

# DETERMINING THE BLOOD ALCOHOL LEVEL OR THE PRESENCE OF PSYCHOACTIVE SUBSTANCES AMONG RAILWAY STAFF

Georgian RĂDĂȘANU\*

## Abstract

*This article aims to analyse the concrete way in which the concentration of alcohol in the blood or the presence of psychoactive substances among the railway staff is determined, in the wider context of the analysis, within a separate scientific approach, of the railway crime regarding the fulfillment of the duties of service under the influence of alcoholic beverages or other substances, provided by art. 331 para. (2) CP.*

*Following the examination of the Order of the Minister of Transport and Telecommunications no. 855/1986, we will be able to observe the causes for which, in order to prove the concentration of alcohol or the presence of psychoactive substances among railway personnel with duties regarding the safety of railway traffic, the judicial bodies end up applying, by extension, the provisions of a normative act aimed at judicial probation in the case of persons involved in events or circumstances related to road traffic.*

*In this context, this approach seeks to raise the issue of the need for a clear and predictable infralegal regulation, which takes into account the specificity and the current realities in the railway and medical fields, in order to provide real support for the judicial bodies regarding the proof of the found railway crime within the Criminal Code.*

**Keywords:** railway staff, alcohol concentration, order, methodological norms, breathalyzer.

## 1. Introduction

According to art. 331 para. (2) CP, the crime of being at work under the influence of alcohol or other substances is the act of railway personnel with duties regarding the safety of the means of transport, intervention or manoeuvre on the railway to fulfil their duties, having an alcohol concentration of over 0.80 g/l pure alcohol in the blood or, as the case may be, being under the influence of psychoactive substances.

Starting from these considerations, we mention that, in order to establish the presence/concentration of alcohol in the blood of railway personnel, there is regulated, at the infralegal level, the Order of the Minister of Transport and Telecommunications no. 855/24.02.1986 regarding some measures to strengthen discipline in the units of the Ministry of Transport and Telecommunications (hereinafter, Order no. 855/1986). This normative act, which, although it was not published in the Official Gazette, is in force and continues to produce legal effects, an aspect also confirmed by the Ministry of Transport through Address no. 1735/28.01.2024.

Order no. 855/1986 provides a series of rules that aim, in principle, at the prevention and disciplinary sanctioning of the introduction or consumption of alcoholic beverages in the units of the Ministry of Transport and Telecommunications or, as the case may be, of railway personnel coming to work under the influence of alcoholic beverages<sup>1</sup>.

To the extent of the violation of such conduct, it is generally stipulated that: „Persons who are guilty of introducing or consuming alcoholic beverages in the unit, of showing up to the work schedule under the influence of alcohol, as well as the direct managers and those of the units that know, allow or do not take the necessary measures in case of the commission of such acts, will be sanctioned with the greatest severity, including the termination of the employment contract”<sup>2</sup>.

After mentioning these rules, the order brings together, at the end, a sequence of appendices that provide: Instructions regarding the detection and sanctioning of some violations committed by the personnel of the railway units under the influence of the consumption of alcoholic beverages (*Annex I*); Guide for drawing up the report of the physical state of the person who signs that he has consumed alcoholic beverages (*Annex V*); Guide regarding the use of the „Breathalyzer” device (*Annex VI*); Instructions for the application of the Order of the

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\* PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest; Legal staff assimilated to judges and prosecutors, Ministry of Justice (e-mail: radasanu.georgian@yahoo.com).

<sup>1</sup> See point 1 of this order.

<sup>2</sup> See point 2 of this order.

Ministry of Health and Social Provisions no. 757/1961 regarding the collection of the blood sample, in order to measure the blood alcohol level (*Annex VII*) or Extract from the guide for blood alcohol measurement (*Annex VIII*).

In this context, in contrast to railway traffic, for the purpose of judicial probation of the concentration of alcohol or the presence of psychoactive substances among the drivers of road vehicles or trams [in the conditions of the existence of the crime of driving a vehicle under the influence of alcohol or other substances (art. 336 CP)], we find published in the Official Gazette of Romania, Order of the Minister of Health no. 1512/2013 for the approval of the Methodological Norms regarding the collection, storage and transport of biological samples for the purpose of judicial probation by establishing the alcohol level or the presence of psychoactive substances in the body in the case of persons involved in events or circumstances related to road traffic (hereinafter, Methodological Norms).

Analysing the aspects of common interest contained in the two normative acts, we will be able to state that, unlike the Methodological Norms, Order no. 855/1986 does not (also) regulate a procedure aimed at judicial probation in the case of railway offences, as would naturally be required, under the conditions of a rule of criminalization at the primary level (CP - Law no. 286/2009) which requires the existence of a certain concentration of alcohol in the blood. Such an order seeks, in substance, to establish disciplinary liability by means of a procedure similar to that aimed at establishing criminal liability in the case of traffic offences, but which does not enjoy an update in relation to the existing realities in the railway or medical field and, thus as we will see, and those found in the plan of substantive criminal law.

In these conditions, the question arises of the need for an order that aims at a common procedure regarding the determination of the consumption of alcoholic beverages and the establishment of the alcohol concentration among the railway staff, a normative act that provides for clear, accessible and up-to-date provisions, both in view of supporting the control bodies regarding the establishment of disciplinary violations, as well as the judicial bodies for the purpose of proving the offense provided for in art. 331 para. (2) CP.

## 2. The procedure for detecting alcohol in exhaled air

Annex I of Order no. 855/1986 groups a series of instructions in the content of three chapters concerning general aspects regarding the ascertainment of the consumption of alcoholic beverages, forms and procedural matters for ascertaining such consumption, as well as the category of disciplinary offenses applicable in the case of the consumption of alcoholic beverages. Within the general aspects, Annex I provides that the procedure for ascertaining the consumption of alcoholic beverages is applied in all cases when the railway staff:

- shows up at work and shows signs of having consumed alcoholic beverages;
- shows signs of having consumed alcoholic beverages during work;
- is caught on the act, consuming alcoholic beverages during work (regardless of the quantity consumed);
- committed violations that produced events nominated by the management of the Department of Railways, or that endangered traffic safety<sup>3</sup>.

Such a procedure is carried out by the head of the unit<sup>4</sup> where the violation occurred, or, as the case may be, by his substitute, and for staff working in the current line or in isolated points/cantons, independent stops, fuelling points, water pumps, etc.) by the head of the nearest unit or by the bodies with training and control tasks<sup>5</sup>.

Regarding the actual ascertainment procedure, Annex I provides that, in the situation where the staff shows signs of being under the influence of alcoholic beverages when presenting at work or during work, the

<sup>3</sup> See point 1 of Chapter I.

<sup>4</sup> According to point 2 of Chapter I from Annex I to Order no. 855/1986, by *head of unit*, in the meaning of these instructions, is meant: head of RCM, head of RCT, head of section, head of depot, head of shed, head of wagon inspection, head of construction site or head of station (building maintenance, welding, centralization and remote control, electrification, industrial production, centralised-remote control apparatus, line repairs, welding line repairs, CT installations, buildings etc.) travel agency heads, RCM heads, service heads (reception of locomotives or wagons, financial, public food etc. ), as well as the heads of units having the same name as the above within the Bucharest Metro Operating Company.

<sup>5</sup> According to point 2 of Chapter I of Annex I. Also, point 3 establishes that the personnel who perform functions and activities of a continuity nature (movement employees, inspection locksmiths, mechanics, mites, etc.) have the obligation to check the condition of the personnel to whom the service is handed over hand over the service to notify the higher hierarchical body (station head, section head etc.), when he finds that he is under the influence of alcoholic beverages and not to hand over the service to the person in question.

ascertaining bodies will proceed to conclude a report<sup>6</sup>, take a statement of the person in question, the use of the breathalyzer, respectively when collecting the blood sample in order to establish the blood alcohol level (Chapter II, point 1). On the other hand, in the situation where the railway staff is caught while on duty consuming alcoholic beverages, by one of the bodies that have the right to make the finding, regardless of where they are and regardless of the amount consumed, a minute and when taking a statement from the person in question (Chapter II, point 2).

Regarding the results obtained as a result of the use of the sample with the breathalyzer, to the extent that, after blowing, the reagent column remains yellow, there is a presumption that the suspected person did not consume alcoholic beverages, [Chapter II, point 5 para. (3)], while in the situation where the reagent column turns green, it is assumed that the suspect has consumed alcoholic beverages [Chapter II, point 5 para. (3)]. In the latter case, the employed person will be immediately replaced from the job and used in activities that do not concern traffic safety, until the situation is finally resolved (Chapter II, point 3)<sup>7</sup>.

Last but not least, it should be mentioned that, although blowing into the breathalyzer is mandatory for railway staff whenever there are indications or, as the case may be, it has been noticed that the person in question is under the influence of alcoholic beverages<sup>8</sup>, the railway staff can refuse to submit to the use of such evidence. In this case, his option will be recorded in the findings report, under the signature of the head of the unit and the witnesses [pt. 5 para. (5)], in which case the refusal to use such evidence will constitute grounds for the disciplinary termination of the employment contract<sup>9</sup>.

Under these conditions, we can state that, as regards the detection of the presence of alcohol in exhaled air, such a procedure does not raise problems from the perspective of the clarity of the rule, a fact for which it is necessary to keep it in the future regulation (common to the field of disciplinary and criminal liability), in the case of taking blood samples in order to determine the amount of alcohol in the blood, an aspect of interest both for establishing disciplinary and criminal liability, things are somewhat different.

### 3. Procedure for taking biological samples

#### 3.1. Preliminary aspects

From the very beginning, we mention that the taking of the blood sample is done at the request of the ascertaining body and is mandatory both in the hypothesis in which, following the sample with the breathalyzer, the reagent vial turns green (regardless of the height), and in the situation in which the person suspected of having consumed alcoholic beverages requests such a sampling [point 6 para. (1)]. Practically, in the two hypotheses, an obligation arises both for the railway staff and for the medical unit to proceed with the collection of blood samples.

In this context, we recall that, unlike the provisions of art. 185 para. (1) of GD no. 1391/2006<sup>10</sup> which establish, among other things, the obligation to take biological samples in order to determine the alcohol level of the driver of the road vehicle only when the test result shows a concentration higher than 0.40 mg/l of pure alcohol in the exhaled air [letter a)], for the birth of the obligation for the railway personnel to be subjected to the taking of biological samples, the existence of a certain concentration of alcohol in the exhaled air is not necessary, given that the text of the order speaks of coloring the vial of the reagent in green regardless of what height is reached.

However, the question arises, naturally, why such an obligation does not persist in the case of railway personnel subject to the taking of biological samples only in the hypothesis that the concentration shown by the breathalyzer is greater than 0.40 mg/l of pure alcohol in exhaled air, given that, as is well known, the concentration of alcohol in the blood is, as a rule, twice that of the exhaled air. Faced with such a dilemma, the

<sup>6</sup> We note that with regard to the record of ascertaining the physical condition of the person who shows signs of having consumed alcoholic beverages, it will be concluded in the presence of two witnesses from the staff of the railway unit and, in their absence, from outside the unit, which shows trust and objectivity, taking into account the indications found in annex no. 5 to MTT Order no. 855/1986.

<sup>7</sup> In both cases, the vial with the reagent will be attached to the original report after it has been closed and sealed according to the guidelines [Chapter II, point 5 para. (2)].

<sup>8</sup> See point 5 para. (1) from Cap. II.

<sup>9</sup> According to Chapter III point 1 letter c), „the disciplinary termination of the employment contract is applied to: c) personnel who refused the breathalyzer test or blood sample collection, based on the statement of findings;”

<sup>10</sup> GD for the approval of the Regulation of application of GEO no. 195/2002 regarding traffic on public roads.

answer to such a question can be related to the nature of the liability that operates according to the degree of alcohol concentration in exhaled air.

Specifically, if in the case of railway personnel with duties regarding the safety of railway traffic, an alcohol concentration of no more than 0.8 g/l of pure alcohol in the blood leads to the most serious disciplinary sanction - termination of the employment contract<sup>11</sup>, under the conditions in which the text of point 2 of Order no. 855/1986 speaks of his presence at work under the influence of alcoholic beverages, in the case of the driver of a road vehicle such a concentration leads, instead, to the detention of contraventional liability. That is why, looking at the consequences that can occur in terms of patrimonial/private and family life, the specialised administrative body provided, as a means of protection for the railway staff, the obligation to take biological samples regardless of how high the ampoule ends up being colored of reagent in green.

Next, if we refer to the category of instruments that can be the basis for the birth of such an obligation, we appreciate that the future regulation must not only look at the hypothesis of testing the alcohol level in exhaled air exclusively by means of the reagent vial, but also the one in which the establishment of such of concentrations is done by means of the alcohol test (certificate). In this context, we remind that, in the practice of judicial bodies, in addition to disposable alcohol test ampoules with an air collection balloon<sup>12</sup>, breathalyzers (Dräger breathalyzer) are used to determine alcohol levels<sup>13</sup>. Moreover, the bodies of railway-specific entities or those within the railway safety inspectorates use, in addition to alcohol test ampoules and breathalyzers as part of actions to prevent and combat the consumption of alcoholic beverages among railway personnel.

Under these conditions, we appreciate that the future order will have to provide for the obligation to take biological samples also in the situation where the presence of alcohol in the blood was detected, beforehand, with the help of the breathalyzer (certificate). Moreover, such reasoning may also be applicable *mutatis mutandis* in the situation where control bodies use breathalyzers, homologated and metrologically verified technical devices for determining the concentration of alcohol in the blood.

In addition to these assumptions, the situation in which submission to the taking of biological samples can also arise as a result of the request for the taking of biological samples coming directly from the control bodies (in particular, those by the police), without having previously been requested to test the alcohol in the exhaled air. Such a hypothesis could even constitute grounds for the disciplinary liability of the railway staff<sup>14</sup> and/or the criminal liability for the crime of refusing or avoiding the taking of biological samples.

In this context, we recall that, according to art. 331 para. (3) CP, the crime of refusing or avoiding the taking of biological samples is the act of employees with duties regarding the safety of the means of transport, intervention or manoeuvre on the railway to refuse or evade the taking of biological samples necessary in order to establish alcohol concentration or the presence of psychoactive substances. Such a crime, similar to those already existing in the field of road, air or naval traffic, was recently introduced by the Romanian Parliament through Law no. 314/2023 for the amendment of art. 331 CP<sup>15</sup>. In consideration of some situations in practice when the railway staff proceeded to refuse or evade the taking of biological samples, without such conduct being able to attract criminal liability, but only the disciplinary one, the legislator felt, in a way correctly, the need to eliminate any barriers in detecting and preventing the crime of being at work under the influence of alcoholic beverages or other substances, provided for in art. 331 para. (2) CP.

Returning now to the request received, directly, from the ascertaining bodies, it was shown in the practice of the supreme court that the crime of refusing or avoiding the driver of a vehicle, the driving instructor in the training process or the examiner of the competent authority, from taking from the taking of biological samples, does not impose «as a prerequisite, the testing of exhaled air in order to establish the alcohol level. Therefore, the claims of the defense in the sense that „exhaled air testing appears as a *sine qua non* procedure, without which the objective side of the offense provided for by art. 337 CP cannot be outlined”, exceeds the legal

<sup>11</sup> Looking in this context, we can say that, in contrast to the current Criminal Code, which requires the existence of an alcohol concentration of 0.8 g/l of pure blood alcohol in the old Criminal Code, for the crime of presence at work under the influence of alcoholic beverages, it was necessary to ascertain the state of intoxication of the railway personnel who directly ensured the safety of the movement of the means of transport of the railways [art. 275 para. (2) from the Criminal Code].

<sup>12</sup> Târgu Mureş County Court, crim. sent. no. 591 of May 30, 2017; Focşani County Court, crim. sent. no. 1212 of September 30, 2019, available on the website: [www.rolii.ro](http://www.rolii.ro).

<sup>13</sup> Buzău County Court, crim. sent. no. 570 of June 13, 2019, available on the website: [www.rolii.ro](http://www.rolii.ro).

<sup>14</sup> In the provisions of point 1 letter c) from Chap. III.

<sup>15</sup> Published in the Official Gazette, Part I no. 1013 of November 7, 2023.

provisions incident to the matter and is based on an erroneous interpretation of the provisions of the criminal law»<sup>16</sup>.

However, we appreciate that, in order to comply with the principle of the legality of incrimination, it is necessary, at least, to have a rule that establishes such an obligation for the railway staff to submit to the taking of biological samples, to the extent that there is a request, in this sense, coming from the police body. Such an obligation can be found either in the contents of the future order, or, rather, at the primary level, an example in this sense can even be represented by Law no. 195/2020. We mention in this sense that, according to art. 38 of GEO no. 195/2002 regarding traffic on public roads: „Drivers of vehicles, except for those pulled or pushed by hand, car instructors certified to carry out the practical training of people to obtain a driving license, as well as the examiner of the competent authority, during the practical tests of the exam to obtain a driving license, are obliged to submit to breath testing and/or the collection of biological samples in order to establish the blood alcohol level or the consumption of psychoactive substances, *at the request of the traffic policeman, s.n.*”

Therefore, the detecting agent, in addition to the option in which he opts, in advance, for testing the exhaled air, should also be able to have at his disposal the mechanism in which he directly requests the railway staff to participate in the collection of biological samples<sup>17</sup>. To the extent that the railway staff, having been notified by the police officer of the consequences of his refusal or evasion, does not comply with the request from him, he will conclude a record of such conduct, which he will before the criminal investigation bodies, according to art. 61 CPP.

According to point 7 of Chapter II of Annex I, the collection is done within no more than two hours from the moment of finding and drawing up the report, unlike the collection of biological samples in the case of road vehicle drivers, in which case the Methodological Norms provide, in the content of art. 9 para. (1), that: „The collection of biological samples in order to establish the alcohol level or the presence of psychoactive substances in the body will be done in the shortest possible time after the occurrence of the road event or the circumstance that requires their collection.” In this context, considering that, from a scientific point of view, the collection of blood samples must be carried out as quickly as possible, it would be useful for the future order to provide for the need to collect them in the shortest possible time.

### 3.2. The actual procedure of collecting biological samples

In concrete terms, such a procedure is carried out by a doctor or, in its absence, by a healthcare professional, in accordance with the provisions of the „Guide on blood sample collection” (Annex no. 7) and with those of the excerpt entitled „The guide for the dosage of alcohol in the blood” (Annex no. 8)<sup>18</sup>. In the situation where the railway staff refuses or avoids taking the blood sample, this will be recorded in the minutes by the head of the unit and confirmed by the witnesses (point 10). In the conditions in which the act of refusal or evasion from the collection of biological samples leads to the termination of the individual employment contract of the railway personnel with attributions regarding the safety of railway traffic<sup>19</sup>, we will, in practice, be faced with an accumulation of legal responsibilities (criminal and disciplinary), an aspect which, however, will be able to be dealt with more extensively in a separate scientific approach.

Analysing the content of Annexes no. 7 and 8 of Order no. 855/1986, we can see that the medical staff collects a single biological sample in order to determine the alcohol concentration of the railway staff. However, as is well known, in order to establish the phase of absorption or elimination of alcohol from the body, it is necessary to perform a retroactive calculation of the concentration of alcohol in the blood, which is carried out following the ordering of a medico-legal expertise. The use of such an evidentiary procedure in order to establish the alcohol concentration at the time of detection of the railway personnel with attributions regarding the safety

<sup>16</sup> See HCCJ, crim. s., crim. dec. no. 369/RC/28.09.2021, [www.scj.ro](http://www.scj.ro). Similarly, in another decision (CA Ploiești, crim. s., crim. dec. no. 739/11.09.2019, [www.rolii.ro](http://www.rolii.ro)) it was noted that „the incriminating text does not provide for the prerequisite of testing with the breathalyzer device, being necessary, in order to fulfil the constitutive elements of the crime, only the request of the police bodies to take biological samples from the defendant and the refusal or the evasion of the defendant, a driver detected in traffic, from this sampling.”

<sup>17</sup> Moreover, also in criminal doctrine [S. Bogdan (coord.), D.A. Șerban, G. Zlati, *New Criminal Code. Special part. Analyses, explanations, comments. The Cluj perspective*, Universul Juridic Publishing House, Bucharest, 2014, p. 609], it was specified that the ascertaining body will still be able to opt either for the option of testing the exhaled air, or for the direct request addressed to the driver to participate in the taking of biological samples, the same being applicable, from our point of view, and regarding railway staff.

<sup>18</sup> See point 7 of art. II.

<sup>19</sup> See Chapter III point 1 letter c) from Annex I.

of railway traffic implies, from a medical point of view, the necessity of collecting two blood samples at an interval of one hour one towards the other.

In this context, considering the scope of the implications regarding labor relations, including the one aimed at the dissolution of the individual employment contract in the case of railway personnel, the need to take two blood samples at an interval of one hour from each other may represent a guarantee for the railway staff in the face of dismissal decisions that do not present a solid foundation from a scientific point of view, namely that at the time of the performance of the duties of the service, the employee with attributions regarding the safety of railway traffic was, in fact, under the influence of alcoholic beverages<sup>20</sup> or, as the case may be, that he had a certain alcohol concentration (if we refer to the rest of the railway staff who do not hold such duties)<sup>21</sup>. Under these conditions, the standard of the need to take two biological samples under the conditions shown above must be part of the content of the future normative act, even looking, exclusively, from the perspective of the mechanism for establishing the disciplinary liability of railway personnel.

Now, looking at the field of road traffic, we can see that the double sampling is also provided for in the Methodological Norms, which stipulate that, for the determination of blood alcohol, two blood samples will be collected at an interval of one hour from each other, and failure to comply with such an obligation will lead to the impossibility of performing the retroactive estimation of the blood alcohol level<sup>22</sup>. Under these conditions, the lack of the second blood sample will lead, on the model of judicial probation in the case of traffic offences, to an impossibility of performing the retroactive calculation at least regarding the establishment of criminal liability<sup>23</sup>.

However, even in the absence of the forensic report containing such a calculation, we cannot omit the fact that the testing of the alcohol concentration in the blood, in order to incur criminal liability, can be carried out in practice and by means of other means evidence, such as the toxicological analysis report (a single sample taken), the breathalyzer result, the suspect's or the defendant's acknowledgment of the consumption of a certain amount of alcohol, or even the clinical examination report, such evidentiary means being able, equally, to be the basis for establishing disciplinary liability.

In this context, also analysing the decisions handed down by the courts regarding the crime of being at work under the influence of alcohol or other substances [art. 331 para. (2) CP], I was able to find that, similar to the proof of the traffic offense provided for in art. 336 para. (2) CP, the judicial bodies, in an almost unanimous way, proceed in the case of the railway offense to collect two blood samples at an interval of one hour from each other, precisely in order to establish the ascending slope or, as the case may be, descending from the alcohol level of the railway staff<sup>24</sup>.

As an example, taking into account „the entire evidentiary material administered in the case, namely the defendant's statements, (...) the minutes of consent for the collection of biological samples and for the physical examination dated 03.11.2017, the clinical examination sheet and the report on the collection of biological samples - annex 6 and, respectively, annex 2 to the Methodological Norms, both dated 03.11.2017 (...)”<sup>25</sup>, we can observe that the evidentiary means provided for proving traffic offenses are taken over by the judicial bodies in order to substantiate the content of the railway offense provided for in art. 331 para. (2) from the Criminal Code<sup>26</sup>.

<sup>20</sup> As required by point 3 of the order.

<sup>21</sup> According to Chapter III. point 1 of Annex I: «Disciplinary cancellation of the employment contract, according to the provisions of art. 35 letter f) of the Disciplinary Statute of the personnel of the transport units applies to: a) the personnel whose blood sample was taken upon presentation and during the service for which the communication of the analysis laboratory was received with the mention „alcohol in the blood 0.5 gr/1000 or more;”».

<sup>22</sup> See art. 10 para. (1) and 102 of the Methodological Norms. With the mention that the exceptional situation when it will no longer be necessary to collect two biological samples will be when the certified technical means does not indicate the presence of alcohol in the exhaled air, the taking of the second sample can only be carried out at the request of the person involved in the events or circumstances in relation to road traffic [art. 10 para. (2) from Methodological Norms].

<sup>23</sup> If not even in the case of the disciplinary one.

<sup>24</sup> Braşov Court, crim. sent. no. 25/15.01.2024; Alexandria Court, crim. sent. no. 329/08.11.2023; Arad Court, crim. sent. no. 1378/25.08.2023, Miercurea Ciuc Court, crim. sent. no. 202/15.03.2023, Cluj-Napoca Court, crim. sent. no. 1203/11.11.2022; Bucharest Court, 1<sup>st</sup> District, crim. sent. no. 90/18.02.2022 ([www.rejust.ro](http://www.rejust.ro)); Buzău Court, crim. sent. no. 505/18.06.2021; Răcari Court, crim. sent. no. 239/16.12.2021, remained final on the criminal side by CA Ploiesti, crim. s., crim. dec. no. 497/19.04.2022; Buzău Court, crim. sent. no. 75/04.02.2020; Focşani Court, settlement pen. no. 1212/30.09.2019 ([www.rolii.ro](http://www.rolii.ro)).

<sup>25</sup> Buzău Court, crim. sent. no. 75/04.02.2020; Buzău Court, crim. sent. no. 570/13.06.2019 ([www.rolii.ro](http://www.rolii.ro)).

<sup>26</sup> The two annexes mentioned in the sentence are an integral part of the Order of the Minister of Health no. 1512/2013 approving the Methodological Norms.

However, in the context of the trial of the same railway crime, we also find in practice an isolated decision in which it was held that according to: „toxicological-alcohol analysis bulletin no. 3511/540/A-12/16.08.2016, issued by IML Mr. Mureș, it turned out that, at 03:40 on 13.08.2016, the blood alcohol level of the defendant S.G.L. was 1.00 g‰ of pure alcohol in his blood”. However, under the conditions in which the unexpected control of the control bodies within the S.N.T.F.C. - The Traffic Safety Service took place at around 1:20 a.m. and considering the existence of a blood alcohol level of 1.00 g‰ of pure alcohol in the blood, it is difficult to say whether, at the time of the control, the railway staff was really on an upward slope or, as the case may be, descending, in the absence of taking a second blood sample at an interval of one hour from the first sample. That is why the establishment of criminal liability in the case of railway personnel becomes much more difficult to achieve in practice in the situation where a longer period of time passes from the moment of capture to the time of collecting biological samples, a fact likely to cancel/reduce from the accuracy of the scientific result obtained.

In the light of the above-mentioned jurisprudence, we can conclude that the judicial practice, almost unanimously, imposes, for scientific reasons, on the model of proving the traffic offense (by referring to the Methodological Norms), the need to take two biological samples in order to prove the railway offense provided for in art. 331 para. (2) CP, reasoning that could operate even with regard to disciplinary liability, in the context of its implications for the person/property of the railway staff that could be affected by incurring disciplinary liability.

### 3.3. Aspects of criminal procedural law

In the event of the occurrence of one of the „cases provided for in point 1 letters a), c), d)<sup>27</sup>, the files of the staff to whom the finding was made at the presentation or during the service, will also be sent to the criminal investigation bodies”. As can be seen, such a norm aims at the obligation to report to the criminal investigation bodies, among others, in the event that the concentration of alcohol in the blood of the railway staff, less that of the one responsible for the safety of railway traffic (in the context of the special norm found at point 7<sup>28</sup>), resulting from blood sampling, is greater than 0.5 g/l. In such a hypothesis, observing the content of the offense provided for in art. 331 para. (2) CP, which speaks of the existence, regarding the employees with attributions regarding the safety of the means of transport, intervention or manoeuvre on the railway, of an absorption of more than 0.80 g/l of pure alcohol in the blood, remains debatable the thesis regarding the automatic notification of the criminal investigation bodies regarding the commission of an alleged act provided for by the criminal law, in the conditions where such persons do not possess, by hypothesis, the quality imposed by the incrimination norm<sup>29</sup>.

On the other hand, in the situation of the personnel who compete for traffic safety in the railway units, in addition to the immediate termination of the employment contract, the criminal investigation bodies will be notified, according to the law, in the situation where he is found guilty of the introduction and consumption of alcoholic beverages in the unit or, as the case may be, they show up to the work schedule under the influence of alcohol<sup>30</sup>. However, from the perspective of the automatic notification of the criminal investigation bodies regarding a possible commission of the offense provided for in art. 331 para. (2) CP, it is necessary to treat with prudence some situations which, obviously, exclude *de plano* the incurring of a criminal liability [e.g., the railway staff provided for in art. 331 para. (2) CP is caught introducing alcoholic beverages on the job (having a bottle of wine in his bag) or, as the case may be, is caught consuming alcoholic beverages while on duty, to the extent that the breathalyzer test result (certificate) indicates a value of no more than 0.1 g/l pure blood alcohol]. That is why, we believe that in such cases it is necessary to make a clear demarcation between disciplinary and criminal

<sup>27</sup> According to Chapter II point 1 letters a), c), d): «Disciplinary cancellation of the employment contract, according to the provisions of art. 35 letter f) of the Disciplinary Statute of the personnel of the transport units applies to: a) the personnel whose blood sample was taken upon presentation and during the service for which the communication of the analysis laboratory was received with the mention „alcohol in the blood 0.5 gr/1000 or more”; c) to the staff who refused the breathalyzer test or the collection of the blood sample, based on the statement of findings; d) to the staff who were caught consuming alcoholic beverages while on duty (regardless of the quantity);».

<sup>28</sup> According to point 7: „The cases of indiscipline provided for in point 3 above will also be referred to the criminal investigation bodies, according to the law.”

<sup>29</sup> It is true that such verification can be done once the criminal prosecution in rem has started, but we believe that some caution must be shown regarding those reports that concern acts committed by persons who cannot, obviously, possess the quality of personnel with duties regarding the safety of railway traffic.

<sup>30</sup> See point 7 in conjunction with point 3 of the order. In fact, a similar rule that covers the entire railway staff can be found in Chapter II point 3 para. (3): „In the cases provided for in point 1 letters a), c), d), the files of the personnel to whom the finding was made at the presentation or during the service, will also be sent to the criminal investigation bodies.”

liability, by drawing some filters regarding reporting to criminal investigation bodies, so that the latter do not end up being reported with facts that, obviously, are the exclusive object of disciplinary liability.

#### 4. Finding the presence of psychoactive substances

According to art. 332 para. (2) CP, constitutes the crime of being at work under the influence of alcohol or other substances of railway personnel with duties regarding the safety of the means of transport, intervention or manoeuvre on the railway who perform their duties under the influence of psychoactive substances. Against the background of the lack of a definition of *psychoactive substances*<sup>31</sup>, the Panel for resolving some legal issues within the HCCJ, reiterating the reasoning expressed by the supreme court in a decision handed down on appeal in cassation<sup>32</sup>, held in the operative part of dec. no. 48/2021<sup>33</sup> that: «The use of the phrase „psychoactive substances” from the criminalization norm of art. 336 para. (2) CP includes, in addition to the category of substances referred to in Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the normative acts in force, republished, and the substances provided for in the content of Law no. 143/2000 regarding the prevention and combating of illicit drug trafficking and consumption, republished, with subsequent amendments and additions, and of Law no. 339/2005 regarding the legal regime of plants, narcotic and psychotropic substances and preparations, with subsequent amendments and additions».

In justifying this solution, the court reiterated, for the most part, what was already expressed in its previous jurisprudence, noting, among other things, the fact that: «The term „psychoactive substances” designates a wide range of substances likely to produce such consequences, this category includes both narcotic and psychotropic substances, as expressly defined by art. 2 letters c), d) from Law no. 339/2005 regarding the legal regime of plants, narcotic and psychotropic substances and preparations, as well as other substances with psychoactive effects, regardless of whether they are part of the category of those under national control, in the sense of art. 2 letter d1) from Law no. 339/2005, or those subject to the legal framework provided by Law no. 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided by the normative acts in force. The properties of substances or mixtures of substances from the above-mentioned categories and the harmful effects of their consumption on the central nervous system, resulting in changes in the functions and psychic processes or in the behavior of the consumer, represent elements of an objective nature, substantiated from a medical point of view and accepted unanimously at the international and national level. (...) By using the phrase, the legislator wanted that the category of „psychoactive substances” could include any substance that produces „stimulation or inhibition of the central nervous system of the person, resulting in changes in the functions and mental processes and behavior or creating a state of dependence, physical or mental”. An additional element in support of this conclusion also emerges from the fact that the same phrase is used by the legislator in other contexts within the Criminal Code, for example in art. 77 letter f), where it regulates as an aggravating circumstance „the commission of the crime in a state of voluntary intoxication with alcohol or other psychoactive substances, when it was provoked in order to commit the crime”.»

Although the reasoning of the supreme court took into account the offense provided for in art. 336 para. (2) CP, it applies equally to the railway offense found in art. 331 para. (2) CP. Under these conditions, the proof of the existence of a psychoactive substance among the railway staff will cover any of the substances found in the three normative acts mentioned above.

Next, regarding the mechanism for proving the presence of such substances, we specify that, unlike the Methodological Norms on road traffic which provide for a series of clear provisions in this regard, Order no. 855/1986, surprisingly, did not/does not deal with the issue of taking biological samples in order to establish the presence of psychoactive substances, neither from the perspective of criminal liability, nor by referring to the disciplinary one. We must admit, however, that this could be seen as justified under the old regulation, as such criminalization did not exist until the entry into force of the current Criminal Code. However, with the introduction of Law no. 286/2009 of the act consisting in the performance of duties by the railway personnel

<sup>31</sup> We mention that based on art. 241 of Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code, by psychoactive substances are meant the substances established by law, at the proposal of the Ministry of Health.

<sup>32</sup> HCCJ, crim. s., crim. dec. no. 365/RC/16.10.2020, [www.scj.ro](http://www.scj.ro).

<sup>33</sup> Regarding the examination of the referral made by the CA Ploiești, crim. s. and for cases involving minors and family, in crim. dec. no. 5989/315/2020, by which a preliminary ruling is requested for the resolution of a matter of law in principle, published in the Official Gazette, Part I no. 698/14.07.2021.



with attributions regarding the safety of railway traffic under the influence of psychoactive substances [art. 331 para. (2) thesis II CP], at the infralegal level a correlation with the primary norm was no longer ensured, by creating a procedure aimed at collecting biological samples (blood and urine) in order to prove the presence of such substances.

In these conditions, looking at the period 1986-2014, when the presence at work under the influence of psychoactive substances was not considered a crime, to the extent that railway staff with attributions regarding the safety of railway traffic were caught, for example, consuming alcoholic beverages during working hours program, the individual employment contract should be terminated immediately. On the other hand, in the hypothesis that the same staff was caught under the influence of psychoactive substances, his deed failed to meet, from a formal point of view, even the conditions for holding a disciplinary offense<sup>34</sup>. Therefore, such an approach taken by the institutions/authorities with attributions in this field may seem somewhat surprising, both on the old regulation and, above all, in the context of the current Criminal Code, in which the issue of the cumulation of criminal liability with of the disciplinary one.

Returning to the judicial probation, although no court decisions have been identified, so far, regarding the commission of the offense provided for in the contents of the second sentence of art. 332 para. (2) CP, but only cases in progress at the level of the Transport Police Directorate<sup>35</sup>, until a future intervention at an illegal level, we can only appreciate that, similar to testing the concentration of alcohol in the blood, the judicial bodies will be required to refers (as an emergency solution) to a normative act that is not specific to the railway domain, but to the road domain, as is the case with the Order of the Minister of Health no. 1512/2013 for the approval of the Methodological Norms. It is true that, from a criminal procedural perspective, carrying out the collection procedure based on the Methodological Norms cannot lead *eo ipso* to the exclusion of the means of evidence thus administered (toxicological analysis report or clinical examination), being difficult to prove, in our opinion, the existence an injury that cannot be removed other than by cancelling the act.

But, even so, referring to the provisions of an order aimed at a traffic sector other than the railway, leaves a big question mark from the perspective of the role of the competent institutions/authorities in ensuring an accessible and predictable legal framework for its recipients, whether we are talking in this case by law enforcement bodies, by bodies of specific railway entities, or even by those who are subject to disciplinary or criminal procedures.

## 5. Conclusions

Following the analysis of the illegal legislation, we were able to establish the existence of an order that no longer benefits from an update in relation to the existing realities in the medical field (*e.g.*, the need to take two blood samples at an interval of one hour from each other) or, after case, with those found in the Criminal Code (*e.g.*, the lack of a procedure for ascertaining the presence of psychoactive substances in the body of railway personnel).

In the face of such shortcomings and in the context of a regulation aimed, in substance, at the establishment of disciplinary liability among railway personnel, the judicial bodies are required to apply by analogy, in proving the railway offense provided for in art. 331 para. (2) CP, specific provisions in the field of road traffic. In these conditions, on the model of judicial probation in the case of road incidents, it becomes necessary to issue an updated order that provides for a series of methodological rules in order to establish the alcohol level and the presence of psychoactive substances in the case of persons involved in events or circumstances related to railway traffic.

Regarding the content of the future order, given that Order no. 855/2016 presents, among other things, aspects aimed at the prevention and disciplinary sanctions of railway staff for the consumption of alcoholic beverages, we appreciate that these provisions should also be found in the future normative act, in an accessible

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<sup>34</sup> Of course, we do not exclude from the plan that the deed of the railway staff could have been included in some general rules, such as the duties regulated in the statute.

<sup>35</sup> As an example, we remind you that: „On the evening of September 27 this year, during the action carried out by the policemen of the Galați Regional Transport Police Department, they carried out checks to detect railway personnel who, in the exercise of their duties, are under the influence of alcoholic beverages or of psychoactive substances. Thus, a man, a locomotive engineer, who worked on two passenger trains, was detected. Following testing with the device provided, indications emerged regarding the possible presence of psychoactive substances.” (<https://www.politiaromana.ro/ro/stiri-si-media/stiri/verificari-ale-politistilor-pe-linia-depistarii-personalului-feroviar-aflat-sub-influenta-alcoolului-sau-a-substantelor-psychoactive>, last accessed on 20.03.2024).

and coherent manner for its recipients, with consideration of current medical issues. Obviously, another solution could be the one in which the procedure aimed at determining the concentration of alcohol in the blood or the presence of psychoactive substances, in order to incur disciplinary liability, be the subject of a separate order from the one aimed at judicial probation in the purpose of establishing criminal liability. However, in the context of the intrinsic link between the two types of liability, as well as the advantage of already administering some means of evidence, we believe that the solution of issuing a single order that groups, in a harmonious manner, both aspects of nature is preferable evidence that will then substantiate the legal liability of the railway staff.

Regarding the issuer of the future normative act, considering that there are procedures that concern both the activity of the railway staff and that of the medical staff in the medical units belonging to the Ministry of Health (subsidiarily, those from the network of the Ministry of Transport and Infrastructure can also be mentioned<sup>36</sup>), we appreciate that it would be appropriate to initiate this initiative jointly by the Ministry of Transport and Infrastructure together with the Ministry of Health.

Of course, the Ministry of Internal Affairs can also be considered as the initiator, in the context of the activity of the criminal investigation bodies within the Transport Police Directorate, but we believe that, rather, the most important role in the development of the future instrument must be held by the two ministries with main competences regarding railway and medical aspects, it being sufficient for the Ministry of Internal Affairs to hold, in this case, the role of approver.

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<sup>36</sup> Found in Annex no. 2 to GD no. 370/2021 regarding the organisation and functioning of the Ministry of Transport and Infrastructure, published in the Official Gazette of Romania, Part I, no. 333/01.04.2021.