SOCIAL POLICY INFLUENCES IN THE FIELD OF TAX POLICY

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Abstract:
Having regard to the constitutional provisions concerning the national public budget, which establish, as a matter of principle, that the national public budget comprises the State budget, the State social security budget, and the local budgets of parishes, towns, and counties [1], made up mostly from fees, as well as from other revenues, in this paper, I intend to examine to what extent the separate imposition of non-harmonised direct taxes is compatible with the constitutional provisions on the fair distribution of the tax burden. [2]
In this context, I note that the constitutional legislature itself [3] has foreseen the possibility of setting up funds, available to entities, but provided that the amounts representing contributions to such funds be used exclusively for their intended purpose. Such contributions complement the budgetary resources and the imposition thereof can be achieved through infraconstitutional rules. One example is Government Emergency Ordinance no. 77/2011 establishing a contribution to finance expenditures on health. [4]
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I. Ensuring the right to protection of health

The right to protection of health is guaranteed, whereas the State is required to take the necessary measures to ensure hygiene and public health, reason why the organisation of healthcare and social security system for sickness, accident, maternity and recovery, the control on the exercise of medical and paramedical professional activities and other measures to protect the physical and mental health of the person are established by law. [5]

In terms of measures implementing the constitutional provisions, one of the legislative acts with a major impact on the health system is Law no. 95/2006 on healthcare reform [6], which implements the fundamental principles and rules under Community law. Thus, the ordinary legislature sought to achieve a

healthcare system economically efficient, addressing major areas of healthcare, such as the public health, national programmes in the field of healthcare, social healthcare insurance, the European health insurance card and the national health insurance card, the optional health insurance, the financing of some health-related or medicine-related expenditure.

Law no. 95/2006 governs the sources of funding for public healthcare expenditure, whereas health funds are allocated for medicines with and without a personal contribution. However, such funds proved to be insufficient given the steady growth in the number of patients benefiting from the services provided by the public healthcare system that led to significant increase of expenditure incurred from public sources, and the supplementation of the sources of financing of the public health system was necessary.

In this context, as well as in the context of the global economic crisis, the State had to implement the measures needed to supplement the sources of financing of the public health system, to ensure a continuous access of the population to medicines with or without personal contribution granted in outpatient system, under the national healthcare programmes, as well as to healthcare units with beds. However, given the high consumption of medicines exceeding the allocated threshold [7], it was required also intervention by way of legislative delegation, i.e. the Government adopted a number of successive legislative acts.

Concerning the need to keep public budgets under control, it is acknowledged that public budgets, including those dedicated to cover healthcare expenditure, are under significant constraints, an issue which was also revealed in the Summary of the Pharmaceutical Sector Inquiry Report. [8]

II. The establishment of the clawback tax in Romania

Following the example of other European countries [9], Romania has implemented the clawback contribution system by means of Government Emergency Ordinance no. 104/2009 amending and supplementing Law no.

95/2006 on healthcare reform. That legislative act has established the payment of a quarterly contribution due for revenues obtained by drug manufacturers, according to a progressive scale varying between 5 % and 11 % of these revenues.

Then, the Government enacted Government Emergency Ordinance no. 77/2011 establishing a contribution to finance expenditures on health, with effect from 1 October 2011, which represents the legal framework also today, but with the corresponding amendments and supplementations, and which has repeatedly constituted the subject-matter of the review of unconstitutionality.

This contribution is assimilated to a tax liability [10], and it is therefore managed by the National Agency for Fiscal Administration in accordance with Government Ordinance no. 92/2003 on the Code of Fiscal Procedure. [11]

The amounts collected from the contribution provided for by this emergency ordinance [12] constitute revenue to the budget of the Sole National Fund of Social Healthcare Insurance and are used for medicines included in the national health programmes, for medicines released with or without personal contribution and for medical services.

According to Government Emergency Ordinance no. 77/2011, the subjects covered by its provisions are the holders of authorisations for placing medicinal products on the market, or their legal representatives, who are required to pay a quarterly contribution for medicines included in the national health programmes, and for medicines released with or without personal contribution for outpatient treatment, based on prescription, through open pharmacies, and for hospital treatment, as well as for medicines used for the medical services supplied by dialysis centres, covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health. The quarterly contribution is calculated according to the formula of calculation laid down by this emergency ordinance.

These provisions do not *explicitly* define the concept of *holders of marketing authorisations of medicinal products*, so that such authorisations are

available to all legal persons involved in the marketing of medicinal products, whilst drug manufacturers are also included into this category, and the scope of these subjects is not limited to Romanian legal persons. According to Article 4 (1) of Government Emergency Ordinance no. 77/2011 "*within 30 days of the date of entry into force of the provisions of this emergency ordinance, holders of authorisations for placing medicinal products on the market [13], who are not Romanian legal persons, shall be obliged to submit to the National Health Insurance Fund the identification data of their legal representatives who will carry out the legal obligations laid down by this Emergency Ordinance, as well as the list of products subject to mandatory quarterly contribution*."

From the analysis of the legal provisions, it results that the scope of products subject to mandatory quarterly payment is wide, comprising: a) medicines included in the national health programmes; b) medicines released with or without personal contribution, used for outpatient treatment, on prescription, through open pharmacies, and for hospital treatment; c) medicines used for the medical services supplied by dialysis centres.

The compulsory nature of the quarterly contribution is due to the fact that, as is apparent from the Government Emergency Ordinance no. 77/2011, these products are covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health. Therefore, only those operators who place on the market the medicinal products whose consideration is ensured from the source indicated above are liable to pay that contribution, with the obligation [14] to submit to the National Health Insurance Fund the list of medicines for which they owe the contribution.

Indeed, not all drug manufacturers are included in the national health programmes, but from an analysis of all the provisions of Government Emergency Ordinance no. 77/2011, it results that not the capacity of drug manufacturer entail payment of tax, but the capacity of holder of marketing authorisation of medicines, and not only for medicines included in the national health programmes, but for all medicines that are covered from *the Sole National*

Fund of Social Healthcare Insurance and from the budget of the Ministry of Health. [15]

The obligation of the subjects mentioned above, namely payment of the contribution owed by them, is established on quarterly basis (quarterly contribution) and is calculated by applying a percentage "p" to the "consumption of medicines" covered from *the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health*, consumption relating to the sales of each payer/holder of marketing authorisation for medicinal products. [16]

III. The case-law of the Constitutional Court regarding the clawback contribution

The imposition of any duties and charges implicitly leads to the dissatisfaction of those who are bound to pay them, so that the clawback tax has had its share of criticism, in that the payers of this contribution have bought a number of legal proceedings seeking annulment of the notices for the amounts due on that basis. While such cases were pending before courts, exceptions of unconstitutionality were raised both on specific issues concerning certain texts of the emergency ordinance, and the ordinance in its entirety.

These provisions have been criticised both extrinsically, namely in relation to the constitutional provisions of Article 115 (4) and (6) on emergency ordinances and intrinsically, primarily in terms of infringement of equality, right to protection of health, protection and guarantee of the right to property, fair distribution of the tax burden. [17]

Upon exercising the constitutional review, the Constitutional Court took into consideration, firstly, the legislative dynamics with regard to this matter. Thus, the provisions of Government Emergency Ordinance no. 77/2011, and in particular those relating to the calculation of the contribution, were amended and supplemented as follows:

- by Government Emergency Ordinance no. 110/2011 amending and supplementing certain legislative acts in the areas of healthcare and social

welfare was introduced Article 3^1, which at paragraph (5) provides, inter alia, that "*sales value (...) means the value of medicines, in accordance with the law, covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health, which also includes value added tax*"; [18]

- by Government Ordinance no. 17/2012 on regulating certain fiscal measures [19], which, in Article 7 - Section 2 — *Regulations on quarterly contribution provided for by Law no. 95/2006 on healthcare reform, as subsequently amended and supplemented, and Government Emergency Ordinance no. 77/2011 establishing a contribution to finance expenditures on health*, explicitly provides that the calculation formula does not include value added tax, returning to the legal solution in force before amendment by Government Emergency Ordinance no. 110/2011.

- as regards the distribution of reimbursed medicines, according to Government Emergency Ordinance nr.2/2014, "*in the case of medicines reimbursed within the national health insurance system, the holder of the marketing authorisation or its representative in Romania shall take all necessary steps to ensure that the wholesale distribution of such medicines is achieved by 3 or more authorised wholesalers, except for medicines supplied under the conditions of Article 699*."

Therefore, when ruling on the first case referred to it, given that the claims of unconstitutionality related only to Government Emergency Ordinance no. 77/2011 and in particular to Article 1 and Article 3, in the initial wording thereof, which did not expressly state that the calculation formula shall also include the value added tax, the Constitutional Court found that the court called upon to hear applications for annulment of notices communicated under Government Emergency Ordinance no. 77/2011 must see to the correct implementation of Article 3 thereof. [20] Upon settling the first exception of unconstitutionality, the Court found that the authors thereof showed no interest in challenging the provisions of Article 3^1 of Government Emergency Ordinance no. 77/2011 [21], whereas those were not applicable in that case. In view of the

above, the Court found that the exception of unconstitutionality of the provisions of Government Emergency Ordinance no. 77/2011, and in particular Article 1 and Article 3 criticised in that case, deals with issues relating to the interpretation and application of the law in cases pending before courts, and such falls outside the jurisdiction of the Constitutional Court, reason why the exception of unconstitutionality was dismissed as inadmissible.

In that context, the Court held that, where new notices, based on the provisions of Government Emergency Ordinance no. 77/2011, as supplemented by Emergency Government Ordinance no. 110/2011, will be referred to courts for resolution, the Constitutional Court will rule on the new provisions upon referral. [22]

Subsequently, the constitutional review was exercised also with regard to the legal provisions modifying the calculation formula that also included the value added tax.

IV. The unconstitutionality of a "*tax on tax*" duty.

Article 31 (5) of Government Emergency Ordinance no. 77/2011, as supplemented by Government Emergency Ordinance no. 110/2011, with special reference to the phrase "*including also VAT*", was subjected to constitutional review as well. [23]

In the respective case, in addition to the arguments put forward by the author of the exception of unconstitutionality and mentioned in Decision no. 1007 of 27 November 2012, applicable also to the case in question, the criticism were directed, on the one hand, at Article 3^1 (5) of Government Emergency Ordinance no. 77/2011, as introduced by Government Emergency Ordinance no. 110/2011, and, on the other hand, at the notices having as legal basis the provisions of Article 3^1 of Government Emergency Ordinance no. 77/2011, as supplemented by Government Emergency Ordinance no. 110/2011.

During the review of constitutionality, the Court observed that Article 3^1 (5) specifically states that sales value, as governed by Government Emergency

Ordinance no. 77/2011, means the value of medicines covered from the Sole National Fund of Social Healthcare Insurance and from the budget of the Ministry of Health, which also includes the value added tax.

According to the legislature, the quarterly contribution represents a percentage applied in itself not only to the price of medicines, but also to the value added tax applied to the price of medicinal products, which, in the Court's view, is tantamount to a *tax on tax*.

By virtue of the general principle applicable in tax matters, taxes and charges apply only to taxable matters — revenues or property, and not to other taxes. However, the fact that the clawback tax is levied on another tax comes against the constitutional provisions on the fair distribution of the tax burden, which is why the inclusion of the value added tax in the total value of sales in relation to which the clawback tax is calculated appears as unconstitutional. [24]

In this context, the Court has upheld the exception of unconstitutionality and found that the phrase "***including also VAT***" in Article 3^1 (5) of Government Emergency Ordinance no. 77/2011, as supplemented by Government Emergency Ordinance no. 110/2011, is unconstitutional, whereas the Constitutional Court's approach is rather strict in applying the provisions on fair distribution of the tax burden. [25]

Moreover, immediately after the amendment of Government Emergency Ordinance no. 77/2011 through **Government Emergency Ordinance no. 110/2011**, a question has been referred to the European Commission in relation to the "VAT taxation", i.e. the clawback mechanism with regard to the value added tax in Romania and its compliance with Community law. [26] In its reply to that question dated 15 February 2012 [27], it was pointed out that according to a preliminary assessment of this issue by the Commission, the clawback tax is considered a direct tax, non-harmonised at EU level, to be paid by companies, not being passed to the final consumer through mechanisms similar to those in place for VAT/excise duties. It is therefore necessary to examine whether there is any breach of EU law in the area of direct taxation. However, from the point of

view of direct taxation, there does not appear to be a breach of EU law, for the following two reasons: the clawback tax applies equally to resident and non-resident drug manufacturers present on the Romanian market; there does not appear to be any difference regarding the calculation of the tax to be paid by the Romanian or by the foreign holders of authorisations to release medical products on the Romanian market, which makes the tax to appear as non-discriminatory.

In this context, it was revealed that this is a non-harmonised tax, and that Romania is free to establish how such is to be applied, as well as to include the value-added tax in the tax base. However, Directive 2006/112/EC does not become thus applicable to that tax. It was therefore considered that Directive 2006/112/EC does not appear to preclude such an approach. Furthermore, the clawback tax version taken into account in the discussions between the Commission, the International Monetary Fund and the Romanian authorities is based on the design of clawback systems in other Member States. The control of pharmaceutical expenditure is vitally important for the financial assistance from the EU and the International Monetary Fund as it has direct and significant effects on the sustainability of public finances and therefore on the future macroeconomic stability of the country, since these costs are the principal cause of the build-up of arrears and the existence of unregistered bills in the general budget of Romania. [28]

V. Conclusions

According to the Constitutional Court, the clawback contribution is a parafiscal levy, imposed in accordance with Article 139 of the Constitution, under which “taxes, duties, or any other revenue of the State budget and the State social security budget shall only be imposed under the law”. [29]The parafiscal levies therefore represent a distinct and special category of revenues, lawfully directed to institutions and/or bodies which, according to the State, require such additional revenues. [30] When carrying out the constitutional review, the Court has stated that it is the exclusive right of the legislature to impose parafiscal charges on taxpayers, *in casu* the clawback tax incumbent on economic

operators which are specifically covered by Government Emergency Ordinance no. 77/2011.

Moreover, according to the case-law of the European Court of Human Rights, a Contracting State, in particular when defining and implementing a policy on tax matters, enjoys a wide discretion, subject to a 'fair balance' between the demands of the public interest and the defence of fundamental human rights. [31] The legislature must enjoy, when implementing its policies, especially the economic and social policies, a margin of discretion to determine whether there is a public interest requiring regulation, as well as the implementing provisions, allowing it "*to maintain a balance between the interests at stake*". [32] However, the right to protection of health is one of the fundamental rights under the Constitution of Romania and the State is obliged to see that it is respected.

Therefore, the imposition of contributions such as the clawback tax, which shall become revenue for the budget of the Sole National Fund of Social Healthcare Insurance and shall be used exclusively for medicines included in the national health programmes, for medicines released with or without personal contribution and for medical services, is in line with the constitutional provisions of Article 139, provided that the other provisions of the Basic Law are complied with.

References:

[1] As provided for in Article 138 (1) of the Constitution of Romania.
[2] The fair distribution of the tax burden is set forth under the provisions of Article 56 (2) of the Basic Law.
[3] To that effect, see Article 139 (3) of the Constitution of Romania.
[4] Published in Official Gazette of Romania, Part I, no. 680 of 26 September 2011.
[5] According to the provisions of Article 34 of the Constitution of Romania.
[6] Published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006.
[7] Issues raised in the preamble of Government Emergency Ordinance no. 77/2011.
[8] In January 2008, the European Commission launched an inquiry into the pharmaceutical sector to investigate possible anti-competitive conditions. http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_ro.pdf.
[9] According to the pharmaceutical sector inquiry report, the clawback tax was in place at the date of the report, in countries such as Austria, Belgium, Italy, the Netherlands, Poland, United Kingdom. http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_ro.pdf.
[10]According to Article 5 (1) and (2) of Emergency Government Ordinance no. 77/2011.
[11] Republished in Official Gazette of Romania, Part I, no. 513 of 31 July 2007, as subsequently amended and supplemented.

[12] The contribution is provided for in Article 3 of Government Emergency Ordinance no. 77/2011.
[13] On the coverage of the medicinal products for which payment is due on a quarterly basis, all holders of authorisations for placing medicinal products on the market, whether they are Romanian legal persons or representatives of foreign legal entities, are required to submit to the National Health Insurance Fund within 30 days 'the list of medicines subject to quarterly contribution', as stated also by the Court in Decision no. 1007 of 27 November 2012, published in Official Gazette of Romania, Part I, no. 878 of 21 December 2012.
[14] As stated in Article 4 (2) of Government Emergency Ordinance no. 77/2011.
[15] In this respect, see Decision no. 1007 of 27 November 2012, published in Official Gazette of Romania, Part I, no. 878 of 21 December 2012, Decision no. 39 of 5 February 2013, published in Official Gazette of Romania. Part I, no. 100 of 20 February 2013, Decision no. 52 of 12 February 2013, published in Official Gazette of Romania, Part I, no. 167 of 28 March 2013, Decision no. 263 of 21 May 2013, published in Official Gazette of Romania, Part I, no. 418 of 10 July 2013, and Decision no. 344 of 24 September 2013, published in Official Gazette of Romania, Part I, no. 678 of 5 November 2013.
[16] Pursuant to Article 3 of Government Emergency Ordinance no. 77/2011.
[17] As grounds for the unconstitutionality of the provisions of Government Emergency Ordinance no. 77/2011, the authors relied on Articles 16 (1) stating that "citizens are equal before the law and public authorities, without any privilege or discrimination", Article 34 on the right to protection of health, Article 44 (1) and (2) relating to protection and guarantee of the right to property, Article 56 (2) stating that "the legal system of taxes must ensure a fair distribution of the tax burden" and Article 115 (4) and (6) on emergency ordinances. It also cites the provisions of section 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, prohibiting discrimination, as well as of Art. 1 paragraph 2 of the Additional Protocol No 1 to the Convention, on the protection of property.
[18] Published in the Official Gazette of Romania, Part I, no. 860 of 7 December 2011.
[19] Published in the Official Gazette of Romania, Part I, no. 611 of 24 August 2012.
[20] The reasoning part of Decision no. 1007 of 27 November 2012.
[21] Article 31 was introduced by Government Emergency Ordinance no. 110/2011. It comprises the phrase "*including also VAT*"
[22] Idem.
[23] See, to that effect, Decision no. 39 of 5 February 2013, published in Official Gazette of Romania, Part I, no. 100 of 20 February 2013.
[24] Idem.
[25] As stated in the operative part of Decision no. 39 of 5 February 2013.
[26]http://www.europarl.europa.eu/plenary/ro/parliamentary-questions.html#sidesForm
[27]http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-012188&language=RO
[28] The answer to this question is published in the OJ C 285 E of 21 September 2012.
[29] For other papers, see Mircea Ștefan Minea „*About the constitutionality of the parafiscal charges imposed in Romania*", in the Constitutional Court Bulletin no. 1/2011, http://193.226.121.81/publications/buletin/12/minea.pdf
[30] For example, Decision of 21 May 2013, published in the Official Gazette of Romania, Part I, no. 430 of 15 July 2013.
[31] See judgment of 23 February 2006 in *Case Stere and Others* v. Romania, paragraph 50; see also *Case Gasus Dosier*, subparagraph 60, and Case Building Societies, paragraph 80.
[32] Judgment of 4 September 2012 in *Case Dumitru Daniel Dumitru and Others v. Romania*, paragraphs 41 and 49.