THE PRESCRIPTION OF THE RIGHT TO APPLY THE SANCTION OF THE PENALTY FOR THE CONTRAVENTION STIPULATED WITHIN ART. 51, LET. A FROM THE LAW OF CONCURRENCY NO. 21/1996, COMMITTED IN A CONTINUOUS FORM

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ABSTRACT:
LAW NO. 21/1996 DOES NOT CONTAIN ANY SPECIAL REGULATIONS REGARDING THE PRESCRIPTION TERM OF THE RIGHT TO APPLY THE SANCTION FOR CONTRAVENTIONS STIPULATED IN THE LATTER, THUS THE DISPOSITION OF THE CONTRAVENTIONAL PENALTY IS PRESCRIBED IN THE CONDITIONS STIPULATED IN ART. 13 PAR. 1 AND 2 FROM THE GOVERNMENT ORDINANCE NO. 2/2001 REGARDING THE LEGAL REGIME OF THE CONTRAVENTIONS

KEY WORDS: CONCURRENCY, CONTRAVENTION, CONTINUOUS, PRESCRIPTION, SANCTION

INTRODUCTION

By the decision[1] no. 264 from the 4th of July 2002, The Commission of the Council of Concurrence applied the sanction of the contraventional penalty amounting to 809.404.219.569 lei (80.940.421,9569 RON) S.N.Tc. R. SA, thus retaining that the above-mentioned society is guilty of having committed the contravention stipulated in art. 5, let. a from the Law no. 21/1996[2], by the fact that in the association contract with G.O.C. B.V. (materialised in the creation of a new society, a clause of non-concurrency was introduced, which significantly affected the concurrency of the market of data transmission during the

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[1] Not published.

[2] In conformity with this legal text, the acts committed with intention or due to negligence by enterprises or associations of enterprises Conform, by which the provisions of art. 5 from the Law. no. 21/ 1996 are violated, are considered contraventions. The contravention retained in the task of the recurrent, refers to the fact that " any express or tacit agreements between the economic agents or the associations of economic agents which aim at or that may result in the prevention, restriction or distortion of the concurrency on the Romania market are prohibited "(...)" [art. 5 par. (1) from the Law no. 21/1996, in its initial form].

period October 1999 – April 2001[3], which violates art. 5 par. 1 from the Law no. 21/1996, as it was decided by the decree[4] no. 168 from the 14th of May 2002 of the Competition Council[5].

S.N.Tc. R. SA formulated a complaint against this decision, and by the decision no. 305 from the 26th of July 2002 the president of the Competition Council diminished the penalty to the amount of 405.000.000.000 lei (40.500.000 RON).

By the appeal declared and registered within the High Court of Cassation and Justice, S.N.Tc. R. SA requested the annulment of the last decision mentioned above and the abrogation of the contraventional fine, claiming that the application right of the sanction was prescribed, since a period of more than 6 months had passed since the perpetration of the contraventions and until the application of the sanction.

The section of administrative and fiscal legal department of the High Court of Cassation and Justice admitted the appeal by the decision no. 2673 from the 19th of April 2005, thus cancelling the decision no. 305 from the 26th of July 2002 issued by the president of the Council of Concurrency and, implicitly, the fine applied to S.N.Tc. R. SA [6]

The Court of Justice established that, in the absence of special regulations in the Law no. 21/1996, regarding the prescription of the law to apply the contraventional sanctions, the case shall be governed by the provisions of the general law in contraventional matter, respectively the Government Ordinance no. 2/2001. The advocacy of the intimate, the Competition Council, in the sense that the prescription term was the one stipulated in the Decree no. 167/1958[7], was removed based on the reason that the regulations contained in the respective normative document refer to the civil relations of private law, and thus, are not applicable in the hereby case since the conventional law represents an integrated part of the sphere of the public law.

THE PRESCRIPTION TERM OF THE RIGHT TO APPLY THE CONTRAVENTIONAL SANCTION

The concurrency law no. 21/1996 does not establish the prescription term for the application of the contraventional sanctions stipulated in the hereby normative document, thus, it has been discussed whether the case shall be governed by the provisions of the general law in contraventional matter, stipulated in the Government Ordinance no. 2/2001, or those contained in the Decree no. 167/1958 regarding the extinctive prescription.

The contraventional law, generally, belongs to the public law, the contraventional liability being derived from the penal liability under the report of the substance[8], however its application presents the civil procedure as common law[9].

Mainly, the concurrency law is a branch of the public law, since it contains imperative - prohibitive norms whose observance is monitored by the specialised bodies of the public administration, especially the Competition Council[10], and in the case of violating some of the

[3] On the 5th of April 2001, the non-concurrency clause was cancelled by the parties of the association agreement, based on the point of view of the Competition Council, that was requested by the S.N.Tc. R. SA even since the association date with G.O.C. B.V., respectively from the month of October d 1999.
[4] Not published.
[5] This decision, by which the committing of the contravention was established, remained definite, by rejecting the action formulated in the court (civil sentence no. 1202 / 2002, of the Court of Appeal in Bucharest and the civil decision no. 1045/2003, Of the High Court of Cassation and Justice).
[6] Not published.
[7] Decree no. 167/1958 was abrogated by the Law no. 71/2011, the respective domain being regulated in the new civil Code.
[8] A. Iorgovan, *Administrative Law Treaty,* vol. II, Nemira Publishing house, Bucharest, 1996, pp. 235 and foll.
[9] I. Poenaru, *Issues of contraventional lergislation*, in „Law" Journal no. 2/1998, pp. 46 and foll.
[10] R.G. Paraschiv, *Competition Law*, ProUniversitaria Publishing House, Bucharest, 2014, p. 8.

latter (including by committing restrictive practices, as in the case analysed), contraventional and even penal sanctions can be applied.

By means of the restrictions imposed regarding certain anticompetitive practices or of illicit concurrency and by monitoring the observance of these restrictions, the concurrency law protects the free exertion of the rights of the economic agents. It also, defends the contractual liberty and the liberty of extra-contractual action of the economic agents, by prohibiting certain actions that may negatively influence the loyal competition and that may be concluded based on the liberty of will[11].

In these conditions, it is indubitable that for the establishment of the prescription term related to the law referring to the application of the sanctions stipulated by law, they shall be governed by the specific norms belonging to the conventional law, since the conventional liability falls in the category of the public order.

The Decree no. 167/1958 – which stipulates prescription terms (that are longer) for the exercitation of the right to action, thus having a patrimonial object – it refers to the civil reports of private law, and not the legal reports of public law.

In the absence of specific regulations within the Law no. 21/1996, the verification of the circumstance related to whether the contraventional sanction has been applied during the term takes into consideration the general regulations, stipulated in art. 13 from the Government Ordinance no. 2/2001, in conformity to which the sanctioning dispositions must be applied in maximum 6 months from the committing of the act (par. 1).

However, since the respective offense embodies a continuous character (the non-concurrency clause being applied without interruptions for almost 18 months), one might think that the sanction was applied in the term – if we interpret as ad literam the text, par. 2 of art. 13, which stipulates the following content: „In the case of continuous contraventions, the term stipulated at par. (1) is considered from the date of establishing the act ..." – since the contraventional act was ascertained on the date of the 14th of May 2002 (by the decision of the Competitive Council), and the fine was applied on the 4th of July 2002 and reduced on the 26th of July 2002.

By a contextual and logic interpretation, reported to the specific facts for the case analysed, it may be concluded that in the present situation, the provisions of par. 1 of art. 13 from the Government Ordinance no. 2/2001are applicable, since the conversation, even if it was continuous, had depleted on the 5th of April 2001, at the initiative of the parties of the association contract, the act thus being " committed" in that respective moment. As a result, we consider that it is rational that par. 2 of the same article be applied only for the continuous contraventional facts which are still committed and that are not depleted on the date of being noticed by the competent organs.

For the legal accuracy and in order to avoid the possible contradictory interpretations, it may be imposed, by the *lege ferenda*, the completion of par. 2 from art. 13 from the Government Ordinance no. 2/2001, in the sense that the prescription term is considered – in case of the continuous contraventions – from the date of ascertaining the act. This is applied only for the cases in which this observation takes place before the depletion of the illicit activity.

[11] H. Dumitru, S. David, *The fundamental principles governing the regulations applicable to the securities market* (part III), in „Magazine of commercial law", nr. 10/ 1996, pp. 56-57.

THE ANALYSIS OF THE CONDITIONS OF EXISTENCE RELATED TO THE CONTRAVENTION RETAINED IN THE CASE

From the general definition of the contravention, stipulated within art. 1 from the Government Ordinance no. 2/2001, it results that its existence is conditioned by the committing, with a sense of guilt, of an act established and sanctioned by law.

The significance of guilt is related to discernment, but also the liberty of choice of a conduct related to a conscious aim assumed[12].

The non-concurrency clause (established between associates) is not explicitly illustrated in the content of art. 5 par. 1 from the Law no. 21/1996, as being a prohibited decision, however, it can be included in the category of decisions which result, in certain conditions, in the prevention, restriction or distortion of the concurrency on the Romanian market – the prohibited practices are not being restrictively enumerated. Moreover, within the content of par. 2 of art. 5 from the law, the cases in which these practices are permitted, not being of the nature to affect concurrency, if certain conditions are fulfilled, are provided.

From the file it definitely results that S.N.Tc. R. SA requested from the part of the Competition Council, even from the conclusion of the association contract, a point of view related to the non-concurrency clause, in order to establish if it enters the category of the anti-competition practices (in the concrete manner), the offending society demonstrating good faith, especially since in the content of art. 5, par. 1 from the law, the anti-concurrency characters of this type of clause is not expressly stipulated, as it has been shown.

We consider that the good faith of the society sanctioned also results from the fact that, subsequent to their documentation, on the 5th of April 2001, the society proceeded to the annulations of the non-concurrency clause (along with the other part of the association contract).

In these conditions, we may consider that we can submit to discussion, with a justified ground, whether the conditions regarding the guilt necessary for the existence of a constant sanction, as there is no certainty that the society in cause did not take action with a "consciously – assumed purpose", to prevent, restrict or distort the concurrency on the Romanian market or on a certain part of it, as it is demonstrated in art. 5 par. 1 from the Law no. 21/1996.

CONCLUSION

The solution of the High Court of Cassation and Justice appears as legal ad grounded (reported to the legal ground used), however, we considered that the present case requires certain considerations related to the normative document governed for the establishment of the prescription term related to the application rights of the contraventional sanction, as well as regarding the moment from which this term is considered in case of the continuous contraventions. Moreover, in substance, we appreciate as a result of the analysis of the conditions stipulated by the law for the existence of the contravention retained, that there are doubts related to the achievement of the requirements regarding the guilt of the " offender ", since the latter solicited the Competence Council its point of view regarding the legality of the non-concurrency clause, immediately subsequent to its stipulation within the association contract.

[12] T. Popescu, *Administrative Law*, part II, coordinator E. Albu, Fundaţia România de Mâine Publishing House, Bucharest, 2008, p. 187.

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