Contraventional complaint - the non-unitary practice of the courts in applying the provisions regarding the error rate of the cinemometers

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Abstract: The courts invested with the resolution of the contravention complaints against the minutes of finding and sanctioning contraventions, gave different interpretations of the legal norms regarding the application / non-application of the error rate of the cinemometers, reaching contradictory solutions and unfairness for the justice. In this respect, the Prosecutor's Office attached to the High Court of Cassation and Justice prepares an appeal in the interest of the law, in order to unify the practice at the level of the courts. There is a majority practice of the courts with regard to the resolution of the contravention complaints invoking the provisions of art. 3.1.1. (c) of the NML 021-05 Legal Metrology Norm, therefore, in order to arrive at a fair conclusion, a corroborated analysis of the relevant legal provisions in the resolution of the contravention complaints, the reasoning in the judgments and the technical details of the measuring instruments speed. During the elaboration of this paper I took into consideration the Romanian legislation, namely the road code, the criminal code, the civil procedure code, the applicable rules of the European Convention on Human Rights, as well as the specialized technical documentation.

Keywords: contravention complaint; speed; error margin; cinemometer; decision.

Introduction

The courts are faced with minor offenses brought by persons who criticize how to detect and apply contravention sanctions in terms of exceeding speed limits. Measurement of vehicle speed is achieved by means of cinemometers, which must meet the requirements of the Normative Metrology Norm NML 021-05.

Jurisdiction in solving the contravention complaints belongs to the civil courts, being applied the norms of the Civil Procedure Code in addition to Government Decision 2/2001 on the legal regime of contraventions, but the jurisprudence of ECHR has held that, irrespective of the law applicable to contraventions in national law, in the light of the case-law of ECHR they fall within the scope of criminal charges. Thus, when judging them, criminal procedural rules are taken into account, being the principle of the presumption of innocence [1], the offender being considered innocent until a final judgment, the principle of "equality of arms" and the principle in dubio pro reo.

In the trial of a contravention complaint, the court applies, in a mandatory and effective manner, the content of judgments handed down by the European Court of Human Rights as provided in the preamble to the Convention [2]. Thus, by the judgment of Anghel c. Romania of 4.10.2007, the ECHR found that certain provisions of the law on contravention encourage jurisprudence contrary to the presumption of innocence. On the merits, the ECHR considered that "the Romanian procedural system in the field of contravention, based on civil procedural principles requiring the court opening proceedings - the offender in this case - to prove the veracity of the statements, is contrary to the presumption of innocence." The Court considered that the presumption of legality and veracity of the offense verdict is an unreasonable presumption, placing the accused in an unfavorable situation.

In view of these considerations, it should be born in mind that the text of the Convention has been part of Romania's domestic law since 1994 and, in relation to the provisions of Article 20 paragraph 2 of the Constitution, there is inconsistency between the covenants and treaties concerning fundamental human rights, to which Romania is a party and internal laws, prioritize international regulations, unless the Constitution or domestic laws contain more favorable provisions.
1. Features of cinemometers

The determination of the speed of movement of a motor vehicle is done by means of vehicle speed measuring devices which can be placed on police cars, can be directly handled by a radar operator or can be fixed to outboard carriages. The commissioning and use of speed measurement instruments shall be carried out in accordance with procedures established both by the NML 021-05 [3] Legal Metrology Norms [3] and the manual for the use of that speedometer.

On March 31, 2016, the State Secretary of the Ministry of Economy and Commerce addresses the question of "Homologation and verification of radar equipment" by a deputy from the National Liberal Party parliamentary group, in the sense that "Until the Romanian Legal Metrology Office has granted 25 model approvals and additions to model approvals for different types of cinemometers according to the list of model approvals issued by the Romanian Legal Metrology Office. Radars are the apparatus used for the purpose of applying the provisions of the road legislation and ensuring the safety conditions in the carriage of goods and are the means of measurement subject to legal metrological control (through the approval of a metrological verification model, etc.) exercised by the Romanian Bureau of Legal Metrology [4].

With regard to the operating principle of the cinemometers it can be: Doppler, with opto-electronic barriers, with inductive sensors, LEDAR, laser or piezoelectric sensors. For example, LTI 20/20 TurCAM uses the principle of laser operation and the Auto vision radar type uses the principle of Doppler operation [5].

There is the opinion that in the control of the speed of traffic on the public roads the most used models are the Auto-vision Compact PYTHON II Radar and Radar Auto vision, which operates on the Doppler effect and measures the speed of movement of cars both in stationary mode and in regime travel. When measuring the speed in motion, the cinemometer measures the speed of movement of the police vehicle on which the cinemometer is installed and the relative speed of the target vehicle whose speed is measured against the patrol [6]. Cinemometers operate either in stationary mode, either in stationary mode or in the mode of movement of the vehicles on which they are installed.

It is clear from the same answer of the Ministry of Economy and Trade with the business environment that all recorded measurements are conditioned by the prior settings of the apparatus, the speed of movement of the police vehicle being also measured by the cinemometer by processing the reflected traffic signal according to the settings of the cinemometer and the sense of moving cars to the patrol.

It is important to note that a calibration period is required for each radar device regardless of the model to ensure a correct recording. There are cases where detective officers suddenly start radar when they see that a vehicle with a speed above the legal limit enters the range, which alters the quality of the record.

According to the instructions in the operation and use manual of the cinemas, they have the possibility to make distinct measurements of the speed of movement of the target vehicles as well as of the speed of movement of the patrol car. Depending on the performance of the radar, it can record at the same time, regardless of the speed of the patrol car and the speed of two vehicles in traffic.

2. Measurer error scale

A current problem is the timing of applying the margin of error because in the judicial practice we come across two different opinions, in the sense that some of the courts have considered that the margin of error is applicable at the moment of the finding of the contravention or if it was not applied by to the determining agent, is applied by the court at the time of the settlement of the contravention complaint, and on the other hand, the courts considered that the provisions on the margin of error apply only at the time of verification and approval of the radar apparatus by the legal metrology service.

In order to assess whether the radar device operates under the conditions expressly provided by the legislation in force, it is necessary to consider the following aspects by the courts:
- the fact that the model of the moment meter with which the finding of the contravention was carried out was approved by the Institute of Legal Metrology;
- the metrological verification report of the radar apparatus;
the fact that the radar device was mounted on a police car by an authorized person and that the metrological and technical requirements of NML 021-05 were met during installation;
- a copy of the RADAR Registry and the report of the finding agent;
- the metrological approval certificate of the road cinemometer;
- proof that the investigating agent has the status of Qualified Operator as defined in LMN 021-05;
- the radar action chart indicating that the radar device mounted on the police vehicle that carried out the recording is in mission and in what position it is (sense of direction or opposite);
- manual use of the radar apparatus;
- whether the self-test was performed or whether the radar device has the ability to self-test;
- the weather conditions at the time of the registration;
- the speed allowed on the road sector where the finding was made.

The maximum tolerable errors for the speed measurement are set in the operating conditions of the cinemometers under the influence of the factors of influence as they result from the provisions of art. 3.1.1. lit. c) as well as those provided by art. 3.1.2 of the Legal Metrology Norms LMN 021-05.

The amount of tolerable errors for speed measurement differs as the radar device undergoes laboratory testing under normal traffic conditions for stationary-only cinemators or for both in-station and travel, or only in the displacement mode.

Therefore, we note that under laboratory conditions, this device records tolerances of +/- 1 km / h for speeds up to 100 km / h and +/- 1% of the measured value for speeds equal to or greater than 100 km / h, reaching ± 4 km / h for speeds up to 100 km / h ± 4% of the measured value for speeds equal to or greater than 100 km / h in travel mode [7].

Radar equipment shall be tested under the influence factors explicitly mentioned in the legal metrology rule, establishing the values between which these instruments have been subjected to testing, exceeding these values or putting them into service under conditions other than those in which they have been tested, is a sufficient reason to believe that radar equipment exceeds the maximum tolerable speed measurement errors.

Influencing factors such as temperature, humidity, power supply voltage, electromagnetic radiation, interface pulses (salves, trains under certain conditions), electrostatic discharges, and sinusoidal vibrations may affect the smooth functioning of radar equipment, leading to recordings exceed the tolerated values. Also, the temperature conditions at the time of storage of these appliances must be within the limits prescribed by the legal metrology rule.

3. The court's solutions regarding the application of the error rate of the cinemometers

The practice of courts is different in dealing with contravention complaints against contraventions that have found deviations in the road traffic regime by exceeding the speed limits. The analysis of a part of the judgments given by the courts is found in Decision no. 50 of June 26, 2017, file no. 932/1/2017 of the High Court of Cassation and Justice.

The High Court of Cassation and Justice was referred by the Bacau Court for a preliminary ruling on the following question of law: "If the provisions of art 3.1.1 letter c of the Normative Metrology Norm no. 021-05 of 23.11.2005 approved by Order no. 301 of November 23, 2005, should be interpreted as applying at the moment of detection of the offense as a result of the speed measurement by the radar operator / court in the course of solving the contravention complaint, or applies only at the time of verification and approval of the radar apparatus by the legal metrology service."

In order to rule on this complaint, the High Court of Cassation and Justice analyzed the applicable legal provisions in the field and the practice of courts in the country. The Supreme Court rejected as inadmissible the Bacau Court's request that the conditions for admissibility set out in Art. 519 of the Code of Civil Procedure.

The doctrine and case-law of the Supreme Court have identified the following admissibility conditions, which are required to be cumulated [8]:
- the existence of a matter of law, the issue under discussion must be a genuine one, capable of giving rise to different interpretations;
the legal right to be raised during the trial before a court panel of the High Court of Cassation and Justice, of the court of appeal or of the tribunal, invested with the final settlement of the case;
- the right of the law is essential in the sense that its clarification depends on the substantive settlement of the case;
- the right to be new;
- the legal right is not subject to appeal in the interest of the law currently pending and the High Court of Cassation and Justice has not already ruled on the matter of law by a binding decision for all courts (it falls within this category of judgments delivered in - an appeal in the interest of law and preliminary rulings);

As a result of the examination of each individual admissibility condition, it was found that the referral of the Bacau Court did not meet the requirement of the novelty of the issue of law and dismissed the petition as inadmissible.

Also, the Supreme Court ruled that: "The analysis of the content of art. 519 of the Code of Civil Procedure reveals that the novelty of the subject matter of the referral is a distinct condition from that of the previous failure of the High Court of Cassation and Justice to rule on the matter of law or the lack of an appeal in the interest of the law in progress to deal with that matter of law."

Relevant is the analysis carried out within this file, although it has not been exhaustively done, it provides information on how to deal with contravention complaints from different courts.

The High Court of Cassation and Justice considered that the majority orientation of the courts is in the sense of applying the provisions of art. 3.1.1 lit. c) of the Normative Metrology Norm LMN 021-05 only at the time of verification and approval of the radar apparatus by the Legal Metrology Service; therefore, the margin of error is considered in the metrological validation of the apparatus and not in determining the speed in a specific case [9].

In this regard, the Galati Tribunal ruled as follows: "The +/- 4% tolerance of the radar apparatus, provided by NML 021-05, is the maximum deviation range in which each radar device must fit in order to be admitted to the verification metrological approach, and after the metrological verification of the apparatus, that tolerance is not taken into account at every recorded speed already considered to be included in the cinemometer" [10].

On the other hand, the solutions in which the courts pronounced for the application of the above-mentioned normative text, both at the time of the metrological verification and when the offense was found / judged, the supreme court considers it to be a minority orientation.

The decision of The High Court of Cassation and Justice also held two isolated guidelines, a single judgment issued by the Bihor Court, according to which the normative provisions in question apply in the course of the settlement of the contravention complaint, with the consequence of removing the complementary sanction of the suspension of the right to drive and of the fact that the normative text the discussion applies at the moment of finding the contravention.

Conclusions

In order to unify the practice, the Prosecutor's Office attached to the High Court of Cassation and Justice prepares to promote an appeal in the interest of the law, at which time the enforcement of the Supreme Court decision becomes mandatory for all disputes concerning the application of the provisions on the error rate of the cinemometers.

In applying the provisions on the margin of error, even if the radar device is metro-logically met, which the Road Police proves to prove by presenting the metrological verification bulletin, there is no certainty that the speed measured with that device is effective, as long as the legal metrology rule states that it registers a tolerated error of +/- 1% to +/- 4% depending on how it is used (in motion or stationary) and the recorded speed.

I believe that the determining agent has the possibility, but not the obligation, to apply the margin of error when the offense is discovered. He draws up the contravention report according to the data provided by the measuring instrument, but the court is required to apply the margin of error for the following reasons:
1. The legal metrology standard LMN 021 05 provides in Chapter 3, subchapter 3.1.1. titled "Maximum tolerances errors for speed measurement", the values between which the radar device must be in operation and not at metrological verification (calibration of the measuring instrument). The metrological verification is carried out in order to ensure that there are no errors greater than those prescribed by the norm of metrology at the time of use of the apparatus, the existence of an error margin not disputed by the courts until now, they reasonably appreciate that the margin of error shall be applied subsequently to the finding of contravention.

2. Given the fact that in the ECHR case-law the offenses are assimilated to criminal offenses and the rules on the presumption of innocence are incidences, we mention that the report of finding and sanctioning the contravention can not prove itself of the existence of the deed, its author and guilt, this minutes being merely the act by which a person is accused of committing the offense.

3. In accordance with the principle of the presumption of innocence, the petitioner is not obliged to prove his innocence, any doubt by taking advantage of the person accused of committing the offense, according to the principle in dubio pro reo. Therefore, in the absence of a binding decision as to the timing of the error rate of the cinemas, there is a doubt as to the benefit of the petitioner.

References

[1] See Article 5 of the Code of Criminal Procedure. The principle of the presumption of innocence is also found in the Universal Declaration of Human Rights (Article 11) and in the Romanian Constitution (Article 23 (11)).
[3] Published in the Official Gazette no. 1.102 bis of 7 December 2005.
[8] See in this respect Decision No. 50 of 26 June 2017 of the High Court of Cassation and Justice, point 35
[9] Decision No. 50 of 26 June 2017, the High Court of Cassation and Justice