

## Service order execution procedure (in terms of labour law)

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### **Abstract**

*From the perspective of labor law, it is understood that the execution of the order of service, the essence of labor discipline, has in principle lawful purpose and, consequently, can not attract liability. It requires, however, the regulation mechanism by which theoretical assertions regarding order execution service materializes from a procedural standpoint.*

**Keywords:** *the individual employment contract; legal liability; order of service; discipline at work; conscience clause.*

**JEL Classification:** K31

### **I. Introductory aspects**

A). In any of its forms, liability – including those covered by labor laws – by the idea of social responsibility – natural in any society, regardless of its type<sup>2</sup>.

Legal liability can be incurred only if the constitutive elements of the illegal act. But besides these circumstances that lead to graduation penalty, interest and those special circumstances, in principle, the labor law does not regulate self-contained and specific and that result ceases unlawful act – although in materiality her, it is harmful<sup>3</sup>.

The circumstances extrinsic act which constitutes grounds of exemption, involves a conjunction operation of the rules<sup>4</sup> of the Civil Code<sup>5</sup> (common law) of

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<sup>2</sup> Respectively: disciplinary, that specific form of liability; financial liability as a variety of contractual civil liability; material, as a specific form of liability; contravention liability, meaning sanctioning contraventions of labor legislation; criminal responsibility, meaning punish certain crimes by labor legislation (see, in this regard, I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, third edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2014, p.767).

<sup>3</sup> See, in this regard, S. Ghimpu, I.T. Ștefănescu, Ș. Beligrădeanu, Ghe. Mohanu, *Dreptul muncii, Tratat*, volume II, Scientific and Encyclopedic Publishing, Bucharest, 1979, p. 51; A. Țiclea, *Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență*, eighth edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2014, p. 897.

<sup>4</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 832.

<sup>5</sup> Exclusion of liability causes heritage are: force majeure and fortuitous event (art. 1351 Civil Code); crime victim or a third party (art. 1352 Civil Code); exercise of the rights (art. 1353 Civil Code); other reasons for exemption (art. 1354 Civil Code); liability clause (art. 1355 Civil Code); self-defense (art. 1360 Civil Code); trade secret disclosure (art. 1363 Civil Code); carrying out an activity required or permitted by law (art. 1364 Civil Code).

the Criminal Code<sup>6</sup> with the Labour Code<sup>7</sup> – to the extent that they are compatible with the specific ratio legal work.

**B).** In the following we will analyze a specific form of execution of an obligation by the employee – respectively order execution service.

**a).** As shown, labor legislation has taken in issuing general legal framework on this specific issue. Relevant to this study is that the service order execution does not know a single rulebook neither ILO nor the EU<sup>8</sup>.

Therefore, to resolve situations that arise in practice, one must use the rules of the common law (civil law) and the criminal.

In accordance with art. 1364 of the Civil Code, carrying out an activity required or permitted by law or order of a superior does not relieve of responsibility the man who may be aware of the unlawful nature of his act committed in such circumstances.

Art. 21 para. 1 of the Criminal Code states that it is justified<sup>9</sup> under the criminal law act consisting of the exercise of a legal right or fulfill an obligation imposed by law, subject to conditions and limitations contained therein. According to art. 21 para. 2 of the Criminal Code, is also justified under the criminal law act

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<sup>6</sup> In criminal law there are following categories of cases: **a) supporting causes:** self-defense (art. 19 of the Criminal Code); state of emergency (art. 20 of the Criminal Code); unite as exercise or performance of an obligation (art. 21 of the Criminal Code); the injured person's consent (art. 22 of the Criminal Code). **b) causes that do not attract liability:** physical coercion (art. 24 of the Criminal Code); moral coercion (art. 25 of the Criminal Code); not be attributable to excess (art. 26 of the Criminal Code); underage defendant (art. 27 of the Criminal Code); irresponsibility (art. 28 of the Criminal Code); intoxication (art. 29 of the Criminal Code); error (art. 30 of the Criminal Code).

<sup>7</sup> Accordingly, the force majeure and normal risk of service – as shown (art. 254 par. 2 of the Labor Code).

<sup>8</sup> International labor rules provide that the burden of regulation of disciplinary liability of individual employees performing the contract work is left to the exclusive jurisdiction of each state (the exception Convention no. 158/1992 regarding the termination of employment by the employer provides – in art. 7 – that: "An employee can not be fired for reasons related to his conduct or his work before being given the opportunity to defend himself against the allegations made against him ..."). Liability restorative ILO rules exist which, although not specifically refers to that principle, to include provisions to this effect (such as, for example, Convention no. 95/1949 on the protection of wages, Convention no. 100/1951 on equal remuneration for work male and female labor for work of equal value; Convention no. 131/1970 on minimum wage fixing; Convention no. 183/2000 on maternity protection; Convention no. 106/1957 on weekly rest; Convention No. 146 / 1976 on paid leave etc.). European labor rules do not provide legal regime of disciplinary liability of employees during the performance of individual work. Reconstructive responsibility knows no single EU regulation, there are only rules that contain provisions on the conduct of legal obligations to work – in the case of non-financial liability is engaged (such as, for example, the Charter of Fundamental Rights; Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Directive 91/533/EEC on an employer's obligation to inform employees; Directive 2002/14/EC on the general framework informing and consulting employees etc.).

<sup>9</sup> Not considered a criminal offense under the criminal law, if any of the reasons justifying prescribed by law (art. 18 par. 1 of the Criminal Code). The effect extends to supporting causes participants (art. 18 par. 2 of the Criminal Code).

consisting in fulfilment of an obligation imposed by the competent authority, as provided by law, unless it is manifestly illegal<sup>10</sup>.

The provisions mentioned, art. 21 para. 1 Criminal Code, aimed at a right or an obligation imposed by law (and not another source of law), while art. 21 para. 2 Criminal Code refers to an obligation imposed by the competent authority in the manner prescribed by law<sup>11</sup>. In the second case (art. 21 para. 2 of the Criminal Code) integrates, in our view, and the order given to the employee by the employer (or by other hierarchical superior)<sup>12</sup>.

**b).** From the perspective of labor law, the employee has the obligation to respect legal provisions of orders and hierarchical – otherwise they might be constitutive elements of the disciplinary deviation (art. 247 para. 2 of the Labor Code). Furthermore, according to art. 40 para. 1 letter c of the Labour Code, the employer recognized his right to give mandatory orders to the employee on their legality.

It appears thus evident that the execution order<sup>13</sup> fulfilment service is nothing but a legal obligation incumbent on the person assigned following the conclusion of the individual employment contract – this task is closely correlated with subordination and ensure labor discipline<sup>14</sup>.

**C).** Service order execution, being the essence of labor discipline, it is understood that the observance, in principle, is a legitimate and, consequently, can not attract liability<sup>15</sup>.

It requires, however, some clarifications and circumstantiation if execution of the service or inopportune unlawful (wrong, unfounded) that naturally attracts and harm the employer.

**a).** As shown, according to art. art. 40 para. 1 letter c conjunction with art. 247 para. 2 of the Labour Code, the employee tasked to observe only the laws of orders and hierarchical. *Per a contrario*, as stated in legal doctrine of labor law<sup>16</sup>, execution of an order manifestly illegal service, issued in violation of legal rules on jurisdiction of the issuing body, the content and form of that order, does not release the employee from disciplinary. Everything is clearly illegal and an order that the employee's superiors had stopped to execute an obligation incumbent *ex lege*.

<sup>10</sup> In legal doctrine highlighted that only if the order is manifest illegality, refusing enforcement is "justified, allowed and even required" (see V. Pop, *Răspunderea disciplinară a magistraților*, "Studii de Drept Românesc" no. 1-2/1996, p. 99).

<sup>11</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 772.

<sup>12</sup> *Ibidem*.

<sup>13</sup> In legal doctrine employer it showed that the agreement is similar to the service order, constituting a cause of relief when the Member, through its organs, authorizes an employee to carry out actions that have the effect of reducing unit heritage. However, unlike the order of service that can emanate from any hierarchical superior, if the employer's agreement, consent can be given only by a person who is an organ of the legal person. The agreement is a declaration, when the service order requires the execution of (see, in this regard, A. Țiclea, *op.cit.*, p. 898-899).

<sup>14</sup> See, in this regard, S. Ghimpu, I.T. Ștefănescu, Ș. Beligrădeanu, Ghe. Mohanu, *op.cit.*, p. 96.

<sup>15</sup> *Ibidem*.

<sup>16</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 772.

Consequently, we consider that guilt or innocence executing employee is assessed according to whether manifest illegality of the order was received or not. Evidence of wrongdoing is assessed on a case by case basis, depending on a number of factors such as, for example, the position held by the employee concerned; if nature can obviously occupied position to realize whether or not the order is legal; the training of the person concerned; previous warnings about the illegality of the other provisions cards<sup>17</sup> etc.

*b).* Another problem is that the employment of the possibility of legal liability if received an order is formally legal, but, in fact, the possible effects, appears inappropriate.

In principle, the employee is not obliged to assess him alone, the opportunity of an order received; respond in such a case, the one who gave culpable, order by definition inappropriate<sup>18</sup>. However, those employees who have the obligation to verify the appropriateness service or operations of certain expenses, and disciplinary liable in the event that executes an order manifestly inappropriate (such as, for example, accounting officers on material costs, money, loan officers, etc.)<sup>19</sup>.

*D).* Outside legal situations that do not attract legal liability outlined above, the contracting parties can negotiate a conscience clause – unforeseen specific clause in the Labour Code – which, once inserted in the individual employment contract, entitles the employee to not execute a legal order service, to the extent that – if it would implement – would contravene, in this way, various options determined by his conscience<sup>20</sup>. The employee, however, must prove that it can execute pertinent legal order of service due to its objection of conscience<sup>21</sup>.

It is possible, exceptionally, as moral reasons (ethical) – legally recognized – the employee is entitled to refuse to execute an order of service, even without the individual work in their contract a clause of conscience. We emphasize that such a refusal based on moral considerations and defending disciplinary liability must be expressly covered by a bill<sup>22</sup>, to be invoked by the employee<sup>23</sup>. In other words,

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<sup>17</sup> See, in this regard, S. Ghimpu, I.T. Ștefănescu, Ș. Beligrădeanu, Ghe. Mohanu, *op.cit.*, p. 97.

<sup>18</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 772; I. Șorică, *Răspunderea disciplinară a salariaților*, Wolters Kluwer Publishing House, Bucharest, 2010, pp. 130-131.

<sup>19</sup> See, in this regard, B. Vartolomei, *Dreptul muncii pentru învățământul economic*, Economica Publishing House, Bucharest, 2009, p. 143.

<sup>20</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 359.

<sup>21</sup> *Idem*, p. 360.

<sup>22</sup> Thus, in the past, researchers could, according to art. 24 lit. n the Government Ordinance no. 65/2002 regarding the status of research and development (published in the "Official Gazette of Romania", Part I, no. 647 of 31 August 2002 rejected act by Law no. 265/2003, published in the "Official Gazette of Romania" part I, no. 434 of 19 June 2003) refuse reasoned moral and ethical considerations, to participate in scientific research that have a negative impact on human and natural environment.

<sup>23</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 773.

while the legality/illegality is a general requirement, morality/immorality expressly required to be regulated for the employee to avail of its existence<sup>24</sup>.

## II. Service order execution procedure

A). Legislation does not regulate the mechanism by which allegations evident above theoretical – that integrates the content of art. 1364 Civil Code and that of art. 21 para. 1 and 2 of the Criminal Code – materializes from a procedural standpoint.

There is only one legal rule<sup>25</sup>, the exception which expressly states the conditions under which a certain type of employee may refuse a provision of his employer: according to art. 11 para. 4 of Government Decision no. 1256/2011 on the operational conditions and the procedure for authorizing the temporary employment<sup>26</sup>, where assignments – provided by temporary employment – can endanger the life, physical and/or mental temporary employee, it is entitled to refuse written refusal at issue can not be grounds for punishment or dismissal.

B). Conversely, if certain professional categories were adopted regulations on procedural mechanism to execute the order of service, of which we highlight the following as examples:

a). Thus, in the case of civil servants, legal norms (art. 45 par. 2 and 3 of Law no. 188/1999 regarding the status of public) establishes the following mechanism:

- the civil servant is entitled to refuse in writing and motivated, fulfilling orders received from the supervisor if they deem illegal;
- if the originator provision made in writing a public servant is obliged to execute it, unless it is manifestly illegal. Statutory rules not clear if the order is made in writing that, at the outset or later – so after initially maintaining his record was made. We appreciate that interpretation is rational in the sense that the procedure should remain the same, whether the order is filed in writing at the outset or is initially verbally and subsequently formulated in writing.
- the public official has a duty to inform the superior of the person who issued the disposal of such cases.

Theoretically, it is possible that the provision that executed it, in these circumstances, the public official yet to be unlawful<sup>27</sup>. But who executed it will not be liable to disciplinary if previously followed the procedure prescribed by law. Liability will return, so only one who persisted in giving an illegal order.

b). Likewise, the rules under Government Ordinance no. 121/1998<sup>28</sup> laying down the following procedural aspects:

<sup>24</sup> *Ibidem*.

<sup>25</sup> *Idem*, p. 772.

<sup>26</sup> Published in the "Official Gazette of Romania", Part I, no. 5 of January 4, 2012.

<sup>27</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 772.

<sup>28</sup> Published in the "Official Gazette of Romania", Part I, no. 328 of August 29, 1998.

- the military did not respond to material<sup>29</sup> damages<sup>30</sup> in the execution order of the head of the master or competent<sup>31</sup>. In this case, the master or head of the unit is responsible material (art. 6 para. 1 d in conjunction with art. 18 par. 1 letter to the Instructions No. 114/2013 concerning material liability for damages personnel Interior Ministry<sup>32</sup>)

- they are exempt from the rule outlined above-soldiers who, having the opportunity to remove part or all damaging consequences of the order received, did not report this in writing and did not, negligence or bad faith, measures to avoid the damage – situations that meet with commanders or the heads of (art. 6 para. 2 in connection with Art. 18 par. 3 and 4 of Instruction no. 114/2013). In achieving the goal reminded states that: reporting must be in writing, with registration number at the main office (art. 18 par. 4 of the Instruction no. 114/2013); if this is not possible, the report records 24 hours from execution or returning from mission - mentioning, necessarily, that have been reported verbally to the person who gave the order / execution disposal of harmful consequences (art. 18 para. 4 of the Instruction no. 114/2013).

### III. Conclusions and proposals *de lege ferenda*

In conclusion, as we have shown, order execution service is in principle lawful purpose and, consequently, can not attract liability.

However, *de lege ferenda* we consider that it would be useful labor law legislation governing procedural mechanism to execute the order of service – to ensure uniformity of the rules applicable in this case and will proceed as follows:

- the employee have the right to refuse written and motivated to fulfil orders received superior if they deem illegal;
- if the originator available formulate in writing the employee be required to execute it, unless it is manifestly illegal; procedure must remain the same, whether the order is filed in writing at the outset or is initially verbally and subsequently formulated in writing;
- employee have a duty to inform the superior of the person who issued the disposal of such cases.

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<sup>29</sup> No liability is a specific form of liability - financial liability with forming, generic, restorative liability labor law (see, in this regard, I.T. Ștefănescu, *op. cit.*, p. 767).

<sup>30</sup> The damage must be a direct consequence of the exact execution of the order given – it is also necessary that the staff available to carry out or execute the order received have not been able to prevent even partial, of its damaging consequences (art. 18 par. 1 b and c of Instruction no. 114/2013).

<sup>31</sup> According to art. 18 para. 2 of the Instruction no. 114/2013, complies with the requirements set out without exhaustive enumeration have the following: written order, registered/unregistered, but always bearing the handwritten signature of the master / chief responsible; the possibility of supporting existing witness evidence on the spot where the person received verbal orders from the commander/chief responsible; the possibility of storing audiovisual recordings videoconference system, intranet etc.

<sup>32</sup> Published in the "Official Gazette of Romania", Part I, no. 469 of July 29, 2013.

Given the reality of the absence of statutory regulations, consider – as shown founded legal doctrine<sup>33</sup> – that nothing precludes such a system precisely to order the relations between employees and bosses hierarchical be established in other categories of establishments than public authorities and institutions, through their national rules.

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<sup>33</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 773.