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THE PROCESS OF ESTABLISHING AND EXAMINATION OF THE CONTRAVENTIONS BY THE NATIONAL ANTI-CORRUPTION CENTER – case study

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Rezumat: *În materialul propus a fost relevat un studiu de caz privind constatarea faptelor contravenționale de către Centrul Național Anticorupție (CNA). În context, ne-am referit la două aspecte importante: competența cu privire la constatarea faptelor contravenționale și competența cu privire la examinarea cauzelor contravenționale. A fost realizată analiza juridică a contravențiilor care sunt de competența CNA prin prisma elementelor constitutive. Considerăm că materialul propus spre publicare va fi util studenților de la facultățile de drept, dar și practicienilor în domeniul jurisprudenței pentru a fi pus în aplicare.*

Cuvinte-cheie: *agent constatator, Centrul Național Anticorupție, contravenții, sancțiuni contravenționale, elemente constitutive.*

Introduction. A modern society can ensure its existence only if it is protected against the acts that undermine the norms of human coexistence. The state performs this function of social protection with the help of law that provides a "charged battery" of intervention rules from the competent authorities. A special form of social reaction is provided by the contravention law through the application of sanctions to the people who don't comply their behavior with the legal norms. The contravention sanction is a measure of coercion and re-education that is applied to the contravener with the purpose to correct him and prevent the committing of contraventions.

In order to restore the order, the legislator has delegated to its competent bodies the attribution to establish and apply sanctions to the recipients who violate the precepts of the contravention norms. In the matter of contraventions, these individuals are called official examiners or "official subjects". They contribute to the achievement of the purpose of the proceeding for a contravention that is stipulated by the legislator in art. 374 par. (2) of the Contravention Code of the Republic of Moldova (hereinafter CC): "A proceeding is an activity carried out by a competent authority with the participation of parties and of other persons who are holders of rights and obligations aiming to establish a contravention, to review and resolve the case and to establish the reasons and conditions that contributed to the commission of the contravention". Furthermore, according to art. 385 par. (1) CC: "The official examiner is the representative of the public authority who solves within the limits of his/her competence a case of a contravention… An officer of the authorities indicated in art. 400-423[10] shall be appointed as official examiner and empowered to establish the contravention and/or to impose a sanction".

Results and discussions. The presented material refers to the resolution of contraventions by the official examiner established in accordance with art. 401 CC – "The National Anti-Corruption Center", as follows:

(1) The contraventions stipulated in art. 313[1], 313[3], 314, 314[1] CC shall be *examined* by the National Anti-Corruption Center.

(1[1]) The contraventions stipulated in art.264, 312, 313, 315 and 315[1] CC shall be *established* by the National Anti-Corruption Center.[7]

From the content of art. 401 we deduce two different powers of the NAC, a competence of examination and another one of establishing contraventions. In the second case, the documentation on the contravention is submitted for examination to a competent court of law.

In the same context, the Law of the Republic of Moldova no. 1104 from 06.06.2002 regarding the National Anti-Corruption Center inclusively establishes the attributions, obligations and rights of the NAC to solve the contravention cases:

- In art. 4 a), "the attributions of prevention, detection, investigation and suppression of contraventions and crimes of corruption and those related to corruption, as well as of the acts of corruptive behavior";
- In art. 5 e), "the obligation to carry out procedures in the case of administrative contraventions assigned to its competence" (This law requires an amendment here through the prism of CC, with the exclusion of the word "administrative") and,
- In art. 6 d), "the right to draw up documentation on the contraventions related to its competence".[8]

In order to implement the mentioned regulations, in 2019, the Instruction regarding the procedure of establishing, drawing up and recording the documentation on the contraventions within the National Anti-Corruption Center was approved, consisting of twenty-two chapters[9],

[7] The Contravention Code of the Republic of Moldova from 24.10.2008. In: Official Monitor no. 3-6/15 of 16.01.2009, republished in the Official Monitor No. 78-84 of 17.03.2017.

[8] The Law of the Republic of Moldova no. 1104 from 06.06.2002 regarding the National Anti-Corruption Center. In: Official Monitor no. 91-94 of 27.06.2002.

[9] The Order of the National Anti-Corruption Center no. 17 from 19.02.2019 on the approval of the Instruction regarding the procedure of establishing, drawing up and recording the documentation on the contraventions within the National Anti-Corruption Center.

as a methodical support for the officers of the National Anti-Corruption Center in the process of establishing and examination of contravention cases. According to the annex no. 2 of the order regarding the approval of this instruction, it was also approved the Register of records of the documentation on the contraventions. Mostly, this instruction includes extracts from CC, systematized and structured according to the attributions of the official examiner, the order of the proceeding for a contravention (the principles of the proceeding, citation of the contravener, drawing up the documentation, the termination of a proceeding, submitting the materials to the court, etc.), with some normative reflections that are specific to the National Anti-Corruption Center, which will be mentioned below.

In order to implement art. 401 CC, the official examiners of the National Anti-Corruption Center will take notice of the reasonable suspicions that a contravention has been committed whose resolution is within their competence, the act of self-notification being immediately recorded in the Register of records of other information regarding crimes and incidents (Register no. 2), which are considered to be unique documents of primary evidence, according to the regulations from the Order of the NAC no. 95 from 18.07.2008 regarding the single records of crimes, criminal cases and individuals who have committed crimes.

The Register of records of the documentation contains the following information:

- registration number in R-II,
- number and date of drawing up the documentation,
- name, surname, position, address of the contravener,
- the article from CC which provides the act for which he was accused,
- number and date of the decision that was taken,
- the sanction that was applied (if the fine is applied, its amount must be indicated),
- if the contravention case was dismissed, the reason must be indicated.

This kind of Register is kept by the Legal Service of the NAC and also by the North and South regional general divisions in order to be recorded appropriately.

An important aspect that is highlighted in the instruction is that "from the moment when the official examiner draws up the documentation on the contravention, it is presumed that he has gathered sufficient evidence to prove the commission of the contravention and the culpability of the person who is responsible for committing it. Respectively, from this moment, the official examiner will not accumulate any more evidence until the proceeding for the contravention is submitted for examination to the court. Otherwise, the right to a fair trial will be violated".[10]

The right to examine the contravention cases and apply sanctions for the contraventions that are within the competence of the NAC belongs to the director and the deputies of the NAC, and also to the heads of its regional subdivisions and their deputies. From the content of art. 401 CC, we deduce that there are cases when the officer of the NAC is the one who establishes the contravention and the court is the one that applies the sanction, but there are also cases when the same person establishes the illicit act and applies the punishment to the contravener. According to the autochthonous specialty literature (dr. I. Trofimov in his work "The status of the official examiner in revealing and documenting the cases…", page 54-55), the opinions on this provision have divided (and not necessarily in the case of the NAC), especially because in this situation it is quite difficult to ensure the impartiality of the official examiner in the process of examination of the case and also because the term "official examiner" semantically supposes the competence of establishing and/or examination of a contravention, but not of applying the sanction. There is a dose of fairness in this statement, but we also must take into account the fact that the current conditions impose the risk to double or even triple the number of pending cases in the courts. Respectively, this fact would generate the impossibility to ensure an immediate reaction of the state to the violations of the contravention norms and also to examine them within the statute of limitations. Moreover, the courts should not be charged with the

[10] Ibid.

examination of cases that represent minor violations of law with low degree of social danger. In this regard, a suggested solution would be the renaming of the person/authority that examines the case and applies the sanction, from "official examiner" to "contravention official".

According to the statistics presented by the NAC, during the last year (2019), the representatives of the NAC have drawn up 43 contravention documentations. Fines were applied in 13 cases out of the total number of the decisions that were adopted, and in 15 cases the materials were submitted to the competent court in order to take a decision.

Analyzing by categories of contraventions, 27 documentations were drawn up for "Exceeding one's power or work duties" (art. 313 CC); 7 documentations for "Receiving an illegal reward or financial profit" (art. 315 CC); 6 documentations for "Misuse of power or of one's official status" (art. 312 CC); 2 documentations for "Protectionism" (art. 313^1 CC) and one documentation for "Illegal participation of a public officer, a person with a position of public dignity in an entrepreneurial activity" (art. 264 CC). In 11 cases the proceeding for contravention was terminated in accordance with art. 30 CC, because of exceeding the statute of limitations.[11]

In addition to the attribution of solving contravention cases, the NAC implements measures in order to prevent contraventions by developing and spreading informative materials, guidelines for officials of different levels and also by publishing special sections dedicated to the prevention of illicit acts on the website of the institution. During the last year, the NAC performed: short-term trainings for public officers working in the Ministry of Foreign Affairs and European Integration, custom officers, directors of secondary technical and vocational education institutions, heads of central and local bodies specialized in the field of education, medical workers, public officers working in the National Agency of Auto Transport, and also information sessions for tax inspectors with control attributions from the State Tax Service, for audiences from the Center of Excellence of the General Inspectorate of the Border Police, etc.[12]

Legal analysis of the contraventions established/examined by the NAC.

Basing on the content of art. 401 CC, in our study we will characterize the contraventions that are within the competence of the NAC through the prism of their constitutive elements.

The generic object in most of the analyzed contraventions is represented by the social relations regarding the activity of public authorities and only in a single case, art. 264 CC, the generic object consists of the social relations regarding the entrepreneurial activity. Most of the contraventions that are within the competence of the NAC are provided in Chapter XVI CC.

The objective side of the contraventions is manifested both by action (for example, art. 264 CC "Illegal participation of a public officer, a person with a position of public dignity in an entrepreneurial activity", art. 312 CC "Misuse of power or of one's official status"), as well as by inaction (for example, art. 314 CC "Concealing an act of corruption or an act related to it, or avoiding to take the necessary measures", art. 314^1 CC "The failure to ensure protection measures for the public officer").

As an optional feature of the objective side is *the place* of committing the contravention, usually this is the workplace of the public officer or of the person with a position of public dignity, or the person who is exercising his work duties. *The manner and the means* of committing the act must be established in order to determine the mitigating or aggravating circumstances (for example, an officer was rewarded with three boxes of chocolates for issuing a certificate, art. 325 CC "Receiving an illegal reward or financial profit").

In most of the cases, *the subject* of the contraventions is the "special subject". In order to determine the existence of a contravention or its qualified form, the active subject has to satisfy a special condition, in addition to the general ones. It means that he must have a certain special quality: a responsible person, a person with a position of public dignity, the leader or secretary

[11] www.cna.ma, accessed on 30.08.2020.

[12] https://cna.md/lib.php?l=ro&idc=86&t=/Sensibilizare/Parteneriate-sociale&#idc=164&, accessed on 23.08.2020.

of the collegiate body. This quality becomes a constitutive element, either of the analyzed contravention or of its qualified form. For instance, art. 313^3 CC "Exceeding one's power regarding the permissive documentation", par. (1): "Delaying the issuing of a permissive document without giving a reason and/or exceeding the period of time established by law… shall be sanctioned by a fine of 45 to 60 conventional units applied to a responsible person...".

In some cases, the subject of the contravention is an individual (for example, art. 313^1 CC "Protectionism, meaning the support for solving the problems of individuals or legal entities that is not provided by legislation… shall be sanctioned by a fine of 60 to 90 conventional units applied to an individual…"). Thus, we notice that in the most contraventions the subject comes out from the provision or from the sanction, and even from the title of the legal norm (as in art. 264 CC). But there are also cases when the subject is not mentioned at all in the content of the norm. In this situation, he is deduced from the text of the material norm (for example, art. 312 CC "Misuse of power or of one's official status", even though the characteristic of the subject of this contravention is not specified, we deduce that he is a person with special attributions that could generate a kind of behavior that would contravene the public interests or the rights and interests protected by law of individuals and legal entities). In this regard, it is recommended to the legislator to provide a specification of the subject, in the quality of a responsible person, and also the element of material or personal interest (as it is provided in the criminal law in the case of abuse of power or abuse of official position) should be introduced in the provision of the norm that stipulates this deed as a contravention.

In all the cases, *the subjective side* of the analyzed contraventions is characterized by culpability that manifests through intent. In some material norms the intentional character of the committed act is revealed even in the text of the provision (for instance, art. 312 CC "Deliberately using one's official status in a way that contravenes the public interest...", where "deliberately" means with intent).

Conclusions. The role of the state authorities as "official examiners" meant to solve the contravention cases, particularly the NAC in our publication, is to ensure the realization of the rights and legitimate interests of the people. Every derogation from the rules of social co-existence must be immediately treated with a coercive reaction from the state. For this reason, the contravention law has empowered some authorities to establish, examine and sanction the contraventions within a legal process. To this end, there were developed methodological instructions and institutional – operational procedures on "how to act and what exactly the representative of the authority has to do" in order to appreciate correctly and objectively the contravention and to prevent the committing of new illicit acts. The English writer and philosopher John Ruskin was right when saying that *"What we think or what we know or what we believe is in the end of little consequence. The only thing of consequence is what we do".*

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