CONSIDERATIONS ON THE ADMINISTRATIVE PUNISHMENTS IN THE ROMANIAN LEGAL SYSTEM

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Abstract

Administrative punishments are applied as a consequence of engaging administrative liability for the breach of the provisions of administrative law. Among these punishments, the most important ones are the sanctions with regard to contraventions (contraventional offences). The Ordinance of the Government (OG) no. 2/2001 is the general framework for contraventional offences sanctions.

According to its provisions, contraventional offences punishments are classified in main sanctions, such as warning, contraventional fines and community service, and complementary sanctions: confiscation of the goods used for, or resulted from contraventions, stay in execution or annulment of the approval which authorizes a certain activity, closing the unit, blocking of the bank account, suspending the activity of the economical agent, withdrawing the license or the approval for certain operations or external commercial activities - temporary or definitive, demolition of the constructions and bringing the land to its initial state.

The application of these administrative sanctions is governed by legal principles. In the hypothesis of a challenge of these sanctions, the procedure to be followed in front of the law court is the civil procedure. However, in concrete situations, some sanctions have been characterized as repressive and therefore there is a need that procedural safeguards characteristic to criminal law are provided for the sanctioned person.

Key words

administrative liability, contraventional offences, minor offences, repressive sanctions

1. PRELIMINARY

Administrative liability arises when the provisions of administrative law are not observed. The scope of administrative liability is wide, since it also covers contraventional liability, which is a particular case of administrative liability, occurring in the case of committing what the law categorizes as contraventions or minor offences.

2. HISTORICAL OVERVIEW

In the Criminal Code of 1936, there were three categories of wrongful acts, differing by the degree of seriousness: crimes, delicts (less

serious than those termed crimes) and contraventions (less serious than those termed delicts). In 1954, the provisions of the Criminal Code related to contraventions as minor offences were abolished and they were regulated under administrative law, which established their conditions, determination and enforcement.

The Government Ordinance no. 2/2001, which has the same juridical consequences as the law, established a new legal framework of contraventions, maintaining them beyond the scope of the Criminal Code.

3. DEFINITION OF CONTRAVENTIONS

In accordance with GO no. 2/2001, a contravention is the offence committed with a guilty mind, as established and sanctioned by law, government ordinances (ordinances are issued under a special law, within the limits and conditions specified therein, as one of the legislative rights of the government, in particular cases) or government decisions (decisions are issued in order to organize the law enforcement), or by the decision of the local or county council. It designates a minor offence, as opposed to a delict or a crime.

The administrative nature of this offence is generated by the legal regime of most acts within which it is regulated. Except law as a source of regulation in this matter, all other acts are obviously administrative in nature, because administrative central or local authorities adopt them. When the contravention is establish by law, its administrative regime is due to the involvement of the public administrative authorities competent to find and to punish this offence, and the courts specialized in administrative matters are also competent, during the contestation procedure.

The executive bodies establish contraventions and their sanctioning, unlike crimes, which are established by Parliament.

4. CHARACTERISTICS

The main characteristics of contraventions are pointed out by the legal definition. Firstly, the contravention is committed with a guilty mind. As a matter of principle, the form of the guilt is not relevant, be it intentional or unintentional (negligent), unless the law expressly sanctions the acts committed with intent.

Secondly, only the expressly mentioned law or administrative acts establish the contravention. The competence of establishing and sanctioning contraventions is restrictive for the local and county public authorities; it works only in the fields in which these authorities have regulatory competences and only if Parliament and Government have not regulated similar contraventions. If the local authorities exceed their restrictive regulatory competences, the decisions that have been adopted might be annulled by the administrative court of law, during the proceeding started by a person with an interest in the matter.

5. OFFENDERS

The offenders can be legal or natural persons, as resulting from GO no.2/2001 and the manner in which contraventional liability is regulated, as well as some sanctions, are specific to one category or another.

A natural person might become contraventionally liable only if he is less than 14 years old, because until this age, the provisions of GO no.2/2001 expressly exclude him.

For a young offender between 14 and 18, GO no.2/2001 provides that the minimum and the maximum limits of the fine are reduced by half. A young offender, who is less than 16 years old, might not be submitted to community service.

Contraventional liability for legal persons is generally and expressly established by GO no.2/2001. These provisions indicate that the legal person might be sanctioned under special laws, if the legal conditions are met. Thus, for the legal person, contraventional liability is regulated under various special laws and administrative authorities decisions.

The contraventional liability of legal persons does not exclude the liability of natural persons having decisional power in their activities. If one person committed several contraventional offences, the punishments are inflicted for each of them. If these offences are found in the same certified police report, each punishment will be inflicted without exceeding the maximum established by law for the most severe offence or the maximum for the community service.

If several persons commit a contraventional offence, each of them will be punished separately, according to their own contribution and involvement.

Thus the stipulations confirm the criminal origin of this contraventional offence and also require guarantees provided by art. 6 ECHR for the offenders.

6. ADMINISTRATIVE MINOR OFFENCE PUNISHMENTS

According to GO no. 2/2001, the main contraventional punishments are: the warning, contraventional fines and community service.

As complementary sanctions, GO no.2/2001 indicates: confiscation of the objects used for, or resulting from the commission of offences; stay of execution or annulment of the authorization for a certain activity; closure of an establishment; blocking of the bank account; suspending the activity of the economic agent; withdrawing the license or the authorization for certain operations or external commercial activities - temporarily or definitively; demolition of constructions and reinstatement.

These are the general punishments, but special laws might set out other main or complementary sanctions, as is the case of traffic regulations.

7. MAIN PRINCIPLES FOR THE APPLICATION OF MINOR OFFENCE PUNISHMENTS

The sanction will be applied in proportion to degree of seriousness of the act.

Complementary sanctions will be applied depending on the nature and seriousness of the act.

For a single offence, a single main punishment and one or several complementary sanctions will be applied.

As a general rule, the warning and fine might be applied to any offender, whether natural or legal person, but community service might be applied only to natural persons.

8. WARNING

The warning is the mildest administrative sanction and it consists of the verbal or written warning of the offender depending on the social danger of the offence, accompanied by the recommendation for the offender to observe the legal provisions. It will be applied directly by the police officer after establishing the facts or by the judge, when in the legal procedure of the offender's complaint, he decides that the main punishment applied by the police should be replaced by a warning.

As a general rule, the warning might be applied when the offence has a lowest degree of seriousness, even if the law did not expressly establish this sanction for a specific offence.

9. ADMINISTRATIVE FINE

The administrative contraventional fine is a specific sanction applied to the offender and it consists of a sum of money to be paid, in accordance with the seriousness of the act. The minimum value is 25 lei (6 Euros), as provided by law, and the maximum is: 100,000 lei (25,000 Euros) for contraventions established by law or government ordinance, 50,000 lei (12,500 Euros) if the contraventions are established by government decision, 5,000 lei (1,250 Euros) if the contraventions are established by the county authorities and 2,500 lei (600 Euros) if the contraventions are established by municipal or communal local authorities. The fine is an administrative sanction which might be applied to natural and legal persons, it goes directly to the public budget and it will be recovered by the fiscal bodies through a writ of execution if the offender is not willing to pay.

10. COMMUNITY SERVICE

Community service is an administrative sanction that might be established only by law and it is limited to a maximum of 300 hours.

This sanction might be applied only to natural persons, as an alternative to the fine. If the offender cannot pay the fine within 30 days and if he does not have any property that can be seized by a judgment, the offender will address the court with a request to replace the fine with community service. During his first appearance in court, the offender can also ask for and receive a period of 30 days to pay the fine. Initially, GO no. 2/2001 established that the replacement of the fine with community service can be done only with the consent of the offender, but through decision no. 1354/2008, the Constitutional Court held that by imposing the offender's consent as a condition for the replacement of the fine, the community service sanction lacks efficiency, the offender being able to avoid his liability and thus Article 1 (5) of the Romanian Constitution is not observed. This article provides the obligation for any citizen to observe the law.

11. CAUSES REMOVING THE CONTRAVENTIONAL NATURE OF THE OFFENCE

In accordance with GO no.2/2001 there are some causes which remove the unlawful nature of the act: legitimate self-defence, state of necessity, physical or moral coercion, irresponsibility, involuntary drunkenness, error and disability, which are related to the offence.

These causes, except the last of them, are identical with those, which exonerate liability under criminal law.

The acts committed in one of these cases are not contraventional offences, because the offender was not guilty. His will was not free.

The occurrence of one of these cases and the legal consequences might be decided upon only by the court of law, since the police agent, by his report, might not be competent to remove the contraventional nature and to exonerate the offender.

12. THE PRESCRIPTION – A CAUSE FOR REMOVING THE CONTRAVENTIONAL NATURE OF THE OFFENCE

According to GO no.2/2001, the prescription represents a cause for removing the application of the fine.

There are two types of prescription. The prescription of the application of the contraventional fine occurs if this sanction is not applied within 6 months after the commission of the minor offence.

For continuous minor offences, 6 months will be calculated from the time when the agent established the offence in his report.

The prescription of the execution of the contraventional fine occurs if the paper including the certified report of the agent in which the minor offence was established and sanctioned, is not communicated to the offender within one month from the date mentioned in the report as the date of the application of the fine.

13. ECHR DECISIONS VERSUS ROMANIA IN THE MATTER OF CONTRAVENTIONAL OFFENCES AND THEIR PUNISHMENTS

Minor offences (contraventions) were not characterized under Romanian domestic law as “criminal”. However, the European Court of Human Rights has established that the guidelines provided by the domestic law are relative.

To determine whether an offence qualifies as 'criminal' for the purposes of the Convention, the first matter to be ascertained is whether or not the text defining the offence belongs, in the legal system of the State, to the criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the punishment that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6, to the ordinary meaning of the terms of that article and to the laws of the Contracting States.

The Court recalled that for Article 6 to apply by virtue of the words 'criminal charge', it suffices that the offence in question should by its nature be 'criminal' from the point of view of the Convention, or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the 'criminal' sphere. The general character of the legal provision infringed by the applicant together with the deterrent and punitive purpose of the penalty imposed on him, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature. The relative lack of seriousness of the penalty at stake could not deprive an offence of its inherently criminal character. These principles were established in case Lauko v. Slovakia, but they are also available for the minor offences (contraventions) in the Romanian law system.

The case Lauko v. Slovakia is important for the Romanian legal system, because the Court has decided that entrusting the prosecution and punishment of minor offences to administrative authorities was not inconsistent with the Convention, while the offender has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees of Article 6.

GO no.2/2001 establishes the proceedings in case of the offender’s complaint before an independent and impartial court of law. There are public, verbal and contradictory proceedings, but they did not give all the guarantees of art. 6 ECHR, as we have found in the decision of the case Anghel v. Romania.

The legal proceedings started by the complaint of the offender in the matter of minor offences (contraventions) against public order were included within the scope of art. 6 ECHR in terms of criminal matters. In accordance with the previous principles established by Court to determine the nature of the “charge” this type of minor offences were characterized as criminal. The guarantees established by article 6, including the innocence presumption are fully applicable.

In the case Anghel v. Romania, the applicant disputed the fine, considering it unlawful as he denied having committed the offence against public order of which he was accused, but his appeal was unsuccessful. He complained in front of EHR Court about the unfairness of national proceedings. The Court has found that the applicant had been "charged" since, at the latest, he had been served at his home address with the order to pay a fine. It further took note of uncertainties surrounding the testimonies taken into account by the Romanian courts and considered that the proceedings had breached the applicant's right to the presumption of innocence.

After this decision, courts of law have applied all the guarantees provided by art. 6 ECHR in the proceedings concerning challenge of fine or community service punishments.

The case Nicoleta Gheorghe v. Romania (2012) is very important, because in fact, it is an ascertainment that the Romanian legal system in the matter of minor offences works under the terms of ECHR.
Following a police report, the offender was ordered to pay a fine of 700,000 Romanian lei (ROL) - approximately 17 Euros - for disturbing the peace in the block of flats where she lived. The applicant contested the police report in court, claiming that the allegations set out in it did not correspond to what had actually happened. Relying on Article 6 § 1 (right to a fair trial) and Article 6 § 2 (presumption of innocence), she complained that the proceedings she had brought in order to contest the report alleging an offence of disturbing the peace were unfair.

EHR Court has decided no violation of Article 6 in this case, considering that the Romanian tribunal has applied all the quantities provided by art 6, the offender having the right to provide any evidence against the police report and the tribunal did not start and continue the proceedings with false, preconceived ideas concerning the innocence presumption which was for the benefit of claimer.

14. CONCLUSIONS

Despite the difficulties raised by the determination of their juridical nature, the application of these administrative sanctions is governed by legal principles. In the hypothesis of a challenge of these sanctions, the procedure to be followed before the court is the civil procedure.

However, in concrete situations, some sanctions have been characterized as repressive and therefore there is a need that

procedural safeguards specific to criminal law should be provided for the sanctioned person.

From a comparative perspective, on the Slovenian State Portal it is established that the persons accused of having committed a minor offence are innocent until their liability is established by a final judgement and a minor offence means any act violating the law, a

Government regulation or local self-government ordinance, which is, as such, termed as a minor offence, the commission of which is followed by sanctions.

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