



The Ablation System. More Favourable Contravention Law or Legal Facility? Brief Considerations on Law no. 155/2020

Ionela-Alina Zorzoană¹

Abstract: This article aims at being a comparative analysis between the concepts of *more favourable contravention law* and *legal facility*, regarding the ablation system provided by Government Ordinance no. 2/2001 on the legal regime of contraventions, with subsequent amendments and supplementations. Thus, we shall try to answer the question what is the legal nature of the ablation system? The discussions are in both directions, as there are opinions according to which the ablation system corresponds to the material law, when it actually is a more favourable legal regulation. Obviously, the effects of the two institutions are different and we shall analyze them herein below. We chose as a case study Law no. 155/2020 for amending and supplementing the Law on electricity and natural gas no. 123/2012 and on amending and supplementing other regulations, which exempted the ablation system in the field of electricity from application.

Keywords: ablation; legal facility; more favourable law; electricity

1. The Applicable Legal Framework (Podaru, 2019, pp. 6-25)

The core of the subject is in chapter III of G.O. no. 2/2001 regarding the legal regime of contraventions², where, until July 2018, were stipulated the following provisions at art. 28 par. (1) “*The offender may pay, **on the spot or within maximum 48 hours** as of the date of concluding the protocol or, as the case may be, as of the date of the service thereof, half of the minimum fine provided in the regulation, the ascertaining agent mentioning this possibility in the protocol. In the*

¹ PhD candidate, Faculty of Law, “Nicolae Titulescu” University, Romania, Address: Calea Vacaresti 185, Bucharest 040051, Romania, Corresponding author: alinazorzoana@gmail.com.

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regulation of establishing the contraventions this possibility must be explicitly provided. The terms established by hours start to run as of midnight the following day and the term expiring on a public holiday or when the service is suspended shall be extended until the end of the first business day”, the so-called ablation system.

Subsequently, by Law no. 203/2018 on measures to streamline the payment of contravention fines¹ the test has been substantially amended. Thus, further to the amendments brought to art. 28 par. (1) of GO no. 2/2001, *“The offender may pay, within maximum 15 days as of the date of handing or remitting the report, half of the minimum fine provided by the regulation and the ascertaining agent shall mention this possibility in the protocol”.*

Thus, two major changes can be noticed: the second thesis of art. 28 par. (1) was repealed and, on the other hand, art. 22 par. (2) of Law no. 203/2018 is inserted, according to which: *“As of the effective date of this law, the offender may pay half of the minimum fine provided by law also in such cases when the regulation establishing the contraventions did not expressly provide for this possibility”.*

It can be noted that, with the repealing of the second thesis of art. 28 par. (1), which previously regulated ablation only as an *exception*, the intention of the lawmaker was to raise the ablation system to the rank of general principle, this being applicable even in the absence of its express regulation.

2. Analysis of the Opinions Expressed in the Doctrine. More Favourable Contravention Law vs. Legal Facility

Opinions started to appear mainly as a result of the amendments brought by Law no. 203/2018. Thus, in an opinion (Ursuța, 2018) it was noted that *“we are in the presence of a rule of substantive law, as it directly concerns the sanction applicable for the committed deed, even if it only creates a benefit for which the offender’s manifestation of will is also necessary materialized in the effective payment of half of the minimum fine within 15 days as of the date of remitting the protocol”.* The author bases his opinion on the case-law of the Constitutional Court which, by Decision no. 932 of 14 December 2006² established that the provisions of art. 10 paragraph (1) of the first sentence of Law no. 241/2005 on combating tax

¹ Published in the Official Gazette of Romania, Part I, no. 647 from 25 July 2018.

² Published in the Official Gazette no. 42 from 19 January 2007.

evasion, which provided as a cause of impunity the payment of damages until the first trial term is a more favourable criminal law, and the notion of first term must be interpreted as: "immediately following the effective date of Law no. 241/2005, regardless of the phase in which the trial of the criminal process is". We do not agree with this justification, due to the simple reason that the Decision of the Constitutional Court refers to a case of impunity, whereas the ablation system is a facility for the case when the offender pays half from the minimum amount of the fine within a certain period. Moreover, the deed remains, it is still punished with the same limits of the minimum and maximum amount of the fine provided for each offense, but probably in order to encourage them to pay a part of the fine, the lawmaker granted this possibility. On the other hand, while the more favourable law rightfully intervenes without the contribution of the offender, in the case of ablation, a manifestation of will on his part is required, *i.e.* of paying half of the minimum fine.

Another author who seems to embrace this opinion claims that *"by this provision, the lawmaker enables the sanctioning with a lower fine of the person who commits the contravention, admits his mistake, being a guarantee that in the future he will refrain from breaking the law"* (Drăghici, Iacob & Draghici, 2019, p. 93). We consider the statement a bit exaggerated, in the context in which in most cases, the sanctioned persons avail themselves of the benefit of the ablation only to pay a much smaller amount as a contravention fine and this is not an admission of guilt or a certainty that they will not commit more contraventions. Curiously, the same author, although retaining the ablation system as an issue related to the *sanctioning* of the offender, so as material, however, explicitly mentions the situations in which we can speak of a more favourable contravention law, namely: if by a regulation the deed is no longer considered a contravention, it is no longer sanctioned; if the sanction provided in the new regulation is more convenient, it shall be applied; when the new regulation provides for a more severe sanction, the previously committed contravention shall be sanctioned according to the provisions of the regulation effective on the date of its committal (Drăghici, Iacob & Draghici, 2019, p. 96). These situations are also retained by another author *"A more favourable contravention law, from the perspective of art. 15 par. (2) of the Romanian Constitution, supposes the intervention of a regulation subsequent to the committal of the contravention, a regulation that either no longer provides for the social conduct sanctioned in contravention by the former law, a situation in which we speak of losing the nature of a contravention, or imposes a lesser sanctioning*

system, a hypothesis in which we are in the presence of a more favourable contravention "law" in a narrow sense" (Ursuța, 2020).

Disagreeing with these opinions, we consider that in reality, it is a facilitation consisting in the possibility granted to the offender to pay half of the minimum established by law for the concerned deed. It is true that there may be situations in which it is necessary to re-individualize the sanctions applied correctly at the time of drafting the protocol further to the intervention of subsequent elements - the application of a more favourable contravention law (Ursuța, 2018, pp. 38-39), but such are totally different and unmistakable issues. Moreover, such an interpretation would deprive of any content the subsequent legislative amendments, which are – let's say - unfavourable or less favourable, which cannot be applied to deeds committed before their effectiveness, which is a nonsense of the law, as the law is made in view of its application. We shall analyze in the next chapter such a situation, in which the lawmaker excluded from the application the ablation system in case of contraventions in the sector of electricity and natural gas. However, if we admit that the ablation system represents a more favourable contravention law, it would mean that Law no. 155/2020 for the amendment and supplementation of the Law on electricity and natural gas no. 123/2012 and on the amendment and supplementation of other regulations¹ that we shall talk about, will not be able to be applied to the deeds committed before its effectiveness, as there is Law no. 230/2018 as the law more favourable to the offender. However, such an interpretation is inadmissible, in the context in which the intent of the lawmaker to sanction more drastically the deeds in the field of energy and to exempt them from the possibility of paying half of the minimum fine is obvious.

The second opinion, with which we agree, was expressed in the speciality literature, noting that the ablation system is a facility (Podaru, Chiriță & Păsculeț, 2019, p. 356) granted to the offender, the authors appreciating that there would be two reasons that determined the lawmaker to introduce this system: one of a moral nature: that of causing him to voluntarily admit guilt, one of procedure (pragmatic): that of causing him to voluntarily pay the established fine (in a reduced amount), avoiding thus the commencement of the enforcement procedure, which involves other expenses for the involved public authorities (Podaru, Chiriță & Păsculeț, 2019, p. 354).

¹ Published in the Official Gazette of Romania, Part I, no. 665/17 July 2020.

Another author who adheres to this opinion notes that “*in order to determine the offender to pay as soon as possible the amount of money representing the fine, the lawmaker provided a measure in favour of the perpetrator who wants to pay the fine quicker*” (Hotca, 2012, pp. 369-370) and “*the agent who applies the sanction is bound to communicate the facility to the sanctioned person*” (Hotca, 2012, p. 371; Vedinaş, 2017, pp. 560-561).

3. Law no. 155/2020 - Reason for Dissatisfaction of Operators in the Energy and Natural Gas Sector

By Law no. 155 of 24 July 2020 for the amendment and supplementation of the Law on electricity and natural gas no. 123/2012 and on the amendment and supplementation of other regulations, at point 57 and point 117 respectively, were amended:

- art. 94 of Law no. 123/2012, *i.e.* “*The legal regime of contraventions: To the contraventions provided in art. 93 par. (1) are applicable the provisions of Government Ordinance no. 2/2001 on the legal regime of contraventions, approved with amendments and supplementations by Law no. 180/2002, with subsequent amendments and supplementations, except for the provisions of art. 8 par. (2) lit. a) and of art. 28 par. (1) of this latter regulation.*”

- art. 198 of Law no. 123/2012, *i.e.* “*The legal regime of contraventions: To the contraventions provided in art. 194 are applicable the provisions of Government Ordinance no. 2/2001, approved with amendments and supplementations by Law no. 180/2002, with subsequent amendments and supplementations, except for the provisions of art. 8 par. (2) lit. a) and of art. 28 par. (1) of this last regulation*”.

Therefore, considering the gravity of the deeds in the electricity and natural gas sector, the lawmaker considered that the operators who commit such contraventions shall no longer benefit from this facility which was provided for in general in GO no. 2 / 2001, should be able to pay half of the minimum fine within 15 days.

The dissatisfactions of the sanctioned operators were not late to appear, as they invoked the further application of the ablation system provided by GO no. 2/2001.

As I have already mentioned, any contrary interpretation as desired by the operators, would deprive of content a text from a regulation both with superior legal force, but also of a special nature versus GO no. 2/2001.

By way of example and comparison, in a Decision,¹, having been notified with the ruling of a preliminary decision, the High Court of Cassation and Justice - Panel for resolving legal issues from 9 November 2020 referred to the applicability of the ablation system regarding the documents issued by the Competition Council. The High Court of Cassation and Justice admitted the notification filed by the Bucharest Tribunal - Civil Section V and established that the provisions of art. 22 par. 2 of Law no. 203/2018 on measures to streamline the payment of fines are not applicable in terms of contravention sanctions applicable by the Competition Council pursuant to art. 55 par. 1 of the Competition Law no. 21/1996, with subsequent amendments and supplementations².

In order to establish this, the supreme court noted that the institution of ablation concerns the sanctioning regime in contravention law and is a method to extinguish liability by the offender's recognized legal facility of paying half the minimum fine in a short time. The ablation system is, however, incompatible with the specific norms of Law no. 21/1996 which, in this view, is not supplemented by the common law, and the contrary interpretation would disregard the purpose stated in art. 1 of this regulation, as well as the principles governing the application of the contravention sanctions provided by art. 55 of Law no. 21/1996, as regulated by national and European legislation.

Thus, it can be seen that the supreme court ruled on the one hand, that the institution of ablation is a method to extinguish the contravention liability and also a facility granted by law to the offender, to pay in a very short time only half of the minimum fine, and on the other hand, that the provisions of art. 22 par. 2 of Law no. 203/2018 concretely regulated the possibility of applying this system in those cases in which the regulations establishing the contraventions did not expressly provide for this possibility.

The electricity and natural gas sector is similar to the one we referred to, as the contraventions committed by the operators are of an increased gravity.

It is true that operators who challenged the protocols issued by the National Energy Regulatory Authority invoked exceptions of unconstitutionality of the provisions of Law no. 123/2012, which excluded from application the ablation system and it remains to be seen how the constitutional judges will assess the invoked

¹ Decision of the High Court of Cassation and Justice no. 72/9 November 2020 was published in the Official Gazette of Romania, Part I, no. 75/25.01.2021

² For a detailed analysis of the Decision of the High Court of Cassation and Justice, <https://www.universuljuridic.ro/despre-sistemul-ablatiunii-in-materia-dreptului-concurentei/>

arguments. Basically, what the operators want is to commit as many contraventions as they want and then pay half of the minimum provided by law and to be able to commit another contravention.

If Government Ordinance no. 2/2001 and the provisions of art. 22 par. (2) of Law no. 203/2018 represent the general norm in contravention matters, Law no. 123/2012, regulating the matter of electricity and natural gas, established its own sanctioning regime in the field, with a double role, to amend the illicit conduct and to discourage the commission of similar deeds. The contravention deeds prohibited and sanctioned by Law no. 123/2012 are deeds of increased gravity and have a significant impact on the environment of electricity and natural gas and on consumers, considering the social values protected by this regulation, a reason due to which the level of sanctions that can be applied is extremely high, likely to give meaning and efficiency to the double role mentioned above.

Therefore, establishing a special procedure and a distinct sanctioning regime and removing from application the provisions of art. 28 of the Government Ordinance no. 2/2001, it is necessary to conclude that the norms from Law no. 123/2012 represent the *lex specialis* and therefore, in the matter of the contraventions provided in art. 93 par. (1) of the law the ablation system should not apply.

On the other hand, the Constitutional Court has already ruled repeatedly on the provisions of the Competition Law comprising provisions almost identical to such in art. 94 of Law no. 123/2012.

Thus, by Decision no. 191 of 9 April 2019¹, the Court held that “20. (...) *the court of constitutional contentious has ruled on the legislative solution before, meaning that they are, for example, Decision no. 556 of 7 June 2007, published in the Official Gazette of Romania, Part I, no. 560 of 15 August 2007, Decision no. 243 of 4 March 2008, published in the Official Gazette of Romania, Part I, no. 288 of 14 April 2008, or Decision no. 490 of 21 November 2013, published in the Official Gazette of Romania, Part I, no. 92 of 6 February 2014. On those occasions, the Court held that, in view of the impact of the infringements of the competition rules, which have serious consequences both for the economy as an aggregate and, directly, for consumers and other undertakings on the market, in order to be effective, sanctions must send a strong message of deterrence to offenders and be in the amount necessary to achieve the deterrent effect. The contravention sanctioning system applicable in the field of competition has certain specific*

¹ Published in the Official Gazette of Romania, Part I, no. 572 from 11 July 2019.

features, such as the fines provided for in very high amounts and the limited applicability of common law in the field of infringements. (...) 23. The regulation of some contraventions and of the applicable sanctions has as consequence the decrease of the economic operator's patrimony, but this is a measure objectively and rationally justified by the imperative of protecting the social interest and the rule of law, by adopting specific rules of prevention and sanctioning the deeds generating or that could generate negative economic phenomena (see ad similib Decision no. 308 of 13 June 2013, published in the Official Gazette of Romania, Part I, no. 461 of 25 July 2013, and Decision No. 128 of 10 March 2016, par. 16). In this context, the Court finds that according to art. 44 par. (9) of the Constitution, the goods destined, used or resulting from crimes or contraventions may be confiscated only under the conditions of the law. 24. (...) art. 1 par. 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms allows Contracting States to adopt such laws as they deem necessary to ensure the payment of taxes or other contributions or "fines ".

These considerations were repeated in the more recent Decision no. 318 of 9 June 2020¹. Therefore, it can be concluded that, according to the practice of the Constitutional Court, the removal of the application of the ablation system by a special law does is not a violation of constitutional principles.

In such a context, similar to the contraventions sanctioned by the Competition Council, are also those in the energy and natural gas sector, where we are talking about a field of national security. But the operators in the sector have superficially treated along the years the obligations they have and the regulations under the umbrella of which they carry out their activity.

It is obvious that the lawmaker understood these issues by referring also to the very high amounts of the fines provided by Law no. 123/2012, but also to the fact that the operators committed a multitude of contraventions, being aware that they will pay half the minimum fine, regardless of the gravity of the deeds and the amount applied by the ascertaining agent.

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4. Conclusions

It can be noticed that the ablation system still generates a lot of discussion in the doctrine. Beyond the issues subject to analysis, we consider it important to be more aware of the danger and gravity of the offenses, especially in areas such as electricity and natural gas, which can have very serious consequences.

Unfortunately, although the application of sanctions is intended to be a correction of the operators' conduct, they continued to violate the rules governing their activity by taking advantage of the fact that, regardless of the amount of fine imposed, they were to pay half of the minimum fine provided by law (*i.e.* RON 4,000!), which was disproportionate to the gravity of the noted deed. These situations also led to a stricter regulation of the system of applying the sanction of the contravention fine, establishing the express exemption of the ablation system. Although dissatisfied operators in the sector, which shall have to pay – concurrently with the effectiveness of Law no. 155/2020 - fines in the amount provided by the ascertaining agent, we express our hope that they will become more aware of the gravity of their actions and the serious consequences they might generate and they shall pay more attention to the legal provisions in the field in which they operate.

Bibliography

- Drăghici, C.; Iacob, A. & Draghici, C.V (2019) *Contravention law*. Craiova: Sitech, pp. 93-96.
- Hotca, M. A. (2012). *The legal regime of contraventions. Comments and explanations*. 5th edition. Bucharest: CH Beck, pp. 369-371.
- Podaru, O. (2019). About the ablation system in contravention law: An inconsistent policy with strange effects. Bucharest: Universul Juridic no. 8/2019, pp. 6-25.
- Podaru, O.; Chiriță, R.; Păsculeț, I. (2019). *The legal regime of contraventions. Government Ordinance no. 2/2001 with comments, 4th edition*. Bucharest: Hamangiu, pp. 354-356.
- Ursuța, M. (2018). *Contravention law and judicial procedure in public law. Current events and perspective*, pp. 38-39.
- Ursuța, M. (2020). Losing the nature of a contravention and application of the more favourable contravention law. Theoretical and practical issues. "Dreptul/The law" (Lawyers' Union) no. 8.
- Verginia, Vedinaș, V. (2017). *Administrative law*, 10th edition. Bucharest: Universul Juridic, pp. 560-561.