Fiscal legislation and protection of the environment on the European and national level. Relevant jurisprudence of the European Court of Justice and the Constitutional Court of Romania

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Abstract

Legal fiscal tools may represent a "powerful engine" to strengthen environmental protection. They mainly refer to eco-taxes, reduction and/or exoneration of taxes, taxes dedicated to actions in favor of the environment protection. Relevant examples on the "internalization" of related costs through taxation, as well as para-fiscal taxes may be offered, together with a perspective of new fiscal policies developed on international and European level. In Romania, several legislative acts in the respective area have been adopted and implemented, starting with 2008, followed by several decisions of the national courts, as well as relevant judgments issued by the European Court of Justice (CJEU), declaring the national legislation as being incompatible with the texts of the Treaty. A legal provision of the European law may be used within the framework of the review of constitutionality, as an indirect rule of reference, pursuant to Art. 148(2) and (4) of the Constitution of Romania.

Keywords: *fiscal legislation, protection of the environment, Court of Justice of the European Union, Constitutional Court of Romania***.**

JEL Classification: K32, K33, K34

1. Preliminary considerations

Fiscal measures may represent a "powerful engine" to orient and positively change individual and collective behaviors and various countries world-wide have developed legal fiscal tools and have implemented legislative provisions in order to strengthen environmental protection. The main purposes of the respective legal provisions are generally the same in all countries, meaning:

- *to obtain the dissuasive effect* of the legal provision, referring to a certain behavior of all public and private actors;
- to support and encourage *pro-active measures* in favor of the protection of the environment;
- to further *invest in environmental measures and projects*, the amount of money obtained through these taxes.

Consequently, the fiscal tools do not refer only to *eco-taxes,* imposed on emissions or activities that generate pollution, but also to *reduction or exoneration of taxes* to be paid, as well as *taxes directly dedicated to actions in favor of the environment protection.*

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In the same time, part of these fiscal tools implement the *"polluter-pays principle",* as a "classical" tool, like for ex., the taxes on water (on using of water resources, on water pollution and its remedies etc.) meaning, in fact, to "take the necessary resources from the potential polluters to finance public policies in the area of water/environment protection"[2].

Fight against air pollution and noise offers relevant examples on the "*internalization" of related costs* through taxation of activities (for ex., taxes on aviation activities and/or operators, based on different levels of air pollution and noises produced by airplanes; taxes on noise reduction; the so-called "para-fiscal" taxes on ejecting polluting substances in the air), as well as *para-fiscal taxes* on the ejection of pollutant substances, like oils (mineral and industrial used oils) aiming at supporting the costs of collection, disposal and recovery of the respective substances.

On a certain moment, *new fiscal policies have been developed on international level* (by OECD, for ex., or following the works on Kyoto Protocol to reduce air pollution and greenhouse gas emissions), introducing the eco-taxes in various countries, different from the implementation of the classical "polluter pays" principle, and consisting in taxation of all activities which, during production and commerce/exchange of goods, may contribute directly or indirectly to environment pollution (air, water, soils pollution and other activities able to increase the greenhouse effect).

Following the *OECD' recommendations and the 5th Community Environmental Action Program – "Towards sustainability",* the European Union is favorable to the implementation of fiscal norms and tools (eco-taxes, rules regulating the common market etc.), based on the fact that the respective tools are enough flexible, oriented on positive costs-efficacity results and able to reach the strategic goals of environment protection[3].

The EU did not adopt, until this moment, regulations dedicated to environmental fiscal measures, so *Member States remain free to tax on their own public policies*, all activities and products having a possible impact on environment protection, but *respecting the Treaty' rules on common market.*

In the same time, starting with the 5th Action Program, the European bodies have developed fiscal tools, mainly dedicated to *"encourage"* ("esprit d'incitation") the eco-taxes[4], as follows:

- the *taxation on energy products and electricity*[5] restructuring the European framework of taxation in the respective area. The legal text was grounded on the former Art.93 (actual Art.113 of the Treaty) and

[2] The "polluter-pays" principle has been initially developed by OECD in the early '70s and then adopted on international level. The Rio Declaration of 1992 included it between its main principles (the 16th principle) and it is also part of the European law – art.191 of the Treaty (TFUE), together with prevention and precaution principle, as developed later by several directives.

[3] CE, "Livre vert sur les instruments fondes sur le marche en faveur de l' environnement et des objectifs politiques connexes", COM (2007) 140 final, p.1-3.

[4] Eve Truilhe-Marengo, *Droit de l'environnement de l'Union Europeenne*, Ed. Larcier, Coll.Paradigme, Paris, 2015, p.90-93.

[5] Directive 2003/96 of October 27, 2003, published in the Official Journal L 283, October 31, 2003.

signified more than encouraging eco-activities, through fixing the minimum level of taxes applicable to energy products - if they are used as fuel or heating fuel, and electricity-, and authorized Member States to take necessary measures to support activities to reduce the pollutant emissions. But, together with a harmonized legal framework, several special regimes and exceptions/exonerations have been approved, which means that the text of the Directive offers also an *image of the difficulty to harmonize fiscal measures on European level*[6];

- the *EU Water Framework-directive*[7] establishing that, starting with 2010, Member States should use fiscal policies aiming at stimulating consumers to use water resources in a sustainable manner; but it was relatively far to generate a real policy of taxes and prices based rigorously on "polluter-pays" principle;
- the *Eurovignette*[8] - to be paid by vehicles (especially long/heavy vehicles) for using the railroads and roads infrastructure, implementing the "polluter-pays" principle. The Directive does not oblige Member States to establish additional taxation on vehicles, for air pollution and noise they may generate, but authorize Member States to introduce the different levels of taxation, based on the environmental performance of the vehicles. It offers also the possibility of exemptions from the payment of the respective taxes (for ex., for those less than a certain weight) which diminish the interest or the efficacity of environmental protection through these taxes.

It is obvious that the regulations adopted on international and European level are properly transposed and implemented by Member States, but some of them may be contrary of European and international norms and relevant jurisprudence (CJEU' jurisprudence) and are subject of decision of the Court of Justice of the European Union (CJEU), respectively national courts, as well as Constitutional Courts.

For example, the *Constitutional Council of France* has declared un-constitutional the so-called "taxe carbonne" (referring to CO2 emissions issued by transport, agriculture, waste management etc.), underlining its lack of efficiency and its un-fairness, based on the large number of exceptions from tax payment, meaning that finally approx. 93% of industrial carbon emissions (excluding fuel) are excepted from the tax payment, the heavy duty remaining on citizens and houses which was considered un-equitable. It was not the environmental fiscal measures that the Constitutional Council disapproved, but the way they have been implemented[9].

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[6] See E.Truilhe-Marengo, *op.cit*, p. 91.

[7] Directive 2000/60 of October 23, 2000, published in the Official Journal L 327, December 22, 2000.

[8] Directive 2011/76 of September 27, 2011, published in the European Official Journal L 269, October 14, 2011.

[9] W. Mastor, "*La contribution carbone a la lumiere de la decision du Conseil constitutionnel du 29 Novembre 2009…*" cited by Agathe van Lang, *Droit de l'environnement*, 4e ed. mise a jour, Themis Droit PUF p. 138.

It is obvious that combined legislative measures and tools should be developed and may represent a "successful story" for a proper, efficient protection of the environment, such as: mandatory measures (like, for ex., the tax policies and norms), punitive measures (civil and criminal liability for the environmental damages), voluntary participation and involvement of citizens and NGOs, fiscal and economic "friendly" tools (like, for ex., reductions of taxes to support eco-friendly activities).

2. Some relevant aspects of the Romanian legislation regulating taxes for environmental protection and jurisprudence of the Constitutional Court of Romania

The right to a healthy environment is stipulated by Article 35 of the Constitution of Romania: *"(1) The State shall acknowledge the right of every person to a healthy, well preserved and ecologically balanced environment. (2) The State shall provide the legislative framework for the exercise of that right. (3) Natural and legal persons shall be bound to protect and improve the environment."*

We may note also a certain time sequence and evolving case law in the area of environmental taxes, taking into account the example of the special tax to be paid on the first registration in Romania of passenger cars and motor vehicles, initially regulated in 2003, by Articles 214^1-214^3 of the Fiscal Code (Law no.571/2003).

Subsequently, the Government has adopted Emergency Ordinance no. 50/2008, introducing a pollution tax for motor vehicles (1 July 2008-13 January 2012), which, in its preamble, stated that the respective tax was to be paid with a view to protecting the environment by implementing programmes and projects for improving air quality and for ensuring compliance with the limit values laid down in European legislation in this area. According to Article 1 of Government Emergency Ordinance no. 50/2008, the purpose of the legislative act was to set the legal framework for establishing the pollution tax for motor vehicles, which was to constitute revenue for the budget of the Environment Fund and was to be managed by the Environment Fund Administration, to finance environmental programmes and projects, such as: the programme for stimulating the renewal of the national fleet of motor vehicles; the national programme for the improvement of the quality of the environment through the creation of green spaces in built-up areas; projects for the replacement or improvement of traditional heating systems by systems using solar energy, geo-thermal energy and wind energy; projects relating to the production of energy from renewable sources: solar, wind, geothermal, biomass, micro hydropower plants; projects concerning afforestation of land degraded or grubbed up; projects of re-naturalisation of land removed from the natural heritage; projects for cycle tracks.

On 7 April 2011, **the Court of Justice of the European Union delivered a judgment in Case C-402/09**, *Ioan Tatu v the Romanian State, through the Ministry of Finance and Economy, the General Directorate of Public Finances of Sibiu, the Administration of Public Finances of Sibiu, the Environmental Fund Administration*

and the Ministry of the Environment, in response to the preliminary request made by a Romanian ordinary court.

The Court of Justice of the European Union stated that Government Emergency Ordinance no. 50/2008 had the effect of discouraging the import to Romania and use of second-hand vehicles purchased in other Member States of the European Union (par. 58). It stated that Article 110 of the Treaty (former Article 90 EC) must be interpreted as precluding a Member State from introducing a pollution tax on motor vehicles on their first registration in the respective Member State, if the tax discourages the use of second-hand vehicles purchased in other Member States, but without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market (par. 62).

As a result of the CJEU' judgment, the respective Government Emergency Ordinance was replaced by Law no. 9/2012 concerning a tax on pollutant emissions from motor vehicles (in force between 13 January 2012 and 15 March 2013), which, in Article 1, provided that it sets the legal framework for the tax on pollutant emissions from motor vehicles (which was to become revenue to the budget of the Environment Fund and be managed by the Environment Fund Administration, in order to finance environmental programmes and projects).

In 2015, *the Court of Justice of the European Union noted, in its judgment of 14 April*, in Case C-76/14 *Mihai Manea v the Prefect's Office — County of Brașov — Driver License & Vehicle Registration Office*, referring to the provisions of Law no. 9/2012, that Article 110 of the Treaty must be interpreted as not precluding a Member State from introducing a tax on imported second-hand vehicles at the time of their first registration in the respective Member State and on vehicles already registered in that Member State at the time of the first buy-selling (or other type of ownership' transfer) within that Member State; but, precluding the Member State from exempting the owners from paying the tax for vehicles already registered, and for which a tax was previously paid, but found to be incompatible with EU law (through an CJEU' decision).

Following this decision of CJEU, the Romanian legislator replaced the Law no. 9/2012 by Government Emergency Ordinance no. 9/2013 on the *environmental stamp duty in respect of motor vehicles.* In its preamble, it was mentioned the need to ensure the appropriate framework for programmes and projects in the field of environmental protection, to improve air quality and to comply with the limit values laid down by European legislation in the respective area. It aimed to transpose also the European Commission's recommendations laid down in its Communication of 14 December 2012, mentioning that *various tariffs of car taxation should not be based on technology-specific criteria, but rely on objective, commonly available and policy-relevant performance data*, such as CO_2 emissions. It regulated the environmental stamp duty (representing revenue for the Environmental Fund budget and to be used by the Environment Fund Administration, to finance programmes and projects for the protection of the environment).

On 9 June 2016, the Court of Justice of the European Union delivered its third judgment in this area, in Case C-586/14, *Vasile Budișan v the Administration for Public Finances of Cluj County*. It mentioned that the provisions of Government

Emergency Ordinance no. 9/2013 exempted from the payment of the environmental stamp duty, the transfer of ownership of second-hand vehicles the registration of which in Romania has already given rise to the payment of a tax incompatible with EU law, while second-hand vehicles imported from another Member State remain invariably subject to environmental stamp duty at the time of their registration, in Romania. Thus, *such an exemption of tax payment was capable to offer a competitive advantage on second-hand vehicles already registered on the Romanian market, and therefore discourage the importation of similar vehicles from other Member States* (par. 42).

Moreover, CJEU mentioned (par.27) that "a Member State may not charge tax on imported second-hand motor vehicles based on a value which is higher than the real value of the vehicle, with the result that they are taxed more heavily than similar second-hand cars on the domestic market. Therefore, in order to avoid discriminatory taxation, the actual depreciation of second-hand vehicles should be taken into account (judgment of April 2015 in *Manea*, C-76/14, par.34 and the case-law cited)". Also, according with par.28 of the respective CJEU' judgment a Member State "might be able to establish, by means of fixed scales determined by statute, regulation or administrative provision and calculated on the basis of criteria such as a vehicle's age, kilometrage, general condition, method of propulsion, make or model, a value for second-hand vehicles which, as a general rule, would be very close to their actual value (see judgment of 14 April 2015 in *Manea*, C-76/14, par. 35 and the case-law cited)".

CJEU held, therefore, that Article 110 of the Treaty must be interpreted as precluding the respective Member State to exempt from paying the tax by owners of vehicles already registered, who paid previously a tax that was found incompatible with the EU law, but, in the same time, the did not benefit from reimbursement of the respective tax, from the part of the State (par. 54).

As a result, Government Emergency Ordinance no. 9/2013 was replaced, as of 1 February 2017, by Law no. 1/2017 for elimination of certain fees and charges, and amending and supplementing certain legislative acts, published in the Official Gazette of Romania, Part I, no. 15 of 6 January 2017.

In its case law the Constitutional Court of Romania decides that the environmental stamp duty is aiming at establishing the environmental fund with a clear purpose, whereas it is a para-fiscal charge, and it is payable only once. Also, the Constitutional Court mentions that, according to Article 35 (2) of the Constitution, the State provides the legislative framework for the implementation of the right to a healthy environment, based on the fact that the collected stamp duty becomes revenue to the Environmental Fund budget and it is used by the Environment Fund Administration to finance programmes and projects for the protection of the environment. In those circumstances, the Court concluded that the respective legislative measures had in view the fulfilment of the obligation laid down in the Constitution itself (see the Decision no. 162 of 17 March 2015, published in Official Gazette of Romania, Part I, no. 370 of 27 May 2015, par. 24).

All exceptions of unconstitutionality concerning this tax have been rejected as unfounded.

By its Decision no. 668 of 18 May 2011, published in Official Gazette of Romania, Part I, no. 487 of 8 July 2011, the Constitutional Court rejected by a majority vote, as unfounded, the exception of unconstitutionality of the provisions of Article 4 (a) of Government Emergency Ordinance no. 50/2008 introducing a pollution tax for motor vehicles, of Annexes 1-4 to this Emergency Ordinance, as well as of Government Emergency Ordinance no. 50/2008 as a whole. Upon reaching that conclusion, the Court held, referring to its case-law, with regard to the infringement of Articles 30, 34 and 110 of the European Union Treaty, that *is not within the competence of the Constitutional Court to assess the compatibility of provisions of national law with the Treaty of the European Union, in the light of Article 148[10] of the Constitution*. Such *competence, namely to raise the question if there is a contradiction between the national law and the Treaty, belongs to ordinary courts* which, in order to reach a fair and lawful conclusion, either of its own duties or on the request of a litigant, *may submit a preliminary request to CJEU*, under the Article 267 of the Treaty, to the Court of Justice of the European Union. Should the Constitutional Court consider itself competent to rule on the compatibility between national law and European law, such would lead to a possible conflict of jurisdiction between the respective courts, which, at this level, shall be inadmissible.

The Constitutional Court observed that, on 7 April 2011, the Court of Justice of the European Union delivered a judgment in Case C-402/09, *Ioan Tatu against the Romanian State, through the Ministry of Finance and Economy, the General Directorate of Public Finances of Sibiu, the Administration of Public Finances of Sibiu, the Environmental Fund Administration and the Ministry of the Environment*. The effects of the judgment are those shown in the settled case-law of the Court of Justice of the European Union, namely that the interpretation which - in the exercise of the jurisdiction conferred upon it by former Article 177 (now Article 267 of the Treaty), the Court of Justice gives to a rule of Community law -, clarifies and defines where necessary, the meaning and scope of that rule, as it must be or ought to have been understood and applied from the time of its coming into force (judgment of 27 March 1980 in Case 61/79, *Amministrazione delle finanze dello Stato v Denkavit italiana Srl*., par. 16; judgment of 2 February 1988 in Case 24/86, *Vincent Blaizot v University of Liège and others*, par. 27, and judgment of 15 December 1995 in Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, par. 141).

3. Conclusions

Whereas the Romanian Constitutional Court is neither a legislator in itself nor a court having jurisdiction to interpret and apply European law in disputes relating to citizens' rights, it is to be mentioned that a legal provision of the European acquis may be used within the framework of the review of constitutionality, as an indirect rule of reference, pursuant to Article 148 (2) and (4) of the Constitution of

[10] Article 148 refers to Romania's EU accession.

Romania, only if two conditions are cumulatively met: on one hand, *the legal provision shall be sufficiently clear, precise and unambiguous by itself*, or *its reasons should have been established in a clear, precise and unambiguous manner by the Court of Justice of the European Union* and, on the other hand, *the legal provision shall have a certain level of constitutional relevance*, so that its content may infringe or may be contrary to the Constitutional texts. In such a case, the Constitutional Court' decision is apart from the mere implementation and interpretation of the law (a competence belonging to ordinary courts), or from the legislative policies developed by the Government, as appropriate. In the light of the aforementioned cumulative conditionality, *the Constitutional Court is free to directly refer to judgments of the Court of Justice of the European Union, or whether to formulate itself preliminary questions*, in order to determine the content of the European legislative provision.

Such an approach comes from the cooperation between the national constitutional courts and the Court of Justice of the European Union, as well as from their judicial dialogue, without the establishment of any hierarchy between them. In this case, although the rationae of the European standards have been established by the Court of Justice of the European Union, the requirements arising from the respective judgments are related to the obligation of the legislator to lay down rules accordingly.

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