

REVIEW ARTICLE

PECULIARITIES IN PERFORMING MEDICAL EXAMINATION TO ASSESS THE EXTENT OF ALCOHOL INTOXICATION OF DRIVERS ACCORDING TO THE LEGISLATION OF UKRAINE AND SOME OTHER COUNTRIES

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ABSTRACT

The aim: This study is aimed at conducting a comprehensive analysis of the Ukrainian legislation regulating the alcohol testing procedure for drivers, investigating the practice of its implementation, reviewing international experience in this field, and elaborating proposals for its improvement.

Materials and methods: During the writing of the article, the current legislation of Ukraine is regulated, which regulates the procedure for medical examination to establish the state of intoxication of drivers, namely the Code of Ukraine on Administrative Offenses. This work meets the requirements of the Declaration of Helsinki. Methodology of the study includes general scientific methods (dialectic method, inductive and deductive approaches), special investigative techniques.

Conclusions: Our study has underlined the necessity to improve the legal regulation for more effective alcohol testing program for drivers in Ukraine. This implies the elaboration of guideline for alcohol testing procedure and its approval by the Ministry of Health of Ukraine; to specify and legislate maximum permissible indicator values of blood alcohol concentration; to set the list of drugs and other substances through regulation; to adopt administrative responsibility for driving while intoxicated with alcohol (from 0.2 ppm to 1.1), and criminal liability for driving under severe alcoholic intoxication (1.1 ppm and above).

KEY WORDS: medical examination, alcohol and drug intoxication, medications

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INTRODUCTION

Driving under the influence of alcohol is the most serious and dangerous violation of traffic rules. Often such an offense is the cause of traffic accidents, including victims and death. Thus, during 9 months of 2020, 3,286 road accidents were committed in Ukraine through the fault of drunk drivers, in which 81 people died and 1,152 people received injuries of varying severity [1].

To reduce the number of this type of violation and its negative consequences, important is the inevitability of responsibility for its commission. To do this, first of all, it is necessary to have quality legislation that will establish a fair measure of responsibility for driving while intoxicated, the power of the police to prevent, detect such offenses, as well as document them. At the same time, it is important to maintain a fair balance between individual drivers' rights and the public interest within the meaning of the European Convention on Human Rights [2], which is part of Ukrainian law. The public interest in this case is road safety, as well as the protection of life and health of citizens affected by drunk driving. At the same time, drivers of vehicles should not be subjected to arbitrary actions of the police during their medical examination for intoxication.

As practice shows, the legislation of Ukraine, which determines the procedure for conducting a medical

examination for intoxication of drivers of vehicles, is imperfect. It lets avoid the responsibility of persons driving while intoxicated. Impunity, above all, provokes repeated similar offenses, as well as offenses with serious consequences.

Thus, there is a need for a comprehensive study of the procedure for medical examination of drivers to determine the state of intoxication and taking into account international experience in developing optimal recommendations for making appropriate changes to current legislation of Ukraine.

THE AIM

The aim of the study was a comprehensive analysis of the legislation that regulates the procedure for reviewing the state of intoxication of drivers, the practice of its application, as well as international experience in reviewing the state of intoxication of drivers and developing proposals for its improvement.

MATERIALS AND METHODS

During the writing of the article, the current legislation of Ukraine was analyzed, which regulates the procedure of

medical examination to establish the state of intoxication of drivers, namely the Code of Ukraine on Administrative Offenses (hereinafter - KUpAP) [3]. The procedure for directing drivers of vehicles for examination in order to identify alcohol, drugs or other intoxication or under the influence of drugs that reduce attention and speed of reaction, and conduct such examination (hereinafter - the Procedure) [4]. Instruction on the procedure for detecting signs of alcohol, drugs or other intoxication in drivers of vehicles or being under the influence of drugs that reduce attention and speed of reaction (hereinafter - the Instruction) [5], Instruction on police registration of materials on administrative offenses in the field of security road safety, recorded not in automatic mode [6]. The case law of Ukraine on consideration of cases of administrative offenses for driving while intoxicated, international experience of the police in conducting and sending for medical examination of drivers to determine the state of intoxication are also analyzed. The article is written taking into account the scientific and practical work of Ukrainian and foreign scientists, such as O.G. Zerenin and S.M. Mostova, who in their manual revealed the legal aspects, methods, devices and methods of determining alcohol in exhaled air and other bioenvironments [7]. R.Yu. Kohan, who conducted a comparative analysis of US and EU legislation on medical examination for drug intoxication [8],

G.Ye. Dudin and S.V. Kalinin, who disclosed the procedure for referral of drivers for intoxication, as well as problematic issues regarding the medical examination of drivers for intoxication in the Russian Federation in terms of proceedings in the case of an administrative offense [9], A.S. Kravets and N.Yu. Veselov, who considered the problematic issues of legislative regulation of medical examination of drivers in Ukraine [10].

This study was conducted on the basis of general scientific and special methods of cognition. Thus, with the help of the dialectical method of scientific cognition, the conceptual apparatus for examining drivers for intoxication has been studied. Methods of deduction and induction allowed to establish practical problems with the procedure for sending drivers for a medical examination to establish the state of intoxication, the preparation of relevant procedural documents. The comparative legal method allowed to consider the foreign experience of medical examination of drivers for intoxication and the possibility of its implementation in the legislation of Ukraine.

REVIEW AND DISCUSSION

It should be noted that the legislation of Ukraine does not define the concept of medical examination to determine the state of intoxication. The Procedure and the Instruction operate with such concepts as inspection by a police officer at the place where the vehicle is stopped and examination by a doctor of a health care institution. The latter is practically called a medical examination. The basis for the driver's examination at the health care facility is the referral of a police officer after the driver refused to conduct

an examination for intoxication at the stop of the vehicle or disagreed with the result of such inspection. Also, in accordance with the legislation of Ukraine, the examination may be conducted in specially equipped mobile points (cars) belonging to health care institutions. But in fact it has found its application in practice.

The problems faced by the police in drawing up a report under Article 130 of the Code of Administrative Offenses, which provides for liability for driving while intoxicated, is that the opinion on the results of a medical examination for intoxication is issued only a few days after it. However, in different regions, this period is calculated differently and ranges from 7 to 14 days. This is due to the fact that the method of medical examination state of intoxication is regulated. There are only guidelines for conducting such a review at the regional level. Accordingly, the police have no right to draw up a report on an administrative offense or to take measures to ensure proceedings in an administrative offense case, such as removing the driver from driving, temporarily detaining the vehicle and temporarily revoking the driver's license. However, in some medical institutions in Ukraine the practice is such that the medical examination first reveals signs of intoxication, then examines the air exhaled by the driver, using appropriate technical means. From this, a conclusion is issued about the state of intoxication immediately after the event. At the same time, samples of the body's biological environment are taken from the driver for laboratory testing, after which a second conclusion is issued. Police officers draw up a report on the basis of their initial detention, but do not send the collected materials to the court until they are re-arrested. If the repeated conclusion has a conclusion about the driver's sobriety, the collected materials, including the protocol on administrative offense, are simply written off. However, this practice is isolated and raises questions about the legitimacy of its application. First, this method of examination of the driver is possible only on the grounds of alcohol intoxication, as drug intoxication, as well as the effects of drugs that affect the speed of reaction and attention, can not be detected by examining the driver exhaled air. Secondly, the degree of alcohol intoxication in accordance with the Instruction is determined by the amount of ppm in the blood and not in the exhaled air. The same problem is faced by police officers, who, firstly, do not have the technical ability to examine the driver for drug intoxication, and secondly, do not have the ability to check the level of alcohol in the driver's blood, despite the fact that The instructions prescribe the algorithm of actions of the police during the inspection.

Another problem with the review of intoxication, which, in our opinion, deserves attention, is the lack of a quantitative indicator of the content of narcotic substances in the blood, necessary for bringing to administrative responsibility. Thus, the establishment of any amount of drugs in the driver's body in fact entails administrative liability under the relevant part of Article 130 of the Code of Administrative Offenses, despite the fact that it provides for liability for driving while intoxicated. However, drug intoxication and blood

levels of drugs are different things. Drug intoxication can last for several hours, and the content of drugs in the blood can be several days or more. Therefore, we believe that it is advisable to establish a normative indicator that takes into account the intoxication of the driver while driving due to drug use. The same applies to drugs that reduce attention and speed of reaction. Their quantitative indicator is also not regulated. Article 130 of the Code of Administrative Offenses provides for liability for driving under the influence of such drugs. This means that the drugs should not just be in the blood, but their amount should be such that they affect the condition of the driver while driving, namely reduce his attention and speed of reaction. Therefore, it is necessary to establish a normative quantitative indicator that determines the impact of drugs on the driver, which reduces his attention and speed of reaction while driving.

Consider the international experience of conducting a survey to determine the state of intoxication of drivers of vehicles. In Germany, a slightly different level of blood alcohol content - for novice drivers with experience up to 2 years, as well as for drivers under 21, this is zero, for other drivers this figure is up to 0.3 ppm, but from 0.3 to 0.5 ppm - this will be a warning if there are no other traffic violations and the driver can safely drive the vehicle. The indicator at which it is considered that the driver cannot safely drive the vehicle is 1.1 ppm of alcohol in the driver's blood. Thus, in the case of the presence of alcohol in the blood from 0.3 to 1.1 ppm, the determination of the ability to drive safely is the competence of the police. If the presence of alcohol in the blood of more than 0.3 ppm and the inability of the police to drive a vehicle safely and regardless of whether the presence of alcohol in the amount of 1.1 ppm in the blood of the driver is grounds for criminal prosecution under Article 316 of the Criminal Code Code of Germany (Strafgesetzbuch), which provides for a fine or imprisonment of up to one year with deprivation of the right to drive vehicles [11]. At the same time, as in Ukraine, the German police can check the level of alcohol in the exhaled air of the driver, which according to German law is less than the level of alcohol in the blood and is 0.25 ppm. However, you can only be prosecuted if your blood alcohol level is measured. Therefore, it is the driver's duty to undergo a medical examination, and if he fails to comply with this duty, the police officer has the right to detain the driver, then by telephone (for efficiency) the police obtain a prosecutor's or court's permission to take blood samples. Oral permission is later confirmed in writing. The same procedure is provided for signs of drug intoxication or other intoxicants. A separate article in the Criminal Code is provided for resisting a police officer during detention [12, 13].

Administrative liability for violation of traffic rules is enshrined in the Law on Traffic in Section 3 Violations and fines [14]. Thus, Article 24 provides for liability for driving a vehicle if the driver has more than 0.25 ppm in the exhaled air or more than 0.5 ppm in the blood. This article also provides for liability for driving under the influence of intoxicants.

In most EU countries, as in Germany, the blood alcohol limit is 0.5 ppm. These countries include Austria, Belgium,

Hungary, Greece, Denmark, Spain, Italy, the Netherlands, Norway, Portugal and France. This figure is higher only in countries such as the United Kingdom, Ireland and Switzerland, and is 0.8 ppm. But in Estonia and Sweden this figure is the same as in Ukraine - 0.2 ppm, in the Russian Federation - 0.3 ppm. In a number of such countries, Sweden, Norway, Holland, Austria, Great Britain, the Russian Federation, the United States, Japan, the quantitative indicator of the level of alcohol in the exhaled air is less than in the blood by about half [7, p. 5-6].

As for the medical examination of drivers for drug intoxication, as in Germany, the police have the right to detain the driver in order to take blood samples only after a court order in most EU countries, as well as in the United States.

Most EU countries prohibit drunk driving caused by any drug. This documents the state of intoxication, not the presence of drugs in human biological environments. Some EU countries set limits on the concentration of drugs in the blood, in excess of which no other evidence is required that the driver is intoxicated. Some European countries have a two-tier system, which on the one hand prohibits drunk driving of any substance, and on the other hand for some specific drugs set limits for drug concentration in the blood or zero concentration thresholds [11, 15].

According to Part 2 of Article 9 of the Constitution of Ukraine, the conclusion of international agreements that contradict the Constitution of Ukraine is possible only after the relevant amendments to the Constitution of Ukraine.

In accordance with Part 2 of Article 8 of the Constitution of Ukraine, the Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must comply with it.

Thus the Constitution of Ukraine laws and other regulations must comply with the provisions of international treaties.

Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR of April 25, 1974 № 2614-VIII ratified the Convention on Road Traffic.

According to Part 1 of Article 15 of the Law of Ukraine "On International Treaties of Ukraine" current international treaties of Ukraine are subject to conscientious compliance with Ukraine in accordance with international law [16].

In accordance with Part 6 of Article 8 of the Convention, national legislation must provide for special provisions relating to the management of alcohol, as well as the legally permissible level of alcohol in the blood and, where appropriate, in exhaled air, the excess of which is incompatible with driving a vehicle.

The only legal act in Ukraine that determines the permissible blood alcohol content for driving a vehicle is the Instruction on the procedure for detecting drivers of signs of alcohol, drugs or other intoxication or being under the influence of drugs that reduce attention and speed of reaction, approved by the order of the Ministry of Internal Affairs of Ukraine and the Ministry of Health of Ukraine dated 09.11.2015 № 1452/735 [17]. As for the permissible

content of alcohol in exhaled air, this issue is not regulated by any legal act of Ukraine.

In the case of *Pravoe Delo and Shtekel v. Ukraine* (application no. 33014/05, p 51, 52), there had been a violation of Article 10 of the Convention. In particular, a norm cannot be considered a law until it has been formulated with sufficient precision to enable the citizen to regulate his behavior.

Thus the current legislation does not contain any provisions that set limits on the amount of alcohol in exhaled air, after which driving is not allowed.

CONCLUSIONS

Taking into account the considered problematic issues that arise in the process of examining the driver for intoxication, as well as taking into account international experience, the following measures are proposed to improve the legal regulation of this process in Ukraine:

1) to develop and approve at the level of the order of the Ministry of Health of Ukraine a method of conducting a medical examination for intoxication;

2) at the legislative level to establish the quantitative maximum permissible level of alcohol in the blood, as well as in the exhaled air at which it is allowed to drive a vehicle;

3) normatively approve the list of narcotic drugs and other substances, as well as their quantitative indicator in the blood, at which it is prohibited to drive a vehicle;

4) legally differentiate liability depending on the degree of intoxication of the person driving the vehicle, namely to establish criminal liability for driving under the influence of alcohol, if such intoxication is 1.1 ppm or more, as well as in state of intoxication. Establish administrative liability for driving while intoxicated from 0.2 ppm to 1.1 ppm;

5) abolish the responsibility for refusing to be examined for intoxication and empower the police to detain the driver in order to pass an examination for intoxication if there are signs of intoxication of the driver of the vehicle and he refuses to voluntarily undergo such examination. to establish the possibility of compulsory collection of blood samples for examination on the basis of a court sanction;

6) legally establish the possibility to remove the driver from driving the vehicle until the results of the driver's examination for intoxication, but not more than 24 hours.

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