DIFFERENCES IN THE ENFORCEMENT OF CLAIMS BELONGING TO PUBLIC INSTITUTIONS FINANCED ENTIRELY FROM THEIR OWN REVENUES VERSUS THOSE FINANCED ENTIRELY OR PARTIALLY FROM THE LOCAL OR STATE BUDGET

Beatrice NICULAE[*]

Abstract

This article aims to address the differences that exist throughout the country with regard to the power to enforce a claim belonging to a public institution but financed entirely from its own revenues. Moreover, the claim in question belongs strictly to the budget of the institution and is therefore not a claim which first goes to the state budget and then is redirected to the budget of the institution. This raises the practical question of whether the traditional bailiff is competent to enforce the claim in question on behalf of the institution, or whether there is an obligation to have recourse to tax executors, taking into account, in particular, the purpose of the claim, its course and the fact that it is not a tax claim in the true sense of the word.

Keywords: *tax claim, enforcement, public institution, bailiff, own revenue.*

1. Introduction

We intend to take as a case study the example of the State Inspectorate for Road Transport Control, which is the specialised permanent technical body of the Ministry of Transport and Infrastructure designated to inspect and control compliance with national and international regulations in the field of road transport. According to Art. 3 lit. c) GO no. 26/2011[1] on the establishment of the State Inspectorate for Road Transport Control with subsequent amendments and additions, the institution is financed entirely from its own revenue which is constituted as follows:

„c) by way of derogation from the provisions of art. 8 para. (3) and (4) of GO no. 2/2001 on the legal regime of contraventions[2], approved with amendments and additions by Law no. 180/2002, with subsequent amendments and additions, a percentage of 30% of the amounts collected following the application of contraventions, other than the amounts collected following the application of:

- art. 61 para. (1) of GO no. 43/1997[3] on the road system, republished, as subsequently amended and supplemented;

- art. 8 para. (1) of GO no. 15/2002 on the application of user charges and tolls on the national road network in Romania[4], approved with amendments and additions by Law no. 424/2002, as subsequently amended and supplemented;

- art. 8 para. (1) of GD no. 1373/2008[5] on the regulation of the supply and carriage of divisible goods by road on public roads in Romania, as amended and supplemented;

- art. 6 of GD no. 1777/2004[6] on the introduction of traffic restrictions on certain stretches of motorways and European national roads (E) for road vehicles, other than those intended exclusively for the transport of persons, on Fridays, Saturdays, Sundays and public holidays, as subsequently amended and supplemented".

As such, it is clear that we are referring to a classic example of a public institution that is financed by its own revenue.

[*] PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: beatricestefania.niculae@gmail.com).

[1] Published in the Official Gazette of Romania no. 625/02.09.2011, with subsequent amendments and completions.

[2] Published in the Official Gazette of Romania no. 410/25.07.2001, with subsequent amendments and completions.

[3] Republished in the Official Gazette of Romania no. 237/29.06.1998, with subsequent amendments and completions.

[4] Published in the Official Gazette of Romania no. 82/01.02.2002, with subsequent amendments and completions.

[5] Published in the Official Gazette of Romania no. 749/06.11.2008, with subsequent amendments and completions.

[6] The normative act was applied until May 1st 2018, being repealed by GD no. 239/2018, published in the Official Gazette of Romania no. 376/02.05.2018, with subsequent amendments and completions.

2. The bailiff is competent to enforce the 30% percentage and is currently the only one with this possibility

A public institution would, as a general rule, have four possibilities of recovering debts arising from enforceable titles, as follows:

- *by voluntary payment by the debtor*: In view of the fact that it has been necessary to have recourse to last solution, meaning enforcement by a bailiff, it is more than clear that the debtor's obligation has not been performed voluntarily.
- *by having recourse to tax executors:* We bring into question Act no. 3197/14.06.2017 issued by the National Tax Administration Agency, filed in a case before the Hațeg Court, by which it expressly stated that: „we confirm receipt of the enforceable title (...) for the tax obligation to pay in the amount of 6,300 lei, representing 70% of the amount of the fine established by the institution report no. (...). *Please note that the amount of 2,700 lei is the responsibility of the State Inspectorate for Road Transport Control and is not to be paid to the state budget*" (document attached to this request). Therefore, even the central fiscal authority considers that it is not competent to enforce the 30% percentage related to the subscribed amount, the central tax authority recognizing that it is not a claim that is part of the state budget, refusing to enforce the amount due to the institution.
- *through their own enforcement bodies.* Tax executors are public officials within the units subordinated to the central tax authority who carry out the enforcement measures and the entire enforcement procedure, in order to recover the tax debts of economic agents and individuals to the general consolidated budget of the State. They must also hold a service badge which they must present in the exercise of their activity, being empowered before the debtor and third parties by means of a tax executor's badge and delegation issued by the enforcement body (art. 223 of the Tax Procedure Code[7]). From this derives their quality of public officials, the tax executor performing a public function in the sense of the Administrative Code, with even the provisions of Law no. 188/1999 on the Status of Public Officials[8], as amended by GEO no. 57/03.07.2019 on the Administrative Code[9] being applicable to him.

However, we are dealing with a public institution without its own enforcement bodies, and there is no possibility of setting up such bodies, since the institution's staff are not public officials, from an administrative point of view. Moreover, the legislation in force at the moment does not allow the establishment of own enforcement bodies within this particular institution. Note that this would have been the perfect way of recovering the percentage.

If the institution would have been fully or partially financed from the state budget, only then could we have had recourse to the central tax authority, respectively to the tax executors. We refer to point 3, below, detailing that the deadline for entry into force of Law no. 352/2015 has been successively extended and the law is therefore currently not in force.

- *by bailiff, according to the provisions of the common law:* In view of what has already been detailed in relation to non-execution by the tax executors, *i.e.,* the lack of any of the institution's own enforcement bodies, it follows that this is the only way in which this particular institution has any legal recourse or action of any sort.

Thus, if we do not have the option of enforcement under ordinary law, it follows that the institution's object of activity becomes obsolete and the institution ends up in a situation of inability to pay, since the central tax authority considers the 30% as an extra-budgetary debt and, as such, does not recover it.

Consequently, the 30% share of the amounts relating to the enforcement of fines, not being a revenue due to the State budget as a whole, represents extra-budgetary revenue which is, in practice, operating expenditure, ensuring the continuation of the institution's activity, and therefore falls within the competence of the bailiff.

- *the role of enforcement by bailiff.* Enforcement by bailiff is important because it ensures that individuals and companies pay their debts to their creditors. This process involves the use of a court order or a warrant from a designated authority to recover the debt owed. Bailiffs act on behalf of the court to enforce court orders and judgments, including the seizure of assets and properties, freezing of bank accounts, and the sale of assets to recover debts owed. Before bailiffs are appointed, court orders or judgments must first be obtained by the creditor. For instance, a creditor may seek a court order for enforcement by a bailiff against a debtor who has

[7] Law no. 207/2015, published in the Official Gazette of Romania no. 547/23.07.2015, with subsequent amendments and completions.
[8] Republished in the Official Gazette of Romania no. 365/29.05.2007, with subsequent amendments and completions.
[9] Published in the Official Gazette of Romania no. 555/05.07.2019, with subsequent amendments and completions.

failed to pay their debt, or for possession of a property or asset that is in dispute. Once a court order is obtained, a bailiff is appointed to enforce the order, and to recover the debt owed.

The procedures involved in the enforcement by bailiff vary depending on the type of court order or warrant being executed. In most cases, bailiffs are required to give notice of their intent to carry out the enforcement action. This notice is usually given in writing, and it informs the debtor of the planned enforcement action and the date and time at which it will be carried out.

During the execution of the enforcement action, the bailiff may seize certain assets, such as vehicles, jewellery, and furniture, and may also freeze bank accounts or garnish wages, depending on the terms of the court order or warrant. In situations where the bailiff is authorized to remove assets or goods, they may sell them to raise funds to settle the debt owed.

In conclusion, enforcement by bailiff is a crucial aspect of the legal system, as it ensures that debts owed by individuals and companies are recovered on behalf of creditors. Bailiffs play an important role in enforcing court orders and judgments, and carry out a range of duties, including seizing assets, freezing bank accounts, and selling goods and assets to settle debts owed. The procedures involved in an enforcement by bailiff vary, but generally involve giving notice of the intent to carry out an enforcement action and carrying out the action in accordance with the terms of the court order or warrant. Overall, enforcement by bailiff serves as an important tool in maintaining the integrity of the legal system and ensuring that justice is served.

3. Extension of the entry into force of Law no. 352/2015 until April 1st 2023

Precisely in order to remove the inconsistencies and contradictions that may arise in the work of the institution, the legislator considered that it was necessary to amend the legal framework, through Law no. 352/23.12.2015[10] which is amending and supplementing GO no. 26/2011 on the establishment of the institution. Thus, Law no. 352/2015 aims to change the way the institution is financed, in the sense that, in the future, it would be fully financed from the state budget. Currently, this particular institution is financed from its own revenues.

Article III of the aforementioned law states that the regulation will enter into force on 01.01.2017. However, this deadline has been successively extended[11], with Law no. 352/2015 never entering into force to this day and, therefore, not being applied or even relevant to take into consideration from a practical point of view. Thus, the institution remained a public institution financed from its own revenues, as expressly provided for in art. 3 of GO no. 26/2011, in force.

4. The 30% percentage is not public revenue but an extra-budgetary claim

Given that the allocation of 30% of the amount of the fine is established by a special normative act, including an express derogation from the provisions of GO no. 2/2001, and as the money goes directly to the budget of the institution, it is clear that the legislator himself intended to exclude this money from the category of budgetary or fiscal claims, the amount resulting from the application of the percentage being paid into the accounts of the institution and therefore, the aforementioned percentage, which is paid directly to the budget of the institution, is exempt from the provisions of art. 8(3) and (4) of GO no. 2/2001 on the judicial system of contraventions.

We would like to draw attention to an essential difference made by the legislator, namely that found in the Tax Procedure Code, *i.e.,* art. 220 and art. 226 para. (10) and para. (11). Strictly in relation to public institutions which do not have their own enforcement bodies, the legislator's choice is clear, as follows:

Public institutions financed in whole or in part from the state budget or the local budget are obliged to send enforceable titles to the competent tax authority, central or local, as the case may be. The wording 'will forward' does not grammatically allow for any other possibility.

On the other hand, public institutions financed entirely from their own revenue, irrespective of whether they are under central or local authority, have the option of choosing whether to appeal to the central or local tax enforcement authorities. As such, the wording 'may forward', analysed from a grammatical point of view,

[10] Published in the Official Gazette of Romania no. 979/30.12.2015, with subsequent amendments and completions.

[11] According to the sole article of Law no. 309/23.12.2021, published in the Official Gazette of Romania no. 1226/24.12.2021, which amends the sole article of the GO no. 82/27.12.2019, the term provided for in art. III of Law no. 352/2015 is extended until 01.01.2023. The deadline was subsequently extended until 01.04.2023.

means that the choice of enforcement body is at the discretion of the public institution, which may have recourse to either the tax executor or the bailiff. However, the option of choosing the tax executor remains a simple benefit, not an obligation, which can be waived precisely by the use of the verb 'may'. It is in this context that the relationship between the verbs 'may' and 'will' should be seen. 'Will' can also imply 'may', whereas 'may' can never imply 'will', as in 'must'. Depending on their character, rules are differentiated into mandatory rules, which stipulate what must or must not be, or what must or must not be done, on the one hand, and permissive rules, which stipulate what may or may not be, or what may or may not be done, on the other.

Accordingly, since the law clearly distinguishes as to who has the obligation and who has the option to have recourse to the enforcement bodies of the fiscal authorities, it follows that we cannot accept an interpretation to the effect that the institution, as a public institution financed entirely from its own revenue, can only have recourse to fiscal enforcement, since such an interpretation would be an addition to the law.

In the same sense is also the dec. no. 16/2019 delivered by the High Court of Cassation and Justice[12], which considered a single criterion for changing the nature of a claim, namely the final destination, the reasoning being summarized as follows: if the claim (or part of it) is part of the general consolidated budget, it follows that it is a tax claim, respectively a budgetary claim, as appropriate, falling within the scope of enforcement by tax executors. *Per a contrario*, if the claim (or part of it) is not part of the general consolidated budget, it is a civil claim, falling within the scope of enforcement by bailiffs.

5. Conclusions

To consider that the percentage of 30%, expressly individualized by the legislator, by supplementing the provisions of the Code of Civil Procedure with those of the Code of Tax Procedure, without taking into account the grammatical interpretation and the choice of the legislator with respect to art. 226 para. (10), para. (11), para. (12), par. (13), would be an unjustified and unfounded widening of the competence of fiscal enforcement. Art. 227 para. (1) of the Code of Tax Procedure expressly specifies that „enforcement may extend to the income and property owned by the debtor, which may be pursued in accordance with the law, and their recovery shall be carried out only to the extent necessary for the realization of tax claims and enforcement costs".

Art. 1 points (7) to (12) of the Tax Procedure Code contains the definitions of budgetary and tax claims, both principal and accessory, the essential criterion being that the principal revenue must be intended for the general consolidated budget. Further on, also in art. 1, but in points 13-14 of the Code of Fiscal Procedure, a reading of these paragraphs shows that the institution is not a fiscal or budgetary creditor in any way. The position of the debtor, on the other hand, is that which must be circumscribed, with reference to art. 1, points 15-16, of the Code of Fiscal Procedure, namely the individualisation of the amount of the fine by the legislator. Thus, for the amount of 70% owed to the general consolidated budget, the person penalised is a tax debtor, whereas for the 30% owed to the institution, the person penalised is a civil debtor. The institution will not be able to enforce the part relating to the general consolidated budget, just as the tax executors will not be able to enforce, on behalf of the institution or the central tax authority, the 30% part, as it is not a tax or budgetary claim and therefore does not form part of the general consolidated budget and, implicitly, is excluded from the scope of tax enforcement.

If the institution had been financed from the state budget, the issue would have been completely different, but, in view of the applicable legal realities, the institution's 30% would have to be considered not as public revenue but as an extra-budgetary claim. See also CCR dec. no. 942/2008[13], as an example providing that the legislator has full power to establish a derogatory regime, regardless of the field, which has happened in this case, by clearly identifying the part of the fine that will be part of the general consolidated budget, respectively the part of the same fine that has a completely different purpose, being an income of a company that is financed entirely from its own revenues, the latter having no direct or indirect link with the general consolidated budget.

Recovering revenue is important for an institution for several reasons. Firstly, revenue makes it possible for an institution to provide the services it is tasked with effectively. Without revenue, the quality of the services offered would be compromised, potentially leading to dissatisfaction and even unrest among the public. Secondly, revenue is essential for any institution to fulfill its mandates and meet its obligations. For example, a corporation that fails to realize its revenue projections may be unable to meet its financial obligations like paying

[12] Published in the Official Gazette of Romania no. 402/22.05.2019, available on the website *www.iccj.ro*, consulted on 01.02.2023.
[13] Published in the Official Gazette of Romania no. 716/22.10.2008, available at *https://legislatie.just.ro*, consulted on 01.02.2023.

salaries or paying suppliers. If this occurs, it can lead to a financial crisis that could ultimately put the business at risk of bankruptcy. Similarly, a government agency that does not recover its revenue may fail to meet its budgetary obligations, leading to budget deficits, debts, and the inability to make vital investments. Thirdly, recovering revenue enhances an institution's capacity to earn additional funds. For example, a business that recovers all its funds will have more resources to engage in investments that can increase its revenue streams, like expanding its product line or entering new markets. Similarly, a government agency that recovers its revenue can have the liberty to invest in revenue-generating programs that can improve its fiscal position and capacity for future investments. Finally, recovering revenue is important to an institution's reputation. An institution that is seen as successful in recovering its revenue can attract new investment, partners, and clients. Conversely, an institution that fails to recover its revenue can have difficulty in attracting new partners, clients or investors, leading to a negative impact on its credibility and future prospects.

In conclusion, regardless of what will happen with the provisions of Law no. 352/2015, *i.e.,* whether the deadline for entry into force will be further extended or not, the issues addressed in this article will also be of interest in the future for any public institution in an identical or similar situation in terms of financing and enforcement. This is precisely why, given that practice in the territory is divided, with final decisions either admitting or rejecting requests for enforcement submitted by the bailiff, the promotion of an appeal in the interest of the law seems to be a matter of particular utility and urgency.

References

Case-law

- HCCJ dec. no. 16/08.04.2019;
- CCR dec. no. 942/23.09.2008.

Legislation

- GO no. 26/2011;
- GO no. 2/2001;
- GO no. 43/1997;
- GO no. 15/2002;
- GD no. 1373/2008;
- GD no. 1777/2004;
- Law no. 207/2015;
- Law no. 188/1999;
- GEO no. 57/2019;
- Law no. 352/2015.

Websites

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