

CONTROVERSIES REGARDING THE COMPULSORINESS OF PRECAUTIONARY MEASURES IN CASES REGARDING TAX EVASION

Ramona Mihaela COMAN*

ABSTRACT: *The law to combat tax evasion provides a compulsoriness of establishing the precautionary measures. Therefore, Article 11 of Law no. 241/2005 for the prevention and combating of tax evasion, sets down that, in the event that a crime provided for by this law has been committed, taking precautionary measures is mandatory. As a principle, the provisions of a special law are supplemented by the provisions of the general law, tot the extent that they do not conflict. Therefore, it is obvious that in relation to the competence to dispose of them, the act by which it is disposed of, the remedy, the general provisions of the Code of Criminal Procedure are applicable.*

From the analysis of art. 11 of Law 241 of 2005, however, it would result that the precautionary measures are taken in all cases, without any exception, without the courts being able to make an evidence-based analysis of the necessity and proportionality of these measures. The article analyzes to what extent this interpretation does not contradict the constitutional requirements regarding free access to justice, the right to defense, the protection of private property equally.

KEYWORDS: *attachement order; tax evasion; unconstitutionality; the right to defence; free acces to justice.*

JEL Code: *K14, K34*

1. INTRUDUCTIVE CONCEPTS

Precautionary measures are procedural measures of a real nature which have the effect of freezing movable and immovable property by the imposition of seizure (Neagu, Ion; Damaschin, Mircea;, 2014). As a result of the seizure, the owner of these assets loses the right to dispose of them or to strike charges, the measure thus affecting the attribute of the legal and material provision, throughout the criminal proceedings, until the final settlement of the case (Moldovan, 2017).

The law on combating tax evasion requires the imposition of precautionary measures. Article 11 of Law No 241/2005¹ on the prevention and combating of tax evasion provides

* Associate professor PhD., University of Medicine, Pharmacy, Sciences and Technologies George Emil Palade, Tg. Mures, ROMANIA.

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that, if an offense provided for by this law has been committed, precautionary measures are to be taken. As a principle, the provisions of a special law shall be supplemented by the provisions of the general law, insofar as they do not contravene them. It is therefore clear that, in relation to the power to order them, the act ordering them, the appeal procedure, applies to the general provisions of the Code of Criminal Procedure.

The analysis of Article 11 of Law 241/2005, however, shows that precautionary measures are taken in all cases, without any exception, without the courts being able to make a substantiated analysis of the necessity and proportionality of these measures. The question thus arises whether the general provisions on the grounds for which an insurance measure may be taken are still valid? Whether or not the body ordering the measure must give reasons for the act by which it orders?

2. CONDITIONS FOR THE ESTABLISHMENT OF INSURANCE SEIZURE IN GENERAL

According to Article 249 of the Proc.pen Code, precautionary measures can be taken both in the criminal investigation phase, as well as in the preliminary chamber or trial phase. The prosecutor will order *ex officio*, by order, and the judge of the preliminary chamber or the court will order *ex officio* or at the request of the prosecutor, by conclusion. Both the order and the conclusion must be reasoned.

In the literature it was noted that “the conclusion by which precautionary measures are taken must include all the mentions provided by law for these procedural acts. The reasons for the procedural act by which precautionary measures are taken must be effective both in fact and in law; therefore, it is not sufficient to mention that the criminal prosecution has been initiated or that the defendant has been ordered to be prosecuted and that precautionary measures are required, but to mention in particular the reasons that led to these measures. The reasoning is inextricably linked to the cause of the precautionary measures and their purpose.” (Udroiu, 2020).

The Constitutional Court has established² that the precautionary measure, regardless of the judicial body that establishes it, must be motivated, it being necessary to show, in the document by which it is ordered - ordinance or conclusion, the fulfillment of the legal conditions regarding the necessity of ordering the measure. At the same time, the act must include the extent of the damage or the necessary value for which attachment is sought and the amount to be secured in this way.

Therefore, the judicial body will be able to order the taking of a precautionary measure based on the analysis of the values involved in the case: The value of the damage, the likely amounts that should be confiscated, the creditworthiness of the suspect/defendant, the value of the assets that he/she has.

The legislator has expressly provided for the purpose for which the measure may be taken: in order to avoid hiding, destroying, alienating or evading from prosecution property that may be subject to special confiscation or extended confiscation, or that may serve to guarantee the execution of the penalty of the fine or of the judicial expenses or the repair of the damage caused by the crime.

² Decision No 312 of 09 June 2020, published in Official Gazette No 1000 of 29 October 2000, paragraph 16.

The statement of reasons must thus refer to one of the four situations for which the precautionary measures have been put in place: To avoid 1. hiding, 2. the destruction, 3. alienation or 4. evading from follow-up. No other reason can justify the imposition of the precautionary measure. The fact that the damage must be recovered, or that there is a possibility of confiscation if the defendant is found guilty, does not in itself justify the imposition of the measure.

In the judicial practice³ it has been shown that the condition regarding the necessity of establishing the measure is not fulfilled in order to avoid hiding, destroying, alienating or evading from the pursuit of the property, and there are no minimum elements regarding possible concealment, destruction, alienation, or evading. In the case, the court had held that the defendant has controllable incomes, and the civil responsible parties are solvent companies: “The private hospital is an entity that benefits from a status and financial resources known to the public institutions empowered in this regard”.

3. THE OBLIGATION TO TAKE THE INSURANCE MEASURE VS. FREE ACCESS TO JUSTICE

In the case of tax evasion offenses, as I have shown, the legislator imposed the obligation to take precautionary measures. Apparently, on the basis of this legal text, the prosecutor or the judge, notified of such an offense, would be obliged by law to institute the precautionary measure, no longer having the obligation to verify the existence of one of the four situations: Hiding, destroying, alienating or evading from the pursuit of property. However, this interpretation would raise some constitutional issues.

Thus, first of all, if precautionary measures were ordered for all persons investigated / tried for committing the offenses provided by the tax evasion Law, without any analysis of the factual situation, of the evidence, of the necessity of establishing the measure, this would result in the court having only a formal role in examining the application for attachment and subsequently deciding an appeal against that measure. The right to a fair trial also concerns the right of the person to have access to an effective remedy, not just formal, in which the judge has a decision-making power, based on the law and his own conviction (Bodea, 2020).

Art. 21 of the Romanian Constitution guarantees free access to justice and the right of persons to a fair trial. The Constitutional Court has shown inconsistency in determining whether or not these provisions are applicable in the matter of precautionary measures.

Thus, initially, by Decision No 207 of 31 March 2015⁴, the Court examined the right to free access to justice from the perspective of Article 6 ECHR and held that in the matter of challenging the precautionary measures ordered in criminal proceedings the guarantees of a fair trial established by Article 6 of the Convention, it would not be applicable, “since the establishment of attachment is not a trial on a criminal charge.”

Subsequently, Decision 24 of 20 January 2016⁵ states that the standard of protection offered by the provisions of the Convention and the case-law of the European court is minimal, so that it can be provided by conventions or by the fundamental law, in so far as

³ Case 1436/320/2021/a3 Court Tg. Mures, end of March 28, 2022, unpublished.

⁴ Published in M. Of. no. 387 of June 3, 2015

⁵ Published in M. Of. no. 276 of April 12, 2016

the substance of a right is affected (Right to property and right to a fair trial), a higher standard of protection of rights, according to the provisions of Article 20(2) of the Constitution and Article 53 of the Convention.

Regrettably, the Constitutional Court soon returns to the first argument, pronouncing Decision 320/2016⁶, in which the Constitutional Court found that it did not infringe the free access to justice guaranteed by Article 21 of the Constitution. This article of the Constitution refers to the procedural rights and guarantees established by the rules of criminal procedure, referring again to Decision No 629/2015.

Decision No 24 of 2016 had the effect of amending the legislation which made the appeal of the appeal against the assuagatory measures possible. The legislative amendment of the provisions of Article 2501 of the Code of Criminal Procedure was introduced into the criminal procedural law by the provisions of art. II item 63 of the Government Emergency Ordinance no. 18/2016 amending and supplementing the Criminal Code, following the decision of the Constitutional Court mentioned above and aimed to introduce an effective remedy to protect private property.

The Constitutional Court itself has indicated by the above-mentioned decision no. 24/2016 that the mere right of the person concerned to address justice in this way becomes formal as long as the guarantees specific to the fair trial are not respected (para. 25). Therefore, the obligation imposed by the legislator to impose precautionary measures would prejudice free access to justice if the judge were not given an effective opportunity to verify the need for the precautionary measure to be established. As has been shown in the doctrine, court decisions are an important relevant of the most significant legal problems of individuals and expect answers as quickly as possible, but also as complete as possible (Manu, 2020).

4. THE OBLIGATION TO TAKE THE INSURANCE MEASURE VS. THE RIGHT TO DEFENSE

Although Article 250 and 1 C.pr.pen provides for the possibility of contesting against the precautionary measure taken by the court, this remedy would become useless as long as the establishment and maintenance of the precautionary measures would be mandatory, without exception.

Failure to grant the effective right of defense for the defendant or for the person subject to restrictive rights measures is contrary to the provisions of Article 6 of the Convention. (3)lit. (c) the ECHR stipulates that any person accused of a crime has the right "to defend himself or to be assisted by an elected defender". In the case-law of the ECHR⁷ it has been held that the right to legal aid is the right to effective assistance and representation. The presence of a lawyer who has no opportunity to intervene in order to enforce the rights of the defendant or the suspect does not bring any benefit to him⁸. Therefore, the impossibility of providing effective legal assistance by the chosen lawyer, in the case-law of the ECHR, amounts to a lack of defense.

⁶ Published in M. Of. no. 636 of August 18, 2016

⁷ ECHR, Imbrioscia/Switzerland case, no. 13972/88, 24 November 1993, paragraph 43

⁸ ECHR, Aras/Turkey case (no. 2), no. 15065/07, 18 November 2014, paragraph 40

Thus, if I accepted that in any situation where a person is brought to trial for a tax evasion offense, the seizure measure should be automatically ordered, without any exception, the role of the lawyer would be useless, as would the principle of adversarial, orality, as well as providing for an appeal against the conclusion.

Considering the provision of precautionary measures in these cases as mandatory is likely to infringe the rights of defense of the accused persons and to deprive the lodging of a challenge against these measures. Although Article 250 and 1 C.pr.pen. Provides for the possibility of contesting against the precautionary measure taken by the court, this appeal becomes insuffuse.

4. THE OBLIGATION TO TAKE THE INSURANCE MEASURE VS. THE GUARANTEE OF PRIVATE PROPERTY EQUALLY

Art 44. Article 2 of the Constitution provides that private property is guaranteed and protected equally by the law, regardless of the holder. In the event of damage caused by the Commission of a tax evasion offense, the amounts of money obtained from their recovery shall be the private property of the State. Private property is guaranteed and protected equally by law, regardless of the holder, and therefore even if the holder is the State. Therefore, the provision of additional protection to the property of the State in relation to the property of any other natural or legal person (e.g. in the case of embezzlement, fraud to creditors, etc., the obligation of precautionary measures is not imposed) is a violation of equal ownership.

By decisions no. 320/2016 and decision 96/2018, the Constitutional Court rejected the exceptions of unconstitutionality with regard to Article 11 of Law no. 241/2005, in reasoning the Court holding that the regulation of these exceptions, of situations in which the attachment is mandatory, was determined, in particular, by the Court of Justice of the European Union. the importance of social relationships through them. But why would the private property of the state require greater protection from the private property of others? In the case of minors and persons lacking the capacity to exercise, the Constitution expressly provides for additional protection in Articles 49 and 50. But the same reasoning cannot be applied to the State. Private property should enjoy the same guarantees regardless of the holder.

6. THE OBLIGATION TO TAKE THE PRECAUTIONARY MEASURE VS. THE NECESSITY AND PROPORTIONALITY OF THE RESTRICTION OF SOME RIGHTS

According to Article 53 of the Constitution, the exercise of rights or freedoms may be restricted only if it is necessary in a democratic society, is proportionate to the situation which caused it, is applied in a non-discriminatory manner and without prejudice to the existence of right or freedom.

The restriction of any right guaranteed by the Constitution, and therefore the right to property, may be ordered only if necessary. The necessity cannot be determined in the abstract by a general provision, as provided for in Article 11 of Law 241/2005, but must be considered in concrete terms, in relation to each case. Or, if the text considered

unconstitutional automatically requires judicial bodies to establish attachment, it implicitly excludes the analysis of necessity.

Also, given the specific nature of the tax evasion offense, in which the State through its organs is a civil party, indicating an alleged amount of damage (which obviously can be determined at the trial as being less or non-existent), would require the seizure to be applied on the probable amount of damage, the value that the civil side itself indicates. In those circumstances, the judge can no longer consider the proportionality of the measure of the restriction of the right to property referred to in Article 53 of the Constitution.

At the same time, the restriction must be applied in a non-discriminatory manner, or it is obvious that the different treatment applied to civil parties, natural or legal persons other than the State, who, when they have suffered damage from a crime, do not benefit from the same guarantees; it is also obvious that the discriminatory treatment applied to the defendant who did not hide the assets allegedly obtained as a result of the crime is applied to the defendant who hid these assets and on whom the seizure cannot be instituted, and last but not least, The discriminatory treatment applied to the defendant and to the civil responsible party in relation to the civil party, which has the power to make the case, due to the text of Article 11 of Law 241/2005, by the simple establishment of a civil part, of some assets of the defendant and the civil responsible party, without any judge being able to effectively verify the necessity of applying the measure, the latter being obliged by law to apply it.

7. CONCLUSIONS

Regardless of the way in which the legislator has assessed the necessity of ordering the seizure, as deriving from the law or as being left to the judge, we consider that the necessity and proportionality between the purpose pursued in the establishment of the measure and the restriction of the property right of the accused person must be ensured. The condition follows both from Article 1 of the first additional Protocol to the European Convention on Human Rights and Fundamental freedoms and from Article 53(2) of the Romanian Constitution, republished.

Even if Article 11 of the Law on Combating tax evasion is a special rule, which derogates from the general rule, its concrete application cannot contravene the fundamental rights guaranteed by the Constitution – the right to a fair trial, the right to defense, the right to property. The establishment of the precautionary measure cannot be established in the abstract by the legislator, which is the task of the judicial body, to determine in each individual case whether or not an attachment is required.

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