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The Interaction between European Law and National Law in the Case Law of Constitutional Courts

Romania

The Interaction between EU Law and national Romanian Law

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The interaction between EU law and national Romanian law

The paper I would like to present below refers to the only Decision pronounced by the Constitutional Court of Romania regarding the relationship between the domestic and the European Law.

This Decision has been criticized by the doctrine, for the reasons I will emphasize at the end of the presentation.

Decision no.59/2007 on the issue of constitutionality of the provisions under Articles 1 and 3 from the Law on the approval of some financial measures for the small and medium enterprises in the beer industry

The criticized legal provisions: Articles 1 and 3 from the Law on the approval of some financial measures for the small and medium enterprises in the beer industry, according to which *small and medium enterprises in the beer industry fulfilling certain conditions are exempt from the payment of fiscal obligations (namely excise duties, income tax and VAT) and of ancillary payment obligations (representing interests, penalties and late payment increased amounts related to the exempt fiscal obligations) that are outstanding at the date of 31 December 2003 and have not been paid by the date this law comes into force.*

The enterprises must fulfill the following conditions: they have a production capacity of less than 200 hl/year; they have not filed for bankruptcy; they have drawn up the restructuring plans for restoring of viability; are engaged in bringing their own financial contributions within the restructuring plan, of at least 40% of its total financial value for medium enterprises, and respectively of at least 25% for small enterprises.

The constitutional provisions invoked by plaintiffs:

Article 56: *“(1) Citizens have an obligation to contribute to public expenditure, through taxes and fees.*

(2) The legal system of taxes must ensure a fair distribution of the tax burden.”

(3) Any other dues are prohibited, except those determined subject to the law, for exceptional circumstances.

Article 135 par.(2) a) : “(2) *The State must provide for: a) [...] protection of fair competition of businesses[...].*”

The Plaintiffs' argumentation:

The authors of the notification claim that the criticized legal provisions infringe the Constitutional provisions because a part of the taxpayers will benefit of state aid, which represents the premise of a profit obtained through a non-competition practice. This aid is not justified, because the state is not a shareholder in the "companies" benefiting of payment exemptions, and the attempt to save only a part of the taxpayers from bankruptcy is contrary to the competitive environment. The aid granted through the criticized law creates the premise for the increase of the production capacity, thus infringing the rules of competition and free market.

The Constitutional Court's decision and argumentation:

The Court notes that the provisions of Article 135 Paragraph (2) Letter (a) from the Constitution stipulate the obligation of the state to ensure the protection of fair competition, however Free competition is regulated by law, not also by Constitution.

Having in view that, starting from 1 January 2007, Romania joined the European Union, the Court will examine the domestic legislation on state aids and its compatibility with the European Union legislation in the domain, because, in accordance with Article 148 Paragraph (2) from the Constitution, "Following accession, provisions in the founding Treaties of the European Union, as well as other binding regulations under community law shall prevail over any contrary provisions of domestic law, while observing provisions in the accession instrument."

Because the domestic legislation in the state aids domain does not regulate the way in which these shall be granted, the compatibility of granting this aid with the free competition is established by direct application of the provisions of Article 87 from the Treaty establishing the European Community.

The Constitutional Court estimates (on the basis of (EC) Regulation no. 70/2001 of the Commission from 12 January 2001) that the state aids provided by the criticized law can be compatible with free competition, in accordance with Article 87 Paragraph (3) from the Treaty establishing the European Community, because these aids are aimed at maintaining in the economic activity small and medium enterprises having tradition in the beer production and which are in

economic difficulty, undergoing a restructuring process. In order to maintain a competitive market structure, the European Commission has in view the beneficial role of small and medium enterprises on the dynamism of economy, and consequently these are allowed to benefit of state aid in an amount that would not affect the commercial exchange between the Member States. Thus, the Court establishes that the state aids provided for by the criticized law are not likely to affect the commercial relations towards the other internal producers and moreover, towards the other Member States of the European Union.

In the end, the Court held that the obligation to notify the state aid is incumbent on the Competition Council, as authority which serves as a contact between Romania and the European Commission, which Commission will decide on the granting of the state aid had in view by the law undergoing the constitutionality control.

The President of the Constitutional Court of Romania and one of the Judges' Dissenting Opinion

The Law on the approval of some financial measures for the small and medium enterprises in the beer industry deviates from the provisions of Community Law and in this way comes into contradiction with the provisions of Article 148 from the Constitution of Romania.

Argumentation:

On the basis of (EC) Regulation no. 70/2001 of the Commission from 12 January 2001, on the enforcement of Articles 87 and 88 from the Treaty establishing the European Community in the case of the state aid for the small and medium enterprises (which is part of the domestic law), the aids encouraging the use of the national products over the imported products are forbidden, or more precisely, the provisions of the regulation in this domain do not apply [Article 1 Paragraph (2) Letter c)]. One cannot contest the fact that there is an obvious competition in the beer industry between the national products and the imported products, which excludes any state aid in this domain.

Regarding what was held by the Decision of the Constitutional Court, the following points of view were formulated in the doctrine:

1. The only authority that can pronounce itself on the compatibility of the legal norms regulating the state aid with the provisions of the Treaty of

Accession to the European Union, before the legal norms come into force, is the European Commission, according to the Government Urgency Ordinance no. 117/2006. In this case, the state aid has not been notified to the European Commission, the only authority which could have decided on its granting. The Constitutional Court has thus substituted itself to the European Commission, by verifying the compatibility of the legal norms regulating the state aid with the Treaty of Accession to the European Union.

Among the attributions of the Constitutional Court, provided by Article 146 from the Romanian Constitution, is not also that regarding the comparison of the domestic legal norms, by a priori verification, with those of the European law, in order to establish their compatibility. In these circumstances, the Constitutional Court has exceeded its attributions. The comparison of the domestic norm with the international one and the application of the provisions of Article 148, Paragraph (2) from the Constitution is incumbent exclusively on the ordinary law courts. This comparison cannot be made until the domestic legal norms have come into force.

In my opinion, the Constitutional Court must have in view the opinions expressed by the doctrine in the future, showing more prudence in taking its decisions.

Finally, I would like to thank Professor Toniatti for organizing C.o.C.o.A Summer School and to assure him that all the knowledge acquired with this occasion will be applied in my activity at the Constitutional Court of Romania, as much as possible. It is also important that I will have the opportunity to share the acquired knowledge with my students from the National Magistrates Institute, future judges and prosecutors in Romania.

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