence of alcohol, it is necessary to establish beyond any doubt that the perpetrator had a higher blood alcohol level than the established one by the rule of incrimination.

In the second opinion, it is appreciated that the provisions provided by art. 78 para. 2 introduces a legal presumption, which establishes that the value of the blood alcohol level at the time of testing is also that at the time of driving on public roads, as a result of the author's violation of the obligation not to consume alcoholic beverages between the time of a car accident and timing of alcohol testing.

In this article we will analyze the two opinions present in legal doctrine and judicial practice, as well as the decisions of the High Court of Cassation and Justice and the Constitutional Court in this matter.

Keywords: *alcohol concentration, Criminal code, legal presumption, car accident, driving on public roads.*

1. Introduction

According. art. 78 para. 1 of GEO no. 195/2002[1], *the driver, agricultural or forestry tractor or tram, the certified driving instructor who is in the process of practical training of a person to obtain a driving license, as well as the examiner of the competent authority during the practical tests regarding the obtaining of the driving license or any of its categories or subcategories, involved in a traffic accident, are prohibited from consuming alcohol or substances or narcotic products or drugs with similar effects after the event and until the test to determine the concentration of alcohol in the expired air or stemming from biological samples.*

Art. 78 para. 2 of GEO no. 195/2002 establishes that *in the situation where the provisions of para. (1) are not fulfilled, the results of the test or analysis of the biological samples collected shall be deemed to reflect the condition of the driver, driving instructor or examiner concerned at the time of the accident*.

The importance of this legal norm is undeniable, given the fact that it is necessary to prohibit any consumption of alcohol or substances with similar effects after a traffic accident, in order to swiftly and accurately establish the conditions of the accident, and the condition of the driver at that time.

Moreover, in the judicial practice there are situations in which the drivers of vehicles are not identified immediately after committing the deed, and it is not possible to obtain biological samples in order to establish the blood alcohol level at a reasonable time after the moment of driving.

Art. 78 para. 2 of GEO no. 195/2002 establishes a factual presumption.

However, it must be ascertained whether the mere failure to comply with that prohibition of consumption could lead to the driver being punished for the offense mentioned in art. 336 para. 1 Criminal Code, in regards to the amendments brought by the New Criminal Code equates with committing the crime of art. 87 of GEO no. 195/2002.

There are two opinions in judicial practice, the arguments of which we will discuss below.

For an easier understanding of the analysis, we will start from a situation in which a person is prosecuted for committing the crime of driving a car under the influence of alcohol, in breach of art. 336 of the Criminal Code, on public roads on 05.05.2021, at 11.00, and after 9 hours from this moment, biological samples are collected in order to establish the blood alcohol level. According to the results of the toxicological analysis, at 22.00 the driver had a blood alcohol level of 2.00 grams / liter of pure alcohol in his blood.

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2. Content

In a first opinion, it is appreciated that the absolute legal presumption established by the provisions of art. 78 para. 1 of GEO no. 195/2002 cannot automatically lead to the criminal prosecution of a person for committing the crime of driving a vehicle under the influence of alcohol, provided by art. 336 of the Criminal Code, precisely because of the way in which this crime was conceived.

Thus, in the initial form provided by the new codification, the driving on public roads of a vehicle for which the law provides the obligation to hold a driving license by a person who, at the time of extraction of the biological samples, has an alcohol content of over 0.80 g/l of pure blood alcohol is punishable by imprisonment from one to five years or a fine.

Subsequently, in Decision no. 732/2014[2], the Constitutional Court found that the phrase "*at the time of taking biological samples*" from the provisions of art. 336 para. 1 Criminal Code is unconstitutional.

In its decision, CCR noted that "*the material element of the objective side of the crime regulated by art. 336 para. (1) of the Criminal Code is committed by the act of driving on public roads of a vehicle for which the law states the obligation to hold a driving license by a person who, at the time of extraction of biological samples, has an alcohol content of over 0.80 g / l pure blood alcohol. Alcohol soaking is the process of it permeating into the bloodstream, with the consequence of state of (alcoholic) intoxication. In terms of an immediate aftermath, it can be viewed as a dangerous crime, by endangering the safety of traffic on public roads. Being a dangerous offence, the causal link between the action that constitutes the material element of the objective side and the immediate consequence results from the very materiality of the act and does not have to be proven. Alcohol permeation is determined through a toxicological analysis of biological samples collected at a time more or less distant from the time of the crime, upon the detection of the driver of the vehicle in traffic. The condition of an alcoholic intoxication of more than 0.80 g / l of pure alcohol in the blood at the time of taking of the biological samples thus places the consumption of the crime at a time after its commission, given that the essence of the dangerous crimes is the fact that they are consumed at the time of their commission. Once the perpetrator is stopped in traffic, the state of danger for the social values protected by the provisions of art. 336 of the Criminal Code ends, so that, at the time of the extraction of biological samples, criminal prosecution is not justified. The determination of the degree of alcohol intoxication and, implicitly, the classification of the criminal offense according to the moment of taking biological samples, which cannot always be carried out immediately after the commission of the deed, reflects a random and external criterion of the perpetrator's conduct regarding the above-mentioned constitutional and conventional rules. The subjective side of the offense of driving a vehicle under the influence of alcohol involves intentional guilt, which can be direct or indirect. There is a direct intention when the driver of the vehicle foresees, as inevitable, the result of his act and, implicitly, pursues it by committing that offence. There is an indirect intention when the subject predicts the result, does not follow it, but accepts the possibility of its production. However, the manner of criminalization by granting criminal relevance to the value of alcoholism from the moment of taking biological samples does not allow the recipients of the criminal norm to foresee the consequences of its non-observance.* "

Therefore, in the case of the crime mentioned in art. 336 para. 1 Criminal Code, it is essential to establish the alcohol content from the moment of driving on public roads, and not from the moment of the extraction of biological samples.

Looking at the matter from this perspective, in this opinion, it is estimated that an alcohol level of over 0.8 g / l at over 9 hours from the moment of driving the vehicle, cannot lead to the retention of the crime prev. of art. 336 Criminal Code, a dangerous one, which is committed at the moment of driving.

By the CCR Decision no. 732/2014, infringements were noted of the constitutional provisions of art. 1 para. 5, regarding the principle of legality, of art. 20 regarding the preeminence of international treaties on human rights over domestic law, related to the provisions of art. 7 para. (1) on the legality of the criminalization of the Convention for the Protection of Human Rights and Fundamental Freedoms. The phrase "*at the time of biological sampling*" lacked predictability, given that the principle of compliance with the law and the legality of criminalization require the legislator to formulate texts as clearly and as precisely as possible, as well as ensuring the possibility of the interested persons to comply with the legal provision.

Regarding the provisions of art. 78 of GEO no. 195/2002, the application of this presumption could result in the criminal liability of the defendant, for a dangerous crime, provided by art. 336 para. 1 of the Criminal Code, by reference to the level of concentration of pure alcohol in the blood at a time which, later than the consumption of the crime, is also independent of the will of the concerned person. Or, as it has been shown in Decision no. 732/2014 (paragraph 26) "*the essence of dangerous crimes is the fact that*

[2] Published in the Official Gazette of Romania no. 69 from 27.01.2015.

they are consumed at the time of their commission. Once the perpetrator is stopped in traffic, the state of danger for the social values protected by the provisions of art. 336 of the Criminal Code ends ". By applying this reasoning to the case proposed for analysis, it can be noted that the establishment of the typicality of the offence in relation to the moment of sampling indicated in art. 78 para. 2 of GEO no. 195/2002, is not justified, and the establishment of the degree of alcohol intoxication and, implicitly, the inclusion in the sphere of criminal wrongdoing in regards to a moment subsequent to the commission of the act and, therefore, the endangerment of the social values protected by art. 336 of the Criminal Code, implies a random and external criterion of the conduct of the perpetrator in order to be held criminally liable, in contradiction with the constitutional and conventional norms mentioned above.

The legal presumption established by art. 78 of GEO no. 195/2002 renders the engagement of criminal liability dependent on an element that is external to the defendant's conduct, the only one which should have had a bearing on the analysis of the typicality of the act. Otherwise, criminal liability would be incurred even in situations where at the time of driving on public roads, the alcohol level would not have exceeded the concentration of 0.80 g / l pure alcohol in the blood. Also, another argument proposed in support of this orientation of the judicial practice is the minute prepared on the occasion of the Meeting of the Chief Prosecutors of the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, the Organized Crime Investigation Directorate and Terrorism and the prosecutor's offices attached to the courts of appeal of March 9-10, 2020, in the course of which, at paragraph 4.1, was shown that, mainly, in the hypothesis of art. 78 para. 2 of GEO no. 195/2002, the principle *in dubio pro reo* is applicable.

It should be noted that in the old regulation, the act of the driver or of the instructor, in the process of training, or of the examiner of the competent authority, during the practical tests of the exam for obtaining a driving license, of consuming alcohol, drugs or narcotics or drugs with similar effects, after a traffic accident that resulted in the killing or injury of the bodily integrity or health of one or more individuals, before the collection of biological samples or testing by a technically approved and metrologically verified device or until the establishment with a certified technical means of their presence in the expired air, was a crime and punishable by imprisonment from one to 5 years.

Thus, the non-compliance with the obligation not to consume alcohol after driving a vehicle (according to art. 78 para. (2) of GEO no. 195/2002) was criminally sanctioned by art. 90 para. 1 of GEO no. 195/2002.

However, the text of art. 90 of Chapter VI was repealed on 01-Feb-2014 by art. 121, point 3. of title II of Law no. 187/2012.

This abrogation also occurred as a result of the modification of the constitutive content of the crime of driving on public roads of a motor vehicle by a driver who was under the influence of alcohol, after the new codification at art. 336 para. 1 Criminal Code in terms of focusing on the moment of the extraction of the biological samples, and not on the moment of driving of the vehicle.

In these conditions, a new incrimination regarding the sanctioning of the act of alcohol consumption after driving did not find its utility in the criminal architecture, the act of driving under the influence of alcohol being retained in any case by reference to the time of extraction and not driving.

However, after reinterpreting the content of the incrimination prev. of art. 336 Criminal Code, following the CCR Decision no. 732/2014, the offense that was provided by art. 90 para. 1 of GEO no. 195/2002 was not reinstated.

It is true that the legislator intended to reintroduce this behavior in the field of criminal wrongdoing, but the legislative process has not been completed. *(Http://www.cdep.ro/proiecte/2018/400/00/6/se557.pdf)*

Thus, through this legislative project of modification and completion of the Criminal Code, art. 336 para. (1) (marginally called the consumption of alcohol or other substances after a traffic accident) was introduced, which provided that the driver's act of consuming alcohol or other psychoactive substances, after the occurrence of a traffic accident that resulted in killing or injuring bodily integrity or the health of one or more persons, until the biological samples are taken, shall be punished by imprisonment.

According to this opinion, in this case it is not possible to reach a decision to convict the defendant for violating the ban on drinking alcohol after committing the act of driving a vehicle, because the criminalization of this crime is not provided by criminal law.

In a second opinion, it was noted that the norm provided by art. 78 of GEO no. 195/2002 is a supplementary rule, which establishes a presumption of fact allowed by the constitutional court and the Convention and provides that in the case of a person who consumed alcohol after a road accident and before the extraction of biological blood samples, his alcoholic concentration higher is than the limit from which the act constitutes a crime, then that concentration is presumed to have also been existant at the moment of driving the vehicle.

It is thus appreciated that the person in question, by virtue of the legal presumption, becomes the

perpetrator of the crime provided by art. 336 para. 1 Criminal Code.

One of the arguments of this opinion is that art. 90 of GEO no. 195/2002 (repealed) referred to the prohibition of the driver to consume alcohol after a traffic accident that resulted in the killing or injury of bodily integrity or health of one or more persons, while art. 78 para. 1 of GEO no. 195/2002 refers to the prohibition of the driver to consume alcohol, after a traffic accident, without imposing the fulfillment of the condition regarding the occurrence of a certain consequence (killing or injuring bodily integrity or health).

In this way, it is appreciated that the repeal of art. 90 of GEO no. 195/2002 does not influence in any way the applicability of art. 78 of GEO no. 195/2002, because the two incriminating texts operate in distinct situations.

Also according to this orientation of the judicial practice, it is noted that the primary norm of incrimination is represented by the provisions of art. 336 para. 1 of the Criminal Code, and the provisions of art. 78 of GEO no. 195/2002 constitutes a supplementary norm that has a non-criminal character, but completes the criminal norm, this being the matrix that characterizes the entire title that regulates traffic crimes on public roads. The incriminating norms are found in the Criminal Code, and the secondary norms are included in the adjacent legislation, the latter containing the conduct allowed to traffic participants. After the regulatory take-over of road crimes in the Criminal Code, GEO no. 195/2002 became a non-criminal law. However, this finding does not lead to the conclusion that a provision of a non-criminal supplementary law cannot constitute a viable provision of incrimination. For example, the violation of the legal speed regime, even if it is provided by the provisions of art. 48 of GEO no. 195/2002, may entail the crime of culpable homicide, provided by art. 192 para. 2 Criminal Code. In this example, the supplementary norm is only an element that gives efficiency to the incriminating norm.

Regarding the effects of the CCR Decision no. 732/2014, it is considered that by this it was established that the phrase "*at the time of taking biological samples*" in art. 336 para. 1 Criminal Code is unconstitutional.

An argument proposed by the supporters of this opinion is that in the content of Decision no. 732/2014, the CCR did not analyse the eventual unconstitutionality of the provisions of art. 78 of GEO no. 195/2002, as required by art. 31 para. 2 of Law no. 47/1992 on the organization and functioning of the Constitutional Court ("*in case of an admission of the exception, the Court will also rule on the constitutionality of other provisions of the contested act, from which, necessarily and obviously, the provisions mentioned in the notification cannot be dissociated*") .

Also mentioned is the CCR Decision no. 577/2020[3], with reference to Decisions no. 372/26.04.2012 and no. 417/15.04.2010, in which the exception of unconstitutionality was rejected as it was found that the provisions of art. 78 of GEO no. 195/2002 are constitutional, since the criticized provision is in full accordance with the fundamental law, fulfilling the requirements of clarity, predictability and accessibility, so that any subject of law can regulate his conduct according to it.

It is thus stated that art. 78 of GEO no. 195/2002 establishes a presumption of fact accepted in all systems of continental law and accepted by the ECHR.

In support of this assertion, mention is made of the decision of the ECtHR, rendered in the case of Salabiaku v. France (Judgment of 07.10.1988, application no. 10519/1983) by which it was established that in certain cases establishing a person's guilt based on factual presumptions does not contradict his or her presumption of innocence. Any system of law has such presumptions, but in criminal matters a certain proportionality must be ensured in their use, since by excessive or exclusive use, the discretion of the judge would be emptied of any content.

The Court therefore held that such presumptions were admissible only in so far as they were reasonable, operated on facts which were difficult or impossible to prove and could be rebutted by the person concerned.

Applying the reasoning of the ECtHR in the aforementioned case, it is evident that the provisions of art. 78 of GEO no. 195/2002 do not establish an absolute factual presumption. This presumption can be overturned by the accused person by administering evidence in defense or by presenting positive defenses that would lead to the vulnerability of the accusation hypothesis and to the creation of doubt regarding the existence of the crime.

In conclusion, according to this orientation of the judicial practice, the presumption established by art. 78 of GEO no. 195/2002 is a relative one, which can be combated and which does not put insurmountable obstacles to the presumption of innocence. By instituting it, only one element of the crime is considered proven, namely the soaking of blood alcohol at the time of the accident (the moment of driving on public roads), and not the commission of the act itself, thus being part of what the Court calls "*presumptive liability*", considered to be in conformity with the Convention.

[3] Published in the Official Gazette of Romania no. 1152 from 27.11.2020.

3. Conclusions

Thus, it is found that the legal presumption established by art. 78 of GEO no. 195/2002 led to the formation of two different orientations in judicial practice.

If the first states that the existence of this presumption cannot automatically lead to the conclusion of the offense of driving a motor vehicle under the influence of alcohol, provided by art. 336 of the Criminal Code, the second opinion states that this rule constitutes a norm to complete the criminal provisions and may attract criminal liability for the crime mentioned in art. 336 of the Criminal Code.

Given the existence of these different interpretations of the application of the legal presumption and taking into account its very important role, recently, it was decided to notify the CCR to analyse the unconstitutionality of art. 78 para. 2 of GEO no. 195/2002.

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