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THE COURT'S COMPETENCE TO DISMISS THE SUPPLEMENTARY SANCTION

Case Study

proceeding to a new individualization of the applied sanctions, as per the criteria provided by art. 21 par. 3 from the GO 2/2001

Keywords
Contraventional/social sanction,
The contraventional law,
Social danger,
The Government's Order 2/2001,
Individualize the sanction

Abstract

According to art. 34 par. 1 from the UGO no. 34/2001, the court settling the complaint against the offence notice, verifying the legality and substantiality of same, decides on the sanction without distinguishing between the main and the supplementary sanctions. From corroborating these legal provisions with the stipulations under art. 5 from the same normative act, according to which the established sanction must be proportional with the degree of social danger of the committed act, without making differences between the types of sanctions, as well as those of art. 5 and art. 6 according to which the supplementary sanctions are to be applied depending on the nature and seriousness of the fact, it results that the law enforcer has also decided on the right of the court to assess inclusively the proportionality of the sanction in case of applying the supplementary measures, not only in applying main sanctions. And this is so because the proportionality of the committed act and its consequences is one of the requirements demanded by the ECHR jurisprudence in the matter of applying any rights restrictive measures.

Article 21 from the Government's Order 2/2001 concerning the juridical regime of contraventions represents the lawful ground based on which the main contraventional/social sanction of the fine applied to the offending petitioner is being re-individualized through the minutes of ascertainment and sanction of violation, the law enforcer listing the limitative criteria according to which the sanction is being established, the main goal being that of establishing a sanction proportional with the degree of social peril of the offence committed.

Paragraph 3 from the article stipulates *(3) The sanction is applied within the limits provisioned by the normative act and must be proportional with the degree of social peril of the committed violation, considering the circumstances, manner and means of committing the offence, the scope in view, the aftermath produced as well as the personal circumstances of the offender and of the other details recorded in the minutes.*

From the definition of the contraventional law contained in art.1, thesis I of GO 2/2001 regarding the juridical regime of violations we keep in mind the idea that "*the contraventional law defends social values that are not being protected by the criminal law".*

The features of main contraventional sanctions provisioned by art. 5, par. 2 from the pre-cited normative act, represented by the fine and Warning letter and also by the supplementary sanction or the sanction to provide activities to the benefit of the community, as community reparation, consist in the fact that, as compared to the civil or criminal sanctions, they don't have a remedy character but an exclusively preventive-educational one.

Civil sanctions are established and applied by consideration of the degree of actual social danger of the deed expressed by the law enforcer within the lower and upper limits of the sanctions written in the law, these ideal limits expressing the degree of social danger of the deed considered by the law enforcer when they incriminated the contravention.

In doctrine and practice they say that contraventional sanctions represent a form of severe juridical constraint of the one who commits violations, as the social fine is aimed firstly at the patrimony of the offender diminishing it considerably, in some cases the payment of the fine affecting their very means of subsistence, theirs and their families.

Due to this reason, it is no doubt that a measure must be taken by the judge to reach the aimed scope of the law enforcer in art. 21 par. 3 cited above, to apply the sanction proportionally with the actual degree of social danger of the deed, considering the circumstances, manner and means of committing the offence, the scope in view, the aftermath produced as well as the personal circumstances of the offender and of the other details recorded in the minutes.

In the civil suit, admittance of the re-individualization request of the social sanctions applied by the ascertaining agent has as effect either the replacement of the contraventional fine with a gentler sanction, as the warning letter may be, as provided under art. 5 letter a) corroborated with art. 7 from the GO 2/2001 concerning the juridical regime of contraventions, or the diminishing of the quantum of the fine established.

It is important to note that in the contraventional matter there is no lawful wording that allows the judge to re-individualize the sanction of fine in the sense of diminishing it under the minimum level legally established for the respective deed. The judicial practice states that inobservance of the minimum legal threshold violates the principle of legality of sanctions established by the law enforcer[i].

The law enforcer lists limitedly the complementary social sanctions in art. 5 par. 3 letter a) – g) from GO 2/2001 concerning the juridical regime of violations, under the reserve that through special laws there may also be established other complementary sanctions, depending on the particularity and specific of the incriminated act as title of violation/contravention.

The most common supplementary sanctions occurred in practice are those listed under art. 5 par. 3 from above, as follows:

a) Seizing of the goods destined, used or resulted from infractions;

b) Suspension or annulment, as the case may be, of the approval, agreement or authorization to exercise a certain activity;

c) Closing down the unit

d) Blocking bank accounts

e) Suspending the activity of the economic agent

f) Retraction of license or permit for certain operations or activities of foreign trading, temporarily or permanently

g) *Destruction of works and restating the field in its initial state*

(4) By special laws may be established also other main or supplementary sanctions.

From the content of the provisions from art. 5, par. 6 from the GO 2/2001 concerning the juridical regime of infractions we state that *supplementary sanctions are applied according to the nature and seriousness of the deed and,* only if the law enforcer has provisioned that sanction in the special law applicable to the imputed act.

The framework law in the matter of sanctioning violations, the GO 2/2001 concerning the juridical regime of violations, although regulates in art. 5 par. 5 the law principle according to which *the sanction established must be proportional with the degree of social danger of the committed act,* it doesn't contain any provision regarding the

juridical situation of supplementary sanctions in the case of admitting the request of re-individualization of the main sanction of the fine with the Warning letter, respectively it doesn't legally render the judge the possibility to proceed to the replacement of the supplementary sanction applied, with the Warning letter.

In the judicial practice of trial courts from within the competence range of Arad Court House, there were solutions to admit the request of replacement of supplementary sanctions, especially when it came to traffic violations, when it was decided to suspend the right to drive vehicles on public roads, but also in the matter of economic or financial infractions, respectively when it was decided the application of the measure to seize the amounts of money that could have not been justified legally by the economic operator and also in the situation when it was ruled to suspend the commercial activity of the unit for a period of three months.

In this sense, by the civil sentence no. 849 of 25.01.2012 rendered by the Arad Court House in case no. 17927/55/2011 was admitted in part the contraventional claim filed by the petitioner L.C.S. "Fortuna Unicat" Intreprindere Individuala, against the respondent Financial Guard Arad/*The Financial Guard from Arad*, against the offence notice series G no. 0129223/28.10.2011 and in consequence: the sanction of civil fine applied to the petitioner was replaced with the sanction of Warning letter and the supplementary sanction of activity suspension was dismissed.

In order to rule the sentence, the trial court stated that through the offence notice series G no. 0129223/28.10.2011, the petitioner was sanctioned with a fine in amount of 8,000 lei for violating the dispositions of art. 10 letter b) referred to art. 11 b) from the UGO no. 28/1999, republished, as it didn't issue cashier's receipt for all the payments received from clients, as according to the daily report there were registered proceeds of 114 lei as opposed to 217 lei according to the monetary, thus resulting the sum of 103 lei not registered in the fiscal electronic device. Furthermore, as supplementary sanctions and pursuant to art. 11 par. 3 and art. 14 par. 2 from the UGO no. 28/1999, the petitioner was seized the amount of 103 lei not registered with the cash machine and its activity was suspended for three months.

Nevertheless, proceeding to a new individualization of the applied sanctions, as per the criteria provided by art. 21 par. 3 from the GO 2/2001, and considering the circumstances and the means of committing the act, the consequence produced, the reduced value of the sum for which the cashier's receipt was not issued, as well as the fact that the petitioner is organized as an individual enterprise and it is at its first violation of this kind, the court appreciated that the act presents a low degree of social danger, the sanction of a warning letter being appropriate both considering the circumstances of the act and the personal circumstances of the petitioner.

Furthermore, in what the supplementary sanctions is concerned, the court admitted that the suspension of activity for three months is far too severe as to the reduced seriousness of the fact, which, as shown above, justifies the sanction of warning letter, the confiscation of the cashed in amount of money for which no cashier's receipt was issued being quite enough under the light of individualization of applied supplementary sanctions.

The appeal filed by Financial Guard was admitted, the judicial control court decided that although the lower court has correctly stated the de facto state as compared to the evidence presented in the case and rendered a legal and founded decision in what the existence of the violation act committed by the petitioner is concerned, as a result of an appropriate appraisal of the evidences in the case, of the judicial interpretation of the juridical act tried and of a correct application of the legal provisions in the matter, there are revealed element of non-legality concerning the recurred judicial decision regarding the measure adopted by sentence about the dismissal of the supplementary sanction applied through the offence notice contested.

Replacing the social fine applied to the petitioner with the sanction of warning, the lower court ruled unequivocally concerning the existence of the infraction committed by them and as the offending party didn't recur the sentence of the trial court but only the respondent, the judicial control of the appeal court focused only on the aspects related to the individualization of the main social sanction and the legality of the supplementary ones that have been adopted through the appealed minutes.

From this point of view it was found that the lower court has re-individualized judiciously the main social sanction when it replaced the sanction of social fine applied to the petitioner with the sanction of warning as reported to the evidences administered and last but not least the individualization criteria provisioned under art. 21, par. 3 from the GO 2/2001, respectively considering the circumstances and the manner in which the act was committed, the consequence produced, the small quantum of the money for which no cashier's receipt was released, as well as the fact that the petitioner is organized as an individual enterprise and that it is its first violation of the kind, finally appreciating that the act has a reduced degree of social danger, the sanction of warning being appropriate both as per the circumstances of committing the act as well as the personal circumstances of the petitioner, in other

words, the sanction of warning alone is sufficient for reaching the educative and preventive goal foreseen by the law enforcer when naming the juridical norms correctly concluded as having been violated by the petitioner.

From a different point of view, regarding the measure adopted by the court house in relation with the dismissal of the supplementary sanction of suspending the activity of the enterprise, being noticeable that the lower court judge didn't present any de jure assertions concerning the decisions under this aspect but only de facto, more exactly of opportunity in the sense that suspension of activity for a duration of three months would be too harsh in the case, ignoring the fact that its application derives directly from the law according to art. 14 from the UGO no. 28/1999 republished, so that the officers stating the violation and applying the related sanctions couldn't make any personal evaluations as to the aspect shown herein, their only duty being that of applying the legal dispositions imperatively specified.

Regarding this issue, namely if the courts analyzing the truth of the offence notice and the individualization of the main sanction, the courts may analyze also the opportunity of the supplementary sanction, through civil sentence no. 4475 of 02.05.2011, ruled by the Arad Court House in the case no. 993/55/2011, it was partly admitted the contravention claim filed by the petitioner Sc EC SRL against the respondent Financial Guard Arad and, in consequence, it was dismissed the sanction of activity suspension for a period of three months applied to the petitioner by the offence notice series G no. 0129204, drawn up by the respondent on the 10th of January 2011; the rest was preserved in the offence notice series G no. 0129204 drawn up by the respondent on the 10th of January 2011.

In order to rule as such, the first trial court learned that by the offence notice series G no. 0129204, drawn by the respondent at 11.01.2011, the petitioner was sanctioned based on art. 10, letter b from UGO no. 28/1999 with a fine in amount of 8.000 lei, the confiscation of the sum of 634 lei and suspension of activity for a period of three months, respectively with a fine based on art. 1 letter e corroborated with art. 2, letter f from Law no. 12/1990, in quantum of 6.000 lei and seizing of products.

As referred to the de facto state established, the trial court decided that formally, the constitutive elements of the contravention are met, as provisioned by art. 10, letter b from the UGO 28/1999, respectively by art. 1 letter e from Law no. 12/1990.

But as referred to the individualization of the sanction, were considered the provisions of art. 21 par. 3 from the GO no. 2/2001, according to which the sanction applied must be proportional with the degree of social danger presented by the act committed, considering the circumstances of action, the means and manner of committing it, the goal aimed at, the consequences produced and also the personal circumstances of the offender.

Considering the quantum of the fiscally unrecorded amount, namely 643 lei cashed in during a day's work until 13,00 hours, the trial court assessed that the fine applied in minimum quantum of 8,000 lei was proportional with the fact's degree of social danger and that it was also capable to reach as per the petitioner the educative and preventive goal of the sanction, sought out by the law enforcer.

In what the supplementary measure is concerned, the lower court decided that it should be dismissed because pursuant to the provisions of art. 14, par. 2 from the UGO 28/1999, the application of such supplementary measure was not justified. Here, there were taken into consideration, firstly the provisions of art 34, par. 1 from UGO 29/1999, according to which, the court that settles the complaint against the offence notice checking its legality and truthfulness, also decides the sanction, without distinguishing among main and supplementary sanctions.

Secondly, considering the large quantum of the fine applied, 8,000 lei, as compared to the necessity of the petitioner to produce the resources from which to be able to pay the fine, the fact that suspending the activity of the company may lead even to the situation of depriving the state budget of the taxes and fees the petitioner might have been paying from its activity, in the present economic climate it was seen as benefic to ensure the necessary funds for the state budget, by keeping the activity of a trading taxpayer flowing and not suspending such taxpayer's activity. Thus, the court applied art. 5 par. 6 from the OUG 2/2001 by dismissing the measure.

By the civil decision of the Arad Court House, Contentious department has ruled in favor of the appeal filed by the Financial Guard and found that the lower court didn't take into consideration the fact that violating the obligation provisioned by art. 1 from GO 28/1999, the supplementary sanction of activity suspension is seen by the law enforcer as an imperative measure, so that is not the prerogative of the fiscal organs or the court to decide concerning the preserving of the main sanction of fine and to dismiss the supplementary measure. More than that, although the trial court decided also with regard to the substantiality of the sanction applied by the offence notice, asserting that the sanction of 8,000 lei fine is proportional with the degree of social danger and prone to reach the educative – preventive goal pursued by the law enforcer for the petitioner, nevertheless, unfoundedly the court established that according to art. 5 par. 5 and 6 from GO 2/2001 regarding the

supplementary measure, it became called for to dismiss the supplementary measure of the petitioner's activity suspension for three months applied through the offence notice appealed.

From a different angle, referring to the measure adopted by the court house concerning the dismissal of the supplementary sanction of suspending the company's activity, being noticeable that the lower court's judge didn't make any de jure assertions about the decisions made in this sense, but only de facto assertions, more exactly of opportunity in the sense of suspending the activity for a duration of three months is considered to serious for the case, ignoring that the application of such sanction derives directly from the law conformant with art. 14 from the UGO no. 28/1999 republished so that the officers stating the violation and applying the sanctions, had no interest to assess the event under this aspect but only the obligation to uphold the legal dispositions specified.

Invoking the opportunity reasons and preserved as such from the lower court as a justification for dismissing the supplementary measure, respectively that in the present economic climate it would be more benefic for the necessary budget funds to keep ongoing the activity of a trading taxpayer and not to suspend its activity, truly denotes clemency of the court but not in the least a legal argument meant to justify the dismissal of the sanction with inviolable title in the legal norm of the sanctioning law article.

More than that, the committed act presents social danger resulting from the quantum of the fine provided at the minimum limit by the normative act, which demonstrates exactly that the law enforcer has considered that this deed has a certain amount of social danger and minimizing the public order aspect of making liable a company which has clearly violated the legal provisions will only encourage this phenomenon of eluding legal dispositions with the consequence of depriving the state budget firstly from tax payments legally owed by all taxpayers irrespective of the present economic juncture.

The legality and substantiality of the offence notice being confirmed during the trial in the lower court, implicitly the main sanction being preserved, there were no legal reasons why the supplementary sanction shouldn't follow the main one, when the special law expressly enforces such manner of sanctioning.

The analysis of the opportunity to apply the supplementary sanction by the courts has made the object of divergent points of view also in the case of traffic offences.

By the civil sentence no. 5767 from 09.06.2010 not published, the Arad Court House ruled in favor of the complaint, admitting the social plea filed by the petitioner Rus Oliviu, against the offence notice series CC no. 40444168/14.01.2010, against the respondent *Arad County Police Inspectorate* and it was replaced the fine sanction with the warning letter sanction, being also dismissed the supplementary sanction of suspending the exercising of his right to drive vehicles.

For this decision in question, the lower court stated that through the offence notice appealed the petitioner was sanctioned with a fine in amount of 240 lei and 360 lei for violating art. 52 par. 1 and 147 from the GD no. 1391/2006 together with art. 100 par. 3 letter d and art. 101 par. 1, point 18 from the UGO no. 195/2002 – republished, as he drove the vehicle with the registration plates AR 071239 on Calea Aurel Vlaicu and forced the red light without his license on him, getting also the supplementary sanction of seizing the driving license in order to suspend the exercising of the right to drive.

The lower court concluded that the sanctioning decision was finalized by observing the provisions of art. 16 and 17 from the GO no. 27/2001 executed by the petitioner and passing through the red light of the properly functioning traffic light is seen on the radar footage enclosed to the case file.

Nevertheless, the lower court did a new individualization of the applied sanction, with reference to the criteria provisioned by art. 21 par. 3 from GO no. 2/2001 and considering the circumstances and manner in which the deed was committed, the special material situation of the petitioner, his sincere attitude and also the fact that he was a first timer, the court concluding that the act has a decreased degree of social danger, the sanction of warning being sufficient for realizing the sanctioning scope.

In consequence, pursuant to art. 7, art. 21 par. 3, art. 34 and art. 38 par. 3 from the GO 2/2001 concerning the juridical regime of infractions, the court admitted the complaint, has replaced the social fine with the warning sanction and dismissed the supplementary sanction of suspending the exercising of the right to drive, making clear however to the petitioner that he should respect legal dispositions in the future.

Following the appeal filed by the Arad Police Inspectorate, the appeal was admitted and the complaint dismissed.

The Court House ascertained that the lower court has correctly concluded that the offence notice was legally and substantially drawn up but wrongly replaced the sanction of social fine with the sanction of warning dismissing the supplementary sanction of suspending the driving license.

The court house found that according to art. 100 par. 3 letter d from the UGO no. 195/2002, for not observing the significance of the red color sign of the traffic lights will be applied a penalty specified in class II of sanctions as well as the supplementary

sanction of suspending the exercising of the right to drive vehicles for a period of 30 days.

According to art. 52 par. 1 from the GD no. 1391/2006, the red light sign forbids crossing but the respondent didn't observe the significance of the red light in traffic so he was liable with the committing of the violation recorded in the contested offence notice, proven with pictures taken and certified through the report of the ascertaining agent.

The lower court replaced the penalty applied in the offence notice with the warning letter sanction because it took into consideration the personal circumstances of the offender.

The judicial control court found that it was not the case to replace the main sanction of penalty with that of a warning letter because the deed was especially serious, endangering the safety of others participants in traffic.

The dismissal of the supplementary sanction of suspending the driver's license wasn't correct either, as pursuant to art. 100 par. 3, letter d, from the UGO no. 195/2002, for not observing the significance of the red light in traffic, the sanction of fine is applied as specified in the 2nd class of sanctions as well as the supplementary sanction of suspending the exercising the right to drive vehicles for a period of 30 days.

Thus, the court house found that the lower court didn't have the possibility to dismiss the supplementary sanction of seizing the driver's license because both the sanction of social fine and the sanction of warning letter, which are main social sanctions, according to art. 5 par. 2 from the GO no. 2/2001 are jointly applied with the supplementary sanction of seizing the driver's license.

From the wording of art. 100 par. 3 letter d from the UGO no. 195/2002 which provides that "It constitutes violation and it is sanctioned with a fine from the 2nd class of sanctions and with applying the supplementary social sanction of suspending the right to drive for a period of 30 days…", it means that these two sanctions may be taken jointly, not separately, as the law wording uses the conjunction "and" and not "or" between the two sanctions, respectively "the fine and" the supplementary sanction of suspending the right to drive.

In consequence, there is no possibility to dismiss this supplementary sanction as the offence notice was not annulled but it was only replaced the main sanction of social fine with another main sanction, that of a warning letter.

Thus, in an unjustified manner, the lower court has dismissed the supplementary sanction of suspending the right to drive, because there is no such possibility conferred by law.

So as it may be seen, the jurisprudential analysis of the provisions from the special laws referring to the application of supplementary sanctions as seizing goods or suspending activities, are lawfully applied *ope legis*, the supplementary measures accompany the main sanction for the ascertained acts found as violations, considering the goal of the law enforcer under art. 96 par. 1 from the UGO no. 95/2002, preventing a state of danger and the committing of other unlawful acts, so that they cannot be dismissed.

Nevertheless, clearly the analysis of the necessity of proportion between the deed and the applied sanction undergo juridical treatment differences, respectively if in the UGO no. 195/2002 the violations in the traffic regime contain clear and express regulations, the social sanctions being gradually established according to the seriousness of the committed act, it is not the case with the infractions regulated by the UGO no. 28/1999, the social sanction of activity suspension applied pursuant to art. 14 par. 2 from the ordinance in the case of failure to release a cashier's receipt for the delivered goods or the provided services being applied for a period of three months.

Or, according to art. 34 par. 1 from the UGO no. 34/2001, the court settling the complaint against the offence notice, verifying the legality and substantiality of same, decides on the sanction without distinguishing between the main and the supplementary sanctions. From corroborating these legal provisions with the stipulations under art. 5 from the same normative act, according to which the established sanction must be proportional with the degree of social danger of the committed act, without making differences between the types of sanctions, as well as those of art. 5 and art. 6 according to which the supplementary sanctions are to be applied depending on the nature and seriousness of the fact, it results that the law enforcer has also decided on the right of the court to assess inclusively the proportionality of the sanction in case of applying the supplementary measures, not only in applying main sanctions. And this is so because the proportionality of the committed act and its consequences is one of the requirements demanded by the ECHR jurisprudence in the matter of applying any rights restrictive measures.

Without denying the legislative lack.special law, considering as shown above that the urgent ordinance no. 28/1999 doesn't contain dispositions related to the manner of applying the supplementary sanction of activity suspension, we stick by our expressed opinion as to which in case of inexistence of an express-permissive provision to replace also the supplementary sanction with the Warning letter, in the conditions in which the law enforcer appreciated that the sanction of fine that is

to be applied to the offender is not satisfying for meeting the goal expected by the law enforcer – that of educative-preventive character of the social sanction, we consider that the judge cannot deny the application of the supplementary sanction along with the main one, because it would deny the goal pursued by the law enforcer when incriminating an act as violation, to harshly sanction a deed that they qualify as serious and discourage the committing of similar acts in the future.

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[2] Ovidiu Podaru ,Radu Chirita ,The legal contravening law,pubisher *Juridical regime of violations, GO 2/2001 concerning the juridical regime of violations, commented, authors , Hamangiu Publishing House, 2011, page 239.*

NOTES

[i] *The Cluj Court House, Civil Decision no. 513/R/2005, not published, case cited from the Juridical regime of violations, GO 2/2001 concerning the juridical regime of violations, commented, authors Ovidiu Podaru and Radu Chirita, Hamangiu Publishing House, 2011, page 239.*

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