Discussions on Amending the Law no. 241/2005 of Tax Evasion. The Position of Romanian Constitutional Court

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Abstract

A recent discussion on a draft law amending the Law no. 241/2005 on the prevention and combating tax evasion has attracted our attention and we considered it necessary to consult the official websites of the chambers of the legislative in order to observe the status of the amendment. We can observe that the law amendment has not been noticed by criminal law specialists, from the examinations carried out until this moment, excepting some short press articles.

We have observed, on December 2018, that the Chamber of Deputies adopted the final form for the promulgation of the law, which was filed on 20 December 2018 at the General Secretary for the exercise of the right to contest its constitutionality. On 21 December there has been sent a unconstitutionality control request by some deputies. On 13 march 2019, The Constitutional Court, after observing the Law, declared that all the amendments are contrary to the Fundamental Act.

On a first analysis, the position ot the Court is fully justified. The amendment contains some solutions that are, in our opinion, contrary to the provisions of the Criminal Code and the Procedural Code and which are contrary to the rule of the separation of powers, the independence of justice and the equality of the citizens. Moreover, a number of criticisms can be argued regarding the very weak legislative technique used by inserting some terms and expressions that move away from the field of criminal law.

Keywords: *tax evasion, Law no. 241/2005, amendment, claimed prejudice, taxes, equality, oportunity*

1. Some introductory remarks

Amending the Law no. 241/2005 on preventing and combating tax evasion[1] is always a challenge for the legislator. This criminal special law involves a lot of interests, regarding business, and it can be statued that it is between the most discussed and controversial criminal acts. The recent amendment proposal has attracted our attention and we considered it necessary to consult the official websites of the legislative in order to observe the law[2] is in its way.

The so-called „*a priori* constitutionality control" procedure, regulated by Art. 146 of the 2003 Constitution of Romania, also called an „objection of unconstitutionality"[3],

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[1] Published in Oficial Monitor, no. 672 from 27 July 2005

[2] Consulted at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=16750, accessed on 10.09.2019.

[3] Muraru, I., Tănăsescu, E.S., (coord.), *Constituţia României, Comentariu pe articole*, Ed. CH Beck, Bucureşti, 2008, pp. 1396-1397.

concerns the constitutional legitimacy of a law, before its promulgation by the President of the Republic, after it is finally adopted by the legislative[4].

Kelsen was one of the first scholars that affirmed the necessity of a "supreme" act. In *The Pure Theory of Law*, he said that the assertion that a law is unconstitutional is in itself a contradiction, for the reason a law can only be valid on the basis of the fundamental one. If we have reason to assume that a law is valid, the reason for its validity must be find in the state Constitution. An invalid law, sais Kelsen, is not at all a law, and there is no legal basis for it, so no legal claim can be made in relation to it. When we speak of a law that is unconstitutional, we will understand that the law in question can be cancelled, according to the Constitution, not only by the joint procedure, that is by another *lex posteriori*, but by a special procedure, provided by constitution. As long as the rule is not cancelled, it should be considered valid, and as long as it is valid, it can not be unconstitutional[5].

Returning to the amendment in discussion, it contains some solutions that are contrary to the provisions of the Criminal Code and the Code of Criminal Procedure, and which contradict the rule of the separation of powers, the independence of justice and the equality of the citizens in front of the law. Also, a number of criticisms can be made about the weak legislative technique used by inserting some terms and phrases that depart from the field of criminal law.

As we will observe, this was also the option of the Constitutional Court, which, by Decision no. 147 of march 13, 2019, declared the entire law unconstitutional.

The central idea of the Decision is that the amendment contains a lot of uncertain terms and innovations, that cannot be accepted. Our critics in the article follow also that conclusion.

Lex certa imposes a rule of a qualitative condition, to be drafted with sufficient clarity so that any addressee can figure out whether an action or omission falls under the protection of the law[6]. In fact, we can observe that nowadays, the certainty of criminal provisions is understood most like a foreseeability, or predictability, and this condition makes a principal control by international Courts, as the ECtHR, and, observing its jurisprudence, by the national Constitutional Courts[7].

It has been said that besides the desiderate of security of the citizens, the definitely determined character of the criminal norm even comes to support the achievement of the main function of criminal law, which is the protection of social values. The criminal law is enacted to be respected, but it is obvious that it can be respected only to the extent that it determines precisely the scope of the imposed or prohibited actions, in other words to the extent that it can be understood by its recipients[8].

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[4] The objection may be drafted by the President of Romania, by one of the two Legislative Chambers, the Government, the Supreme Court, the Ombudsman and by at least 50 MPs or 25 Senators.

[5] Kelsen, H., *The Pure Theory of Law*, Humanitas Publishing House, Bucharest (2000), p. 324.

[6] Stănilă, L.M., *Principiul legalității: de la lex scripta la lex certa*, in Analele Universității de Vest Timișoara, Seria Drept, nr. 2/2018, p. 78, https://drept.uvt.ro/administrare/files/1550013880-uj-anale-2-2018--paginat.pdf, accessed on 10.09.2019.

[7] Stan, A., *Nullum crimen sine lex certa. The lack of previsibility in criminal law. Legal versus illegal in the recent Romanian Constitutional Court jurisprudence*, in Yearbook, Human Rights protection, from unlawfulness to legality, nr. 1, Novi Sad, 2018, p. 528

[8] Streteanu, F., Nițu, D., *Criminal Law. General part*, vol I, Universul Juridic Publishing House, Bucharest (2014), p. 39.

2. Critics regarding the statement of reasons of the Law

The „explanatory memorandum”[9] of the legislative act is particularly very succinct and does not observe the standards of such an act, especially when it comes to changes that are intended to have a high significance, with serious consequences on the sanctioning level.

It is well known that a lot of European countries adapted the system of punishments against the „financial crimes relating to the position of the accused on the damage caused. It can be said that in Romania this is a new "crime control policy", since the enforcement of the new criminal legislation in 2014[10]. In Western Europe, one of the most efficient legislations in this matter is the Italian one[11].

The legislative said that the main reason of the initiative is "the status of the Romanian judiciary system, the detention conditions and the prison agglomeration, as well as the cases in which Romania was convicted by the international courts for these conditions".

A first criticism of this statement is that the agglomeration level in penitentiaries and the precarious conditions of detention do not belong to the judiciary, being possibly administrative, legal, related to justice, but still beyond the meaning of the "judicial system" that the initiator gives. In Romania, the detention places are subordinated to the Minister of Justice, but it is to much to say that justice is made there. Justice is made in the Courts and it is also known that the detention regime refers to the post-judiciary individualization of the punishment, after the judge pronounced the decision.

On the other hand, although we have criticized[12] the very high punishment limits of aggravated forms of the tax evasion (referring to paragraphs 2 and 3 of Article 9 of Law 241/2005), neither the explanatory memorandum nor the final form adopted by the Chamber of Deputies make any reference to disproportionately high penalties (15 years imprisonment). However, we assume that most of the crimes of tax evasion do not result in very high convictions, there can be identified serious cases where the alternative without deprivation of liberty is impossible. To argue, therefore, that the agglomeration of prisons is the reason why the changes we were about to talk about here is, we think, a false hypothesis.

Moreover, the statement of reasons also uses an expression that contradicts the old and current principles of criminal law. It says that: "the purpose of punishment is to prevent, re-educate, but also to recover damages rather than to keep people in detention, which even attracts more expenses from State".

We can observe that the purpose of the criminal punishment cannot in any case be the recovery of the damage caused by the offence. This may possibly be only one of

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[9] http://www.cdep.ro/proiecte/2018/300/50/4/em445.pdf, accessed on 10.09.2019.

[10] Ciopec, F., *Crime control or due process? Which are the tendencies in Romanian criminal Justice?*, in *Journal of Eastern-European Criminal Law*, no. 1/2017, p. 193.

[11] Mariani, C., *Patteggiamento subordinato al pagamento del debito tributario: nessuna deroga per i delitti di cui all'art. 13 d.lgs. 74/2000*, https://www.penalecontemporaneo.it/d/6517-patteggiamento-subordinato-al-pagamento-del-debito-tributario-nessuna-deroga-per-i-delitti-di-cui-a, accessed on 10.09.2019.

[12] Stan, A., *Considerații cu privire la proporționalitatea sancțiunilor penale. Limitele controlului Curții Constituționale. Cazul contrabandei în formă agravată*, în Revista de drept penal al afacerilor, nr. 1/2018, Ed. Universul Juridic, pp. 65-90.

the aims of the criminal proceedings (in fact, the civil aspect of them). It is true that the finality of punishment oscillates between retribution and prevention (*punitur quia peccatum est, et non pecetcetur*, the old scholars say)[13]. But saying that the purpose of the penalty is the recovery of damages is a legal nonsense.

Recovery of damage caused by the offences is an aim of the victim, that is „civil action", in addition to „public action", which remains a subsidiary action, even in the case the state budget is harmed, as it is the case with tax evasion offenses. The state, that has the attribute to judge is the same as the state that is the victim of tax evasion, but, through a necessary fiction, the identity is removed in the criminal proceedings. The state authority protects the citizens, but it also has to protect itself, it is both a judge and a victim. Otherwise, this situation would generate a difficult discuss about the principle of *nemo esse judex in propria causam suam*[14].

To affirm that a person is convicted in order to recover the damage that he caused by the offence is, we think, dangerous for the system of criminal law. Changing the concept of the right to punish, moving it from the original purpose to the patrimonial purpose, we believe that it is proceeding in the wrong way, where criminal justice approaches rather a patrimonial one than the traditional system.

In any case, some steps along this way have been made and they hardly seem to be stopping. This is because the level of entrepreneurial criminality has made the recovering of illicit gain to become one of the main policy objectives in global criminal proceedings. Thus, the products and the proceeds of crime, meaning here, on the one hand, *lato sensu*, the civil damage caused to the injured and on the other hand the proceeds obtained by the violation of the law became a constant of the criminal activity and a central goal for the authorities.[15]

The Constitutional Court, in decision 147/2019, stated that the main problem of the amendment is the lack of clarity, the confusion of legal terms. It said that: "Regarding the quality standards of the law and the principle of the lawfulness of crimes and punishments, the Constitutional Court, referring to the jurisprudence of the European Court of Human Rights, held that although the criminal law cannot have absolute precision and it is inevitable it is mandatory for it to allow its recipients, if necessary by means of clarifying instructions, to reasonably determine the conduct sanctioned by the rules of incrimination and the consequences of non-observance in the concrete circumstances of each individual causes. At the same time, it was stated that these considerations are all the more relevant to the case of professionals who are required to exercise great care in the exercise of their profession, which is why they expect them to pay special attention to the risk assessment which it presents."

3. Tax evasion crimes: „state of danger" or harm offences?

Most taxpayers voluntarily comply with their tax obligations. However, some taxpayers persevere in being non-compliant and use any means to evade their tax

[13] For a large discussion on the punishments, see Tanoviceanu, I., *Treaty of Law and Criminal Procedure*, Second Edition, Vol. III, Bucharest, 1924 p. 11 *et seq*.

[14] *lat, nobody can be his own judge.*

[15] Gaito, A., Furfaro, S., *Giustizia penale patrimoniale*, revista Archivio Penale, Fasc. 2/2016, accessed at http://www.archiviopenale.it/giustizia-penale-patrimoniale-/articoli/15072, accessed on 10.09.2019.

obligations. It is in respect of those taxpayers, for whom support and monitoring does not improve compliance, that criminal law plays an important role. Moreover, it enhances the general preventive effect that criminal law enforcement can have and reduces noncompliance[16].

Tax evasion, drug or person trafficking and corruption are the main offences that generated the new "crime control" international policy, an international movement where the freezing, tracing and recovering the proceeds of crime is seen as the most important aspect of criminal investigations[17].

In connection with the tax evasion offenses provided in Romania by Law no. 241/2005, although the majority opinion is that these are prejudice offences, that cause damages to the state budget, the opposite opinion was also expressed[18] in the sense that these are crimes that only regard a state of danger.

Legal scholars say that the law does not pretend to use the offenses provided by art. 9 a material, certain and conclusive result, the damage remaining a civil law offense, with criminal relevance only in the matter of individualizing the punishment. However, it cannot be omitted that tax evasion is sometimes in relation to the damage caused, the state budget damage being an implicit consequence of committing the offenses, which would not mean, however, that they become a crime of consequence[19]. The omission to pay what is due to the state budget does not lead to an offender's appropriation with the money, in the classical sense of the term, he does not „take" something to which he is not entitled, but he does not pay for something to which he would be bound, causing damage, an unrealized benefit of the state.

It has also been observed[20], in connection with the crimes prescribed by art. 9 of the special law that the immediate effect of the tax evasion offenses is creating a state of danger for the legal object (the honest economic activities). With regard to tax evasion offenses that have complex content, some of them produce results. For example, it is the result of the offense under art. 9 al. (1) lit. d[21]. English scholars also observed this real controversy, and affirmed that the failure to pay duty does not necessarily mean that the individual has obtained benefit by evading it.[22]

The aspect of the incrimination architecture of art. 9 from the Law, shows another author[23], is the essential element that makes the opinion, even the majority one, that we are talking about danger crimes, to be strongly questioned. The existence of the two aggravated forms, lead to the conclusion that art. 9 par. 1 of the Law no. 241/2005, which actually incriminates the tax evasion, is based on the fact that these crimes have caused a general consolidated budget loss of up to 100,000 EUR.

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[16] OECD (2017), *Fighting Tax Crime: The Ten Global Principles,* OECD Publishing, Paris. http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.htm, accessed on 3.06.2019.

[17] Boucht, J., *The limits of asset confiscation. On the legitimacy of extended appropriation of criminal proceeds*, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 4.

[18] Boroi, Al., (coord.), *Dreptul penal al afacerilor*, Ed. 6, Ed. CH Beck, București, 2016, p. 132.

[19] Boroi, Al., (coord), *ibidem.*

[20] Hotca, M.A., (coord), *Infracțiuni prevăzute în legi speciale. Comentarii și explicații*, Ed. a IV-a, Ed. CH Beck, București, 2017, p. 159.

[21] Lit. d) and art. 9 penalizes "the alteration, destruction or concealment of accounting documents, fiscal stamps or electronic fiscal stamps or other means of data storage".

[22] Alldridge, P., *The limits of confiscation*, 2011, Criminal Law Review, pp. 827-843.

[23] Toader, M-C., *Este sau nu infracțiunea de evaziune fiscală infracțiune de pericol?,* accesed at www.juridice.ro, https://www.juridice.ro/384656/este-sau-nu-infractiunea-de-evaziune-fiscala-infractiune-de-pericol-2.html, accessed on 10.09.2019.

4. Analysis on the text of the amendment

If until February 1, 2014, Law 241/2005 provided for a case of non-punishment and a case of reducing the punishment, after the amendment of the Law from that date, Article 10[24] regulates only the attenuation of the punishment: *("in case of a crime of tax evasion provided for in Articles 8 and 9, if in the course of criminal investigation or trial, until the first term of trial, the defendant fully covers the claims of the civil party, the limits provided by the law for the committed crime are reduced to half ")*.[25]

Discussions on the nature of the offenses provided by Law no. 241/2005 may be particularly extensive, but we do not believe that it is the time of a digression in this sense, because the purpose of our short analysis is to highlight some inaccuracies and errors in which the legislator fell upon the law amending the provisions of tax evasion. We will not insist on the issues in which the scholars have broadly expressed, even in the current regulation, by criticizing them from the point of view of the lack of clarity, but only of the elements brought by the modifying law.

1.1. Recovering the damage caused, a condition for giving up the accusation?

First of all, the law-draft amendment regulates that paragraph 1 of Art. 10 shall be modified and shall have the following content:

"In case of a crime of tax evasion referred to in Articles 8 and 9, if during the criminal investigation or the trial, until the first term of the trial, the defendant fully covers the damage caused by committing the offense, increased by 20% with the addition of interest and penalties, it will be ordered, once, to give up the prosecution. "

The text begins by taking over the content of art. 10, but continuing with new elements, the first of which being the replacement of the *"claims of the civil party"* with *"the damage caused by committing the offence"*. It seems that the legislator's intention was to cut the issue, which we have already pointed out, in relation to the two opinions regarding the nature of danger or of prejudice, in the sense that the introduction of the phrase: *"the damage caused"* is unequivocally established that the crime is one of damage (prejudice). In this respect, we remark the inconstancy of the legislator, because in the text form before the amendments made on 2014, art. 10 also referred to *"damage caused"*.

Is there a difference, other than terminological, between the two concepts? We believe that it is, the central element of the difference being that between the concept of "availability", or "disponibility", specific to civil proceedings, and the "officiality", a characteristic of public criminal action. Damage is one of the elements of tort law civil liability, but a primary element, because in its absence there is no civil liability[26]. It has also been argued that although damage is the essential and necessary condition of civil liability, the proof of its existence is not in itself sufficient to incur civil liability,

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[24] Hotca, M.A., (coord), *op. cit.*, pp. 181-188, B. Vîrjan, *Infracțiunile de evaziune fiscală*, Ed. CH. Beck, București, 2011.

[25] According to art. 8, "It is a criminal offense and is punished by imprisonment from 3 years to 10 years and the prohibition of certain rights in the taxable person's determination in good faith of the taxes, taxes or contributions, resulting in obtaining, without right, money with title of repayments or refunds from the general consolidated budget or compensation due to the general consolidated budget".

[26] Vanca, P.O., *Acțiunea civilă în procesul penal*, Ed. Universul Juridic, București, 2018, pp. 64-65.

the damage still having to be certain, directly and personally, and be the causal consequence of the illicit activity.

Returning to the "traditional" form, it seems the legislative made a step forward, because the evaluation criterion is materialized, the budget damage being determined by an expertise. The claims of the civil party, as has been said, relate only to an allegation, sometimes being not realistic. The civil party in a case referring to tax evasion is the state, represented by the Ministry of Public Finance, respectively the National Agency for Fiscal Administration[27]. In conclusion, the defendant, in order to benefit the legal disposition, must cover the claims of the civil party, not the damage caused to the general consolidated budget.

We believe, however, that we cannot really speak of a real damage but also of the claims of the allegedly injured, because this can only be discussed when the injured party has established it by the court. Expertise is only a means of proof, among others, which does not by itself constitute a dictum of a court. Only the judge dealing with the related criminal and civil conflict may order the defendant to cover a certain amount of damage to this final moment, although, declaratively and terminologically, he uses the same denomination, in reality we are only talking about claims.

Without making a forced comparison, just as we cannot really talk about a crime committed until the court has finally ruled in this respect, but just an act prescribed by the criminal law or a reasonable doubt, we cannot talk about a certain damage, but only a claim.

Then, another issue that can be the subject of many controversies is the nature of the 20% percentage of the calculation base, which increases the amount to be paid. The Criminal Code and the special criminal laws no longer use these kinds of institutions to increase the costs the defendant will pay. Is this a „criminal fine" of mixed, a criminal and civil fine? It seems to be compulsory, because the law makes the exercise of a right conditional upon its execution. What can be an amount that exceeds the proven damage – it is not a civil fine, more a criminal one. It is although certain that the law linked its payment to a new institution of criminal procedural law – the waiving of accusation, which the prosecutor orders when finds a reduced gravity of the offence. We believe that the addition to the proven prejudice is a *sui-generis* criminal law institution, similar to a fine, which can be difficult to fit into one of the traditional institutions of this type.

What also surprises us in this paragraph is that the law falls into a serious confusion, stating that waiving the accusation may be a solution of the judge, when it is obvious that this is not an attribute of it. The text asserts, without doubt, that "if, in the course of the criminal prosecution or trial, until the first term of the trial, the defendant fully covers the prejudice (...), the criminal prosecution is waived".

The hypothesis in which the defendant pays the prejudice and the "increase" being, at first sight, legally covered, because, according to art. 318 Code of criminal procedure: "in the case of offenses for which the law provides for the punishment the fine or imprisonment of maximum 7 years, the prosecutor may waive the criminal prosecution when it finds that there is no public interest in pursuing the offence". But such a solution after the trial begins is not legal and has no support in procedural provisions. In Romanian system, once the case is sent to the Court, the prosecutor cannot waive his accusation (in some common law procedural systems, this can happen).

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[27] Toader, M.C., *cited.*

Only the Judge is sovereign to pronounce one of the solutions provided by the law, waiving the punishment (not the prosecution), postponing the punishment, conviction, acquittal[28]. So, whether or not it is a confusion, it is a gross one, between waiving up the accusation (attribute of the prosecutor) and waiving up the punishment (court solution), the legislative ignoring the separation of judicial functions and the solutions that can be ordered by them, considering that the prosecutor could use the remedy after the court was notified.

Another problematic issue of the provision is that the legislator requires the prosecutor (and the judge, if admitting that the reference is to waiving the punishment and not to waiving the accusation) a certain solution. It is true that under the regulation in force until 1 February 2014, the old art. 10 of the Law required the court if the damage caused and recovered was up to EUR 50,000 in the equivalent of the national currency, the application of an administrative sanction (a fine of 100 to 1,000 lei). The provision, although not declared contrary to the Constitution, raises issues from the point of view of the magistrate's independence, it is true, by reference to the law, but it can be said that by imposing a certain solution without accepting a margin of appreciation. Even the Constitutional Court, in a controversial decision stated in this respect, and that a solution might be imposed upon him[29].

The Court, in the decision on the amendment, argued that "regarding the prosecutor's obligation under Article unique pt. 1 of the Act, to order the waiving of accusation, if the defendant, during criminal investigations, fully covers the damage caused by the act, plus 20% (...), notes that these aspects are violations of the principle of the lawfulness of incrimination and punishment, 23 par. (12) of the Constitution and, at the same time, of the quality standards of the law, stipulated in art. 1 par. (5) of the Constitution".

1.2. The fine, a possible solution?

After paragraph (1), of art. 10 of Law 241/2005, the legislator introduces three new paragraphs, par. (1^1)-(1^3). The first one has the following content:

"(1^1) in case of committing a tax evasion offense referred to in Articles 8 and 9, if, in the course of the trial, until the end of the judicial investigation, the defendant will fully cover the damage caused by committing the offence, increased by 20%, plus interest and penalties, the court will order the penalty of criminal fine."

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[28] See also Udroiu. M., (coord.), *Codul de procedură penală, comentariu pe articole*, Ed. CH Beck, Ediția a II-a, București, 2017, p. 1353 și urm.

[29] In Decision no. 90 of February 22, 2016, the Constitutional Court ruled that "through the prosecutor's competence to waive the prosecution, according to art. 318 of the Code of Criminal Procedure, prior to or at the beginning of this procedural stage, with the consequence of not prosecuting the suspect or defendant and of abdicating ab initio a penalty, places him in the position of "saying" the right and to give a judgment likely to be enforced, conferring its prerogatives of juris dictio and imperium, specific to the courts. In this way, the Court held that, by applying the provisions of art. 318 of the Code of Criminal Procedure, the prosecutor directly carries out an act of justice. However, justice needs to be done in a transparent way by settling cases according to the principles of criminal procedural law governing the conduct of court hearings. At the same time, the Court found that, by imposing the obligations laid down in Art. 318 par. (3) of the Code of Criminal Procedure, the prosecutor places himself on the position of judge of cases by applying measures similar to punishments through an act that is neither administrative nor judicial.

The text is intended to be a procedural extension of the previous one, whereby the benefit of a lower punishment (the criminal fine, in the present case) is granted in the case of the payment of the damage, with the related increase and after the first term of the criminal trial.

Firstly, it should be noted that in this case, the payment shall be completed at least when the debates in front of the judge are finished. The procedural moment is the one in which the court, after the administration of the evidence, asks the prosecutor and the parties to present the arguments on the criminal charge. The sanction is higher, because the trial evolved over time and it could be said that the defendant did not understand from the first moments to repair the damage, realizing it only at the last moment before the beginning of the debates. From this point of view, the solution is justified, but we believe that the lack of an option given to the court is contrary to the Constitution (for the aforementioned reasons).

We cannot fail to recall the old provision of art. 10 of Law 241/2005, which stipulated (before February 1, 2014) that, if during the criminal prosecution or trial, until the first term of the trial, the defendant fully covered the damage caused, up to 100,000 euros, in the equivalent of the coin national, the fine *"could be"* imposed. The law therefore provided only an option, a possibility for the court to choose the pecuniary penalty. But by the new amendments, as with the provision requiring the prosecutor to waive prosecution, the judge is required to impose a fine on this date without any other sanctioning option. This is not constitutional, and we are returning in the time of fixed, predetermined punishments, of a sad memory, where the court, in case of guilt, had to apply the single punishment[30]. It can be argued that the fixed penalty is a pecuniary one, being a favor, but we still believe that the breached principle is the same in all cases.

Most modern states adapted their repressive systems, paying more attention to the fines[31], by increasing the number of cases where it may be applied alternative with the imprisonment. The fine is also said to realize its coercitive function by its ability to reduce to a certain extent the patrimony of the offender, following his re-education through the material restrictions that follow.

However, it is not clear, according to the criticized norm, the amount of the fine that could be applied, since the provision does not corroborate with the general rule regarding the criminal fine, from art. 61 Criminal Code. First of all, Art. 8 and 9 of Law no. 241/2005 do not provide for alternative punishment of the fine to that of the prison and the first legitimate question is whether a special provision may derogate from it. Our view is that this is not possible without a correlative change of the pure sanctioning rule, because, in essence, the rules we are considering are a mixed, substantive criminal law and procedural law. Therefore, in order to be able to order the payment of the criminal fine, we believe that a judge cannot directly apply the text of the art. 1^1, cited above, but will have to refer to the special rule (Articles 8 or 9 of the law) and then to the text governing the criminal fine.

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[30] Tanoviceanu, I., *Treaty of Law and Criminal Procedure*, 2nd ed., 1924, vol. III. More than half of Vol. III is devoted to the history and evolution of punishments, especially to the capital punishment, because most of the times the fixed sentence was death, its individualization on the way of execution only, depending on the seriousness of the offense and the accused person. In the French Penal Code in 1810, the fixed death penalty was imposed in 27 cases.

[31] Paşca, V., *Drept penal. Partea Generală*, Ed. a IV-a, Ed. Universul Juridic, Bucureşti, 2015, p. 456.

Then, even if we admit that a criminal fine might apply, we are not sure what are the limits between which it would be established. Article 61 of the Criminal Code links the amount of „days/fine" with prison sentences with which the fine is provided alternatively. However, if we do not have this alternative, we cannot legally establish a number of days. There are in fact very few offenses that provide only the penalty of the fine, with a unique character[32], and art. 61 al. 4 lit. a) The Criminal Code also stipulates certain limits within which the court will set the days-fine. In the case of tax evasion to use this mechanism, in this case we will have a single penalty provided for by a derogatory rule? Hard to accept, because the criminal policy imposed that the fine, as a single punishment, should be a sanction imposed on particularly socially dangerous acts at the lower limit of criminal repression.

1.3. Late payment of the damage and the conviction without deprivation

Article 1^2 of the amending law reads as follows:

"(1^2) in the event of a crime of tax evasion referred to in Articles 8 and 9, if the defendant's obligation to cover within one year from the delivery of the sentence is established by court decision, the damage caused by committing the act, increased by 20 % of the base, plus interest and penalties, the court may only order the suspension of the sentence under probation only once. If the convict does not cover the amount ordered within the prescribed time limit, the probation will change into imprisonment".

It is particularly difficult for us to understand what the legislator wanted to regulate through this text. Is this a special rule of "canceling the probation"? How can the Court otherwise order the suspension of the execution of the punishment, if we already speak of the premise of establishing a payment obligation? It would appear that the legislator considered the hypothesis that the defendant undertakes to pay the damages in one year, in which case it would be possible to choose for the actual non-execution of the punishment (which, however, it is possible also by broad law, if we consider the minimum of punishment for the simple variant of Article 9 of the law).

Then, it is almost impossible to understand the meaning of the following phrase, which seems to want to regulate a new institution in criminal law, not envisaged in any other law, that of "the transformation of punishments". A "transformation" as stated in the text under consideration is completely devoid of normative support in the general part of the Code, generating serious confusions and enrolling in the incoherence of the entire law under our criticism. The Court said it is "non-juridic".

In fact, comparing it with the system in force, al. 1^2 seems to be unfavorable for the accused, contrary to the apparent intentions of the amendment, because if, according to the general rule, the court dismisses the probation and orders the execution of the punishment, unless the convict proves that he had no possibility to fulfill the civil obligations, the new derogatory text does not provide for this exception, sanctioning with imprisonment the defendant in all cases.

The following text provides that:

"If the magnitude of tax evasion provided for in art. 8 and 9 justify such a measure, the court may order the sums provided for in the preceding paragraphs to be covered within 1-3 years, the failure to pay them with the consequences provided for in the previous paragraph".

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[32] In the Romanian Criminal Code, a single offense provides for the single fine punishment, the "violation by any means of the secret of voting" (Article 389, paragraph 1).

The text does not seem to have the right place in the succession of the texts of the law, it would naturally have been placed before, and not later, because we find out from its content that it is intended that, by judgment, payment within a set timeframe of established injury. The legislative technique is deeply deficient, naturally the previous norm being a development and a consequence of what follows, they had to be reversed in a somewhat natural sequence. But almost nothing seems legally in this amendment as we advance in its analysis, as this text also has a number of deficiencies.

First of all, the use of terms that have nothing to do with criminal law continues: "the magnitude of tax evasion". In current language, it is true that tax evasion can be large or small, but although the law is said to be foreseeable, accessible to the recipient, the concept seems to have been taken to the extreme, and the law should not operate with such terms. A number of synonyms could find their place: quantum, value, extent, but the legislator did not consider them, preferring a popular, even an argotic term.

We do not understand the rationale of this provision, because, as we have shown in the foregoing, the provision of art. 97 of the Criminal Code is more favorable, granting the convicted person the right to pay civil damages for the entire time, up to the end of the probation period (which may vary between 2 and 5 years) and on the other hand granting it the benefit of the lack of a bad faith, which, it is real, must be proved, but in any case does not automatically impose the imprisonment.

1.4. Payment of the damage, a personal circumstance?

Lastly, the final text of the amending law states that:

"(1) the provisions of art. 10 par. (1) shall apply to all defendants who have jointly committed one of the acts referred to in art. 8 and art. 9, regardless of whether the payment of the damage was made only by one or a part of them".

This text tried to change the interpretation given by the High Court of Cassation by Decision no. 9/2017[33], whereby it was established that "the provisions of art. 10 par. 1 of the Law no. 241/2005, in force until February 1, 2014, regulate a personal cause of non-punishment/ reduction of punishment limits".

So, the last text being analyzed is a measure of criminal policy that, contrary to what the Supreme Court has established before, benefits all participants in a tax evasion offence, even if only one or more of them paid the damage.

The High Court cites in its decision the Constitutional Court[34], which has ruled against the criticism of the inequality before the law of the defendants in the application of art. 10 of the Law no. 241/2005 that "criticism of violation of the constitutional principle of equality of rights cannot be accepted because the case of reducing the punishment provided by the law applies equally to all persons that are in the situation of art. 10 par. (1) sentence I of Law no. 241/2005, that is to say the authors of a tax evasion offense, which during the criminal prosecution or the trial until the first term of the trial fully payed the damage caused by the criminal offense. As it has also stated: (...) The legislator regulated in Article 10, paragraph (1), sentence I of Law 241/2005 on the prevention and combating of tax evasion a cause of reducing the punishment prescribed by the law for the committed offence, under the conditions established by the law. This is a criminal policy measure determined by the specific

[33] Published in Official Monitor no. 346/11 may 2017.

[34] Constitutional Court Decision nr. 285/2009, published în Official Monitor, Part I, nr. 192 /27 March 2009

nature of the tax evasion offenses, namely the need to recover the sums owed to the consolidated budget as a matter of urgency and is not likely to undermine the right to a fair trial (...) The fact that only the accused who pays covers the damage caused during the criminal prosecution or legal proceedings is entitled to reduce the penalty limits provided by law until the first term of trial has no significance to the restriction of free access to justice. The person concerned has the possibility to appeal to the courts if they consider that the rights, liberty or legitimate interests have been violated and to enjoy all the procedural safeguards provided by law, including in relation to the civil party (...) the interested party is fully free to prove the existence, or the non-existence or the extent of the damage, the court being the one which, on the basis of its constitutional competence (...), decides on the basis of the evidence also on the civil side..."[35]

Returning to the mechanism of unified jurisprudence, which the new law wishes to contradict, the Court, after presenting its own jurisprudence and the views of the doctrine, has shown that in order to have the cause of non-punishment regulated by the provisions of art. 10 par. (1) of Law no. 241/2005, it is necessary to ascertain "the contribution of the defendant to cover all the damage and not the attitude and the contribution of the civil party to recover the debts". In other words, not every way of recovering the damage leads to the incidence of the case of non-punishment, *but only an active, strictly personal attitude of the defendant, to eliminate the consequences of the offense committed.*

It is, therefore, a subjective attitude of the accused to pay the damage caused, which could not be objectively justified, in the opinion of the Supreme Court. The conflict is real and the problem is difficult because we are at the confluence between two systems, the objective and the subjective (which are at the base of almost the major controversies of criminal law)[36]. Is the state's interest in recovering the damage or punishing the person who breached the tax law? It could be argued against the proposal that it is absurd to "award" a defendant who takes advantage of the consistency of another's patrimony (which may have paid the damage without the least intention of helping the former). The criminal trial is not just about paying the damages, it has other reasons. However, the opposite argument can be put forward, in the sense that it would be equally unjust to punish him, as the damage was recovered.

As we said, the Court, on 13 march 2019, declared all the amendment contrary to the Constitution. The main idea of the decision is that the law does not respect the technique of elaborating normative criminal provisions.

5. Final conclusions

The old latin dictum *qui non habet in aere, luat in corpore*[37] seems to be still present in the criminal legislations. Returning to what has been said before in the criticisms expressed, the question of the relation between civil damage, pecuniary

[35] Decision of Constitutional Court no. 647/19 June 2012, published în Official Monitor of Romania, Part I, no. 494/ 18 July 2012.

[36] The situation is also encountered at the institution of anticipate liberation, where the non-payment of the damage is not analyzed as an objective condition, from the point of view of lit. c) and art. 100 Criminal Code, but as a lack of rehabilitation, a negative attitude, according to the subjective criterion.

[37] *He who has no money, will pay with his body*, Digeste, *apud* Tanoviceanu, I., *op. cit.,* p. 561.

punishment on the one hand and criminal law is one of the oldest and most controversial issues in the matter.

We believe that the law amending provisions sanctioning tax evasion does not meet the criteria of either form or content of an effective, foreseeable criminal law, as the Constitutional Court also observed. Although we still argue for reducing the severity of the sanctioning regime, we appreciate that the amendment was an error of the legislator. On the one hand it contains a set of strange terms of criminal law, a series of inaccuracies with the general texts of the Code and, on the other hand, the consequences that would have result if it came into force would not be the expected.

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