

OBSERVATIONS ON THE UNCONSTITUTIONALITY OF GEO NO. 34/2009 REGARDING THE 2009 BUDGET RECTIFICATION AND THE REGULATION OF SOME FINANCIAL-FISCAL MEASURES AND THE NEGATIVE INFLUENCES ON SMALL AND MEDIUM-SEIZED ENTERPRISES (SMES)

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Abstract: *Considering the great number of taxes that Romania has presented by this time, the highest in Europe and the fourth place in the world, the European Commission considered that this is the greatest number of existing taxes in Europe, requiring motivated the reduction of their numbers, with the purpose of combating bureaucracy and promoting a business environment. The large number of taxes, the bushy law in this matter will not help, for sure, Romania find its way out of this present economic crisis.*

Regarding SMES, by the Article 157 in the Treaty of Establishing the European Communities, there has been created the necessary legal support for the promotion and development of this kind of enterprises in the European business environment. Hence, it is obvious that European bodies headed along the time to the encouragement and support for starting this kind of enterprises, for promoting the trade and economic cooperation between them, and last but not least, to ensure a legal framework for competitiveness in a united European economy. Consequently, the European Union imposed the adoption of some strategies at the Community level and a subsidiary national one, thing that would determine the Member States to lay at its fiscal and regulatory policy basis in this domain a compulsory and overriding principle "Think small first".

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Considering the great number of taxes that Romania has presented by this time, the highest in Europe and the fourth place in the world¹, hardly would have sufficed the basket that Romans used to collect money, which by its name "fiscus" determined the origin of the concept of "fiscality"².

Thus, by an interdepartmental group established by the Government consisting of representatives of the Ministry of Finance and of other Ministries and institutions, there were

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¹ <http://www.business-point.ro>

² M.Şt.Minea, L. Chiriac, C.F. Costas, *Dreptul finanțelor publice*, Ed. "Access", Cluj-Napoca, 2005, p. 251.

currently identified 558 taxes and fares, established by a number of 185 normative acts. Out of these 558 taxes, fares and charges, 74 are of fiscal nature and 484 are taxes and tax revenues.³

Assessing this number of taxes, the European Commission considered that this is the greatest number of existing taxes in Europe, requiring motivated the reduction of their numbers, with the purpose of combating bureaucracy and promoting a business environment. The large number of taxes, the bushy law in this matter will not help, for sure, Romania find its way out of this present economic crisis.

In matters of fiscality, the national provisions have as a main objective the facilitation of its functioning, but it is a direct reality that generally there will appear more and more community provisions. No doubt that Community law cannot be an obstacle for the application of the national legislation of each State, but it is clear that the latter, in both direct and indirect fiscality should align to the rules found in the European acts of common regulatory provisions (Directives, Recommendations, Communications, etc.). Unfortunately, European norms regulate successfully in fiscal matter only one tax charge, and that one indirectly, namely the value added tax, otherwise limiting itself to devote to a lesser extent other taxes relating to business and firms, particularly the cross-border, corporate restructuring transactions, mergers and similar operations, the concentration of capital, administrative cooperation in the elimination of bureaucracy and of a double taxation⁴.

Obviously the tax policy of the Romanian state should be included in European fiscal policy, in the foundations of the EC Treaty, which obliges Member States, especially after the Maastricht Treaty, to harmonize its fiscality, the direct and indirect taxation system conforming to this, moreover it would require that among Europeans taxpayers there shouldn't be a better tax law in one country than in another. The cooperation of States imposes not only a common fight against fraud but implicitly requests, precisely for what has been shown before, the elimination of a real discrimination among the national fiscal regulations. It would be more than understandable this point of view as the tax payers, the contributors, individuals or companies wouldn't adopt the "Hegira" towards the States with a lowered fiscality, which wouldn't be a burdening one (for instance in Sweden there are only 2 taxes, in Latvia 7 charges, and in Qatar and Maldives there is a single charge)⁵.

Regarding SMEs, by the Article 157 in the Treaty of Establishing the European Communities, there has been created the necessary legal support for the promotion and development of this kind of enterprises in the European business environment. Hence, it is obvious that European bodies headed along the time to the encouragement and support for starting this kind of enterprises, for promoting the trade and economic cooperation between them, and last but not least, to ensure a legal framework for competitiveness in a united European economy. Consequently, the European Union imposed the adoption of some strategies at the Community level and a subsidiary national one, thing that would determine the Member States to lay at its fiscal and regulatory policy basis in this domain a compulsory and overriding principle "Think small first".

On June 13, 2000, the General Affairs Council has adopted the European Charter for Small Enterprises, which was approved by the European Council during its reunion in Santa Maria da Feira on 19-20 June 2002⁶.

To create an optimal environment for the creation, development of small enterprises, the Charter has established 10 major courses of action, mandatory for the national legislation, including one relating to the fiscal system and financial matters, with reference to the taxation that

³ Thus, at the Ministry of Environment there are 102 taxes and charges, at the Ministry of Administration and Interior 50, at the Ministry of Economy 41, at the Ministry of Transport and Infrastructure 40, at the Ministry of Agriculture 37, at the Ministry of Health 35, Justice 30, Sanitary Veterinary Agency 29, Labor 24, and others. (NewsIn).

⁴ See Francis Lefebvre, "Memento pratique-Union Européenne 2008-2009", Éditions Francis Lefebvre, 2007, p. 761-764
⁵ www.mediafax.ro-6/20/2009

⁶ Within the meeting held on 23rd April 2002 at Maribor (Slovenia) the candidate states accepted the Charter; Romania adopted the Charter's provisions through Government Decision no. 656 of 20th June 2002 on the acceptance of the European Charter Small Enterprises, reason for which it also set up the Work Group for the implementation coordination of the measures stipulated in the European Charter for Small Enterprises.

⁷ Noticing that, within the commercial transactions between enterprises and authorities, payments delay is twice more frequent in the case of large enterprises than the case of SMEs, thing that is true also for the payments due to the SMEs by the large enterprises, the European Parliament and the Council of Europe adopted Directive 2000/35/EC of 29th June 2000 on combating the late payments in commercial transactions.

should reward performance, encourage expansion and job creation, create incentives for small businesses set-up which will require, nationwide, the implementation of the Action Plan for the Financial Services and Action Plan for venture capital, improving relationships between the banking system and small businesses with access to loans and risk capital, improving the access to the structural funds and encouraging the initiatives the European Investment Bank⁷.

Member States were encouraged by the legal acts of the European bodies to adopt fiscal and legal measures, to ensure the implementation of the Community policy regarding the enterprises, especially SMEs, so there were adopted: the Recommendation no.94/390/EC regarding taxation for SMEs (refers to the improvement tax in what concerns the reinvested profit); The Decision no.94/1069/EC regarding transfer of SMEs (offered a legislative tax environment favorable for job preservation); The Decision no.97/761/EC to approve the support mechanism in view of creation of transnational joint ventures on SME level (by this decision there was launched the project "European Joint Venture - JEV): the Recommendation no.90/246/EC regarding the implementation of administrative simplifying policies favorable to small and medium-sized enterprises; the Recommendation no.97/334/EC regarding the improvement and simplification of the business environment for the establishment of new SMEs, etc.

The multiform legal phenomenon forced the EU to define in its European legislation the small and medium-sized enterprises for the first time in the Recommendation no.96/280/CE, so that later to complete this definition in the Recommendation no.2003/361/EC regarding the definition micro, small and medium enterprises.

Defining this kind of business meant its settlement in the framework of European and national fiscal policy, this one being also found in the Romanian legislation⁸, including the Romanian Fiscal Code⁹.

In order to revalue the idea of adopting a regulation to strengthen SMEs, the European Council promoted the project for regulation entitled "Small Business Act (SBA) for Europe. The communication of the European Commission to the Council, to the European Parliament, to the Economic and Social Committee and the Regions Committee¹⁰ shows that the Small Business Act represents the will to achieve a decisive impact to mark the European strategy by a better regulation framework and by establishing a framework for SME development sites to strengthen the modernization and simplification of existing legislation and to improve the strategic approach to entrepreneurship.

SMEs, in view of the European Commission and European Parliament, should form the basis of Community policies, and especially in the age of globalization, as it shouldn't be forgotten the fact that in the European Union there are approximately 23 million small and medium-sized enterprises, which represents 99% of the total of all enterprises and offers more than 100 million jobs. In this context it must be acknowledged the need for these small and medium-sized enterprises to benefit in their development from creating a favorable and balanced environment in their confrontation with large businesses and, why not, with the authorities of the State found in a nearly devastating thirst after new sources of tax exploitation.

By the Resolution of 10 March, 2009, the European Parliament expressed itself in supporting the endowment of the principle "think small first" with a binding legal rule. By this new document, the European Parliament stressed the need for the 10 guiding principles, on European, national and regional level, inviting the European Commission and Council, the Member States to take a firm political commitment to ensure their implementation.

Once adopted the "Small Business Act", there was also born the European Council Regulation regarding the European Private Company Statute¹¹ and there were developed the new rules regarding the state aid by the Regulation EC 800/2008 of the Commission on 6 August 2008, so that certain categories of aid this time become compatible to the common market applicable to SMEs. Moreover a European Commission proposal of 09.04.2009 gained ground as it concerns the substantial modification of the Directive 2000/35/EC regarding combating the late payment, reason for which public authorities should be a good example and pay their bills, as a general rule,

⁸ Law no.364 of July 14th, 2004 on stimulating the establishment and development of SMEs, as amended by Law no.175 of 2006;

⁹ See tax exemption scheme for small businesses, article 152 of the Fiscal Code adopted by Law no.571 of 2003;

¹⁰ COM (2008) 324 final of 25.06.2008;

¹¹ COM (2008) 326 final.

within 30 days, otherwise being obliged to pay interest as compensation for the recovery costs, and a compensation rate of 5% of the amount due, which will apply from the first day of delay.

All the above come to question whether the recent Government Emergency Ordinance no.34 of 11 April 2009 on the 2009 budget rectification and regulation of the financial and fiscal measures¹² and the substantiation note justify the measures taken, subordinated to the idea of reducing inflation and achieving a budget deficit at a level synchronized with macroeconomic objectives. Thus, for the substantiation of the normative administrative act above stated, the initiator shall motivate the development of this Act taking into account the recommendations and the opinions of the European Commission and international bodies regarding the reduction of the budget expenditures for the purpose of reducing current management expenditures and a priority allocation of resources to projects with multiplier effects in the economy, which represents the main means of limiting the rate of economic decline and partial compensation for the reduction of private sector activity. On the other hand, however, it is to be noted that all this "rage of words" says nothing and this is in an obvious contrast to the European fiscal policy as it was stated above.

Adoption and implementation of the Romanian Fiscal Code by Law no.571/2003¹³ constituted a meritorious work in trying to reclaim the past, expressed by normative inconsistency and in trying to harmonize the Romanian legislation with European law, with the principles of EC Treaty and the jurisprudence European Court of Justice¹⁴.

The principles of legality, equality in fiscal matter, juridical security, management freedom, requires the assessment of the need of knowledge, of birth, of the extension of the legal effects regarding fiscality, of their extinction, of their interpretation and application.

It is interesting to note that even in the case in which the EU member states benefit from the freedom to establish fiscal measures, the European Court resumed in its practice, with a vital role, to the Community principle of the prohibition of tax discrimination¹⁵. Even if "discrimination" has in this moment in its substance of interpretation the difference between the "national" and "foreign"¹⁶ taxpayers under the equity method of interpretation, it is required, based on equity method and common quality of a European citizen, the legislation and principles all taxpayers, regardless of nationality that has an equal and not unequal tax treatment, such as lack of national responsibility to be replaced by Community responsibility.

Moreover, the frequent changes in the Romanian tax legislation, in the absence of rational arguments, and what is worse, in the lack of visible results, do nothing but to break the principle of legal certainty¹⁷ by an unpardonable manner.

Consequently, to be noted that recent amendments brought to the Fiscal Code represents disrespect showed by the governors towards the Constitution in general, by the rule of law and hierarchical nature of legal rules in particular. On April 14, 2009, in the Official Gazette of Romania there was published the Government Emergency Ordinance no.34 of 11 April 2009, regarding the budget adjustment for the year 2009 and the regulation of the financial-fiscal measures. The normative legal act of an administrative nature, presents numerous violations of provisions of the Romanian Constitution and some laws.

Thus, in a first violation, we apprehend out of the provisions of the article no.15 paragraph 4 of the revised Romanian Constitution but also of the article 29 paragraph 1 letter b of the Law no.24/2000 regarding the norms of legislative technique for the elaboration of the normative acts by which the Government is obliged to motivate the urgency respectively to motivate the requirements that call for the normative intervention, the basic principles and the finality of the proposed regulations and the objective elements of the extraordinary situation that requires an immediate regulatory legislation. From the contents of the substantiation note which compulsory is published together with the normative act in the Official Gazette of Romania it is easy to determine that the author of that normative act took into consideration only the objectives regarding the budget policy, the reduction of inflation and the achieving of a deficit budget at a level synchronized

¹² Official Gazette of Romania no.249 of April 14th, 2009.

¹³ It took effect on January 1, 2004.

¹⁴ See C.F. *Importanța jurisprudenței Curții de Justiție a Comunităților Europene în materie fiscală*, The Romanian Journal of Fiscality no.1/2007 Romanian magazine, p.43-49.

¹⁵ See R. Bufan, M.Șt. Minea, *Fiscal Code commented*, Wolters Kluwer Publishing House, Bucharest, 2008, p.25.

¹⁶ See R. Bufan, M.Șt. Minea, *op. cit.*, p.25.

¹⁷ See R. Bufan, M.Șt. Minea, *op. cit.*, p.83.

with the macroeconomic objectives without referring to any of the reasons that led to the adoption of some measures with obvious consequences under the tax code and tax procedure.

The above stated confirms the demotivation but in no case confirms the necessity for implementation of some new fiscal measures and neither of the elaboration and estimation of the consequences brought by the legislative changes. It is to be noted that nowhere in the substantiation note the economic crisis was eliminated and by this, everything is clear, the act being devoid of substance and therefore devoid of motivation. The lack of emergency motivation, of the extraordinary situation, entails the unconstitutionality of the ordinance even since its entry into force.

A *second violation* consists of an obvious contempt to the provisions of the article 4 paragraph 1 of the Romanian Fiscal Code which state that any change and modification of this article can be possible "only by law, promoted, as a rule, with six months before the date of its entry in force". Otherwise, the article 139 of the revised Romanian Constitution stresses that "the taxes, the duties and any other revenues of the state budget and of the state social insurance budget shall be established only by law." Moreover, the Fiscal Code in the article 4 paragraph 2 states that any change or completion of this article enters into force starting with the first day of the following year when the changes were adopted."

Under this aspect, it is to be noted that the changes of the Fiscal Code were made by the emergency ordinance and not by law (contrary to the provisions of the article 115, paragraph 6 of the Constitution which expressly prohibits the adoption of the emergency ordinance in the domain of rights, freedom, and duties provided by the Constitution article 53 paragraph 1 and forbids the provisions of the article 139 paragraph 1 from the Constitution which requires that the taxes, duties and other revenues of the state budget to be set only by law, that this not only takes the form of an initiative legislation nor was promoted 6 months before its entry into force (it is true that the legislature leaves a "loophole" output in this case, using the term "as a rule") and its entry into force has been under the Article 11 of Law No. 24/2000, following its publication in the Official Gazette of Romania (under the condition of submitting in advance the ordinance at the qualified Chamber)

To ensure the legislative stability in the juridical security field, it is to be noticed that the enforcement of this administrative - normative act required a period of time, not before the first of January of the following year.

Taking into account the constitutional provisions (article 56 paragraph 3 of the revised Romanian Constitution), the fundamental duties can be regulated only by law, in the restrained sense of this concept and not by emergency ordinance. *A fortiori*, the emergency ordinance contravenes to the provisions of article 1 paragraph 3, 4 and 5 from the Romanian Constitution, which induce to the contributor citizen the fact that Romania is a state law, organized according to the principle of the separation of powers in the frame of the constitutional democracy, state in which the respect for the Constitution and the law is compulsory.¹⁸

The third violation arises from the circumvent of the principle of equality in the taxation field, which supposes the establishing of an equal treatment for the contributors found in the similar situations, which doesn't exclude the fact that in other various situations, there should be applied criteria to create some differentiations for other contributors¹⁹.

Even if the principle of equality in the taxation field doesn't exclude a different treatment for different situations, the Government, by introducing the flat tax, not only it didn't make a distinction (seasonal companies, for example those in the tourism field which have activity only a few months during the year; the companies which have had never activity, etc) but it put all those commercial firms in the same pot, and this situation provoked devastating effects, but not because of the economic crisis, but because of the new legislation²⁰.

¹⁸ See the Constitutional Court, The Decision no.85 of February 8th, 2006, published in the Official Gazette of Romania no.17 of February 23rd, 2006.

¹⁹ See the Constitutional Court, The Decision no.953/1994 published in the Official Gazette of Romania no.312 of November 9th, 1994.

²⁰ The flat tax brings: 150.000 unemployed persons; between May-December 2009 smaller collections to the budget (social insurances, unemployment or health) between 376-800 million lei, extra payments from the budget (unemployment benefit) about 67,5 million lei on a month (in total 540 million lei for the period May-December 2009 http://www.financiarul.com/articol_26070/afacerea-forfetarului-pierderi-de-500-mil-lei-n..... any other labour conscription is prohibited, except those established by law, in exceptional circumstances

The fourth violation consists in the obliteration of the community principle of forbidding the tax discrimination. Thus, by introducing in the Fiscal Code the article 145¹ “*special limitations of the deductibility right*”, we observe that the value added tax for the acquisition of some vehicles cannot be deducted and neither the value added tax for the acquisition of fuel intended for the utilization of the same type of vehicle which are in the use or the property of the tax contributor (for example, the Law Offices, Architecture Offices, and so on). Through the same article there are also enrolled a few exceptions for some categories (for example, the vehicles used exclusively for the workers transport to, and from the place where they are operating), although the use of the vehicle is done by all the categories of contributors for the same purpose (the more so as the vehicle was bought for achieving revenues from the liberal profession).

Moreover, if the public authorities and institutions, as a rule, cannot buy anymore, or take over leasing contracts or rent cars, furniture, and so on (which were exonerated anyway from the payment of the value added tax even before the modifications), the lawgiver finds an “exception”, in the case of the public authorities and institutions which have been established after the enforcement of the new ordinance.

In the same order of ideas, it is to be noticed that the minimal tax (flat tax), not only it won't unlock the economy, but moreover it seems to be created only for the advantage of the big firms. Thus, the small business enterprises with a zero turnover, had to pay, even if they didn't have economic results, 2.200 lei in a year, and the small business enterprises with a turnover of about 215.000 lei in a year had to pay 4.300 lei, the small business enterprises with a turnover of about 430.000 lei in a year – 6.500 lei, minimal annual taxes which come to prove that the *ad hoc* lawgiver, meaning the Government, has obviously despised the small business enterprises, trying to eliminate them from the market, putting on advantage on the other side the big enterprises, through the lack of consistence of the flat tax in which concerns their situation.

The fifth violation of the constitutional provisions consists in disrespecting the dispositions of article 15 second paragraph of the revised Romanian Constitution, exactly the retrospective of the dispositions of article 107 paragraph 2 from the Law no.571/2003 concerning the Fiscal Code through the modifications brought by the article 32 paragraph 1, point 8. Thus, even the tax rates for the years 2008 and 2009 remained unchanged, the companies were obliged to pay the annual minimal tax established through this ordinance by the article 18 paragraph 2 and 3, which has changed fundamentally for the past, the tax amount, even if in that period the provisions of the Law no.571/2003 concerning the tax payments and the filling of the fiscal declarations (chapter V) were already entered into force.

The sixth violation derives from the substance of the Law no.227 of the 10th of June 2009 for the approval of the Emergency Ordinance of the Government no.34/2009²¹ which was adopted as an ordinary law (article 65 paragraph 2 and article 76 paragraph 2 from the republished Romanian Constitution). The Law no.571/2003 concerning the adoption of the Fiscal Code became from ordinary law – organic law, once it was introduced in its contents the chapter “Infringements” through the Law no.494/2004 for the approval of the Government Ordinance no.83/2004, through the effects of the dispositions of the article 73 paragraph 3 corroborated with article 73 paragraph 3 letter h from the republished Romanian Constitution, therefore it is an organic law.

Besides, the Constitutional Court, in a similar case, pronounced a sentence in the sense that “the adoption of the law in cause (the Law no.494/2004 - o.n.), complying to the constitutional exigencies specific to an organic law, qualifies also, the very modified law (the Fiscal Code – o.n.) in its unit, being unacceptable that the law should be just in part organic law, remaining also, for the other part an ordinary one”²².

As a consequence, any modification, completion or repeal of the Fiscal Code can be realized only through a law having an organic character, with the vote of the absolute majority and not with the vote of the simple majority, as it happened in our case with the Law no.227 from the 10th of June 2009 adopted as an ordinary law. Obviously, the budgetary law is an ordinary law, and the Fiscal Code became an organic law, as a consequence any intervention can be adopted on the system of the organic law appointed by the article 76 paragraph 1 from the revised Romanian Constitution.

²¹ Published in the Official Gazette no.402 of June 2nd, 2009

²² The Constitutional Court, The Decision no.545 of July 5th, 2006, published in the Official Gazette of Romania no.638 of July 25th, 2006.

That's why the Government Ordinance no.34 from 2009 cannot reach a happy final once, so much by its form of adoption, but not at least by trying to resolve the problems in the economic environment, it is fundamentally wrong. If under the aspect of the form exposed above the issues are enough to prove the unconstitutionality, the illegality of the ordinance, it isn't less true that the wrong normative appreciation of the Romanian Government comes from the inconsistency of the programmatic sustention of the Community principle *Think Small First*.

If the European Union's institutions through *Small Business Act* have followed at least two directions, first to develop the economic environment by helping the small business enterprises, a source of profit and taxes, innovation, competitiveness, and second to occupy the labor force. The Romanian Government, by changing the taxation system for the enterprises had take into account only the immediate "benefit" to the budget, forgetting the other cymbal of the balance, the huge losses at the budget on a long term.

Thus, if a small business enterprise paid as a tax 3% from the revenue, on the other side, for each employee was paying social contributions, which no doubt meant another source of revenues for the state's budget, it is to be noticed that only in April, to the Chamber of Commerce were filled requests for the suspension of activity for 14.035 enterprises, compared with the same period of the year 2008 when there were fulfilled 1.055 requests.

To get free from the flat tax, most of the suspension of the activity requests were coming from the enterprises with scientific and technical professional activity, and the specialists believe that at least 20% from the whole number of 478.173 small business enterprises registered at the level of 2007, will be transformed into self-employed persons (liberal professions like accountants, architects, financial consultants, liquidators, and so on)²³.

In the context of the economic crisis, it is obvious that the Government Emergency Ordinance no.34/2009 has done nothing but to raise the ambiguity and intolerance for the business environment, this time without any discrimination, of the public authorities, sequel to the misunderstanding of the respect owed to the Constitution, but also to the principle of legality in the financial field, assumed by the contributors by fulfilling a fundamental duty – the obligation to contribute by paying taxes to the public expenses. The state law doesn't have to be acclaimed but done.

²³ <http://www.financiarul.com-6/20/2009>.