

CONSIDERATIONS REGARDING THE EFFECT OF APPLYING THE CONTRAVENTIONAL FINES TO THE ADMINISTRATIVE-TERRITORIAL UNITS

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Abstract:

Both the practical experience gained by the two authors, as external public auditors within the Chamber of Accounts of Timis County, and the difficulties faced by the administrative-territorial units of Timis County in respect to the classification of contraventional fines-related expenditures within the budget execution, motivated the authors to elaborate this study.

This study sets forth both the legislative considerations as well as the personal points of view in relation to the penalties, such as the “contraventional fines” applied by the competent authorities and whose effects, in the case of the administrative-territorial units, are not considered to bring about an increase of the budget incomes, but on the contrary, a prejudice for the state budget. The authors suggest that the natural entity directly involved in the illicit action that has been found be considered legally liable.

Key words: administrative-territorial units, contravention, contravention’s subject, budget, tax

As legal standard¹, the contravention stands for a civil deed, a type of socially inconvenient activity because it compromises the rights and interests of the community or the rights and interests of certain private individuals.

According to the contraventional law, three meanings can be assigned to the term “*contravention*”, depending on the perspective from which the term subject to a legal analysis is regarded.

Therefore:

- **from the social perspective**², the contravention represents the act which causes prejudices to a legal subject or which jeopardizes the social order;
- **from the civil perspective**³, the contravention is considered to be a deviation of the conduct of a community member who disregards the other members of the group where it also belongs to;
- **from the moral point of view**⁴, the contravention translates into an activity contrary to the community’s minimal ethic conscience (*minima moralia*).

The contravention, as an illicit activity, is assigned to an individual who, by its action or non-action, breached a rule of the civil law.

The parties involved in a contravention are the *contravener*, as the active subject and the *injured party*, as the passive subject or the victim.

Furthermore, by definition, *the active subject / the natural entity contravener* is the individual who commits an offense stipulated by the contraventional legislation in force, by deeds/actions of execution, non-execution, persuasion or complicity.

¹ Hotca, Mihai Adrian – Legal conditions of contraventions, Comments and clarifications (Regimul juridic al contravențiilor, Comentarii și explicații), 4th edition, C.H. Beck Publishing House, Bucharest 2009, p. 12

² op. cit. p. 13

³ ibidem,

⁴ ibidem,

The general requirements of the active subject – natural entity, are as follows⁵: **the legal capacity of the contravener, the contravener's liability as well as the freedom of action and freedom of will respectively**; Special requirements of the active subject (or as it may be found in the doctrine: **qualified subject – qualification specially assigned by the rules of civil law, based on which the active subject is carrying out its professional activities** – labor contract, job description, etc.).

Therefore, the quality of the active subject engaged in public service, is considered to be an essential and even a mandatory requirement in respect to the assumption of the labor contractual obligations.

As for the **legal entity active subject / contravener**, the requirements afferent to the contraventional liability of the legal entity are as follows⁶ **the legal capacity of the legal entity** – effective from the date of its incorporation – **and the relevant legal provisions regarding the contraventional liability of the legal entity.**

The contraventional liability of the legal entity is direct and personal and the potential right to redress against the natural entity responsible for committing the contravention will be exercised based on the tort liability.

The passive subject of the contravention (the victim) is the legal or natural entity, holder of the social value that has been injured by the contravention; in other words, the passive subject of the contravention is in fact the contravention's victim.

The penalty may be defined or described as the community's response in respect to the illicit conduct (contravention), and basically, to any action or inaction by means of which a legal or any other type of rule is breached, in other words, the sanction represents that particular reaction against those who breached the provisions of the rule of civil law; as a punitive measure, the fine represents the petitioner's legal means of constraint as well as the prophylactic measure intended to prevent the perpetration of new offenses that breach the legal regulations.

Therefore, in the case of the pecuniary penalty, the „*deprivation*⁷” is made by reducing the contravener's assets by the value of the fine that has been applied, or, if applicable, by the value of the applicable and applied contraventional penalties; the special and general prevention implied by the contraventional penalty represents exactly the purpose of the civil fine.

As far as the provisions of the Government Ordinance no. 2/2001⁸, regarding the legal status of contraventions, these set forth the administrative character of the civil fine. Analyzing the contraventional fine, as it is regulated by the aforementioned regulation we find the “*preventive and punishable*” character of the contraventional fines.

Furthermore, as the juridical doctrine almost unanimously stipulates, the contraventional fine is a **basic pecuniary penalty, a means of constraint consisting in the enforced diminishment of the assets owned by the individual subject to penalty**⁹.

Therefore, according to the aforementioned argumentations, in the case of the private legal entities, by applying the contraventional fines, there is actually achieved an “*enforced diminishment of their assets*”. Subsequently, the competent authorities entitled to decide upon the assets of the legal entity (shareholders, organizational structure) and upon the legal aspects concerning the manner in which such legal entities operate or carry out their business, in compliance with the applicable legislation, they

⁵ op.cit., p. 22-24

⁶ op.cit., p. 26-28

⁷ DEPRIVATION *n.* Loss, suppression, lack of a right, asset, advantage. ♦ (*La pl.*) Privation, poverty; voluntary forbearance. [Pron. -*fi-u-*. / acc. to fr. *privation*, lat. *privatio*]. , according to <http://dexonline.ro/definitie/privatiune>

⁸ Government Ordinance no. 2 as of July 12th 2001 (*updated*), regarding the legal status of contraventions, art. 8

⁹ Romaşcanu, B., - Judicial Contraventional Procedure in the sense of the jurisprudence of the European Court of Human Rights (*Procedura contravenţională judiciară în lumina jurisprudenţei Curţii Europene a Drepturilor Omului*), Journal of the National Institute of Magistracy , THEMIS, no. 2/2005, p.3-4, http://www.inm-lex.ro/fisiere/pag_33/det_133/448.pdf

will decide if the “assets diminishment” affects the personal assets of the associates/shareholders (natural or legal entities – by adding the contraventional fine to the expenditures account, with effects upon the financial year and implicitly, upon the reduction of the dividends to be assigned) or on the contrary – this diminishment may affect the assets of the entity who, based on the labor contractual relations or based on its activity, is fully liable for the offenses subject to the contraventional penalty.

In respect to the private legal entities, considering their impersonal status, the enforcement of contraventional fines upon them exceeds the **legal framework** (as we will demonstrate below) and **evades the very own purpose of the contraventional penalty**, which, as we stated above, refers to the prevention and constraint of offences that violate the legal regulations.

However, in the instances involving the application of civil penalties to the public institutions, in their quality as legal entities, the company – as a social-economic organization¹⁰ - finds itself in a double capacity, both as a legal entity - active subject / contravener and as a passive subject, the victim of the contravention, considering the fact that, by the illegal action, its own social standards have been prejudiced.

Therefore, in these circumstances, it is absolutely necessary to make a clear distinction between the „**active subject**” – **legal entity, public institution** (as a general structure of the company, by means of which it exercises its material and non-material needs) and the **active subject – natural entity**. The active subject – natural entity¹¹ is responsible, according to the applicable legislation, for exercising the duties for which it has been assigned by the company, being thus liable for a series of obligations and at the same time, being protected by a series of rights granted by the same company. Or, by its illegal action or inaction, the **qualified subject** cumulatively satisfies both capacities, acting both as a contravener and as a “*perpetrator*”.

Practical aspects

The legal practice emphasized that in all cases in which the public institutions invested with control duties (the structures within the Ministry of Public Finances – Activity of Fiscal Control, Fraud Squad, General Division for Public Assistance, Unfair Business Practices and Regulated Prices, Labor Territorial Inspectorate, Environment Control Division etc.) have performed different inspections to other public entities to which they found deviations from the specific legislation in force, they have applied penalties such as the contraventional fines to all public institutions, as legal entities, subject to the said controls.

In all cases, the deviations have been found – as the active subject / contravener – at the level of the public institutions subject to verifications, and the legal penalties that have been applied, i.e. contraventional fines, have been either directly or indirectly covered from the state budget, under the conditions in which the result of such operations should be materialized within the budget only as an income and not as expenditures.

Taking into consideration that, on the one hand, the fines become “*budgetary debts*”, and on the other hand, the attributions and the manners of providing the public services are clearly defined and identified at the level of every individual (civil law rules, labor contracts, job descriptions, etc.), the authors have inductively considered that the **contraventional penalties could not be applied to the public entities, as legal entities** (since it will mean that the company applies to itself its own penalties, generating thus a collective fault upon the entire collectivity), **but to individuals** (qualified active subjects) **who, while exercising their public attributions breached**

¹⁰ <http://dexonline.ro/definitie/societate>

¹¹ or *qualified subject – the qualification assigned exactly by the legal rules based on which the active subject carries out its activity – labor contract, job description, etc.*

the legal provisions that regulate the specific activity, and the „patrimonial diminishment” cannot be enforced, under no circumstances, upon the public assets, but upon the assets belonging to the individual assigned to provide those particular public services.

This judgment has also a financial character by the fact that the contraventional penalty applied to the public assets generates, at first sight, both incomes and costs to the public budget. However, a more analytical approach actually demonstrates that this type of operation **generates a prejudice to the public budget** by the fact that, although the income gained is correlated to the cost (at the payment level) it caused (as a financial-accounting stability element), and in fact, this income **generates an additional expense**, exceeding its level, being thus determined by the costs incurred by the control authority (salary costs, travel costs, office automation costs, etc.).

Least but not last, **taking into consideration the form** of a contravention ascertaining protocol – as it has been enacted¹² -, this describes the location where the finding took place, the finding, the deeds punished by the applicable legislation, which are considered as contraventions and which are subject to penalties, as well as the individual blamed to have perpetrated them.

A distinctive situation is the case identified at the level of the administrative-territorial units, where, according to the provisions of the **Law no. 215/2001**¹³ regarding local public administration, *„The administrative-territorial units are public legal entities, with full legal capacity and own assets... The administrative-territorial units are the holders of the rights and obligations deriving from the contracts related to the administration of the assets that belong to the public and private sector where these are parties, as well as from the relations with other legal or natural entities, under the legal conditions”*.

According to the same normative document, the local public administration operates based on the principle of autonomy, as follows¹⁴:

- **„The authorities of local public administration** manage or, if applicable, use the financial resources and the private or public assets of townships, towns, cities and counties, in compliance with the principle of local autonomy”;

- *„The townships, towns, cities and counties represent administrative-territorial units where the local autonomy is exercised and where the authorities of local public administration are set up and legally operate.”;*

- *„The authorities of public administration, by means of which the local autonomy is provided to the townships, towns and cities are the local, township, town and municipal councils, as deliberative authorities and the mayors, as executive authorities...”* - *„The local councils and the mayors operate as authorities of local public administration, and settle the public issues from townships, towns and cities, under the legal conditions”;*

- *„The mayor represents the administrative-territorial unit in its relations with other public authorities, with Romanian and/or foreign legal or natural entities and with juridical authorities”*.

The Romanian Constitution¹⁵ stipulates that, the local councils and the mayors operate, under the legal conditions, as autonomous administrative authorities, and settle the public issues from townships and towns/cities. The provisions of the Law no.

¹² Government Ordinance no. 2/2001, quoted legislation, art. 16

¹³ Law no. 215 dated April 23rd 2001 (**republished**)(*updated*) – regarding the local public administration– art. 21, par. 1).

¹⁴ *ibidem*, art. 10, art. 20, par. (1), art. 23, par. (1); art. 23, par. (2); art. 62, par. (1);

¹⁵ Romanian Constitution as of November 21st 1991 (*republished*) – Official Gazette no. 767 as of October 31st 2003 - art. 121, par. (2)

273/2006¹⁶ - regarding the local public finances, define and legislate the categories of expenses that may be provided in the local budgets and not lastly, the provisions of the Law no. 11/2010¹⁷ - regarding the state budget for 2010, which present and legislate, within its structure, the categories of expenses included both into the state consolidated budget and into the budget of the administrative-territorial units. **Therefore, the administrative-territorial units are not legally allowed to enter, into the financial-accounting statements and into the budgetary execution plans, any types of expenses and implicitly, any type of payments related to the contraventional fines.**

According to the facts presented above its results that the control authorities proceeded to the application of contraventional penalties to the administrative-territorial units which erroneously is regarded as a CONTRAVENER (!?), although this is an impersonal entity, within which the administrative act of public authority (and not only at the representation level) is granted to the mayor, due to the specialty services he/she subordinates.

Considering also the legislative provisions¹⁸ in force, the amounts derived from the fines applied to the natural entities become integral incomes within the local budgets.

Thus, if any deviations from different normative rules are found and if such deviations are incumbent on the responsibility of the administrative-territorial unit, this responsibility is legally transferred to the mayor, in his/her capacity of the main credit release authority, or to the individual who, by his/her action or inaction, failed to discharge his/her attributions, according to the relevant job description (where this is applicable) and for which he/she is remunerated from the public budget of the administrative-territorial unit.

Conclusions

We consider that “*no budget can be amended/sanctioned*”, since there is no single expenditure element that might allow the registration of such amounts into the budgetary statements and also because that, by amending any budget, the punitive effect is lost and the punitive purposes cannot be fulfilled.

Even in the case when the local budget is sanctioned in favor of the state budget, the amount applied and paid from the local budget generates a financial imbalance at the local level and therefore, this imbalance will be eventually covered from the national budget, by offsetting amounts (out of the income taxes or VAT).

To sum up, the amounts set forth as contraventional penalties and paid from the public funds of the local communities are regarded both as a prejudice brought to the expenditure budget of those particular administrative-territorial units – considering that this prejudice is patrimonial, being paid from the unit’s own budget and not from the perpetrator’s budget, in other words, the prejudice is brought to the assets of the legal entity subject to control and not to the assets belonging to the liable natural entity – and as a prejudice brought to the revenue budget, as an income that has not been gained.¹⁹

Therefore, we consider critical the intervention of the law-maker upon the text of the normative act that regulates the legal status of contraventions, so that, if any illegal actions are found at the level of the public entities, the penalty should be applied upon the natural entities responsible for such offenses.

¹⁶ Law no. 273 dated June 29th 2006 (*updated*), regarding the local public finances – Official Gazette no. 618 as of July 18th 2006 - APPENDIX 2 – List of expenditures stipulated in the local budgets

¹⁷ Law no. 11 as of January 26th 2010, the state budget for 2010 - Official Gazette no. 60 dated January 27th 2010 - CHAPTER II – The incomes and expenditures stipulated into the own budgets of townships, towns, cities, sectors and Bucharest.

¹⁸ Government Ordinance no. 2/2001, quoted legislation, art. 8, par. 4

¹⁹ According to the Government Ordinance no. 2/2001, regarding the legal status of contraventions, the fine applied to natural entities becomes an income to the local budget.

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