The Role and Effects of National Administrative Practice in Romania and its Impact on the Application of EU Law

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1. Constitutional and Legal Framework for the Application of EU Law in Romania

1.1 Constitutional Framework

Romania became a Member of the European Union as of 1 January 2007. However, the Constitutional framework for the European integration had been prepared in 2003, when Law no. 429/2003[2] for the revision of the Romanian Constitution[3] was enacted. It is therefore acknowledged, at the constitutional level, that EU Law shall take precedence over contrary or inconsistent national legal provisions [art. 148 (2) of the Constitution] [4]. Consequently, article 148 of the Romanian Constitution is drafted as follows:

ARTICLE 148. Integration into the European Union

(...)

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(...)

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

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[2] Published in Official Journal (*Monitorul Oficial*) no. 669 of 22 September 2003.

[3] Republished in Official Journal no. 767 of 31 October 2003.

[4] For further comments, see I. Muraru, E. S. Tănăsescu (editors), Constituţia României. Comentariu pe articole, Ed. "C.H. Beck", Bucureşti, 2008, p. 1425 - 1441.

1.2 Legal Framework

The principle of priority and supremacy of EU Law has been rarely mentioned in the Romanian legislation enacted by Parliament (*laws*) or by Government (*decisions*, *ordinances* and *emergency ordinances*), probably because these authorities relied on the force of the constitutional rule mentioned in art. 148 (2) of the Romanian Constitution. A recent example shall be considered the new Romanian Civil Procedure Code[5], which shall enter into force on 1 October 2011. According to art. 4 of the new Civil Procedure Code, "*In the areas regulated by this Code, compulsory EU Law shall apply with priority, nonwithstanding the parties' quality or statute*". In the tax field, the Fiscal Code (Law no. 571/2003) or the the Fiscal Procedure Code (Ordinance no. 92/2003) do not contain any particular rules concerning the priority and the supremacy of EU Law when confronted with national tax legislation.

2. Concept of "Administrative Practice" in Romania

2.1. Brief comments on the tax regulations and the administrative organization in the tax field in Romania

As a general rule, within the Romanian legal system, administrative practice is not granted any legal value of all. The Constitution or the national laws do not recognise administrative practice as a source of law. However, particularly in the tax field, one can clearly distinguish an administrative practice related to the interpretation and application of national law. One should notice that various authorities have a power of regulation in the tax field in Romania. The Parliament is the only authority constitutionally authorized to adopt *laws*, including those concerning tax matters. According to art. 74 of the Constitution, citizens' legislative initiative is forbidden as far as fiscal issues are concerned. Generally speaking, the Government is entitled to enact secondary tax legislation, by means of *decisions* taken in order to ensure the proper application of laws. According to art. 115 (1) of the Constitution, Parliament may pass a special law enabling the Government to issue *ordinances* in fields outside the scope of organic laws

[5] Law no. 134/2010, published in Official Journal no. 485 of 15 July 2010.

(for example, the Fiscal Procedure Code was adopted in this manner by Ordinance no. 92/2003). Also, under art. 115 (4) of the Constitution, the Government can only adopt *emergency ordinances* in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents. Unfortunately, these emergency ordinances have been repeateadly used in the last years, particularly in the tax field, as a means of avoiding and limiting the Parliament's regulation and control over tax legislation[6]. Under art. 5 (4) of the Fiscal Code, the Ministry of Public Finances is entitled to issued *orders* and *instructions* in the tax field. However, in the last few years, most of secondary legislation in the tax area was issued by the fiscal structure of the Ministry, the National Agency for Tax Administration, through its President. All of the above mentioned legal acts shall be published in the Official Journal prior to their entry into force. Local authorities have a very limited power of regulation, in the field of local taxes, by means of *local council decisions*. There is no power of regulation in the area of fiscal procedures for the local communities[7]. These regulations are published in local newspapers and on the websites of the communities.

2.2. Practice which is the result of interpretation of laws by tax administration

It should be stated from the beginning that the declared purpose of the Romanian legislators is to limit the cases in which interpretation is given without a legal background. The doctrine underlined that the principles enshrined particularly in the Fiscal Procedure Code are designed to prevent an administrative practice based on the interpretation of law according to internal administrative decisions[8]. According to art. 5 (1) of the Fiscal Procedure Code, it is compulsory that the tax administration applies the tax legislation in the same manner on the entire territory of the country. For

[6] See C. F. Costaş, *Procedura modificării şi completării Codului fiscal şi a Codului de procedură fiscală*, published in *Dreptul* no. 11/2005, p. 72-87.
[7] For an account of these rules, see also M. Şt. Minea, C. F. Costaş, *Dreptul finanţelor publice. Drept fiscal*, Ed. Universul juridic, Bucureşti, 2011, p. 24-25.
[8] D. Dascălu, C. Alexandru, *Explicaţiile teoretice şi practice ale Codului de procedură fiscală*, Ed. Rosetti, Bucureşti, 2004, p. 79-80.

this purpose, public authorities are entitled to elaborate practical guides for the civil servants working in the tax field. Moreover, art. 6 of the Fiscal Code and art. 5 (2) of the Fiscal Procedure Code, the Central Fiscal Commission is entitled to issue *decisions* concerning the unitary application of the tax legislation in Romania. These decisions are approved by order of the Ministry of Public Finances, they are published in the Official Journal and are compulsory for the tax authorities and the taxpayers following their publication. However, these decisions can be challenged in the tax courts by any interested taxpayer. Art. 13 of the Fiscal Procedure Code underlines that the interpretation of the tax regulations must follow the legislator's will, as expressed by law. It is a rather general principle aiming at a proper interpretation of the fiscal regulations and which should be followed especially by the tax administration[9]. In the field of local taxes, there is a consistent administrative practice concerning the issuing of tax decisions for the establishment of due annual local taxes (e.g. building tax, land tax). Although articles 43, 44, 45 and 85 of the Fiscal Procedure Code demand that such a decision is issued by the relevant local tax office of the concerned municipality, no tax office issues such decisions. Annual taxes are determined by the tax administration's electronic tax system and their amount can be checked with the tax office of the municipality or via Internet. The main reason for the breach of the Fiscal Procedure Code resides with the significant costs for the issuing of annual tax decisions. Local taxes are due to the budgets of the municipalities, which collect no more than 10 - 12% of their total resources in this manner. Therefore, they are not happy to spend as much as 1 million euro (for a city of 400,000 inhabitants) for the annual tax decisions[10]. In a few cases, this administrative practice has been quashed in court[11]. Furthermore, one might discuss the administrative practice concerning the tax interes due to

[9] H. Sasu, L. Ţâţu, D. Pătroi, *Codul de procedură fiscală. Comentarii şi explicaţii*, Ed. C.H. Beck, Bucureşti, 2008, p. 49-50.

[10] For further comments, see C. F. Costaş, *Modalitatea de stabilire a impozitelor şi taxelor locale*, in *Revista Română de Fiscalitate* nr. 10/2007, p. 24 - 26.

[11] See, for example, Ploieşti Court of Appeal, decision no. 48 of 17 January 2007, published by Legalis - C.H. Beck database; Arad Tribunal, decision no. 10 of 6 mai 2008, in *Revista Română de Drept al Afacerilor*, no. 5/2008, p. 107 - 118; Timişoara Court of Appeal, decision no. 888 of 24 September 2008, published by Legalis - C.H. Beck database.

taxpayers by the tax administration, in cases when the tax office has wrongly collected taxes and is obliged by a court decision to the reimbursement of such taxes. According to art. 124 (2), 120 (7) and 117 of the Romanian Fiscal Procedure Code, in these cases the tax administration has to pay the fiscal interest (0,04% per day of delay from 1 October 2010, 0,05% per day of delay from 1 July 2010 to 30 September 2010 and 0,1% prior to 1 July 2010), starting from the 46th day following the request of the taxpayer for the reimbursement of tax[12]. The administrative practice concerned two problems. In some cases, the tax offices refused to determine and pay fiscal interest and paid legal interest determined by Government Ordinance no. 9/2000[13] instead, at a significantly lower rate of 5 - 6% per year. In other cases, some tax offices determined the fiscal interest for another period of time, starting from the 46th day following the introduction of a court claim by the tax payers. In this respect, one administration (Direcţia Generală a Finanţelor Publice Arad) even issued an internal decision (*circulară*) which was to be applied by lower tax offices. In both cases, the administrative practice was invalidated in courts, which ruled in favour of the taxpayers and ordered for the payment of fiscal interest[14], starting from the 46th day following the request of the taxpayer from the reimbursement of tax[15]. In a relatively small number of cases[16], the Central Fiscal Commission has issued "official" interpretations of some legal texts in force. For example, by Decision no. 2 of 12 April 2011[17], the Central Fiscal Commission ruled on the determination of VAT for sale of immovable property (buildings and land). The Commission decided that VAT shall be applied to the price of the transaction if the parties established that

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[12] M. Şt. Minea, C. F. Costaş, *Dreptul finanţelor publice. Drept fiscal*, quoted, p. 572 - 573; C. F. Costaş, *Dobânda cuvenită contribuabililor pentru sumele de restituit de la bugetul de stat*, in *Curierul fiscal* no. 2/2009, p. 42 - 44.

[13] Official Journal no. 26 of 25 January 2000.

[14] High Court of Cassation and Justice, decision no. 2548 of 14 May 2010, published by Legalis - C.H. Beck database; Bacău Court of Appeal, decision no. 650 of 30 June 2009, published by Eurolex database; Timişoara Court of Appeal, decision no. 56 of 19 January 2009, not published.

[15] Timişoara Court of Appeal, decision no. 1428 of 19 November 2009, not published; Constanţa Court of Appeal, decision no. 409 of 23 June 2010, not published; Timişoara Court of Appeal, decision no. 519 of 5 April 2011, in *Revista Română de Drept al Afacerilor*, no. 3/2011, p. 115 - 122.

[16] Between 1996 and 2011, the Central Fiscal Commission issued only 17 decisions.

[17] Published in Official Journal no. 278 of 20 April 2011.

VAT is not included in the price or if they did not approach this matter in the contract. On the contrary, VAT shall be determined from the total price of the transaction, if the parties established that the transaction is VAT inclusive.

2.3. Practice which is the result of a consistent conduct of tax administration offices

It has to be mentioned that the organisation of the tax administration in Romania is not at all decentralised. Although there are tax administration at the county level (Direcţia Generală a Finanţelor Publice) or at the municipality level (Administraţia Finanţelor Publice), these offices are part of a centralised system that acts as a whole. Therefore, in most cases local tax administration offices would ask for "guidance" from the county level or the national level and it is rather difficult to distinguish a consistent conduct of decentralised administrative offices. In fact, this approach is also suggested, in the tax field, by articles 5 (1) and 13 of the Fiscal Procedure Code, mentioned above. One example might prove valuable for this idea. If a local tax administration office is obliged by a final and binding court decision to pay the legal costs of the procedure, it cannot pay such costs immediately. The local tax office must prepare a complete report on the case and include all the relevant documents. This file is passed to the county level. The tax administration office at the county level must send the file to the Ministry of Public Finances and ask for approval to pay the legal costs. After such approval is obtained, the file returns to the county level, which pays the relevant amount to the local tax office concerned and send the file to this office. Finally, the local tax administration offices pays this amount to the taxpayer. However, at some points an administrative practice that is not based on a legal text is to seen. One outstanding example concerns the competence of different tax administration offices to conduct a tax inspection. According to art. 32 (1) and 33 (1) of the Romanian Fiscal Procedure Code, the material and territorial competence for any tax inspection is attributed to the lower level of the tax administration (Administraţia Finanţelor Publice) from the taxpayer's domicile or

headquarters. According to art. 4 of Order no. 2311/2007[18] of the President of the National Agency for Fiscal Administration, the lower office can delegate the competence to the upper county office (Direcţia Generală a Finanţelor Publice), provided that the taxpayer is notified about this delegation. Since lower offices have a smaller number of tax inspectors, in all the cases the tax inspections regarding companies are performed by the upper county office. No delegation is granted by the lower tax office and no notice is transmitted to the taxpayer. The scenario has been the same recently for VAT inspections carried out for natural persons that have concluded transactions with immovable property between 2005 and 2010. During administrative procedures and court debates, the tax administration offices have been asked to provide a legal justification for the carrying out of tax inspections by bodies that are not competent according to the law. The only justification provided was an internal document of the National Agency for Fiscal Administration, not published in the Official Journal, which attributed the competence to the upper tax administration offices.

3. Legal Effects of Administrative Practice

3.1. Limitation of the Effects of Administrative Practice

As a general rule, the legislator is trying to limit such administrative practice, as there is an inflation of legal texts in all areas of law, including the tax field. In most cases, administrative practice has been challenged in courts, with significant success. As stated throughout this material, courts have the tendency of quashing administrative practice that derives from the law or that is contrary to EU Law. Therefore, tax courts are limiting the effects of such administrative practice as well. However, such administrative practice shall apply to all taxpayers concerned at least until a judicial decision helds such practice is illegal or contrary to EU Law. Since the Ministry of Finance and the tax administration offices do not take into consideration the relevant national or European case law on the same matter, in each case the taxpayer shall seek to ensure the application of EU Law in courts.

[18] Published in Official Journal no. 842 of 8 December 2007.

3.2. Lack of National Case-Law Concerning the Application of ECJ Case-Law

The analysis of the relevant national case law reveals that tax courts do not refer to the ECJ case-law concerning these matters[19], which is virtually unknown. The Ministry of Finance and the tax administration offices seem to ignore EU Law as a whole in their activity, since no reference is made to relevant case law of the ECJ and the application of national legislation is always preferred to the application of EU Law.

4. Administrative Practice and EU Law

4.1. Car Registration Tax and EU Law

Since its admission into the European Union, Romania has experienced a number of problems concerning the proper application of EU Law, particularly in the tax field. The first serious challenge of a tax regulation emerged in 2007, with regard to the car registration tax (art. 214^1 - 214^3 Fiscal Code)[20]. This tax, which was due on the first registration in Romania of a used car, entered into force on 1 January 2007 and was applied until 30 June 2008. It was designed as an excise duty and it was calculated taking into consideration the age, the engine capacity and the pollution factor of every newly registered car. Taxpayers challenged this tax claiming that it was introduced in order to compensate for the loss of custom duties, VAT and excise duties as of 1 January 2007, following the accession to the European Union. They relied especially on the European Court of Justice decision in the joined cases *Ákos Nádasdi* and *Ilona Németh* [21], since the tax approached in these cases was identical to the Romanian car registration tax[22]. The conflict between art. 90 EC and art. 214^1 - 214^3 Fiscal Code was solved by Romanian tax courts. The first decion on this matter was taken by

[19] ECJ 9 December 2003, C-129/00, *Commission* vs*. Italian Republic*, ECR 2003, p. I-14637; ECJ 27 April 2006, C-441/02, *Commission* vs. *Republic of Germany*, ECR 2006, p. I-3449; ECJ 12 May 2005, C-278/03, *Commission* vs. *Italian Republic*, ECR 2005, p. I-3747; ECJ 7 June 2007, C-156/04, *Commission* vs. *Hellenic Republic*, ECR 2007, p. I-4129.

[20] See C. F. Costaş, *Car Registration Tax - the First Romanian ECJ Case?*, *European Taxation*, 3/2007, p. 151-152.

[21] ECJ 5 October 2006, C-290/05 and C-333/05, ECR 2006 p. I-10115.

[22] For an account of these arguments, see R. Bufan, M. Şt. Minea (editors), *Codul fiscal comentat*, Ed. Wolters Kluwer, Bucureşti, 2008, p. 1090 - 1107.

Arad Tribunal on 7 November 2007 in case *SC Măgura Impex SRL* vs. *Administraţia Finanţelor Publice Arad*. The court ruled that art. 214^1 - 214^3 of the Romanian Fiscal Code are contrary to art. 90 EC, since the car registration tax applied only to used vehicles bought from other Member States, on their first registration in Romania, and not to used vehicles that were already registered in the country. Therefore, on interpreting the provisions of art. 148 of the Constitution and the EC Law, the court declared that national tax provisions are not applicable and ordered the reimbursement of the tax[23]. The judgement was lated confirmed by the Timişoara Court of Appeal by a decision of 20 February 2008. It is worth mentioning that the Court of Appeal denied the tax administration's demand for a preliminary reference to the ECJ, since it appeared that the *Nádasdi* and *Németh* case law was clearly applicable[24]. Such demands were also rejected in other cases, on the same grounds, so that no Romanian tax court ever asked for a preliminary ruling concerning the compatibility of the car registration tax with the EC Law. From this point on, all the 15 Courts of Appeal in Romania ruled that the car registration tax was contrary to art. 90 EC and ordered the repayment of the tax. From the point of view of the relevant administrative practice, although the Romanian car registration tax was clearly contrary to art. 90 EC (art. 110 TFEU), not a single claim for the reimbursement of the tax was accepted by the tax authorities. However, the administrative practice concerning the car registration tax slightly changed in time. Between 1 January 2007 and 30 June 2008, all the claims based on art. 90 EC and art. 148 of the Constitution were denied by the tax administration offices throughout the country, on the grounds that the car registration tax was due according to the relevant national legislation (art. 214^1 - 214^3 Fiscal Code). On advice from the Ministry of Public Finances, all the tax administration offices in the country provided the same answer, namely that the tax was properly collected and that it cannot be reimbursed since national law did not allow for such restitution. On the same centralised

[23] Arad Tribunal, decision no. 2563 of 7 November 2007, published in *Revista Română de Drept al Afacerilor*, no. 1/2008, p. 89 - 100.
[24] Timişoara Court of Appeal, decision no. 188 of 20 February 2008, published in *Revista Română de Drept al Afacerilor*, no. 4/2008, p. 93 - 128.

approach, the tax offices even claimed that national courts are not competent to decide on the restitution claims and that either a decision of the Constitutional Court[25] or a decision of the European Court of Justice should be pronounced before the court decided such a case. However, the final and binding court decisions on the matter were executed by the tax authorities. This was mainly because according to art. 24 (1) of Law no. 554/2004[26], the administration has to execute any final court decision no later than 30 days from the date such a decision was taken. Failure to do so may attract a fine of 20% of the minimum wage per day for the head of the concerned administrative body [art. 24 (2) of Law no. 554/2004]. The Goverment Emergency Ordinance no. 50/2008 replaced the car registration tax with a pollution tax, which was basically determined using the same elements. Although the Romanian Government did never admit that the car registration tax was contrary to EU Law, art. 11 of ordinance no. 50/2008 provided for a partial reimbursement of the car registration tax paid between 1 January 2007 and 30 June 2008. Namely, the taxpayers could asked for the repayment of the difference between the paid car registration tax and the pollution tax due as of 1 July 2008. Consequently, the tax administration offices applied art. 11 of ordinance no. 50/2008 and reimbursed such amounts to the taxpayers. The reimbursement was not automatical, since each taxpayer had to deposit a separate claim with the tax authority and provide the documents required by law. The application of art. 11 of Government Emergency Ordinance no. 50/2008 was denied by the Romanian tax courts. The Cluj Court of Appeal explained in a decions of 14 May 2008 in case *Nicodin Giurgiu vs. Administraţia Finanţelor Publice Cluj-Napoca* that art. 11 could not be applied, since it was itself contrary to EU Law and the Romanian Constitution[27]. On one hand, according to the relevant ECJ case-law, the Member States are obliged to ensure the

[25] Since art. 214^1 - 214^3 of the Fiscal Code were repealed by Government Emergency Ordinance no. 50/2008, the Constitutional Court could not rule on the compatibility of these texts with the Romanian Constitution. The Romanian Constitutional Court is entitled, according to art. 29 (1) of Law no. 47/1992, to rule only on laws and ordinances that are still in force (to that extent, see Constitutional Court, decision no. 948 of 23 September 2008, published in Official Journal no. 706 din 17 October 2008).

[26] Official Journal no. 1154 of 7 December 2004.

[27] Cluj Court of Appeal, decision no. 1145 of 14 May 2008, in *Revista Română de Drept al Afacerilor* no. 7/2008, p. 69 - 87.

complete reimbursement of collected taxes which are contrary to EU Law. On the other hand, art. 11 of ordinance no. 50/2008 violates art. 15 (2) of the Romanian Constitution, concerning the non-retroactivity principle, since the determination of the tax difference mentioned in art. 11 implied the application of the tax pollution tax before the date of its entry into force (1 July 2008). On these grounds, all administrative decisions of partial reimbursement were quashed and the courts decided on the complete reimbursement of the car registration tax.

4.2. Car pollution tax and EU Law

As mentioned above, as of 1 July 2008 the Romanian Government introduced a new car pollution tax to replace the old car registration tax, which was judged to be contrary to EC Law. The car pollution tax, which is still in force at the time being, experienced several forms between 2008 and 2010[28]. In all cases, it was determined based on a formula considering the age of the car, the engine capacity, the pollution factor (Non-Euro to Euro 5) and the legally estimated depreciation of the car. The car pollution tax is due at the first registration of a car in Romania, it is collected by the tax administration offices and directed to the Environment Fund in order to ensure funding of environmental projects (particularly a programme of recycling older vehicles in exchange for a coupon of some 800 euros that could be used for the purchase of a new car). Taxpayers claimed again that the car pollution tax was contrary to art. 110 TFEU (former art. 90 EC) and challenged the tax in court. On this particular claim, the case law of the national tax courts proved to be different, depending on the court and the period when the car pollution tax was applied. As far as this form of the car pollution tax was concerned, most courts declared that Ordinance no. 50/2008 was compatible with the EC Law[29]. They relied on an intepretation of the European Commission, that accepted the car pollution tax as a better

[28] The latest form of the car pollution tax, applied from 1 January 2011, is still in force. However, for the purposes of this article it shall not be discussed, since there is no real case law of the Romanian tax courts on the matter at the time being. It is worth mentioning, though, that this form is similar to the tax applied in 2010, except for the higher level of the tax in 2011.

[29] See, for example, Cluj Court of Appeal, decision no. 2165 of 7 July 2009; Arad Tribunal, decision no. 491 of 16 March 2009.

substitute of the car registration tax, in order to close the infringement procedure opened in 2007. However, some courts declared that the car pollution tax was similar to the car registration tax and that Ordinance no. 50/2008 was contrary to art. 90 EC (art. 110 TFEU)[30]. On 15 December 2008, the Government changed the car pollution tax and increased by three times the tax due for the registration of used vehicles. It mentioned that this measure is necessary in order to protect the Romanian car industry and jobs and it particularly exempted from tax the new cars with Euro 4 pollution factor and an engine capacity of no more that 2000 cm^3 (not suprisingly, these cars were produced in Romania). As a result, all 15 courts of appeal developed a jurisprudence that declared this form of the tax to be incompatible with art. 110 TFUE[31]. As of 1 January 2010, the Government waived the exemption applied for the new cars made in Romania. As a consequence, most national courts ruled that the new form of Ordinance no. 50/2008 was compatible with EC Law[32]. Some courts decided that the car pollution tax was still contrary to art. 110 TFEU[33].

4.3. ECJ Case-Law Concerning the Car Pollution Tax

Regarding the car pollution tax, the Romanian tax courts sent a number of preliminary references to the European Court of Justice. Two of these cases have been recently decided by the judges in Luxemburg. By its decision of 7 April 2011, ECJ decided in the *Ioan Tatu* case[34] that the car pollution tax applied between 1 July 2008 and 14 December 2008 was incompatible with art. 110 TFUE. The Court declared that art. 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax levied on motor vehicles on their first registration in that Member State if that tax is

[30] Brăila Tribunal, decision no. 319 of 30 April 2009, not published; Cluj Tribunal, decision no. 2320 of 5 December 2008, not published; Tg. Mureş Court of Appeal, decision no. 236 of 18 February 2010, not published; Constanţa Court of Appeal, decision no. 363 of 7 June 2010, not published.

[31] See Timişoara Court of Appeal, decision no. 1489 of 2 December 2009, in *Revista Română de Drept al Afacerilor no. 3/2010*, p. 98 - 138; Cluj Court of Appeal, decision no. 2421 of 8 October 2009, not published.

[32] Timişoara Court of Appeal, decision no. 300 of 23 February 2011, not published.

[33] Arad Tribunal, decision no. 1447 din 13 September 2010, not published.

[34] ECJ 7 April 2011, C-402/09, *Ioan Tatu* vs. *Statul Român prin Ministerul Economiei şi Finanţelor*, *Direcţia Generală a Finanţelor Publice Sibiu, Administraţia Finanţelor Publice Sibiu, Administraţia Fondului pentru Mediu, Ministerul Mediului*, not yet published.

arranged in such a way that it discourages the placing in circulation in that Member State of second-hand vehicles purchased in other Member States without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market. It noted under par. 58 that " ... the legislation has the effect that imported second-hand vehicles of considerable age and wear are, despite the application of a large reduction in tax to take account of depreciation, subject to a tax which may approach 30% of their market value, while similar vehicles offered for sale on the domestic second-hand vehicle market are not burdened by such a tax charge. It cannot be disputed that, in those circumstances, OUG No 50/2008 has the effect of discouraging the import and placing in circulation in Romania of second-hand vehicles purchased in other Member States". On 7 July 2011, ECJ issued a similar decision in the *Iulian Nisipeanu* case[35], concerning the car pollution taxes applied between 15 December 2008 and 31 December 2010, which were also declared incompatible with art. 110 TFEU. This decision came as no surprise after the *Tatu* decision.

4.4. The Effects of Tatu Case-Law on Administrative Practice

As far as the administrative practice on this matter is concerned, one might distinguish between the practice before and after the decision in the *Tatu* case. Before 7 April 2011, the tax administration offices throughout the country rejected all claims for the reimbursement of tax which were based on the incompatibility of Ordinance no. 50/2008 with art. 110 TFEU (art. 90 EC). This practice was a centralised practice, imposed by the Ministry of Finance, which even supplied a standard answer and standard defence arguments in court cases. These arguments concerned the fact that Romania, as a Member State of the European Union, can establish a car pollution tax in a non-harmonised field and the alleged approval or non-dispute of the Commission for the car pollution tax. No tax administration office considered the principle of priority of EC Law or the constitutional principle enshrined in art. 148 of the Constitution. The administrative

[35] ECJ 7 July 2011, C-263/10, *Iulian Nisipeanu* vs. *Administraţia Finanţelor Publice Tg. Cărbuneşti, Direcţia Generală a Finanţelor Publice Gorj, Administraţia Fondului pentru Mediu*, not yet published.

practice did not change after the decision in the *Tatu* case. All the taxpayers' claims based on the interpretation of the ECJ of 7 April 2011 were denied. The main arguments of the tax administration offices, also suggested from the central level, are the following: the car pollution tax was duly collected, according to the legislation in force at the time when the tax was paid; the tax administration offices are obliged by art. 5 and 13 of the Fiscal Procedure Code to apply the law in a similar manner on the whole territory of the country; as far as the national law did not provide for a reimbursement of tax, following the decision in the *Tatu* case, the tax offices are not allowed to repay such tax. Therefore, it is highly unlikely that the tax administration offices shall provide a different answer after the decision in the *Nisipeanu* case.

5. Conclusions

5.1. Consistent Administrative Practice Contrary to EU Law

As stated above, in many cases administrative practice has proven to be contrary to EU Law, therefore directly affecting the rights and legitimate interests of taxpayers. Administrative practice of the tax administration offices did not change following a decision of the ECJ in the *Tatu* case, since the authorities claimed that art. 5 and 13 of the Fiscal Code prevented any change of administrative practice unless changes were made in the national legislation, which continued to apply in spite of the effects of the Court's decision. It is so particularly because administrative practice in the tax field is the result of a centralised response to sensitive issues such as car registration tax and car pollution tax. At least for the car pollution tax at issue in cases *Tatu* and *Nisipeanu*, administrative practice is clearly contrary to EU Law. It is worth mentioning that the Romanian Government did not ask for the limitation of the temporal effects of the judgement in the *Tatu* case and that such a demand was rejected in the *Nisipeanu* case. Therefore, administrative practice as to the refusal to apply EU Law and fully reimburse taxpayers for amounts paid between 1 July 2008 and 31 December 2010 shall be challenged in courts.

5.2. Key Role of the Judicial Authorities in Eliminating Administrative Practice Contrary to EU Law

First it should be mentioned that out of the bodies entitled by art. 148 (4) of the Constitution to ensure the application of the principle of priority and supremacy of EU Law, only the judicial authority is acting to that extent. The Government, the Parliament and the President of Romania have done nothing in the past few years to prevent the breach of EU Law, while the Constitutional Court constantly denies control over legislation contrary to EU Law, on the grounds that it lacks competence. Therefore, in most cases, courts, particularly in the tax field, decided to apply EU Law either directly (e.g. car registration tax, car pollution tax, rights of defence) or following an interpretation by the European Court of Justice (in cases *Tatu* and *Nisipeanu*). So far, the judicial authorities did not refer to the relevant decisions of the European Court of Justice [*Commission* vs. *Italian Republic*[36], *Commission* vs. *Republic of Germany*[37], *Commission* vs. *Italian Republic*[38], *Commission* vs. *Hellenic Republic*[39]] in order to support their decisions. One reason might be the fact that these decisions have not been translated into Romanian and therefore they are not directly accesible to tax courts, tax administration offices and taxpayers.

[36] ECJ 9 December 2003, C-129/00, *Commission* vs. *Italian Republic*, ECR 2003, p. I-14637.
[37] ECJ 27 April 2006, C-441/02, *Commission* vs. *Republic of Germany*, ECR 2006, p. I-3449.
[38] ECJ 12 May 2005, C-278/03, *Commission* vs. *Italian Republic*, ECR 2005, p. I-3747.
[39] ECJ 7 June 2007, C-156/04, *Commission* vs. *Hellenic Republic*, ECR 2007, p. I-4129.