THE REASON AND FIELD OF APPLICATION REGARDING ART. 118 PARA. (3) OF EMERGENCY ORDINANCE NO. 195/2002

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Abstract

This article aims to establish the correct interpretation of the obligation to send to the police unit that detected the contravention a copy of the complaint in relation to the performing of appropriate entries in the driving record. It also deals with the consequences that can be reached unjustifiably in the situation when the police unit does not proceed to perform the appropriate entries in the driving record, although they have become aware of the existence of the complaint, being a legal party cited in a pending trial.

Therefore, if the police body does not make the entries in the driving record as soon as it is notified on the existence and content of a complaint of violation, we can find ourselves under the scope of the provisions of art. 335 para. (2) of the Criminal Code, namely driving a vehicle without driving license. It is an unfair situation, due to the fact the law itself provides that the complaint has a suspensive effect as of the time of the registration, namely when it is filed with the registry of the court, there also being available the possibility of obtaining a court clerk certificate.

This document can prove that the complaint exists, so that, if the potential offender was pulled over for a routine check, the offender would have available all the legal means to prove the existence of the complaint and, by default, of the suspension of the effects of the sanction applied to the offender.

Keywords: *complaint, contravention, driving record, pending trial, art. 118 para. (3) of E.O. no. 195/2002, consequences.*

1. Introduction

This study aims to perform a short review of the obligation provided for by art. 118 para. (3) of G.E.O. no. 195/2002[1] on public road traffic, namely the communication by the offender of a counterpart of the complaint of violation filed with the dockets of the court competent to settle it, in order to make the necessary entries in the diving record.

The legal provisions in question may be subject to different interpretations made both by the offence finding authorities, and in what concerns the practice of the courts of law.

Due to these reasons, we hereby draw the attention on the fact that it is possible to reach non-unitary solutions in relation to the cases of litigants, although, from our point of view, there is only one fair and equitable way to construe the obligation established on the offender, as we will show below.

2.1. The history of the regulation of art. 118 of the Ordinance.

In 2007, art. 118 para. (1) of G.E.O. no. 195/2002 read as follows: "A complaint can be filed against the record of findings within 15 days as of the communication, to the traffic police department in the jurisdiction of which the deed was found".

This legal provision was declared unconstitutional by Decision no. 347 of April 3rd, 2007[2], pronounced by the Constitutional Court of Romania.

Therefore, the Court noted that "the existence of any administrative hindrance, which has no objective or rational justification and which could ultimately deny the free access to justice of the individual, violates the provisions of art. 21 para. (1)-(3) of the Constitution. Therefore, the obligation to file the complaint with the body of the official examiner, as a condition of access to justice, **cannot be objectively and reasonably justified by the fact that, after receiving the complaint, the administrative bodies would be aware of it and would not proceed with the enforcement of the applied fine.** Furthermore, **such a legislative solution could lead to abuses committed by the official examiners of the administrative bodies**, which, ultimately, would lead to their criminal and disciplinary liability, would hinder or deny the right of the claimant to free access to justice".

The arguments of the Court on the unconstitutionality of the challenged provisions can be applied in what concerns the obligation to file the complaint with the police body.

Of course, we do not consider the arguments on the violation of the free access to justice, but rather the thesis on the possibility granted to the police bodies to construe the legal texts in such a manner to commit unjustified, unlawful and also discriminatory abuses.

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[1] Hereinafter referred to as the ***Ordinance***, normative act republished in Official Journal of Romania no. 670 of August 3rd, 2006, as further amended and supplemented.

[2] in what concerns the constitutional challenge of the provisions of art. 118 para. (1), (2) and (5) of G.E.O. no. 195/2002 on public road traffic, decision published in Official Journal of Romania no. 307 of May 9th, 2007.

2.2. Current regulation, rationality and applicability.

Currently, art. 118 para. (3) of the Ordinance provides that "the evidence of the registration of the complaint filed with the court within the deadline referred to in para. (1) is delivered by the offender to the police unit of the official examiner, which **will make the entries in the records and** return the driving license".

Para. (3) of the same normative act shall have to be correlated with para. (2) of art. 118, which provides that "the complaint suspends the enforcement of the fines and additional sanctions as of the date of its registration until the date of the judgment".

Given that the complaint of violation can suspend the enforcement, the consequence is that "the measure on the suspension of the driving right should have been suspended. In the administrative practice, this aspect is shown by the issuance of the "temporary traffic permit" – a certificate issued in case the driving permit was withdrawn in order to be suspended and a complaint of violation was filed with the authority of the official examiner[3]".

Notwithstanding, by analyzing the regulation of para. (3) of the Ordinance, we note that, although the sanctions are suspended as of the registration of the complaint with the court, it can be deemed that the police body will not make the entries unless the complaint is communicated to it by the offender.

It is very normal that the police body is not aware of the existence of the complaint until the receipt of the document in question, but it cannot be considered that it has no obligation to make the appropriate entries in the driving record of the offender, from the moment the complaint is communicated to it by the court of law.

If we admitted that the police inspectorate is able to claim that it was unaware of the registration of the offender's complaint following the communication thereof by the registry of the court, we can imagine that we would reach the application of unjustified and disproportionate solutions, with potential consequences of criminal nature.

As a consequence, we believe that the nature and reason for establishing such a provision has indeed a justification, but strictly as to the period between the filing of the complaint with the competent court of law and the moment when the complaint will actually be communicated by means of the registry of the court to the police inspectorate, in order to file a statement of defense, in connection with the criticisms and arguments found and substantiated in the complaint of violation.

2.3. The failure to perform the appropriate entries in the driving record of the offender and the potential consequences that can occur in the criminal field.

If the police body does not make the entries in the driving record as soon as it is notified on the existence and content of a complaint of violation, we can find ourselves under the scope of the provisions of art. 335 para. (2) of the Criminal Code[4], namely driving a vehicle without driving license.

Therefore, in accordance with the provisions of art. 335 para. (2) of the Criminal Code, we note that the wording of the incident legal text does not leave much room for interpretation:

"Driving a vehicle without driving license:

(2) Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which was issued for a different category or subcategory than the one in which the vehicle is included, or whose license has been withdrawn or rescinded or who is not entitled to drive vehicles in Romania shall be punished by imprisonment from 6 months to 3 years or by fine".

By analyzing the text above, it can be noted that the opening of a criminal file is very possible and unfortunately, very probable, only because the corresponding information has not been recorded by the police body, the offender having a complaint of violation already filed on the dockets of the courts of law whereby he/she challenged the lawfulness and validity of the record of findings and subsequent penalties.

It is an unfair situation, due to the fact the law itself provides that the complaint has a suspensive effect as of the time of the registration, namely when it is filed with the registry of the court, there also being available the possibility of obtaining a court clerk certificate. This document can prove that the complaint exists, so that, if the potential offender was pulled over for a routine check, the offender would have available all the legal means to prove the existence of the complaint and, by default, of the suspension of the effects of the sanction applied to the offender.

There is also the possibility that the official examiner checks in the database and finds that there is no entry on the complaint, so that, overly zealous, proceeds with the opening of a criminal file, even if the potential offender holds the court clerk certificate.

Therefore, although the offender appealed the record of findings and subsequent penalties, and the police body was notified in this respect by the court of law, the potential risk on the opening of a criminal file substantiated on art. 335 para. (2) of the Criminal Code is not excluded, on grounds that the complaint is not available in the records of the police body.

[3] See in this respect, Ovidiu Podaru, Radu Chiriță, *Regimul juridic al contravențiilor: O.G. nr. 2/2001 comentată*, edition 2, Hamangiu Publishing House, Bucharest, 2011, p. 289.

[4] See in this respect, Law no. 286/2009 on the Criminal Code, published in Official Journal no. 510 of July 24th, 2009, as further amended and supplemented.

Both the doctrine and the practice of the courts of law note that, in case of driving on public road a vehicle without holding a driving license, the immediate consequence "*consists in damaging social relations concerning public roads safety and creating a state of danger because of the existence on public roads of vehicles driven by persons who did not acquire theoretic knowledge and practical abilities for obtaining driving license*[5]".

Furthermore, in what concerns the nature of the application of the measure on the suspension of the driving right, it was noted that "the suspension of the driving right has not a punitive nature, but a preventive one, as it concerns the protection of public interest against the potential risk posed by a driver suspected of serious breach of road traffic rules and especially against the danger represented by the breach of the traffic rules for traffic participants[6]".

Notwithstanding, we can talk about the immediate consequence of the offence provided for by art. 335 para. (2) of the Criminal Code and the preventive nature of the measure on the suspension of the right to drive vehicles on public roads if the sanction remained definitive, namely: either by not challenging the record of findings and subsequent penalties, or by the complaint being definitively dismissed by a court of law.

We hereby mention that we agree with the above-mentioned author in what concerns the reason of the establishment, the nature of the measure and what it is intended to be protected by applying the measure on the suspension of public roads driving right, but we believe that we should not ignore the presumption of innocence.

As a consequence, if the record of findings and subsequent penalties is not appealed within the legal deadline before a competent court of law, the respective administrative act shall remain definitive and shall produce effects.

Notwithstanding, in consideration of the fact that the sanctioned person filed a complaint of violation, the record of findings and subsequent penalties cannot be effective unless a final decision is ruled which maintains the appealed administrative act.

It is obvious that, if the final decision finds that the cancellation of the record of findings and subsequent penalties is required (either due to non-compliance with absolute nullity conditions or non-compliance with the application of relative nullity, provided that the offender was injured), there is no reason or logics to talk about its potential effects, because it will be considered retroactively that it had not existed. Therefore, any sanction applied by means of the respective record shall be deregistered with the driving record of the offender, upon the request of the offender, accompanied at least by the copy of the final decision, in accordance with the legal provisions in force.

We are considering the situation where the sanction on the suspension of the right of driving on public roads had already been suspended by means of the simple registration of the complaint of violation. The fact that the police body can use the legal text of art. 118 para. (3) of the Ordinance to neglect making the appropriate entries in the driving record of the offender or to commit abuses, certainly should not be able to justify the basis for opening a criminal file, otherwise opened without a legal ground.

Given that contraventions also fall under the scope of criminal charges, as it is already well-known, therefore a "dispute must grant the procedural guarantees acknowledged and guaranteed by art. 6 of the European Convention on Human Rights [which is an integral part of the domestic law under art. 11 of the Constitution of Romania and has priority under art. 20 para. (2) of the fundamental law][7]".

According to the case-law of the European Court of Human Rights, the court must examine in every case to what extent the deed committed by the individual who was sanctioned in the field of contraventions represents a "*criminal charge*", under art. 6 of the European Convention on Human Rights. This analysis shall be performed under three alternative criteria, as follows: the nature of the deed, criminal nature of the legal text defining the contravention, according to domestic legislation, and, last but not least, the nature and severity level of the applied sanction.

Therefore, we believe that the application of *non bis in idem* principle is required, and also under art. 6 of the European Convention on Human Rights and art. 4 of Protocol no. 7 to the European Convention on Human Rights whereby the same principle in the criminal field is established.

Therefore, as the doctrine[8] stated, in what concerns criminal liability that can be applied for the commission of the offence of driving on public roads a vehicle by a person whose driving right is suspended, this "*cannot be undertaken as long as the offender was not officially made aware that the competent bodies*

[5] See in this respect, Decision no. 667/A of August 5th, 2014, pronounced by the Court of Appeal of Cluj, criminal and minors division, available on site www.curteadeapelcluj.ro, accessed on 20.12.2017.

[6] See in this respect, Civil sentence no. 3001 of June 29th, 2012, definitive, not published, pronounced by Bucharest Tribunal, division IX of the contentious administrative and fiscal, available in Cristina Titirișcă, *Contencios administrativ: suspendarea actului administrativ: practică judiciară recentă*, Hamangiu Publishing House, Bucharest, 2016, p. 167.

[7] See in this respect, Andrei Pap, Drept contravențional. Culegere de hotărâri judecătorești 2007-2014. Vol. I. Reflectarea jurisprudenței CEDO în procedura contravențională națională, Hamangiu Publishing House, Bucharest, 2015, p. 24.

[8] See in this respect, Vasile Dobrinoiu (coordinator), Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *Noul Cod penal comentat. Partea specială*, Vol. II, Edition II revised and supplemented, Universul Juridic Publishing House, Bucharest, 2014, p. 716; *The comment of February 28th, 2014 is also available on https://idrept.ro/, site accessed on 08.12.2017*.

ordered the suspension of the driving right[9] *(...) The solution is similar in case the persons against whom the suspension of the driving right had been established filed a complaint of violation whereby requested the annulment of the record of findings and subsequent penalties and this had not yet been definitively settled* [10] ".

In the substantiation of our arguments, we hereby show that, by Civil Decision no. 8458/2014, pronounced by the Court of Appeal of Cluj, the division of the contentious administrative and fiscal[11], in what concerns the text of art. 118 para. (3) the following were noted: "The text refers to the situation where the driving license was withdrawn upon the draw up of the record (…) In the situation of the plaintiff, ***there is nothing to prevent the entry in the driving record to be performed based on the findings of the finding authority, party to the contravention trial***".

Furthermore, in another case[12] which concerned the suspension of the administrative act, the court considered that, "although the plaintiff was returned the driving license only on 20.12.2014, as resulting from the evidence of f. 29, the analysis of the provisions of art. 118 para. (2) and (3) of G.E.O. no. 195/2002 ***the case claimed by the plaintiff cannot be retained as incident, namely that the suspensive effect of the formulation of the complaint of violation would be conditioned by the filing of the proof of registration of the complaint with the police unit the official examiner is part of***. Following the analysis of art. (2) of the aforementioned article, within the limits of the investigation of the appearance of the rights claimed by the plaintiff, the suspensive effect is produced de jure (*ope legis*), ***by the registration of the complaint with the court of law within the deadline provided for by para. (1), the law recognizing the benefit of safeguarding the driving right throughout the judgment of the complaint of violation***. The lack of diligence in the restitution of the driving license, whether or not by fault, cannot represent a precondition of the subsequent claiming of a negative fact, namely those of the failure to exercise a right".

3. Conclusion

In view of the arguments set out in the present study, we conclude that the police bodies should pay more attention and show promptness, professionalism and, last but not least, good-faith, in what concerns the effective registration of the appropriate entries in the driving record of the sanctioned offender.

As we have already noted, by means of the failure to apply and implement these entries in due time, there is a real possibility that a criminal file is opened against the sanctioned person, the consequences being at least questionable, even in case of file closing.

Furthermore, not only the police bodies, but also the courts of law should grant more attention to incident regulations, taking into account the reason for which the measure of the complaint of violation communication to the police body was established, respectively the suspension of the applied sanctions by means of the filing of the complaint with the competent court of law.

In conclusion, in our opinion, the only reason for the establishment of the obligation of the claimant on the communication to the police department of a counterpart of the complaint of violation, takes into account the term between the registration of the complaint of violation and the communication of a counterpart by the registry of the court, in order for the police body to be able to exercise its defense right, by drawing up and formulating a statement of defense.

We believe that this obligation cannot be construed in such a way that it could justify the lack of proper entries recorded in claimant's driving record, especially since the police body becomes party to the litigation contemplating the annulment of the record of findings and subsequent penalties.

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[9] See in this respect, Criminal decision no. 1051/2011, pronounced by the Court of Appeal of Galaţi, available in M. Andreescu, R.S. Şimonescu-Diaconu, *Infracţiuni rutiere*, C.H. Beck Publishing House, Bucharest, 2012, p. 128. [*apud* Vasile Dobrinoiu (coordinator), *op. cit.*, 2014, p. 716].

[10] See in this respect, M.A. Hotca (coordinator), Maxim Dobrinoiu, Mirela Gorunescu, Norel Neagu, Radu-Florin Geamănu, *Infracţiuni prevăzute în legi speciale*, edition 3, C.H. Beck Publishing House, Bucharest, 2013, p. 316 [*apud* Vasile Dobrinoiu (coordinator), *op. cit.*, 2014, p. 716].

[11] The quoted decision can be accessed by idrept platform, on the following websie: https://idrept.ro/DocumentView.aspx?DocumentId=77852050&Info=RG9jSWQ9NDU0OTcmSW5kZXg9RCUzYSUyZiU1ZmNhYmluZXQlMmZwamV4dCUyZmluZGV4Jkhp dENvdW50PTYwJmhpdHM9MWYxKzFmMisxZjMrMWY5KzFmYSsyMDkrMzY1KzM2NiszNjcrMzZkKzM2ZSs1NzkrNTdhKzU4Yis1 OGMrNTkxKzU5Mis2ZjMrNmY0KzZmNSs2ZjkrNmZhKzZmZSs2ZmYrNzAwKzcwMys3MDQrNzEzKzhjZis4ZDArOGQzKzhkNys4Z DgrOWE4KzlhOSs5YjErOWIyKzliOCs5YjkrYWU2K2FlNythZjcrYWY4K2FmZCthZmUrYmM1K2JjNitiYzcrYmNiK2JjYytiZGErYzQy K2M0MytjNDQrYzQ4K2M0OStkZDkrZGRhK2RkYitlMTIr, site accessed on 20.02.2018.

[12] See in this respect, Ruling no. 8484/2014, pronounced by Bucharest Tribunal, division of contentious administrative and fiscal, available by means of idrept platform, on the following website: https://idrept.ro/DocumentView.aspx?DocumentId=78081703&Info=RG9jSWQ9Mjc0MTk2JkluZGV4PUQlM2ElMmYlNWZjYWJpbmV0JTJmcGpleHQlMmZpbmRleCZIaXRDb3VudD0zNCZoaXRzPTJiO CsyYzMrMmM0KzJjNSsyY2IrMmNjKzJlZCsyZWUrMmVmKzJmNSsyZjYrYWQ1K2FkNithZGMrYWRkK2FmMythZjQrYWZiK2FmY ytiODUrYjg2K2I4OStiOGYrYjkwK2RhZitkYjMrZGI0K2RiZCtkYmUrZGM2KzExZDQrMTFkNSsxMWQ2KzEyMGUr, site accessed on 20.02.2018.

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