GENERAL PRINCIPLES OF ADMINISTRATIVE SANCTIONS IN THE ROMANIAN LAW

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Abstract. The article is presenting a general description of the characteristics of administrative sanctions, as well as a comment on contraventions and the group of other administrative sanctions. Legislation that supports different principles is presented. Regarding contraventions, the principles that mirror the criminal origin of this category of sanctions are emphasized.

Key words: administrative law, criminal law, theory of law.

General Description of Sanctions and the Sanction System

Romanian legal literature defines the sanction as a consequence of not observing a rule of conduct prescribed or sanctioned by the state. The definition is based on the Roman law notion of *sanctio* which meant that a rule of conduct was prescribed with the authority of the emperor. All the measures taken for disobeying the law, having a punitive, preventive or remedial character are sanctions. Discussions have been taking place in the legal literature as to whether the term of "sanction" is appropriate for remedial or preventive measures (or should they merely be called "measures" or "consequences"?), but, so far, the general notion of "sanction" is still used.

The importance of the nature of a sanction lies mostly in the involvement of culpability and the personal character of the sanction. Punitive sanctions are only applied as a consequence of a culpable and

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illicit form of conduct (an intentional act or negligence) and it must have a personal character, which means that other persons, who were not involved in the infringement, can not be held responsible for the purposes of the sanction. Remedial sanctions are also applied against culpable illicit conduct, but in many situations they can also be applied against non-culpable illicit conduct, as long as prejudice has occurred. Remedial sanctions can be imposed against another person – a successor or another person designated or allowed by the law. Preventive sanctions are generally objective, which means that they may be applied even if there is no element of guilt or negligence in the illicit deed; they can not be imposed against other persons, however, due to the purpose of such sanctions, which is to stop the person in question from pursuing certain conduct that is dangerous to others. Under penal law, sanctions are grouped into main sanctions, complementary sanctions and accessory sanctions. Under administrative law, the contraventional sanctions are grouped into main sanctions and complementary sanctions. In both branches of the law the main sanctions have a punitive character while the complementary and accessory sanctions have a predominantly preventive or remedial character and may be added to the main sanctions. For example, the Traffic Code demonstrates that the purpose of the complementary contraventional sanctions established thereunder (retaining, withdrawing or annulling driving licence, suspending the right to drive, immobilising the vehicle, etc.) have the purpose of averting danger and preventing other infringements.

Traditionally, under Romanian law, the sanctions are divided into civil sanctions, penal sanctions, administrative sanctions and disciplinary sanctions.

Administrative sanctions can be divided into *contraventional sanctions*, considered to be the most important category, and *other administrative sanctions*.

Originally, the contravention ("contravenţia", "contravention" under French law) was a penal deed with the lesser social danger. The Romanian Penal Code enacted in 1865 replaced the French Penal Code from 1810 which divided penal deeds into felonies, offences and contraventions (the French "*crimes, delictes et contraventions")* according to the level of social danger. By Decree No. 184/1954, the provisions of the Romanian Penal Code or special laws establishing and sanctioning contraventions were annulled. This decree established that contraventions are administrative infringements and it determined a fine

and a warning as sanctions for such deeds. By Law No. 32/1968, which defined and sanctioned the contraventions, the general legal framework was initially settled in the field of contravention responsibility. The main contraventional sanctions, according to this law, were a warning, fine and contraventional imprisonment. If the contraventional fine was not paid or it could not be executed on a compulsory basis because the offender was insolvent, the sanction of a fine could be transformed into contraventional imprisonment by the local (first instance) civil court. This law was later annulled by Government Ordinance No.2/2001, which regulated the legal regime for contraventions, and this is the present framework act in this field. The latest legal act established the current contraventional sanctions and also the specific procedure as far as defining an illicit conduct as a contravention, establishing that a contravention has taken place, and sanctioning and executing the contraventional sanction are concerned. Initially, a new sanction was added to the main sanctions established by Law No. 32/1968: obliging the offender to carry out community service. To the framework dispositions in Government Ordinance No. 2/2001, Government Ordinance No. 55/2002 added dispositions concerning the procedure for applying and executing the sanctions of contraventional imprisonment and obliging the offender to carry out community service. This latest legal act states that the possibility of changing the contraventional fine into contraventional imprisonment, if the fine has not been paid, is was no longer possible. Both Government Ordinances were recently modified and contraventional imprisonment has been excluded from the contraventional sanctions. Government Ordinance No.2/2001 also states that contraventions that are sanctioned by obliging the offender to carry out community service can only be laid down in specific laws and must always have a fine as an alternative sanction.

Complementary sanctions have also been established, such as the confiscation of goods, closing down production or preventing a certain activity, suspending the activity, suspending or withdrawing a licence for developing an activity, blocking a bank account, halting certain works and restoring land to its original condition. These complementary sanctions are mostly of a preventing or reparatory nature. The Government Ordinance No. 2 states that other contraventional sanctions may be established by special laws. Such a complementary contraventional sanction may, for example, suspending a driving licence for three months, as has been introduced under the Traffic Code.

The definition of a contravention provided by Law No. 32/1968 contained the proviso that a contravention was an illicit form of conduct

with a lesser degree of social danger compared to a penal offence. However, the upper limit of the contraventional fine ("amenda contravenţională") was set at more than the upper limit of the penal fine ("amenda penală") and, due to the lack of the principle of proportionality (in comparing penal sanctions with their administrative equivalent), the fact that the fine and imprisonment were penal sanctions as well as administrative sanctions and due to the impossibility of suspending administrative sanctions, the possibility existed that a contravention could be punished more severely than a penal offence. Government Ordinance No. 2/2001 therefore excluded from the definition of contravention the proviso that it has a lesser degree of social danger compared to a penal offence. Legal literature still agrees, however, that the reduced degree of social danger is a characteristic of the contravention as well as of any conduct that results in an administrative offence. But, for natural persons, the upper limit of the contraventional fine is still twice as high as the highest penal fine and there is no limit on other administrative fines. Government Ordinance No.2/2001 did not set different framework limits for contraventional fines with respect to natural persons or legal persons. However, certain legal acts may set lower limits for natural persons and higher limits for legal persons.

Features of contraventional sanctions that mirror their penal origin are the division of sanctions into main sanctions – having a punitive character – and complementary sanctions – having a predominantly preventive or reparatory character, and the legal nature of such sanctions according to the penal principles of *nullum crimen sine lege* and *nulla poena sine lege*. But, penal offences and their sanctions may only be established by law whereas contraventions and their sanctions may be established by law or supplementary provisions such as Government Decisions, and Decisions of local and county councils. Contraventions and their sanctions may be established by law and Government Decisions in all fields of activity. Local councils and county councils may lay down contraventions in those fields of activity where they have competence if laws or Government Decisions have not already determined contraventions in that field.

Initially, the Constitution adopted in 1991 stated that the law is not retroactivate, with the exception of penal law (the principle of *lex mitior*). After the revision, in 2003, article 15 paragraph (2) of the Constitution was modified, the principle of *lex* mitior being extended to the contraventional law too. Government Ordinance No. 2/2001 lays down in its art. 12, that illicit conduct will not be sanctioned as a contravention if,

according to a new law, it is no longer a contravention, and, if a new legal act establishes a milder sanction than the legal act in force when the contravention was committed, the milder sanction will be applied. These provisions express the principle of *lex mitior* and may be regarded as a feature that mirrors the penal origin of contraventions. The link between penal responsibility and contraventional responsibility can also be found in the fact that illicit forms of conduct of the same nature may be defined as being penal offences or contraventions depending on the specific conditions relating to the deed in question. Usually, it is a difference in the degree of social danger. For example, the Traffic Code states that a person who drives while being under the influence of alcohol is committing the contravention of "driving under the influence of alcohol" if the alcohol concentration in his blood is up to 0.8 ‰ and is committing a penal offence if the alcohol concentration exceeds this limit. In other cases, special laws (in fields like forestry, environmental protection, taxes, business competition, the food industry etc.) state that contravening a certain legal regulation is sanctioned as a contravention if it is not committed in such circumstances as to be qualified as a penal offence. In such situations the principle of *non bis in idem* applies, one deed having to be qualified either as a contravention or a penal offence, but not both.

The main difference between contraventional sanctions and their penal equivalent is the authority that applies the sanction as contraventional sanctions are applied by an administrative authority, with the exception of obliging the offender to carry out community service, which can only be imposed by a court. First, penal sanctions could only be imposed against natural persons, while contraventional sanctions could be imposed against both natural and legal persons. This difference has disappeared as the new Romanian Penal Code, which entered into force at the end of October 2006, introduced penal responsibility for legal persons. A recent amendment to the Romanian Penal Procedure Code states that there is a right of silence. No such right exists in the field of contraventional sanctioning.

The remainder of administrative sanctions, other than contraventional sanctions, also have to respect the principle of legality, as legality is considered to be a principle which is fundamental to the administration's activities. The sanctions, the infringements for which they are imposed, the competent authority and the procedure for applying the sanction and the possibility to contest the sanction in question have to be established by specific legal acts. Examples of other administrative sanctions are administrative fines, surcharges, the removal of an illegally

obtained advantage or an advantage obtained without fulfilling certain imposed conditions, halting the production of certain products, seizing vehicles, annulling firearms certificates etc. The administrative sanction is imposed by an administrative decision and the general administrative law principles regarding such decisions (legality, competence, procedure, form) will apply. Specific legal acts may contain detailed regulations. The procedure by which to contest the sanction is the one described by the Law on contentious administrative proceedings No. 29/1990 if not specifically stated otherwise.

Administrative sanctions may have a punitive character, such as a fine. Other measures are of a predominantly preventive nature. Examples are the contraventional complementary sanctions of confiscating goods which will be used to commit the contravention, the suspension of a licence for a certain activity or suspending the activity of the economic agent, other administrative sanctions such as compulsory medical treatment, applying customs seals etc. Administrative sanctions with a remedial character are considered to be, for example, surcharges or prohibiting certain works and restoring land to its original condition.

General principles and codification

General legal principles concerning administrative sanctions are provided by the **Constitution**. Art. 52 specifically refers to administrative acts, providing the right of a person who has suffered damage concerning a right or legal interest as a result of an administrative decision or when the public authority has not dealt with an application in due time, to obtain recognition of the claimed right, or an annulment of the decision and reparation of the damage. This, combined with the provisions of art. 21 which lays down the principle of free access to justice, results in *the right to contest administrative sanctions before a court of law*. The principle of *non-retroactivity* of the law and of *lex mitior* are also provided in the Constitution, art. 15 (2) stating that the law does not retroactivate, with the exception of the more favourable penal and contraventional law. Other constitutional principles apply by analogy, such as the principle of *equality* which means that all persons are equal before the law and before the administrative authorities, so equal treatment should be applied when sanctioning similar offences. The rights of the *inviolability of the home* and *the confidentiality of correspondence* are mentioned and they have to be respected by the investigative authorities. In accordance with the

illegality of forced labour (art. 42), Government Ordinance No.2/2001 states that the sanction of obliging the offender to engage in community service may only be applied by the court with the offender's consent. Another constitutional principle that also applies in the field of administrative sanctions is the *right to a qualified defence before a court of law* (art. 24).

General principles, concerning the sanctioning are to be found in *Government Ordinance No. 2/2001.*

The principle of *legality* can be deduced from the dispositions that state that certain legal acts can define contraventions, the appropriate sanctions and their limits (art.1). The general limits of the main contraventional sanctions are established in arts. 8 and 9. A warning may be applied as a sanction even if it is not especially provided as an alternative sanction, if the finding agent (see below) or competent authority believes that it is sufficient.

Generally, in applying administrative sanctions the principle of *competence* has to be taken into consideration as a principle that governs the activity of the administration. According to Government Ordinance No.2/2001 contraventional sanctions may only be applied by the following so-called finding agents (persons that have the necessary authority) as determined in art. 15: mayors, specially authorised officers and non-commissioned officers of the Ministry of Internal Affairs, persons authorised for this purpose by ministers and other leading figures from the central public administration authorities or by prefects, presidents of the county councils, as well as other persons stipulated by specific legislation (art.15). If the specific legislation states that the finding agent is not competent to apply the sanction, he will forward the contravention report to the competent authority for the sanction to be applied. For example, according to the Traffic Code, in a case of driving under the influence of alcohol, the finding agent will apply the main contraventional sanction of a fine and will withhold the perpetrator's driving licence, but the complementary contraventional sanction of suspending the driver's licence will be applied by the chief of the County Police.

The sanction has to be supported by the necessary grounds for the decision. The finding agent has to draw up a contravention report containing, among other data, a complete description of the illicit conduct and the legal justification for the contraventional sanction (arts. 16 and 17).

There are also provisions referring to the *right of defence*. The finding agent is obliged to ask the offender if he wishes to say anything in his defence and is obliged to mention the allegations in the contravention report (art. 16). Also, the offender may refuse to sign the contravention report (for example, if he believes that its contents do not correspond to the truth) and in this case a certified witness has to sign it in order to verify the offender's refusal. If no witness can be found, the finding agent has to state this in the report (art. 19). The contravention report must also contain the time within which the contraventional act may be contested and the authority where the submission has to be filed.

The principle of *proportionality* is mentioned, meaning that the sanction that is actually imposed has to be within the actual legal limits and proportional to the degree of social danger inherent in the illicit conduct (arts. 5 and 21). However, as mentioned above, the sanction is calculated within the range and limits of contraventional sanctions and a comparison is not made with penal sanctions for illicit conduct of the same nature.

The principle of *existing guilt* refers to the fact that in order to amount to a contravention, the illicit conduct must impute guilt (intention or even the slightest negligence – art.1). Contraventional responsibility is not applicable to minors under the age of 14 years old (art. 11). For persons under 18 years old the contraventional fine is reduced by a half. Also, persons under the age of 16 can not be sanctioned with being obliged to engage in community service. There are no special provisions on establishing the guilt of legal persons. Also, there are no special legal provisions on applying sanctions against legal persons or their representatives or both. Situations that exclude contraventional responsibility are a legitimate defence, state of necessity, physical or moral constraint, fortuitous situations, non-responsibility, involuntary complete drunkenness, error of fact, and infirmity that is connected with the deed (art. 11). These situations may only be found to exclude contraventional responsibility by a court of law when the contraventional sanction is contested.

The principle of *personalising the contraventional sanction* refers to taking objective criteria (the seriousness of the social danger, specific circumstances, means and modality, purpose and effects) into account as well as personal circumstances (art. 21). The latter are not further described. This principle is less well defined compared to penal legislation where the criteria for personalising the sanction are more detailed as well as the effects of some of the existing circumstances.

The principle of double jeopardy or *non bis in idem* has limited application in comparison with penal law. It refers to the situation when an illicit form of conduct against the same legally protected social value qualifies both as an administrative offence and a criminal offence and it may only be sanctioned as one or the other (art. 30). But, in addition to a main penal sanction, a complementary contraventional sanction may also be imposed. For example, according to the Traffic Code if a driver is convicted of serious bodily harm following a traffic accident, the main penal sanction of imprisonment will be applied together with the contraventional complementary sanction of suspending the driver's licence. If a person is guilty of different contraventions at the same time, a sanction will be applied for each contravention (art. 10). If multiple contraventions are sanctioned within the same contravention report, the sanctions will be added together, although they cannot exceed double the general upper limit for a contraventional fine (the upper limit is about 25,000 Euros) or the general upper limit of obliging the offender to engage in 300 hours of community service. A contravention may be sanctioned with one of the main sanctions stipulated in the relevant legal act, to which one or more complementary sanctions may be added. This is due to the fact that only the main sanction is punitive, while those that are complementary are of a predominantly preventive or remedial nature.

According to the principle of *concurrent responsibility*, in the case of participation each person will be charged with the contravention separately (art. 10).

As mentioned before, the principle of *lex mitior* applies to contraventional sanctioning. The illicit conduct will not be sanctioned as a contravention if a specific legal act thereby allows such behaviour (art. 12).

The principle of *legal form* refers to the fact that the sanctioning administrative act (the contravention report) must be in a written form and has to contain all the information prescribed by law in order to be valid. The only exception is a warning that may be issued orally if the offender is present and the finding agent has the competence to issue such a warning.

There is no specific legislation in other administrative sanctions and not much literature either. If a special law does not mention any specific principles, the general principles of administrative law such as legality, competence, the right of defence and legal form are applied in the same way as for contraventional sanctions. Also the principles of proportionality and double jeopardy may apply in the same way.

Providing sufficient grounds for the administrative decision is not the general rule in Romanian administrative law, but, even if specific legal provisions are lacking, the sanctioning administrative decision should provide the necessary grounds as, otherwise, it could not be reviewed by a court of law.