About the Need to Redefine the Concept of Illegal Trading; A Case Analysis and A *De Lege Ferenda* Proposal

~ *Ph. D.* **Daniel Costea** *(Academy of Economic Studies, Bucharest, Romania)*
E-mail: dnlcostea@gmail.com

~ *Ph. D. Dr.* **Cristina Veith** *(Academy of Economic Studie, Bucharest, Romania)*
E-mail: christineveith@yahoo.de

Abstract: *The paper aims to analyse the links between various networks and the way they can interact, particularly where networks belong to different stakeholders, involving also State authority. The case analysis argues on the idea that each restructuring process especially where it targets state-controlled institution needs to incorporate measures to install good corporate governance and management efforts toward open communication and transparency, along with effective quantitative risk analysis and compliance management when assessing an offence which may be deemed "criminal" in its European autonomous meaning. The methodology used comprised a comparative study and historical and logical research tools but also qualitative research such as interviews with the subject company and benchmarking the result to similar cases. The results of the paper point out the relevance of the rules and principles underlying the restructuring process of a public authority, effects and interaction between institutions and the need for clearer and more transparent legal framework, particularly where sanctions can be combined in a manner with negative impact on offender's ability to continue to operate.*

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Introduction

This article emerged from the need to redefine the expression „illegal trading" within the meaning of Law 12/1990 on the protection of population against unlawful commercial activities ("Law 19/1990"), in particular that form of illegal trading which relates to the carrying out commercial activities without complying with the requirements prescribed by [applicable] law. It refers to the outcome of a case which was closed by the fiscal authority by imposing a significant fine along with the additional measure of confiscating the amount generated by the company through the so-called illegal trading. Our analysis touches mostly the aspects of legality and effects of the confiscation since this measure envisaged in our case, the full value of certain transaction carried out apparently by breaching of the Currency control Regulation no. 4/2005 ("Regulation no. 4/2005") issued by National Bank of Romania ("NBR"). Occasionally, the fiscal authority followed the same procedure and where applicable, it fined the companies and confiscated the amount representing the value of the transactions on the basis of article 1 para. a) which speaks about carrying out commercial activities without complying with the requirements provided by law and article 3 allowing confiscation of the amounts serving to or generated through an offence.

This article elaborates on the effects of restructuring a public authority in connection with the interdependent network's theory following a previous article in which we examined theoretical aspects of the restructuring in case of a public authority, such as fiscal administration. An interdependent network is a system of coupled networks where nodes of one or more networks depend on nodes in other networks. Such dependencies are even more strengthen by the developments in modern technology and the tendency of certain authorities to exceed their competences. Dependencies may lead to cascading failures between the networks and a relatively small failure can lead to a catastrophic breakdown of the system, such as insolvency and even bankruptcy.

In the strategic reorientation of an organization, restructuring is the result of a change in optics and it evolved with the global economic environment to the role that characterizes "an organization's ability to innovate, develop a competitive edge over other competing organizations, and change practices, processes and products" (Hirsch P. M. and De Soucey M., 2006). As noted by Seibel H.D., Mayumi O., "the restructuring of an institution requires changes in the corporate culture and mindset of both management and staff". In the case of a state-owned institution restructuring needs to incorporate measures to install "good corporate governance, open communication, ambitious targets and performance incentives, together with effective risk and compliance management" (Seibel H. D. and Mayumi O., 2009).

In Romania, "[an] ineffective public administration and widespread corruption undermine service delivery and hamper Romania's ability to implement structural reforms and draw on EU funds" (European Commission, 2016). Despite the fact that Romania has undergone significant economic growth, the business environment is facing bureaucratic procedures and legal insecurity, and certain legislative initiatives endanger the stability of the financial sector. There is a clear correlation between the deficient management of human resources within

the public administration and the problems faced in the business environment, particularly where legal norms fail to meet the clarity and predictability criteria.

The authors have used comparative methods and practical analysis to investigate the application of legal certainty and other fundamental principles in general practice of the ECHR and ECJ are used to punctually address the necessity of amending an obsolete and unclear legal norm with concrete effects on local business environment, that is illegal trading or carrying out commercial activities without complying with the requirements provided by law.

Brief description of the case

In our analysis, the company was subject to an investigation conducted by the antifraud arm of the fiscal authority. Similarly, to other cases, the control body carrying out an investigation, identified certain incoming payments denominated in euros, received by the economic agent from various clients in exchange for the goods delivered and subsequently, deposited in the company's bank account by one of the company's employees. In other words, the company issues an invoice denominated in lei, representing the value of the goods or services supplied or provided to the client(s) but receives the respective amount in euros or other currency from individual purchasers. The invoices issued in Romanian lei are then cleared by accounting registrations whereby the amount received in foreign currency is converted into lei at the exchange rate announced by the National Bank of Romania. The fiscal body finds that the operations thus carried out represent a violation of the provisions of Regulation no. 4/2005 regarding the currency regime, particularly the obligations which requires a Romanian resident to pay to other resident supplying goods or services, in local currency. Such violation was deemed by the control body to constitute verbum regens of the contravention provided by art. 1, para. 1, a) of Law 12/1990 and ended up besides the maximum fine provided by Law 12/1990 with the additional measure of the confiscation of all amounts denominated in euros.

In the request to reject the complaint made against the contravention minutes, the investigative body argues, among other things, that collecting amounts denominated in euro is a "competitive advantage" because the economic agent avoids the payment of exchange rate differences. In addition, according to the control body, the main sanction with the fine (in our case the fine was 20,000 lei which represents the maximum fine prescribed by Law 12/1990) is insufficient compared to the gravity of the violation, hence the necessity of confiscation, seen as being able to ensure compliance with the legal provision. An additional supporting argument of the ascertaining control body was that the prohibition imposed by Regulation no. 4/2005 "passes" the home legal norm, transforming it into a norm of general applicability. As regards the additional measure of confiscation, in response to claimant arguments that the purpose of this sanction [the confiscation] is not cure, but rather punitive, repressive and exemplary sanction, which characterizes an action having a "criminal" nature as opposed to a simple contravention, the control body expressly recognizes that these conditions are met: "a considerable amount of the amount collected in foreign currency" (the amount subject to confiscation); "punitive,

coercive purpose" of the sanction applied; the confiscation has "the role of discouraging the recurrence of the wrongful act".

In front of the first court, the claimant briefly sustained the following:

(a) lack of competence of the control body in which relates to its right to assess a breach of the Regulation no. 4/2005 regarding the currency regime and consequently, the right to sanction such breach outside the framework provided by Regulation no. 4/2005;

(b) lack of authority of the control body when imposing the additional measure of confiscation of the value obtained while carrying out the transactions in breach of Regulation no. 4/2005;

(c)wrong assessment of the alleged contravention when declaring it as being sanctioned by Law 12/1990 instead of applying the sanctions allowed by Regulation no. 4/2005;

(d)failure of the facts recorded by the control minutes to meet the requirements prescribed for a contravention, particularly those related to the illegal behaviour, the guilt of the offender and the seriousness of the breach;

(e) additional measure of confiscation of an amount equal to the value of the transactions carried out allegedly in breach of Regulation no. 4/2005 does not fulfil the criteria prescribed by the ECJ in connection with the principle of proportionality.

Additional aspects stressed by the claimant envisaged a comparison to other players in the industry who regularly report significantly lower profits on much larger turnovers. For clarity, in our case study, the additional measure of confiscation represented a ridiculous 5,4% of total turnover for year 2017 and approx. 4% of 2018 turnover. Even if lower than the regular yearly profits, if implemented by force, the confiscation of a large amount would pose a high risk for the company being able to continue operating as a going concern. Furthermore, if enforced, the confiscation may cause other creditors of the company reconsidering their ability to maintain enough commercial or financial credit to let the business continue to operate. In preparation of the court judgement, the company employed the services of a judicial expert accountant to perform an out of court expertise which concluded on the legality of accountancy registrations and operations carried out in connection with the alleged illegal transactions.

First court decision

The first court decision was rendered upon a single court hearing whereby the court rejected all evidences submitted by the claimant and rejected the complaint in all respects. The court decision summarily stated that that „according to art. 15 paragraph 1 of the Emergency Ordinance no. 2/2001, the contravention is confirmed by the minutes concluded by the persons specified in the normative act that establishes and sanctions the contravention". It also notes that "the offender was sanctioned under art. 1 paragraph a), art. 2 paragraph 1 and art. 3 of Law 12/1990 on the protection of the population against illegal activities of production, trade or services". Further, it states that "the provisions of art. 2 para. 2 expressly provide that the officials of the specialized apparatus of the mayor, the bodies of the General Directorate for Tax Anti-Fraud, the bodies of the financial control and the personnel of the Romanian

Police, the Romanian Gendarmerie and the Romanian Border Police find the contraventions and apply the sanctions in this matter" and that, therefore," it has no relevance that this attribution is not found in the provisions of GEO no. 74/2013 and GD 520/2013 invoked by the claimant and as the agents of the respondent were competent to ascertain the contravention committed by the petitioner and to sanction it ". Consequently, the first court "rejects the arguments that the power to sanction the offence would fall within the competence of the staff of the National Bank of Romania ...., and will hold that the minutes of finding the contravention was legal legally drawn from this perspective."

Trading without complying with the requirements prescribed by law; the applicability of Regulation no. 4/2005 on currency control

Illegal trading within the meaning of article 1 para. a) of Law 12/1990 relates to one person, be it an individual or legal entity, carrying out commercial activities without complying with the requirements prescribed by law. As a general remark, we believe such definition gives a large power of assessment in favour of the controlling authorities and lacks the character of being foreseeable by the economic agents. Following the logic exposed by the first court decision, breaches of Regulation no. 4/2005 on currency control may be sanctioned to the same extent (meaning by fine and additional measures such as confiscation) by the authorities who by their nature and purpose of activity may not be prepared to appropriately asses and/or handle breaches of currency control regime, such as officials of the specialized apparatus of the mayor. As noted by Montesquieu, "particular intelligent beings are of a finite nature, and consequently liable to error" (Charles de Seconant, Baron de Montesquieu, 1748) hence the authorities' tendency to exceed their powers or exercise them sometimes in a wrong manner, with negative effects on the privately held companies.

The above quoted paragraph of Law 12/1990 generated a significant amount of interpretations, being questioned several times from a constitutional point of view in cases where authorities used their powers to impose sanctions like the one debated in our case. The views expressed by the Constitutional Court on points raised by various claimants when criticizing article 1 para. a) of Law 12/1990 remained unaltered through time:

6. …the author argues, in essence, that the criticized legal provision does not have a sufficiently precise and clear wording, rendering it unpredictable for the recipient of the rule, since the phrase "without meeting the conditions established by the law" does not allow the recipient to get compliant his behaviour or becoming capable to foresee and measure, to a reasonable extent, the consequences which may derive from a certain noncompliance;…. In these circumstances, the claimant believes that he does not enjoy the constitutional guarantee established by the principle of legality, by not being exposed to an arbitrary judgment of the investigative bodies or of the courts, in particular, the judge being forced to establish, by means of case law, outside the purpose of the applicable laws and regulations, which are the requirements regarding the conduct of economic activities, by which the provisions of art. 1 paragraph (4) of the Constitution.

16. By decisions no. 1.117 of October 16, 2008 and no. 942 of November 13, 2012, …, the Court, analysing criticisms similar to those in the present case, found that a problem of interpretation and application of the criticized law text is being discussed, respectively that regarding the meaning of the notion of "law" used in the contents…. It was found that these criticisms cannot be received, as article 1 para. a) of Law no. 12/1990 is sufficiently clear and predictable,…, leaving no doubt as to the conduct on which must have the people who carry out a commercial activity.

17. …the Court held that the provisions of article 1 para. a) of Law no. 12/1990 take into account the normative acts regarding the execution of acts and deeds of commerce, foreseeing the consequences of the violation of the legislation in this matter, whose compliance is a pre-existing obligation… and, for this reason, did not hold the violation of the requirements of predictability of the criticized legal norm.

Among others, Court's stance on article 1 para. a) was that it is precise, clear and predictable, the compilation of an exhaustive list of the normative acts regarding the features characterizing the legal trade (as opposed to illegal trade) not being necessary for the interpretation and the application of the norm [article 1 para. a) of Law 12/1090] challenged by the exception of unconstitutionality.

Legal certainty principle

Legal certainty aims at adaptation of the individual behaviour to the legal validity standards, protection from the State interference and individual confidence in the legal status reliability (Fenwick, 2017). This principle was characterized in various decisions of the European Court of Human Rights.

In Steel and Others v. The United Kingdom case, the ECHR stressed that the Convention requires the law, be it written or unwritten, sufficiently precise to allow the citizen, if needed, with appropriate advice to predict some extent in certain circumstances and the consequences which an action may cause.

In Hashman and Harrup v. The United Kingdom case, the ECHR pointed out that one of the requirements flowing from the expression "prescribed by law" is foreseeability. A certain norm cannot be regarded as "law" unless it is formulated with sufficient precision that gives the person an opportunity to be guided in their actions by that specific rule of thumb. The degree of clarity should ensure formulation of national laws and cannot cover all eventualities. It largely depends on the content of the document, the scope covered by this law, as well as the number and status of those to whom it is addressed.

In Olsson v. Sweden case, the ECHR defined that the law, which granted certain powers to public authorities, must be written with sufficient clarity and accounted for a legitimate purpose to give the individual adequate protection against arbitrary interference.

In Rekvényi v. Hungary case, the ECHR considers in detail, the predictability criterion of behaviour in the future. Norm cannot be considered as "law" unless it is formulated with sufficient precision, which entitles the persons to follow the rule in their actions. A reasonable person should be able, if needed, with appropriate advice to anticipate to a reasonable degree, the consequences which

may result from his action or omission to act. Predictability of consequences with absolute certainty is not required because it cannot be achieved.

Criticism of and discussion on the current approach; breach of EU principles and EU treaties

Assuming the Romanian Constitutional Court was right in its logic when declaring the wording "without complying with the requirements provided by law" as meeting the criteria for legal certainty, then such approach places within the powers of the control body to ability to asses, on a case by case basis, which are the offences falling within the purpose of Law 12/1990, particularly art. 1 para. a) or under other pieces of legislation and decide at its discretion, upon the additional measure of confiscation. In case of an abuse or wrong assessment, the courts should be able to censorship them and remedy the negative effects. However, a question remains where neither the control body nor the court are able to properly asses and enforce the law by framing a certain case within the relevant norm. However, we believe that the defects hidden in article 1 para. a) of Law 12/1990 refer not only to the meaning of "law" but to the meaning of the full expression used, that is "without complying with the requirements provided by law".

We note that the Romanian legal system has a vast number of requirements, each of those raising the same questions: which are the criteria applied by the control body or the court to assess the circumstances regarded as breaches of Law 12/1990 and which ones will be outside its purposes and sanctioned differently? Even accepting ad absurdum that a certain behaviour may contain elements of a contravention, who decides upon the degree of guilt and importance of offence to ground the sanction on article 1 para. a) which enables the confiscation. In line with Constitution, confiscation must in all cases be provided by law. While most of other normative acts do not provide for confiscation as an additional measure, article 3 of Law 12/1990 provides that "The goods that served or were intended to serve when committing any of the offences provided in article 1, if they belong to the offender, as well as the money and goods acquired by committing the contravention are confiscated" leaving no room for interpretation. Apparently, the analysis made by the Constitutional Court left apart the issue of additional measure of confiscation: when it comes to practice, once the control body sets the legal ground within Law 12/1990 framework, then confiscation comes naturally. A certain behaviour which may be sanctioned pursuant to different legal norms, once qualified as an offence pursuant to Law 12/1990, will in most cases lead to confiscation. However, such approach does not match with the EU rules and principles, as argued below.

In our case, from a EU perspective, the minutes and the first court decision represent a serious violation of both the European Convention on Human Rights and the Law of the European Union, respectively of the Treaty on the Functioning of the European Union ("TFEU") and Charter of Fundamental Rights of the European Union, as international treaties, to which Romania is a party and which are directly applicable in the Romanian domestic legal order and have super-legislative legal force. Each of the Convention, the TFEU and the Charter, while retaining their character as sources of

international law, also become the source of Romanian domestic law (Mendelson M.H. et. al., 2019). As a result of their super-legislative force, any internal legal norms to the contrary must be removed from application, the conventional supra-legislative norms being applied directly, unless the domestic law is more favourable to human rights.

The direct application of the Convention falls within the jurisdiction of the courts, in particular the court vested with the settlement of a particular dispute, by virtue of the full jurisdiction of the courts, in what relates to interpreting and applying the legal norms, a process that includes the choice of the applicable law in case of a conflict of laws, by giving effect to the legal norm having a superior legal force. The national judge is the first judge, the ordinary law judge for both the European Convention on Human Rights and TFEU and other EU regulations.

For the purpose of the Convention, among the holders of the rights enshrined in the Convention are not only natural persons, but also collective law subjects, including for-profit legal entities (commercial) companies such as the claimant in our case. The jurisprudence of the European Court of Human Rights is constant and rich in recognizing the quality of legal persons, including for profit, holders of conventional rights. The conventional rights invoked by the claimant are, undisputable, rights which belong equally to and protect also entities made for profit and the ECHR always intended to include corporate entities and other non-natural persons (Emberland, 2006).

Having in mind the prevalence of the Convention and TFEU provisions over the domestic norms, we believe that the case raises serious concerns as regards the ignorance of fundamental principles laid down in the Convention on Human Rights, TFEU and European Charter of Fundamental Rights. Hereinbelow, we summarised some of the inconsistencies which need to be addressed when considering amending or annulling article 1 para. a) and article 3 of Law no. 12/1990.

Violation of the principle of the legality of criminal offences and penalties

The conventional and Charter norms guarantee the principle of legality of criminal offences and penalties. The notion of "law" is, in its turn, an autonomous European notion, imposing also qualitative conditions, among which the predictability (clarity) of the law and guarantees against arbitrariness. Moreover, according to the constant jurisprudence of the European Court of Human Rights and European Court of Justice, the legality is strict, so the qualitative requirement of clarity of the law is higher in "criminal" (autonomous) matters than in extra-criminal matters.

The legal rule on the basis of which the contravention was applied to the claimant through the challenged minutes and which the first court applied without a self-assessment is neither clear nor predictable. Thus, one and the same fact, of not collecting the price of a good sold in the national currency, could be qualified, as one requiring the applicability of Regulation no. 4/2005 regarding the currency regime and of Law no. 312/2004 regarding the Statute of the National Bank, as well as one requiring the applicability of Law no. 12/1990.

However, the two normative acts are completely different in terms of the punishing regime and the control body competent

to apply the sanctions; the size of the contravention is different; the additional measure of confiscation exists only in one of the two normative acts; the competent body with the application of the sanction is different (in one case, the staff within the National Bank of Romania, while the other fiscal authority's employees) - article 1 para. a), article 2 paragraph (1) and (2) and article 3 of Law no. 12/1990, on the one hand, respectively article 3 paragraph (1) and article 7 paragraph (3) of the National Bank of Romania Regulation no. 4/2005, correlated with article 57 paragraph (1) of Law no. 312/2004.

Obviously, the recipient of the rule could not clearly state whether, in connection with the alleged breach, the control body could apply the sanction of confiscation pursuant to Law no. 12/1990 or not (according to NBR Regulation no. 4/2005 and Law no. 312/2004).

At the same time, the legal norm applied by the control body and by the first court does not provide any guarantees against arbitrariness. Thus, the prohibition of making payments in a currency other than the national currency is contained exclusively in the Regulation no. 4/2005, which provides, by reference to Law no. 312/2004, the exclusive sanction of the fine (but not the additional measure of confiscation) and establishes as the competent [controlling] body as being NBR's staff. Fiscal authority officials are competent in our view only in which relates to actions falling under the domain regulated by Law no. 12/1990. However, the fiscal authority officials, acting as control body, expressly found the claimant as acting in violation of the NBR Regulation no. 4/2005 (although they did not have this competence in any form), then, instead of applying the sanction provided by the applicable act (and which could not be confiscation), they applied the sanction of confiscation from different normative act. The arbitrary choice of the normative act, one regarding the competence of the control body and the sanction, another regulating the prohibition, validated by the first court decision, demonstrates that the internal law allows arbitrariness in the application of the sanction (the control body, endorsed by the first court, has apparently an option to choose the rule that suits the circumstances in order to justify their competence, to support the existence of an unlawful act and consequently, legality of the sanction applied).

Given that the right to legality and proportionality of the offences and penalties guaranteed in article 49 of the Charter has a correspondent in the right to legality enshrined in article 7 of the European Convention on Human Rights, and having regard to the principle of protection equivalence and subsidiarity, contained in article 52 para. 3 of the Charter, it follows that the minutes and the first court decision violate art. 7 of the Convention and also article 49 of the Charter. Other issues relate also to the proportionality of the sanctions, being clearly that neither the control body nor the court have exerted any power to properly asses the effects of the sanctions by quality and behaviour of the offender. Finally, as repeatedly envisaged by ECJ, in order to establish whether a provision of community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are appropriate and necessary to attain the objective sought. where community legislation makes a distinction between a primary obligation , compliance with which is necessary in order to

attain the objective sought , and a secondary obligation , essentially of an administrative nature , it cannot , without breaching the principle of proportionality , penalize failure to comply with the secondary obligation as severely as failure to comply with the primary obligation.

Violation of the non bis in idem principle

The control minutes contested by the claimant and the first court decision violate the right to non bis in idem, a fundamental legal principle common to practically all national criminal justice orders in Europe, usually as a constitutional human right (Vervaele, 2005). It is also known as the prohibition of double jeopardy. According to this principle, a person cannot be prosecuted more than once for the same (criminal) behaviour. Its ratio is twofold: on the one hand, to offer judicial protection to persons against the State's jus puniendi, once they have been subject to a prosecution (as part of the principles of fair trial and equity, and on the other hand to ensure legal certainty and the respect of the res judiciata (Alexy, 2002). Neither the conventional norm nor the Charter allow a person be prosecuted, tried or convicted twice for the same act. It is not necessary that all forms of state action (prosecution, trial, conviction) exist at once or have the same cause, a single form being sufficient to violate the principle. Moreover, as it relates to criminal matters and, therefore, to strict legality, the law must offer guarantees against arbitrariness.

However, the domestic law, as interpreted by the administrative body and by the first court, allows, for one and the same fact, different sanctions to be applied, by different control bodies (NBR's staff and fiscal authority's employees), cumulatively, in different procedures (the contravention fine provided by the NBR Regulation no. 4/2005 and the Law no. 312/2004, on the one hand; the contravention fine and confiscation, provided for by the Law no. 12/1990, on the other hand).

As the domestic law does not contain guarantees against arbitrariness from the perspective of the non bis in idem principle, in the autonomous European sense, it turns out that one could invoke the violation of article 4 of Protocol no. 7 to the Convention and article 50 of the Charter.

Violation of the right to peaceful enjoyment of possessions

In the autonomous European sense, money constitute a "property", and since the money received by the claimant were deposited in the company's bank account, it is an effective asset belonging to the claimant. Therefore, the claimant was the holder of an ownership right over an asset, so art. 1 of Protocol no. 1 to the Convention is applicable.

Confiscation of the amount representing the cash value of sales performed constitutes a deprivation of property, which constitutes a violation of the right to property, which entails the application of rule no. 2 of article 1 Protocol 1, namely the one contained in the second sentence of paragraph 1. In order to be valid, such interference must be provided by the "law", pursue a legitimate purpose and be proportionate.

The interference is not provided by a clear, predictable law, an aspect which was already demonstrated.

Additionally, even if one could assume the interference is allowed by law, then in the

form of deprivation of property (confiscation) it does not pursue a legitimate purpose. The confiscation was ordered by the tax authorities, whose role is to ensure proper collection of revenues from the public budget. Or, through the control minutes, an aspect not contested or debated by the first court, it was held that the claimant recorded accurately in its accounting books and records, as income, the price of sales received in Euro. Being recorded as an income, the sums so collected influence the calculation of the taxable profit. None of the claimant's actions reviewed by the control body were designed to hide the profits or otherwise influence the taxable base, a matter that must be of concern to the fiscal authorities. On the other hand, the first court decision endorses the defendant's argument that by doing so, the claimant preserved an advantage toward its competitors by avoiding bearing the risk of exchange rate fluctuations and various fees and commissions related to the exchange operation. In other words, by avoiding certain costs and expenses, the claimant increased its taxable profit and paid consequently, a higher profit tax to the public budget. The alleged "illegality" retained by the control minutes and validated by the first court decision consists of the fact that the bank ultimately, did not make a revenue out of the exchange rate differences. Again, from a theoretical point of view, the role of the tax authorities is to ensure collection of revenues to the public budget, and not increasing or generating revenues for private companies (in our case a bank). It follows that the additional measure of confiscation, considered legal by the first court, did not pursue any legitimate purpose from the perspective of the attributions and competence of a fiscal body.

Therefore, not being provided for by a clear law, not having a legitimate purpose and being totally disproportionate, the confiscation, applied through the minutes and maintained by the first court decision, is a violation of the claimant's right to protection of its property, so that both the Convention and the Charter were breached. Moreover, examining a similar case by reference to the proportionality principle, ECJ stated that "The confiscation measure in question was purely deterrent and punitive in its purpose. However, it has not been convincingly shown that the fine alone was not sufficient to achieve the desired deterrent and punitive effect and prevent future breaches of the declaration requirement. In these circumstances, the Court concludes that the confiscation of the entire amount of money that should have been declared, as an additional sanction to the fine, was disproportionate.

Violation of the right to a fair trial

The first court decision violates the right to a fair criminal case, guaranteed pursuant to article 6 of the European Convention on Human Rights and article 47 of the Charter. As shown above, the additional measure of confiscation is deemed "criminal" in the European autonomous sense. The right to a fair trial requires that litigants should have an effective judicial remedy enabling them to assert their civil rights (Běleš and Others v. the Czech Republic, § 49; Naït-Liman v. Switzerland [GC], § 112). Everyone has the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal. In this way, the right to a fair trial embodies the "right to a court", of which the right of access, that is, the right to

institute proceedings before courts in civil matters, constitutes one aspect (Golder v. the United Kingdom, § 36; Naït-Liman v. Switzerland [GC], § 113).

By its decision, the first court has expressly stated that the control body has an overall competence of sanctioning the facts regarded as offences, and the court can only render null the minutes if the legal framing given by the control body is wrong, as opposed to court's right to reassess factual circumstances and requalify the sanctions by applying a different law than the one invoked by the control body. In other words, the first court argues that it can neither legally requalify facts, nor modify or adapt the sanctions to the degree of guilt and the seriousness of the offence, which clearly indicated that the court does not have or exercise full jurisdiction over the case.

In its constant case law, the European Court of Human Rights has accepted that, for "criminal" (in the European autonomous sense) acts of lesser importance, the sanction should not be applied directly by a court, but by an administrative body, subject to the right of the person concerned to challenge the sanction in front of a court. Such court must have full jurisdiction, both over the facts and in law, including the right to qualify or re-qualify the facts from a legal perspective as well as the right to modulate / adapt the sanctions to the actual gravity and the guilt of perpetrator (which in all cases requires examination of the evidence produced and assessment of certain subjective components).

The first court declined to recognize its full jurisdiction thus infringing the claimant's right to a court having full jurisdiction over the case and, thereby, the right to a fair case.

Materials and Methods

The data analysed in this paper was collected from the sources such as the database of the Ministry of Justice but also from direct interviews with the subject company. The data obtained was then compared to data resulting from other cases to find similarities and to the ECJ and European Court of Human Rights cases. A detailed analysis was performed on the jurisprudence of the Romanian Constitutional Court related to constitutional aspects of Law 12/1990. The data and information obtained was processed and interpreted within the context of the proposed study of the impact of restructuring of a public authority and effects of such action on the private sector. The reorganization of the fiscal authority by granting vast powers to the newly created antifraud department which acts as a "special" arm of the fiscal authority was part of a larger restructuring process. As demonstrated by other examples, such restructuring apparently failed to achieve its declared purposes and continues to negatively impact on the local business environment.

Results and discussions

The requirement of "quality of law" provides that the law must be sufficiently accessible, precise and foreseeable in its application in order to avoid any risk of arbitrariness. According to Barak (Barak, 2012), "generality of the law that implies restrictions is one of the legal certainty's structural components. Law must be general and could be applied for all. Substance but not the wording of the act must be general. "General" law in wording could be selective in substance". Considering the Constitutional Court decisions and the

issues raised by practice, we believe that a mandatory action implies the amendment of article 1 para. a) of Law 12/1990. The meaning of the illegal trading without meeting the requirements provided by law, should be clearly stated by reference to normative acts containing requirements to be complied with or alternatively, it must exclude from its application the additional measure of confiscation which seems to lead to abuse in many cases. A general wording wrongfully applied generates effects which by their nature, damage the alleged offenders' ability to continue operate. An overall penalty consisting of fine and confiscation of the entire sum representing the price of good sold to clients is not and cannot be upheld by the court as being proportionate to the aims sought without a fully-fledged analysis of the case.

Conclusion

The need to debate the manner the expression "without meeting the conditions established by law" rests within the thin line of applying the national law while giving effect to the EU regulation and ECJ case law. The conclusion is that the legal certainty principle requirements in Romania still must be understood and properly interpreted and applied by the courts, especially when asked to review and reassess facts and dosage of certain sanctions. Faced with an incredible flow of normative acts and a number of equally increasing offences, for a potential offender the wording of Law 12/1990, even if amended, does not meet the requirements of the legal certainty principle. Due to the strong links between article 1 para. a) of Law 12/1990 and article 3 which allows confiscation, one can only come to the conclusion that this piece of legislation does not contain a clear restriction to differentiate behaviours or actions falling under other normative acts, neither it is predictable and clearly formulated. Last but not least, it generates confusion in assessing the legitimate public interest and it does not operate a clear division of powers and responsibilities between controlling bodies and the court, especially when looking for a unique and predictable enforcement. Both ECHR and ECJ underline the interpretative role of the judge in guaranteeing the predictability of the normative acts in the systems of continental law. This emphasizes as a final take away, the need for a clear and predictable legal environment, with courts able and willing to exert full jurisdiction over a case.

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