

# TOOLS TO ENSURE THE PREVENTION OF CONTRAVENTIONS

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## Abstract

Nowadays, the most common form of law infringement is contravention. The Romanian contravention law was improved at the end of 2017 by a legislative novelty regulating the instruments to ensure the prevention of contraventions.

The contraventions provided in this administrative act are diverse and it is interesting that despite this, the law maker provides in many cases the application of a penalty, namely the warning, which is then followed, as the case may be, by the application of a measures plan, limited in time. Furthermore, the offenders will not be pardoned every time, but only once, provided that they fulfill the obligations provided by the measures plan and within the deadline established by the official examiner. This law would have remained only at the stage of intention and without application if the executive had not adopted the administrative act identifying the contraventions contemplated by it, but once the respective Government resolution has been adopted, we can only wait for the time to see the effectiveness of its application.

This is why, in this study, we will analyze this topic by being of great interest and adapted to social realities. By being a legislative novelty for the national law system, the scientific research that we performed is mainly focused on the legislation and the doctrine.

**Keywords:** *Contraventions, prevention law, correction plan, warning, Government resolution.*

## 1. Introduction

The field of contraventions is undoubtedly an area with the most profound and complex implications in the everyday life of citizens and, by default, in the administrative practice of authorities with duties in the field<sup>1</sup>. Therefore, we believe that it is required to know the legislation in the field, the contravention functioning mechanism, not so much in terms of the sanction, but especially in terms of the tools for the prevention of contraventions.

The scientific research started with the documentation on the topic and included: legislation, doctrine and case law. Therefore, we noted that, in what concerns the subject we propose and the date on which we draw up this study, no doctrine and case law is available, being about the recent adoption of Prevention Law no.270/2017 of 22.12.2017 (hereinafter referred to as the Prevention Law)<sup>2</sup> and Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model<sup>3</sup>, having the nature of legislative novelty.

Prevention Law no. 270/2017 came into force on January 17<sup>th</sup>, 2018 but it could not be applied due to the fact there is a provision in the content of the law,

respectively art.10 para.(3) which conditioned the subsequent issue of an administrative act, respectively of a Government Resolution to identify the contraventions which fell under the scope of the law and of the correction plan model. This administrative act was adopted only on February 5<sup>th</sup>, 2018 due to the fact Romania had to face a resigning government during this term.

The activity of public administration authorities<sup>4</sup>, at any level, is subject to principles resulting from the legislation, and the lawfulness principle is, in our opinion, the corollary of all principles and is provided by the revised Constitution of Romania itself: “no one is above the law”. In the current historical background, in which humanity escalates a new stage of civilization, thus embracing “unity in diversity”, the role of general principles of law, the legal expression of fundamental relationships within the society is amplified<sup>5</sup>.

Every state has its own enacted law, in accordance with its own socio-political requirements, with the traditions and values it proclaims<sup>6</sup>. The failure to comply with the laws entails legal liability. One explanation for the failure to observe the laws is that the laws are inappropriately made, approved not for common good, but for private interests(...)<sup>7</sup>. The violation by the lawmaker of the justness standard often

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<sup>1</sup> Dana Apostol Tofan, *Drept administrativ*, volume II, edition 4, Bucharest, C.H.Beck Publishing House, 2017, p.371.

<sup>2</sup> Prevention Law no.270/2017 of December 22<sup>nd</sup>, 2017, published in Official Journal no. 1037 of 27.12.2017.

<sup>3</sup> Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model, published in Official Journal no. 107 of 05.02.2018.

<sup>4</sup> For further details, see Roxana Mariana Popescu, *Jurisprudența CJUE cu privire la noțiunea de „administrație publică” used in art. 45 ara. (4) TFUE*, in proceeding CKS ebook 2017, pp. 528-532.

<sup>5</sup> Elena Anghel, *The importance of principles in the present context of law recodifying*, in proceeding CKS e-Book 2015, p. 753-762.

<sup>6</sup> See Elena Anghel, *Constant aspects of law*, in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

<sup>7</sup> Mario Vargas Llosa, *Civilizația spectacolului*, Translation from Spanish by Marin Mălaicu-Hondrari, Humanitas Publishing House, Bucharest 2017, p. 126.

leads to the adoption of unfair laws<sup>8</sup>. “Prevention”, according to the definition provided by DEXonline means, among others “avoiding bad things by taking timely, preventive measures, prevention”<sup>9</sup>. Bad laws do not harm only the ordinary citizen, but they also lower the prestige of the legal system and amplify the contempt for the law, which, like a poison, empoisons the rule of law<sup>10</sup>.

Therefore, in our opinion, Prevention law is not a bad law, but a good law, in accordance with the evolution of the society, adjusted to social realities. A good law should not be seen only from the penalties perspective, but also from the prevention perspective, as in case of the Prevention Law, according to its name given by the law maker. No state has a legislation valid for all times<sup>11</sup>. Therefore, the scope of this study is to point out the opinion of the law maker on the tools for the prevention of contraventions, by presenting in detail how this law works.

## 2. Content

### 2.1. Civil sanctions

The governing rules of contraventions are provided by Government Ordinance no. 2/2001 on the legal regime of contraventions<sup>12</sup>. Contravention is defined by Government Ordinance no. 2/2001 (...) as: “the act committed with guilt, established and sanctioned by law, ordinance, Government resolution, or as the case may be, by decision of the local council of commune, city, municipality or district of Bucharest, county council or General Council of Bucharest”. Contravention Law protects social values which are not protected under the criminal law, according to art. 1 thesis 1 of Government Ordinance no. 2/2001 (...).

From another point of view, contravention, in the opinion of the European Court of Human Rights is qualified as “criminal charge”<sup>13</sup>. Romania is permanently bound to harmonize its legislation with the European legislation, and the national doctrine has

given us many opportunities to analyze the supremacy of the European Union law<sup>14</sup>. Romania ratified the Treaty of Lisbon amending the Treaty on European Union<sup>15</sup> (...) in 2008. The failure to comply with the EU legal regulations leads, as well known, to the opening of the infringement procedure<sup>16</sup>. The European Union law embraces the theory of monism, that is the existence of a single legal order which includes international law and domestic law in an unitary system<sup>17</sup>. In order to eliminate arbitrariness in assessing the social danger degree of an act in order to qualify it as contravention or offence, normative acts provide expressly the category under which a certain illicit conduct falls<sup>18</sup>. A recent study has analyzed comparatively the contravention and the offence<sup>19</sup>, but this is not the object of our study. We can therefore say that the will of the law maker, by being based on criminological analyzes, studies and researches is the one that cause an unlawful act to be included in the category of the contraventions or of the offences<sup>20</sup>.

Civil sanctions are provided both by the regulations in the filed (*s.n.* G.O. no. 2/2001), and by laws and special contravention laws<sup>21</sup>. According to art.5 of G.O. no. 2/2001 on the legal regime of contraventions, civil sanctions can be principal and complementary. There are three *principal civil sanctions*: warning, fine and provision of community service. *Complementary civil sanctions* are: arrest warrant in rem intended to, used or resulted from contraventions; suspension or cancellation, as the case may be, of the endorsement, agreement or authorization to perform an activity; closing the unit; bank account lock out; the suspension of the activity of the economic agent; the withdrawal of the license or authorization for external, temporary or definitive trade; works dismantling and return of the land at its initial state.

The doctrine identified other complementary civil sanctions provided for by art. 96 para. (2) of G.E.O. no.195/2002: a.) application of penalty points; b.) the suspension of the exercise of the right to drive, on limited term; c.) arrest warrant in rem intended to

<sup>8</sup> See Elena Anghel, *Justice and equity*, in proceedings CKS-eBook 2017, Bucharest, p.370.

<sup>9</sup> <https://dexonline.ro/definitie/prevenire>, accessed on 07.02.2018.

<sup>10</sup> Mario Vargas Llosa, *Civilizația spectacolului*, *op.cit.*, p. 126.

<sup>11</sup> Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

<sup>12</sup> Government Ordinance no. 2/2001 on the legal regime of contraventions, published in Official Journal no. 410 of July 25<sup>th</sup>, 2001, as further amended and supplemented.

<sup>13</sup> See Elena Emilia Ștefan, *Răspunderea juridică.Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, pp.216-218.

<sup>14</sup> Roxana-Mariana Popescu, *Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritare a dreptului internațional*, Revista Română de Drept Comunitar, no. 3/2005, pg. 11-21; Augustin Fuerea, *Manualul Uniunii Europene*, edition VI, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, pp. 252-253.

<sup>15</sup> For further information see the Treaty on the European Union, Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pp.62-63.

<sup>16</sup> For other details, see Roxana-Mariana Popescu, *General aspects of the infringement procedure*, Lex et Scientia, International Journal, no.2/2010, Pro Universitaria Publishing House, pg. 59-67.

<sup>17</sup> Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene-o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p.190

<sup>18</sup> Cătălin Silviu Săraru, *Drept administrativ.Probleme fundamentale ale dreptului public*, C.H.Beck Publishing House, Bucharest, 2016, p.214.

<sup>19</sup> Elena Emilia Ștefan, *Delimitarea dintre infracțiune și contravenția în lumina noilor modificări legislative*, Dreptul no. 6/2015, pp.143-159.

<sup>20</sup> Cătălin Silviu Săraru, *op.cit.*, p.215.

<sup>21</sup> A. Iorgovan, *Tratat de drept administrativ*, vol.II edition 4, All Beck Publishing House, Bucharest, 2005, p.408.

contraventions provided for by G.E.O. no. 195/2002 or used for this purpose; d.) vehicle downtime; e.) ex officio deregistration of the vehicle, in case of declared vehicles, according to the law, by order of the authority of local public administration, with no owner or abandoned.<sup>22</sup>

## 2.2. Prevention Law

### 2.2.1. Scope and terms of Prevention Law

Prevention Law no. 270/2017 of 22.12.2017 published in Official Journal no. 1037 of 27.12.2017 and Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model, published in Official Journal no. 107 of 05.02.2018 are the two normative acts with novelty nature in our law system regarding the field of contraventions.

Prevention Law is a normative act which consists of a low number of articles, respectively 11. Appendix no. 1 of Government Resolution no. 33/2018 (...) has 70 items listing the contraventions which fall under the Prevention Law and Appendix no.2 The model of the record of findings and subsequent penalties which consists of: Part I- *Correction Plan* and Part II – *Correction measures fulfillment modalities*.

The declared scope of the Prevention Law is “to regulate a series of tools to ensure the prevention of contraventions. The Government Resolution shall establish the contraventions which fall under the scope of this law”. The Government Resolution the Prevention Law refers to is aforementioned Government Resolution no. 33/2018 (...).

The prevention Law defines the following terms which are found in its content, namely: correction measure, correction plan and correction deadline:

– *correction measure*: any measure ordered by the official examiner in the correction plan the scope of which is the fulfillment by the offender of the obligations established by the law;

– *correction plan*: appendix to the record of findings and subsequent penalties, whereby the official examiner established correction measures and deadline;

– *correction deadline*: the term of no more than 90 calendar days, as of the delivery or communication of the record of findings and subsequent penalties, where the offender can correct the ascertained irregularities and fulfill the legal obligations. The correction deadline shall be established by taking into account the circumstances of the offence and the term required for the fulfillment of the legal obligations. The correction deadline established by the control body cannot be modified.

### 2.2.2. Prevention Law functioning mechanism

According to the law maker, the Prevention Law seems to be a law that sanctions an offender who

commits a contravention which falls under the scope of this law and establishes a measure plan that the offender is bound to fulfill within a certain established deadline. In fact, Prevention Law establishes two stages where the official examiner acts when finds the commission of a contravention, following the performance of a control. We hereby point out that not all contraventions benefit from this relaxed sanctioning regime, but only those expressly provided by Government Resolution no. 33/2018 (...) adopted by the executive branch. There is a sole institution with executive powers at the European Union level, namely the European Commission<sup>23</sup>. Furthermore, we have to make two important notes:

1. As of the enforcement of the Prevention Law, by way of derogation from the provisions of Government Ordinance no. 2/2001 (...), for finding and sanction contraventions referred to in Government Resolution no. 33/2018 (...), the provisions of this law shall apply.
2. In what concerns the sanctions applied according to Prevention Law, these shall be supplemented by the provisions of G.O. no. 2/2001(...).

#### *Stage no. 1.*

According to the provisions of art. 4 para. (1) in case of finding one of the contraventions established by the Government Resolution in art. 10 para. (3), respectively Government Resolution no. 33/2018 (...), the official examiner concludes a record of findings whereby *warning sanction is applied* and a *correction plan is attached*. In this case, no complementary contravention sanctions are applied.

The law expressly provides that the liability for the fulfillment of the correction measures shall be incumbent on the person who, according to the law, bears the contravention liability for the acts which were found.

The official examiner, according to paragraphs (2 and 3) of art. 4 of the Law shall not draw up a correction plan but shall only apply the warning sanction, in the following situations:

- if the offender fulfills the legal obligation throughout the performance of the control;
- if the contravention is not continuous
- if the sanctioning of the contraventions of art. 10 para.(3) of the Law expressly referred to in Government Resolution no. 33/2018 (...), expressly establish the exclusion from the application of the warning.

Furthermore, Prevention Law also regulates the situation where an offender committed several contraventions which fall under its scope. In such cases, if a person commits several contraventions which are found at the same time by the same official examiner, a single record of findings and subsequent penalties shall be concluded, under the fulfillment of the provisions of art. 4 and, as the case may be, a correction plan shall be

<sup>22</sup> Cătălin Silviu Sărațu, *op.cit.*, p.217.

<sup>23</sup> For further information on the European Commission, Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, edition II, Universul Juridic Publishing House, Buchaerșt, 2015, p. 65 and the following.

attached to. We hereby point out that the correction plan model the Prevention Law refers to and which is attached to the record of findings and subsequent penalties is the one published in Government Resolution no. 33/2018 (...).

*Stage no. 2*

Art. 8 para. (1) of Prevention Law establishes that, within no more than 10 business days as of the expiry of the correction deadline, public authority/institution with control powers shall be bound to *resume control* and to fill in part II of the correction plan attached to the record of findings and subsequent penalties and if the case may be, the control ledger with notes on the fulfillment of the correction measures.

Art. 8 para. (2) of Prevention Law provides that, in case the failure to fulfill the legal obligations according to the correction measures within the established deadline is found during the resumption of the control, the official examiner concludes another record whereby the commission of the contravention is found and the contravention sanction/s, other than the warning, is/are applied.

Another important provision of the Prevention Law refers to *the passing of a period of 3 years as of the conclusion of the record of findings* and subsequent penalties, according to this Law. There are two situations regulated by art. 9 of the Law, namely:

- if, within 3 years as of the conclusion of the record of findings and subsequent penalties provided for by art. 4, the offender commits again the same contravention, the legal provisions in force on contravention finding and sanctioning shall be directly applicable;

- if within 3 years as of the conclusion of the record of findings and subsequent penalties provided for by art. 5<sup>24</sup> the offender commits again one or several contraventions provided for by art. 10 para. (3) of the Law, respectively in Government Resolution no. 33/2018 (...), the legal provisions in force on contravention finding and sanctioning shall be directly applicable.

The Prevention Law assigns an article to the importance of the *Control Ledger*. Therefore, art. 6 expressly provides that the official examiner shall be bound to check in the control ledger and in the records of the public authority/institution it is part of whether the offender benefited from the provisions of art. 4. This means that at the end of the control, the details of the control shall be recorded in writing in the control ledger.

There is also the category of those who are not bound to have a control ledger, according to the law. In this case, the official examiner shall be bound to check in the records of public authority/institution it is part of whether the offender benefited from the provisions of art. 4. The official examiner shall be bound to provide expressly the correction plan in the control ledger.

In what concerns the *nullity of the record of findings*, Prevention Law provides in art.7 that the violation of art. 4 paragraphs (1 and 2) shall lead to the nullity of the records.

**2.2.3. The obligations of public authorities /institutions with control powers**

Prevention Law establishes an obligation which is incumbent on public authorities and institutions responsible for controlling, sanctioning and finding contraventions and describes this obligation in art. 3. Public authorities and institutions responsible for controlling, sanctioning and finding contraventions shall be bound, depending on the fields they lead, to produce and disseminate documentary materials, guides and to allocate on the web page dedicated sections on public information on the following:

- a) legislation in force on contravention finding and sanctioning;
- b) rights and obligations of these public authorities/institutions in the performance of the activity on finding contraventions and subsequent penalties, as well as rights and obligations of persons subject to these activities;
- c) distinct indication of contraventions for which public authority/institution has the power of finding and sanctioning contraventions, as well as of sanctions and/or other applicable measures.

Public authorities and institutions with control powers, depending on their competence areas, shall be bound to guide interested persons for an appropriate and unitary application of the law.

In order for the guiding activity to be carried out, public authorities and institutions with control powers shall be bound: a) to issue guidance and control procedures to be used by persons authorized to carry out control activity; b.) to publish on own sites high-frequency cases and guidance solutions provided in this cases, as well as the developed procedures; c.) to exercise actively the role of guidance of the controlled persons in case of every control activity, thus making available, according to the procedures, the indications and guidance required in order to avoid law infringement on the future. The fulfillment of this obligation shall be expressly mentioned in the control protocol, thus showing the provided indications and guidance.

Finally, the central public administration authorities with powers to coordinate nationally the business environment shall be bound that, within 6 months as of the enforcement of the law, to develop and operate a portal dedicated to providing centralized online services and resources for information purposes.

**2.2.4. Examples of contraventions which fall under the scope of Prevention Law**

Government Resolution no. 33/2018 for the establishment of contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model, published in Official Journal no.

<sup>24</sup> It is about several contraventions (...).

107 of 05.02.2018 lists in Appendix 1 the contraventions which fall under the scope of Prevention Law.

For example, the following contraventions fall under the scope of the Prevention Law:

- The failure of the signatory parties to submit for publication purposes the collective labor agreement at the level of group of units or sector of activity (art. 217 paragraph 1, letter c. of the Law on social dialogue<sup>25</sup>);

- The establishment of plantations with areas of more than 0.5 ha of fruit trees and of areas larger than 0.2 ha of fruit-bearing shrubs by every economic operator or family or their extension over the limits of those existent, without planting permission, according to the law (art.29 the Law on fruit growing<sup>26</sup>) etc.

- The conclusion of management/forestry service agreements with persons who acquire exclusively the ownership over the land where it is located (art. 3 paragraph 2 of the Law on finding and sanctioning contraventions in the field of forestry<sup>27</sup>) etc.

- The following acts shall not be deemed offences: the issuance of the fiscal receipt containing erroneous data or not containing all the data provided by the law; the fiscal receipt is not handed to the customer by the operator of the electronic cash register and/or the failure to issue the invoice upon the customer's request (art. 10 letter f/ g of G.E.O. no. 28/1999<sup>28</sup>) etc.

- The following acts shall not be deemed offences: the failure of the taxpayer/payer to submit within the deadline provided by the law the tax registration declarations, tax deregistration declarations or declarations of mentions; the failure of the taxpayer/payer to comply with the obligation to submit to the tax body the data archived in electronic format and the computer applications that generated them (art. 336 paragraph 1 letters a/f of the Code of fiscal procedure<sup>29</sup>) etc.

- the failure to purchase the control ledger from the general departments of the public finance administration within the territory where the taxpayer has his/her registered office, on the legal deadline (art. 7 letter a of Law no. 252/2003 on the control ledger<sup>30</sup>) etc.

- The failure of the traders to comply with the legal provisions on misleading and comparative publicity (art. 10 paragraph 1 of Law no. 158/2008 on misleading

and comparative publicity<sup>31</sup>.) etc.

## Conclusions

Prevention Law will prove its efficiency after passing the time test, after drawing a case law and after appearing its first weaknesses or, on the contrary, it will prove to be a perfect law. If the judge does not find principles appropriate to the case resorted for settlement, the judge can and must create a new rule of law<sup>32</sup>. For the time being, we cannot speak about case law, as we have shown before; despite this, in our opinion, the law maker's effort to pardon an offender from the application of a sanction, under certain terms, is commendable, being fully pointed out the preventive nature of this law with regard to contraventions, deeds entailing a lower social danger compared to offences.

As we have shown in the content of the study, Prevention Law has, on the one hand, a derogatory regime of application compared to common law on contraventions, namely G.O. no. 2/2001 and, on the other hand, is applied only to those contraventions which are expressly provided by Government Resolution, respectively Government Resolution no. 33/2018 on the contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model.

The contraventions provided in this administrative act are diverse and it is interesting that despite this, the law maker provides in many cases the application of a penalty, namely the warning, which is then followed, as the case may be, by the application of a measures plan, limited in time. Furthermore, the offenders will not be pardoned every time, but only once, provided that they fulfill the obligations provided by the measures plan and within the deadline established by the official examiner.

To conclude, we believe that we have achieved the scopes established in drawing up of this study, namely to show this legislative novelty in the field of contraventions and we hope that this will be an efficient law and not a reason for breaking the law due to postponing the application of the penalty after the first control where the contravention was found.

<sup>25</sup> Law no. 62/2011 on social dialogue, published in Official Journal no. 625 of August 31<sup>st</sup>, 2012, as further amended and supplemented.

<sup>26</sup> Law no. 348/2003 on fruit growing, published in Official Journal no. 300 of April 17<sup>th</sup>, 2008, as further amended and supplemented.

<sup>27</sup> Law no. 171/2000 on finding and sanctioning contraventions in the field of forestry, published in Official Journal no. 513 of July 23<sup>rd</sup>, 2010, as further amended and supplemented.

<sup>28</sup> G.E.O. no. 28/1999 on the obligation of economic operators to use electronic cash registers, published in Official Journal no. 75 of January 21<sup>st</sup>, 2005, as further amended and supplemented.

<sup>29</sup> Law no. 207/20115 on the Code of fiscal procedure, published in Official Journal no. 547 of July 23<sup>rd</sup>, 2015, as further amended and supplemented.

<sup>30</sup> Law no. 252/2003 on the control ledger, published in Official Journal no. 429 of June 18<sup>th</sup>, 2003, as further amended and supplemented.

<sup>31</sup> Law no. 158/2008 on misleading and comparative publicity, republished in Official Journal no. 454 of July 24<sup>th</sup>, 2013.

<sup>32</sup> Elena Anghel, *Judicial precedent, a law source*, in proceeding CKS ebook 2017, Bucharest, p.364.

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