SOME ASPECTS CONCERNING THE ENFORCEMENT PROCEEDINGS ON SANCTIONS

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Abstract

Among the most important aspect in the sanction practice, there are recorded the difficulties on enforcing the sanctions with fines for the offences provided by Law no. 61 from 1991 concerning the sanctions on breaching certain rules of social cohabitation, public order and peace.

Key words: enforcement, sanction, fine, procedure

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Some of the most important issues from the administrative practice are represented by the difficulties on enforcing the fine sanctions for the offences provided by Law no. 61 from 1991. In this case, we make reference to the amendment rules from art. 25-29 of the Government Order no. 2 from 2001. Presented in brief, the procedure is as follows: if the offender was sanctioned with fine, along with the minute it will receive also the payment notification. In the payment notification it shall be mentioned the obligation to pay the fine and by case, the compensation, within 15 days from the notification."[2] If the inspector applies the sanction and the offender is present on concluding the minute, this will receive a copy of it. The offender will sign for reception. In case the offender is not present or, although present, refuses to sign the minute, the notification thereof and also the inspector's payment notification shall be performed in term of a month, at most, from the conclusion date. The minute and the payment notification shall be sent by mail, with reception confirmation, or it shall be displayed to the offender's domicile. This can pay immediately or in term of 48 hours from the minute conclusion date, half of the minimum fine provided by law, the inspector mentioning this possibility in

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[2]Art. 25 para. (3) of **Government Order no. 2 din 2001 on the legal regime of contraventions.**

the minute. The fine payment shall be made to the inspector, the Romanian Savings Bank or to the public finance treasury, and a copy of the receipt shall be delivered by the offender to the inspector or shall be sent by mail to the competent authority.[3]

Unlike the provisions of Law no. 32/1968, in the current regulation on the common law applicable for offences, the rule for paying half of the minimum fine is represented by the express provision of this possibility in the special sanctioning rule, as it happens also for Law no. 61 from 1991.

It is appreciated that "*an issue that art. 28 of the GO no. 2/2001 and any other text of the order does not exclusively solve, although it has a significant practical importance, is represented by the legal nature of the term of 48 hours with the consequent possibility to suspend it, or in certain situations to reinstate it in the timeframe. In our case, we believe that this would be a procedural period of interruption or reinstatement in the timeframe. Thus, to the extent that within the term of 48 hours the offender addresses a claim against the minute, this will be ceased, following to run again from the communication date of the first instance sentence, or along with the delivery of the decision of the Court of Appeal, obviously, only in case the claim was dismissed. Also, shall the offender be in the impossibility to pay the fine within the term of 48 hours, it can ask the court, based on a claim having as subsidiary object the cancellation of minute, or by appeal on enforcement, the reinstatement in term for being able to pay the debt, paying the fine based on this reduced amount.*[4]

Against the finding minute of contravention and application of sanction it can be addressed a claim in term of 15 days from the date of its notification. The claim suspends the enforcement. The suspensive effect of the claim shall be applied only on the term for paying the fine and not for the term of 48 hours within which it can be paid half of the minimum agreed fine, if the special rule provides expressly this possibility.

According to "*Law no. 293/2009 for the amendment of the Government Order no. 2/2009 on the legal regime of sanctions*",[5] if the offender does not pay the fine (...), "*the Court will replace the fine with the sanction of the obligation to render community work*". In the old regulation, the Government Order

[3] Art. 28 from the same law.

[4] Ovidiu, Podaru, Radu, Chiriță, **Government Order no. 2/2001 on the legal regime of sanctions, commented and annotated**, Sfera juridică Publishing House, Bucharest, 2006, p.156-157.

[5] Law no. 293/2009 for the amendment of the Government Order no. 2/2009 on the legal regime of sanctions was published in the Romanian Official Gazette, Part I no. 645 from October 1st 2009.

no. 2/2001, it was stipulated that "*the Court can replace the fine with community service, only with the offender's approval*". At the moment, the Court can oblige the offender to the community service for a maximum term of 50 hours, and for children, 16 years old, to 25 hours. Also, *Law no. 294/2009*[6] amends the Government Order no. 55/2002 on the legal regime of the sanctions by community service"[7] in the same meaning, namely the elimination of the requirement concerning the offender's approval.

Based on the amendment of the legal deed it results that the court will apply the community service sanction, if it shall consider that the application of fine is not sufficient or if the offender does not have the material and financial means for its payment. The legal amendment was necessary due to the accumulation of debts not paid to the IRS by the people sanctioned with fines by the public order bodies, competent in field. In fact, by the accumulation of contravention fines, applied systematically, it was reached in some cases the conclusion of a high number of finding minute of contravention, lacking the finality aimed by the legislator and the accumulation of some record amounts owned to the state, debts that will never be executed and on which it will act the prescription. As an example, I mention that "*in Bucharest, an offender sanctioned repeatedly for prostitution, owned in January 2011 to the IRS over 1.118.000 lei, and another offender from Bacau County, sanctioned for the same anti-social facts, should pay over 300.000 lei*".[8] In this meaning, it should be mentioned that "*ten of the Bucharest prostitutes received together for the period 2006-2010, over 6.000 fines*". The national record for this period is held by a person "*that practiced prostitution for 27 years, from Ramnicul Sarat, who had to pay 796 fines*" starting with July 2006 until 2010.

Thus, it can be shown that "*in the first eight months of 2009, there were recorded over 14.000 minutes*" by which there were applied fines for prostitution, and "*during the similar period of 2008, there were recorded only around 10.000 similar minutes*". In principle, I appreciate as beneficial the legislative amendments brought by Law no. 293/2009 and Law no. 294/2009,

[6]Law no. 294/2009 for the amendment of the Government Order no. 55/2002 on the legal regime of community service sanction, was published in the Official Gazette part I no. 645 from October 1st 2009.

[7]Government Order no. 55/2002 on the legal regime of the community service sanctions was published in the Official Gazette no. 642 from August 30th 2002.

[8]Http://www.antena3.ro/romania/statul-roman-ar-castiga-100-de-milioane-de-euro-anual-daca-ar-legalizaprostitutia-117068. html

made in order to avoid the accumulation of outstanding debts towards IRS by the practitioners.[9]

But, it is arising an issue that the aforementioned normative acts do not clarify: what kind of legal liability attracts the failure to fulfil the community service and how will this person answer? In Romania, the labour enforcement is not admissible, and we are not either in any of the circumstances provided to art. 42 paragraph 2) letter c), b) and c) of the Constitution, the sanction of imprisonment[10] being eliminated, and the solution to retransform the community service in debt to the IRS is not opportune, because it would lead to the continuation of the vicious circle. "*The Government Order* no. *55/2002 on the legal regime of the community service sanction"* allows the court to return to the referral of the mayor and to dispose the replacement of the community service sanction with the fine, but in such case, it is only reached a vicious circle of law, which is usually out to the satisfaction of the offender and damages the state by the prescription on the execution of the fine sanction.

There is, of course, the practically reduced possibility that within the term of 2 years for the prescription of the fine sanction enforcement, the offender to obtain goods or incomes executable by the IRS. A solution, in my opinion, beneficial for insuring the efficient functioning of the legal system, like the sanction by the criminal law means for the unfulfillment of the community service established by the decision of the law court. Practically, this person

[9]Liviu Giurgiu, Cristian Giuseppe, Zaharie, Some theoretical and practical aspects concerning the sanctioned offences that affect the social and public order rules, in the Journal of Public Law no. 1/2010.

[10] The provisions of letter d) of paragraph 2) of art. 5 of *Government Order no.2/2001 on the legal regime of sanctions that were providing the sanction with prison were abrogated by the provisions of art. I paragraph 1) of the Emergency order no. 108 from October 24th 2003 on the elimination of the contravention prison, deed published in the Official Gazette no. 747 from October 26th 2003.* Also, by the provisions of paragraph 2), 3) and 4) of art. I of the same law, for the application of the constitutional amendments from 2003, there were abrogated all the provisions contained by the Government Order no. 2/2001 which were regulating the sanction of contravention prison.

The provisions concerning the contravention prison, included in this act became clearly unconstitutional after the enforcement of the amended Constitution, in 2003. In paragraph 13) of art. 23 of the amended Constitution, it was provided that the "sanction of privative freedom can be only of criminal nature". Hence the unconstitutionality of the legal provisions that were regulating the administrative – contravention prison sanction. The sanction based on which the offender is due to render the community service does not determine an effective deprivation of freedom for such person. From the constitutional text results that the prison sanction can be applied only for committing crimes, and in no case for a contravention or a disciplinary on the military regulations. For the cases when the court should have applied the prison sanction, it will apply the obligation of the offender to the community service.

refuses to apply a legal order. But, this solution might come in contradiction with the Romanian criminal policy, because it leads to taking into the criminal sanction system the ill will offenders and bad payers, further hampering the functioning of the procedural and criminal prison system with prostitutes, beggars, troublemakers, street consumers of alcohol, gambling practitioners, wall designers, traders and unruly drivers, etc.

Another aspect that I notice is represented by the amendment provisions of art. I of *Law no. 294/2009 for the amendment of the Government Order no. 55/2002 on the legal regime for community service sanctioning*", according to which "*the court will establish the nature of the community service activities, based on data communicated by the City Mayor*" where the offender has its residence or domicile, taking into account "*its physical and mental capacities, and also the level of professional training*."

Also, for the same purpose, the Government Order no. 55/2002 on the legal regime of the community service sanction provides to art. 17 paragraph 1)-5) that "*the mayor has the obligation to fulfil the enforcement mandate; on establishing the activity that follows to be rendered as community service by the offender, the mayor will take into account its professional training and health state, certified with documents issued by law*". Also, "*it is forbidden to establish for the offender the community service in underground, in mines, subway or other such places with a high level of risk in rendering the activity and also in dangerous places, which, by their nature, can determine physical accidents or might damage the person's health; the sanction of community service is executed by complying with the labour protection rules*". In addition, "*it is forbidden to oblige the child to render an activity that might have risks or it is susceptible to effect its education or to damage its physical, mental, spiritual, moral or social development*."

Given that the people for who it is imposed the application of these sanctions are, normally, sanctioned for breaching some rules of social life, public order and for other similar facts, by grounds it arises the question which are generally "*their physical and mental capacities, the level of professional training and health state?*" Because those that are in such situation, of course along with the street prostitutes, are: usually the beggars, the hazard and shell game players, the destroyers of other's goods, the pimps that are not criminally sanctioned, the homeless people that stay in parks and the heat system and the street consumers of alcohol, to which there are added several categories "*not*

lower than these". Hence, the difficulties for the practical application of these legal provisions.

In regard of these "*special*" groups, from their ranks may come two categories of people that "*block*" the procedure of applying the contravention sanctions: the people refusing to present their identity card, although they have them with, and the people without identity. For the first case, the inspector, by case, will request according to art. 18 of the Ordinance, the assistance of an agent from the public order bodies (policemen, gendarme) that according to art. 48 of the Code of Criminal Procedure will have the right to retain the offender, the refuse to present the identity documents representing by itself an offence sanctioned by *Law no. 61/1991*, to art. 3 paragraph 31). For the second case, given that such person will fail to pay the fine, it is less probable that the sanction procedure will have the effect desired by the legislator. The practical solutions are doubtful, being proposed: the identification of the offender with witnesses, the commencement of the legal procedures in order to establish an identity or the attempt to establish an identity.[11]

Another aspect that I notice in the Government Order no. 2/2001 is the imperative references to the legal regimes or administrative procedures still unregulated.

I will present such example related to the prostitution actions. Art. 3 point 6 of Law no. 61/1991 sanctions "*the attraction of people, in any kind, committed in places, parks, streets or in other public places, in order to have sexual relations with them and in order to obtain material benefits, and also encouraging of forcing, for the same purpose, of a person to commit such facts.*" Art. 3 point 7 of the same legal act sanctions on its turn "*accepting and tolerating the practice of the offences provided to point 6) in hotels, motels, campgrounds, bars, restaurants, clubs, pensions, discotheques or in their annexes, by the owners or administrators or managers of such places.*" Art. 4 paragraph 3) of the same law text provides also that "*in case of committing the offences provided to art. 3 point 7 (...) it is disposed the measure of suspending the activity of the public premises for a period between 10 and 30days*." "*The measure of suspending the activity of the local premise*" is, in fact, under the common law in matter, a complementary civil sanction. Law no. 61/1991, special rule for such cases, does not provide regulatory provisions

[11] See for this Ovidiu, Podaru, Radu, Chiriță, **Government Order no. 2/2001 on the legal regime of sanctions, commented and annotated**, Sfera juridică Publishing House, Bucharest, 2006, p.124-125.

with procedural character in matter, thus, we will apply the procedural dispositions of the common law for sanctions, namely the provisions of the Government Order no. 2/2001. These provide, mandatory, that "the execution of the complementary sanctions is made according to the legal provisions". But these do not exist! If the minute by which it is disposed the application of the principal and complementary sanction is issued by the same public authority that issued also the functioning permit of the place (normally, the Local Council of the municipality, city, commune or district of Bucharest), this will operate by itself the suspension of the authorized functioning of such place. Since normally, the two aforementioned administrative deeds are issued by the same public authority, I appreciate that the sanction authority shall notify the complementary sanction to the issuing authority of the functioning permit, the latter having the implicit obligation to notify the sanctioned person about the suspension of the functioning permit, for a period of 10 up to 30 days. Shall the issuing authority of the authorization comply the sanctioning authority will be able to start the action in the contentious administrative department, based on art. 1 of Law no. 554/2004 on the contentious administrative,[12] (with a possible hierarchic way), obliging the first authority, based on a final legal order on the issuance of the deed, only if this solution has as final effect the proof on the inefficiency of applying the aforementioned complementary sanction for the private law offending person.

Otherwise, art. 24 of the Government Order no. 2/2001 provides the possibility to seize the goods (which in the sanction practice is interpreted as including the notion of money) resulted from committing the offence. In terms of facts sanctioned by law related to prostitution, this consists in seizing the money received from the client, but also of other goods that the prostitute has on her (such as, means of protection against the STD transmission, like condoms). Leaving aside that the seizure of the protection means corroborated with the lack of prostitutes' responsibility may lead to the further infection of others, the application of the measure of goods' seizure should not be performed by the offence finding minute, but only to be ruled by the law court, the inspector performing only the retention and preservation of the goods, and the seizure procedure to be ruled by the law court, notified in term of 15 days after the retention of goods by the authority of which the agent is employed,

[12] Law no. 554/2004 on the administrative contentious was published in the Romanian Official Gazette no. 1154 from December 7th 2004 and was enacted on January 7th 2005.

which *"(...) represents an at least unfortunate choice of the legislator that should have ruled this competence on the law court, in order to assure the perfect compatibility of the national laws with ECHR provisions"*. By art. 1 of *Protocol no. 1, the deprivation of property is prohibited unless it is executed for a cause of public interest and the measure is provided by law.*[13] *By the notion "provided by law", ECHR does not understand any national law provisions, but only those provisions that leave certain guarantees against arbitrage.*[14]

Or, according to the found jurisprudence of the European Law Court, the main guarantee against arbitrage is that a privative measure on rights is not ruled by an executive body, as it is disposed to art. 24 from the Government Order no. 2/2001. A perfect harmonization with the ECHR jurisprudence would have imposed that the seizure measure to be ruled by any law court, but the inspector to be able to take only the measures of preservation for the seized goods.[15]

Personally, I am reluctant on the practical use of the amendment of the provisions of art. 24 paragraph 1) of the Government Order no. 2/2001, because for establishing the seizure by the inspector can be appealed in term of 15 days after notification, in front of an independent and impartial court, and the attribution of disposing the seizure under the exclusive competence of the law court would lead to their agglomeration.

References

1. Law no. 554/2004 on the administrative contentious was published in the Romanian Official Gazette no. 1154 from December 7th 2004 and was enacted on January 7th 2005.

2. Law no. 293/2009 for the amendment of the Government Order no. 2/2009 on the legal regime of sanctions was published in the Romanian Official Gazette, Part I no. 645 from October 1st 2009.

3. Law no. 294/2009 for the amendment of the Government Order no. 55/2002 on the legal regime of community service sanction, was published in the Official Gazette part I no. 645 from October 1st 2009.

4. Government Order no. 2 from 2001 on the legal regime on sanctions published in the Official Gazette no. 410 from July 25th 2001.

[13] Ovidiu, Podaru, Radu, Chiriță, Government Order no. 2/2001 on the legal regime of sanctions, commented and annotated, Sfera Juridica Publishing House, Bucharest, 2006, p.146.
[14] See mutatis mutandis ECHR, **Decision Klass and others**, quote on www.echr.coe.int; **Decision Malone**, quote on www. echr. coe. int .
[15] Ovidiu, Podaru, Radu, Chirița, op.cit. Sfera juridică Publishing House, Bucharest, 2006, p.147.

5. Government Order no. 55/2002 on the legal regime of the community service sanctions was published in the Official Gazette no. 642 from August 30th 2002.

6. Emergency Order no. 108 from October 24th 2003 on the elimination of the contravention prison, act published in the Official Gazette no. 747 from October 26th 2003.

7. Liviu, Giurgiu, Cristian Giuseppe, Zaharie, Some theoretical and practical aspects concerning the sanctioned offences that affect the social and public order rules, in the Journal of Public Law no. 1/2010.

8. Ovidiu, Podaru, Radu, Chiriţă, Government Order no. 2/2001 on the legal regime of sanctions, comented and annotated, Sfera Juridica Publishing House, Bucharest, 2006.

9. Decision Klass and others, quote on www.echr.coe.int; Decision Malone, quote on www.echr.coe. int;

Http://www.antena3.ro/romania/statul-roman-ar-castiga-100-de-milioane-de-euro-anual-daca-ar-legalizaprostitutia-117068. html