

THE OFFENSE STIPULATED BY ARTICLE 336 PARAGRAPH 1 FROM THE ROMANIAN CRIMINAL CODE. UNEVEN JUDICIAL PRACTICE

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Abstract: *The article examines the uneven judicial practice concerning the legal classification of an individual's act that, when detected in road traffic, has agreed to provide first blood sample, but refused the second one, thus making it impossible to retroactively determine the blood-alcohol concentration at the time of driving on public roads. One conclusion shall be drawn that the offense at issue represents the offense of driving under the influence of alcohol or other similar substances.*

Key words: *uneven judicial practice, driving, blood-alcohol, offense, refusing to provide blood sample*

1. Introduction

Romanian Courts have developed an uneven practice regarding the legal classification of a person's act that, when detected, has consented to undergo first blood sample collection, while refusing the second one, thus making impossible to retroactively determine the blood-alcohol level at the time of driving on public roads.

Therefore, *a first opinion* regards the act as a refusal to provide blood sample, reasoned by the inability to retrospectively ascertain the blood-alcohol level at the time of driving on public roads.

A second view indicates that some Courts considered the act as a criminal offense of driving under the influence of alcohol or other similar substances.

2. Legal context

Article 336 paragraph 1 from the Criminal Code stipulates that "Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who, at the time when biological samples were taken, had a blood alcohol concentration exceeding 0.80 g/l shall be punishable by no less than one and no more than five years

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of imprisonment or by a fine."

By order of Health Minister no 277 from 11 March 2015, provisions of methodological norms concerning the biological sampling for judiciary evidence by determination of blood-alcohol level have been amended as follows:

Article 10 paragraph 1: For blood-alcohol level detection, two blood samples are taken at one hour apart from each other, each sample consisting of 10 ml of blood.

When the technically certified blood-test result does not indicate the existence of alcohol while breathing, the second blood sample procurement is no longer necessary, but may be taken only at the request of the person involved in the events or circumstances concerning the road traffic.

Immediately upon collection, the blood sample is evenly distributed in two special vacuum tubes of 5 ml containing an anticoagulant substance.

Shortly after introducing blood into the special vacuum tube, the medical staff who has taken the sample stirs the content of the tubes for homogenisation.

The blood samples taken according to the provisions of paragraphs 1, 2 and 3 are inserted into the appropriate container of the standard toolbox that will later be sealed.

Article 10 index 2: Whenever the two blood samples have not been taken at one hour apart from each other, any retroactive determination of the blood-alcohol level could not be performed afterwards.

3. First opinion.

A first opinion has ascertained the act as a blood collection rejection, justified by the inability to retroactively determine the level of blood-alcohol at the time of driving on public roads.

Article 337 from the Criminal Code concerns the act of refusing to provide biological samples required to determine the blood-alcohol level *referring to as many samples as needed for blood-alcohol concentration measurement*; the provision, considering this issue, is more coherent than the previous regulation - article 87 paragraph 5 from the Emergency Government Ordinance no 195/2002 - from which the term "required" was missing.

It is difficult to assess as unpredictable the liability to provide more blood samples as long as the police officer must communicate this, inter alia, to the driver.

Moreover, although the above-mentioned order has lesser legal force than the law, there is no possible justification for the drivers' lack of knowledge, as they shall be presumed to be aware of the law in force.

Furthermore, it is unlikely to accept that the taking of the second blood sample has its own penalty represented by the loss of the right to request retroactive determination of the blood-alcohol level, as long as such an evidence is not taken following an explicit request, but also may be provided by default. *There may be cases where, without the retroactive computation, the level of blood-alcohol at the time of driving cannot be determined. As a consequence, failing to provide a second blood sample prevents performance of all steps towards finding out the concerned truth.*

Consequently, by Court order no 414 from 1 April 2011, Bucharest First District Court

convicted one accused of the charge of refusing to provide biological samples for establishing the blood-alcohol level. When making this decision, the Court had assessed that the defendant refused to provide the second blood sample, whilst agreeing on the first one. The result of the first blood sample test was 1,00 g/l blood-alcohol.

Still, the Court dismissed as ungrounded the defendant's request for changing the qualification of the offense given by the document instituting the proceedings, pointing out that when an individual refuses to provide biological samples, he/she must be held accountable for the act of *refusing* and not for the act of driving under the influence of alcohol - as this action cannot be proved since that individual *prevents* the substantiation of the offense.

In the light of the above, the Court noticed that the penalty provisioned by the law for refusal of biological samples' collection is more severe (imprisonment from two to seven years), on the one hand, precisely to discourage drivers from refusing to take a blood test and, on the other hand, because this act presents higher social risks than the initial act of driving under the influence of alcohol whereas an individual is deliberately trying to abscond from and to avoid criminal liability when committing the offense provided by article 87 paragraph 1 from the Emergency Government Ordinance no 195/2002.

4. Second opinion

According to a second opinion, some Courts have considered that the deed may be qualified as driving under the influence of alcohol or other similar substances (Bucharest First District Court' decision no 297 from 15.03.2011).

Thereafter, the second opinion emphasizes that **failing to perform the second blood test** of the individual driving the vehicle on public roads shall not prevent the determination of the blood-alcohol concentration at the moment of driving and therefore acquittal is not justified under article 16 paragraph 1 letter b of the Criminal Code.

The issue has lead to enacting divergent nationwide Court decisions based on original wording of the Constitutional Court's decision no 732 from 16 December 2014.

By the decision of the Constitutional Court no 732 from 16 December 2014 it has been ruled that the phrase "**at the time when biological samples were taken**" within article 336 from the Criminal Code does not comply with constitutional provisions. The decision has underlined that blood-alcohol level is determined by toxicological screening of the biological samples taken at some point in time more or less distant from the time of committing the offense, namely the moment when the individual was detected in traffic driving under influence of alcohol. The condition of blood alcohol concentration to exceed 0.80 g/l at the time when biological samples are taken, places the moment of consuming after the time of committing the offense, given that the substance of this type of criminal acts lies in matching the time of consumption with the time of committing the offense (their immediate effect takes the form of infringing upon some social values rather than causing a specific result). At the moment of stopping the driver, the threat on social values protected by the provisions of article 336 from the Criminal Code shall cease on condition that the criminal liability would no longer be justified

relative to biological samples' collection time. Determining the blood-alcohol concentration and consequently, establishing a criminal qualification depending on the time when biological samples were taken, a time that cannot always immediately follow the moment of committing the offense, represents a random criterion placed outside the criminal liability of the perpetrator's conduct and therefore violating the constitutional and conventional provisions mentioned above.

Considering indictment proceedings, some Courts noticed that the removal of the phrase "at the time when biological samples were taken" restores the old legal provision.

Nevertheless, waves of concern are still raising when the Public Prosecutor had not performed forensic expertise or the expertise could not be carried out. In such cases, considering that only one biological sample was provided, the forensic expertise for the retroactive determination of the blood-alcohol level could no longer be undertaken.

Thus, in those cases where a significant amount of time has elapsed from the moment of the driver's being pulled over and the biological samples' collection in conjunction with the accused disputing the blood-alcohol level at their being stopped in traffic, the Court may presume that the blood-alcohol concentration at collection time is not the same as the blood-alcohol level when pulled over.

According to some Courts' opinions, it has been indicated that accurate determination of the moment when driver was stopped in traffic is essential. In case there is a time lapse of minimum 2 hours between the moment of the defendant's detection driving on public roads and the moment when his/her biological samples were collected and considering that any doubt shall be interpreted in favor of the accused, some Courts have evaluated that it is not possible to determine the exact time when the accused has been driving with a blood-alcohol concentration exceeding the legal limit, based on one blood sample.

In such circumstances, there is no way of determining the blood-alcohol level, given the phase of elimination or absorption, as no retroactive ascertainment could be performed. If the judge agrees that, once the defendant had been detected, he/she may be requested to take blood samples within a reasonable period of time after the exact moment of detection, too much time passed between detection time and blood collection time raises serious doubts on blood-alcohol values.

With this sort of cases, **the blood-alcohol concentration at the time of the defendant's driving cannot be determined as too much time elapses** and identification of a criminal offence is actually impossible. Therefore, the Courts have been confronted with doubts concerning the criminal charge issued by the prosecutor as the interpretation would be made in the defendant's favor in compliance with the provisions of article 4 paragraphs 2 and article 99 paragraph 2 from Criminal Code.

According to letter a of the article 16, the Courts have mainly considered that the level of blood-alcohol represents a constituent item of the analyzed criminal offense. In the absence of blood-alcohol concentration, the Court **is not able to determine if the blood-alcohol concentration exceeds the legal limit at the time of the defendant's driving particularly when the accused mentioned in his/her statements that he/she had consumed more alcohol after returning home.** Consequently, the deed may be

considered either misdemeanor (drunkenness, the accused actually giving confirmation of consuming alcohol) or criminal offense if the blood-alcohol concentration would exceed the legal limit. Even if there are other instances subsequent to article 16 from the Criminal Code, the Court must take them into account by order of priority as stipulated by the law.

Thereby, by Court order no 297 from 15 March 2011, Bucharest First District Court acquitted the accused B.V. in terms of committing the offense stipulated by article 87 paragraph 5 from the Emergency Government Ordinance no 195/2002 republished. When issuing the decision, the Court noted that the defendant did not deter the law enforcement officers to determine the blood-alcohol level, therefore did not commit any offence. The accused underwent the breathalyzer test and the result was 0,77 g/l. In addition, the defendant provided the first blood sample at 0:45, the blood-alcohol level being 1,70g‰. The Court assessed that there are no legal grounds for accusing the defendant of committing the offense of refusal to provide biological samples, because according to the grammatical interpretation of the indictment proceedings, the defendant is liable to accept two blood-samples collection.

The Court has also noticed that the indictment standard refers to determining the blood-alcohol level as well as the presence of drugs or medicine. Biological samples collection for each toxicological expertise is regulated by Minister Order no 376 from 2006 and includes both blood and urine sampling. Thus, the plural form of the term "biological samples" stipulated by the law refers to samples used to determine the blood-alcohol level and intoxication with drugs or medicine. Also the term "biological samples" within indictment documentation legitimates the provisions of article 7 from the order no 376/2006 which stipulates that in certain circumstances, one blood sample and one urine sample may be collected for determining the blood-alcohol concentration.

The criminal decision further mentions that one single penalty is stipulated by the article 8 of the order no 376/2006 for the driver who refuses to provide the second blood sample: "In case of refusal to give a second blood sampling, usually the retroactive determination of blood-alcohol level is not performed. The refusal is recorded in the collection minute form as provided by annex 2 of these methodological rules (2). The physician and the police officer shall inform the individual about the implications of the refusal of the second biological sampling as provided by paragraph 1. "

Consequently, if the driver refuses the second biological samples' collection, he/she accepts by default that the value of the blood-alcohol concentration determined by the single blood sample is regarded as the blood-alcohol level at the time of detection. This value cannot be disputed later by requesting retroactive performance of a blood-alcohol test.

Although, once the Criminal Code has entered into force, the above-presented issue of uneven judicial practice would become devoid of purpose, it has been noted that these have reverted to their previous state after publishing the decision of the Constitutional Court no 732/2014 in the Official Journal. Hereby, some Courts have received indictments where the accused who refused the second blood sampling was charged

with committing the offense, of refusal or avoidance to provide biological samples, as stipulated by article 336 of the Criminal Code and some other Courts have been presented with indictments where the defendants were charged with committing the offense of driving under the influence of alcohol, according to the same article 336 of the Criminal Code, the factual situation being essentially the same for all defendants.

5. Conclusion

The absence of the second blood sample taken from the driver detected in traffic does not imply the failure to determine the blood-alcohol concentration at the time of driving and therefore an acquittal decision of the Court according to the provisions of article 16, paragraph 1, letter b from the Criminal Code shall not be grounded.

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