

Exploring the Application of Article 10 (1¹) in Law no. 241/2005: Tax evasion and Non-Punishment Clauses

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ABSTRACT: In Article 10 (1¹) from Law no. 241/2005 for the prevention and combating of tax evasion, a clause of non-punishment is regulated, which becomes incident if the damage caused by the commission of one of the acts provided by Article 6¹, 8 or 9 of this law does not exceed the value of 100,000 Euros, in the equivalent of the national currency, and this damage, increased by 20% of the calculation basis, to which interest and penalties are added, is fully covered during the criminal investigation or during the trial until a final ruling is rendered. In Article 10 (1²), this normative act also states that the provisions governing this clause of non-punishment apply to all defendants even if they did not contribute to covering the damages. In view of these provisions, the High Court of Cassation and Justice - the judicial panel for the settlement of legal issues in criminal matters was seized in order to issue a ruling by which the question of law would be resolved, consisting in the question of whether the provisions of Article 10 (1¹) of Law no. 241/2005 are applicable in the case of covering the damage as a result of an involuntary activity, respectively a foreclosure procedure. By Decision no. 39/2003, The High Court of Cassation and Justice - the judicial panel for the settlement of legal issues in criminal matters rejected as inadmissible the seizure made in order to issue a preliminary ruling for the resolution of the legal issue under analysis, considering that the admissibility conditions stipulated by the Code of Criminal Procedure were not met in the case that generated the seizure, because it is not allowed to resort to this legal means in order to receive from the supreme court the concrete resolution of the case and the question that was the object of the seizure referred to a form of Article 10 (1¹) prior to the current form, which did not condition the incidence of this case of non-punishment by the maximum amount of the damage caused, of 100,000 Euros, a form that was not applicable to the case in which the seizure was made and therefore the dismissal by law did not lead to the resolution of the case. Considering that the problem with which the Supreme Court was seized was not resolved as a result of the rejection of the seizure as inadmissible, in this article we proposed to conduct an analysis; on how the provisions of Article 10 (1¹) and (1²) of Law no. 241/2005 should be interpreted and applied in the situation where the damage caused by the offense is covered by a third party or as a result of an involuntary activity, such as in the case of a foreclosure procedure.

KEYWORDS: clause of non-punishment, damages, tax evasion, real circumstance, foreclosure

Introductory aspects. The conditions in which the clause of non-punishment provided for by Law no. 241/2005 becomes applicable

241/2005, measures are provided to prevent and combat acts of evading taxpayers from paying taxes, fees, contributions and other amounts due to the general consolidated budget of the state, several tax evasion or related tax evasion offences being regulated in this sense in the articles 3-9¹. At the same time, taking into account the state's superior interest in recovering the damage suffered by committing tax evasion crimes, as well as the fact that in the matter of tax evasion, the rules of criminal law come in support of the tax rules (Bugnar-Coldea 2021, 496), to ensure superior protection to the state's right to recover tax debts from taxpayers, in Article 10 (1¹) and (1²) this normative act also regulates cases of reduction of punishments or of non-punishment. They become incidental under certain conditions, when the damage suffered by the state is covered.

We will refer further to the clause of non-punishment provided by Article 10 (1¹) from this normative act, which is the subject of this analysis. Thus, according to this legal text, „if the damage caused by committing the acts from *Article 6¹, 8 or 9* does not exceed the value of 100,000 Euros, in the equivalent of the national currency, and during the criminal investigation or during the trial until a final court decision is issued, this, increased by 20% of the calculation basis, to which interest and penalties are added, is fully covered, the act is not punished, applying the provisions of Article 16 (1) h) of Law no. 135/2010 on the Criminal Procedure Code, with subsequent amendments and additions”.

From the analysis of the legal text, the following cumulative conditions result that must be met in order for this clause of non-punishment to become applicable (Vîrjan 2020, 328-349): i) the commission of an offense under Article 6¹, 8 or 9 of Law no. 241/2005 through which damage is caused to the general consolidated budget of the state; ii) the damage caused not to exceed the value of 100,000 Euros, in the equivalent of the national currency; iii) the damage caused, increased by 20% of the calculation basis, to which interest and penalties are added, to be fully covered during the criminal investigation or during the trial until a final court judgment is issued; iv) the perpetrator has not previously benefited from the provisions in the last 5 years after committing the act provided by Article 10 (1¹) or (1²).

With regard to the condition regarding the commission of an offense under Article 6¹, 8 or 9 of Law no. 241/2005 by which a damage is caused, it must be said that not all the normative ways provided by Article 9 are able to generate a damage. Thus, in the specialized literature it was rightly shown that with regard to Article 9, only in the case of committing the crimes provided for by Article 9 (1) a), b) and c) the immediate consequence consists in the production of a damage, the other modalities provided for in Article 9 not being able to produce such a result (Bugnar-Coldea 2021, 480).

Given that the value of the damage is expressed in Euros, but is calculated in equivalent in lei, the question arises as to what is the RON/EURO exchange rate communicated by the National Bank of Romania that is taken into account when this calculation is made. In the specialized literature it was shown that, considering that this clause of non-punishment was provided in favor of the defendant and the law does not specify which is the reference date according to which the RON/EURO exchange rate communicated by the BNR is established, the principle of applying the more favorable criminal law should be taken into account, even if we are in extra-penal territory, because the course of the national currency is governed by financial-fiscal regulations (Vîrjan 2020, 344). Under these conditions, the highest exchange rate of the Euro communicated by the BNR in the interval between the date of the damage and the date on which the value of the damage is ascertained should be taken into account (Voinea 2006, 186). By Decision no. 258 of May 5, 2016, the Constitutional Court considered, however, that in order to comply with the constitutional requirements of clarity and predictability of the criminal law, the damage should be calculated by applying the exchange rate from the date the act was committed.

Regarding the condition that the damage caused, increased by 20% of the calculation basis, to which interest and penalties are added, is fully covered during the criminal investigation or during the trial until a final court decision is issued, we show that interest and penalties related to the main debt are not included in the notion of damage caused. Thus, the calculation basis provided for in the law, to which the 20% increase is applied, only takes into account the damage caused by the commission of the act, without taking into account the related interests and penalties. By Decision no. 66/2021 pronounced by the High Court of Cassation and Justice – the judicial panel for the settlement of legal issues in criminal matters, it was established that the interests and penalties referred to in Article 10 (1¹) of Law no. 241/2005 for the prevention and combating of tax evasion, it is applied only to the damage caused by committing the act, without taking into account the 20% increase from the calculation basis.

Last but not least, in order to benefit from this clause of non-punishment, the perpetrator must not have committed a crime provided by Law no. 241/2005 within a period of 5 years from the date of the commission of the act for which he benefited from the provisions of the causes of punishment reduction or non-punishment provided by Article 10 of Law no. 241/2005.

Decision no. 39/2003 pronounced by The High Court of Cassation and Justice - the judicial panel for the settlement of legal issues in criminal matters

According to Article 10 (1²) of Law no. 241/2005, the provisions of the clause of non-punishment apply to all defendants even if they did not contribute to cover the damage. In relation to the application of this legal text, in practice there have been situations in which part of the damage was recovered not as a result of active conduct on the part of the defendants, but as a result of foreclosure procedures carried out by the National Tax Administration Agency (ANAF), a civil party in the trial. Such a situation also appeared before the Bucharest Court of Appeal, and in this case, in contradiction with the decision of the court of first instance and the position of the defendants, the prosecutor's office considered that if part of the damage is covered as a result of the steps taken by the fiscal body, as a civil party in the criminal trial, through foreclosure actions, the clause of non-punishment could not be retained, because the recovery of the damage, under the terms of the text of Law no. 241/2005, does not take place as a result of a voluntary action on the part of the defendants. Under these conditions, the Bucharest Court of Appeal seized the High Court of Cassation and Justice – the judicial panel for the settlement of legal issues in criminal matters, for the pronouncement of a decision by which to give a solution in principle to the following question of law: *„If the provisions of Article 10 (1¹) of Law no. 241/2005 are also applicable in the event of damage coverage as a result of an involuntary activity, respectively a foreclosure procedure?”*

The High Court of Cassation and Justice – the judicial panel for the settlement of legal issues in penal matters, however, it considered that the seizure does not meet the admissibility conditions provided by Article 475 Penal Procedure Code, which is why it rejected as inadmissible the seizure made by the Bucharest Court of Appeal – 2nd Criminal Section. In principle, the Supreme Court held that the referring court, in the act of seizure, referred to the clause of non-punishment in a form prior to the current form, in which its applicability was not conditioned by the existence of a damage threshold of 100,000 Euros. However, in the current regulation, the applicability of this cause of non-punishment is conditioned by a maximum damage threshold of 100,000 Euros, in the equivalent of the national currency, a condition that is not met in the case. Under these conditions, the Supreme Court showed that the substantive resolution of the case depends on the application of the current legal provisions relevant to the case, considering that the application of the clause of non-punishment is conditioned by the amount of the damage provided by the law. Therefore, the Supreme Court considered that the resolution on the merits of the case before the Bucharest Court of Appeal does not depend on the clarification of the legal issue that was the subject of the seizure. At the same time, the Supreme Court considered that the condition that the seizure should aim at the interpretation *in abstracto* of certain legal provisions, and not at the implicit resolution of some issues related to the particularities of the case's merits, is not met either.

And yet the clause of non-punishment provided by Article 10 (1¹) of Law no. 241/2005 is incident to prevent and combat tax evasion if the damage is covered by a third party or as a result of an involuntary activity, such as a foreclosure procedure?

Given that the Supreme Court did not solve the legal issue with which it was charged, rejecting the seizure as inadmissible, the question remains whether this clause of non-punishment is incidental and if the damage is fully covered, according to the provisions of

Article 10 (1¹) of Law no. 214/2005, by a third party or as a result of an involuntary activity such as a foreclosure proceeding.

We believe that in order to be able to answer this question, we need to clarify whether the provisions of Article 10 (1¹) of Law no. 241/2005 regulate a clause of non-punishment that represents the characteristics of a *personal circumstance* or we are in the presence of a *real circumstance*. Clarifying this aspect allows us to determine whether the provisions of this case of non-punishment are also applicable in the event of coverage of the damage by a third party or as a result of an involuntary activity, respectively of a foreclosure procedure, or whether they are applicable only if the damage coverage occurs as a result of a voluntary action by the author or the secondary participants in the commission of the crime of tax evasion.

In doctrine it has been shown that *the real circumstances are related to the deed, influencing its degree of social danger, while the personal circumstances are related to the person of the criminal and highlight his dangerousness* (Mitrache and Mitrache 2014, 446). Thus, the real circumstances relate to the action or inaction committed and to its material result (Daneş and Papadopol 1985, 382) and have in mind the act provided by the criminal law, being external to the participant (Antoniou, Bulai and Duvac 2010, 102), while the personal circumstances highlight the mental position of the participants in relation to the commission of the crime or certain characteristics of their personality (Crăciun 2016, 94).

The importance of the distinction between real circumstances and personal circumstances results from the rule established by Article 50 Criminal Code, according to which *The circumstances related to the author or to a participant do not reflect on the others*. [Article 50 (1) of the Penal Code], while *the circumstances concerning the act reflect on the author and on the participants only if they knew or anticipated those circumstances*. [Article 50 (2) of the Penal Code]. In other words, personal circumstances produce effects *in personam*, while real circumstances produce effects *in rem*.

Returning to the legal issue that is the subject of this analysis, we show that with regard to the provisions of Article 10 (1) of Law no. 241/2005, by Decision no. 9 from March 15, 2017, The High Court of Cassation and Justice – the judicial panel for the settlement of legal issues in criminal matters, established that *this legal text regulates a clause of non-punishment/reduction of personal punishment limits*, solution that was also embraced by the Constitutional Court through Decision no. 459 of June 25, 2020 by which it rejected the exception of unconstitutionality of the provisions of Article 8 (1) and (3) and of Article 10 (1) of Law no. 241/2005 for preventing and combating tax evasion. Essentially, in Decision no. 9/2017 it was shown that *the full coverage of the damage until the procedural moment established by the legislator does not refer to the act of tax evasion, but concerns the conduct of the perpetrator after the moment of committing the act, outlining the mental attitude, of active remorse shown by the perpetrator up to that procedural moment, conduct in relation to which its hazard can be appreciated*.

However, the two decisions mentioned above are not sources of constitutional law, considering that courts only have the role of interpreting and applying the law, while the decisions of the Constitutional Court by which exceptions of unconstitutionality are rejected only confirm the presumption of constitutionality of the legal rule that has been subjected to the constitutionality review. Therefore, the pronouncement of these decisions does not prevent the legislative body from amending or even repealing the legal norm that was the object of the analysis made concrete by the pronouncement of the two decisions mentioned above, with the respect of course of the provisions of the Constitution. In this sense, we recall the provisions of Article 477¹ of the Penal Procedure Code, according to which *The effects of the decision shall cease when the legal provision that caused the settled legal issue is repealed, found unconstitutional or amended, except for the case when it subsists in the new regulation*. Or, after the pronouncement of the two decisions, by Law no. 55/2021 regarding

the amendment and completion of Law no. 241/2005 to prevent and combat tax evasion, the legislator introduced Article 10 (1²) with the following content: “*The provisions of this article apply to all defendants even if they did not contribute to cover the damage provided for in paragraph (1) and (1¹)*”. From the analysis of this legal text, it follows that the incidence of the clause of non-punishment is not conditioned by the coverage of the damage as a result of a voluntary action of each participant in the commission of the crime.

Introducing this legal text, which provides that the effects of this circumstance provided by Article 10 (1) and (1¹) also affect the other participants, the legislator practically transformed a personal circumstance into a real circumstance, justified by the need to recover as quickly as possible the damage caused to the general consolidated budget. As the Constitutional Court also held in Decision no. 101/2021 of February 17, 2021, *even if a clause of non-punishment or reduction of punishment limits has all the characteristic elements of a personal circumstance; considering the specificity of the analyzed field, nothing prevents the legislator from modifying its legal regime and regulating it as a real circumstance*. Thus, in this decision of the Constitutional Court, it is noted that by Law no. 55/2021 the legislator converted this clause of non-punishment/reduction of punishment from the category of personal circumstances to the category of real circumstances. We agree with this opinion of the constitutional review court, which was also retained in the doctrine (Bugnar-Coldea 2021, 495), in the sense that it is the right of the state, within its criminal policy, to qualify this circumstance as either personal one or a real one. In the specialized literature it was shown that this qualification by the legislator of the circumstance provided by Article 10 (1¹) as being real highlights *the ancillary nature of criminal law in the matter of tax evasion crimes* (Bugnar-Coldea 2021, 496).

Thus, considering that this clause of non-punishment produces effects on all participants in committing the crime of tax evasion, even if not all of them contributed to covering the damage caused by committing the crime of tax evasion, we find that we are in the presence of a real case of non-punishment. Under these conditions, we consider that the provisions of Article 10 (1¹) of Law no. 241/2005 are also applicable in the event that the damage is covered as a result of an involuntary action, respectively a foreclosure procedure.

Regarding the hypothesis of the coverage of the damage by a third party, the solution must be the same as the situation in which the damage is covered as a result of a foreclosure procedure, for the same reasons as previously stated. In support of this solution comes the argument that in Article 10 no clarification is made regarding the need for the damage to be paid by the defendant or one of the defendants, the wording of the legal text being a general, impersonal one: *the damage is fully covered*.

On another note, regarding the reasons invoked by the initiators of the legislative proposal regarding the amendment of Law no. 241/2005, through which this clause of non-punishment was introduced, in the sense that a motivation was sought for those who commit such acts of tax evasion in order to cover the damage caused, we hold that these reasons cannot change the factual circumstance characteristic of this special non-punishment case. The real character results from the specific effects that are attributed by Article 10 (1²) subsequently introduced by the legislator, aspect confirmed by the Constitutional Court by Decision no. 101/2021 of February 17, 2021, which rejected the unconstitutionality exception of the provisions of Law no. 55/2021 regarding the amendment and completion of Law no. 241/2005.

It is true that in Decision no. 66/2021 of September 29, 2021 pronounced by the High Court of Cassation and Justice – the judicial panel for the settlement of legal issues in criminal matters, it is mentioned that this clause of non-punishment is based on the will of the defendant to remove the harmful effects of his actions, being grafted on the active remorse of the perpetrator. This mention of the Supreme Court in the considerations of Decision no. 66/2021, however, was not part of the logical-legal reasoning that was the basis of the device

by which the legal issue that was the subject of this decision was resolved. Therefore, the said mention did not contribute to the solution rendered, which is why the court is not bound by these considerations.

At the same time, we remind you that this clause of non-punishment implies not only the coverage of the damage caused together with the related interest and penalties, but also the payment of an additional amount of 20% of the calculation basis. Or, if the damage caused together with related accessories can also be covered as a result of an involuntary activity, such as the situation of a foreclosure procedure, the amount of 20% of the calculation basis can only be covered as an expression of the will of the defendant. Thus, as established by The High Court of Cassation and Justice in Decision no. 66/2021, this amount of 20% of the calculation basis is essentially a form of civil penalty that is left to the discretion of the defendant, therefore it does not have the legal nature of a tax claim or a civil claim. Under these conditions, the amount of 20% cannot be the subject of a foreclosure procedure, but can only be based on the will of the defendant to remove the harmful effects of his act, in order to benefit from the clause of non-punishment. Therefore, we appreciate that this is the explanation why the High Court of Cassation and Justice considered in decision no. 66/2021 that this clause of non-punishment is grafted on the defendant's active remorse.

Therefore, and in the hypothesis in which the consideration of the damage and related accessories are fully covered by the foreclosure procedure, if the defendant chooses to pay the 20% difference in order to benefit from the clause of non-punishment, the condition of a voluntary action of the defendant, grafted on active remorse, is fulfilled, a condition specific to a personal circumstance.

Conclusion

Considering the above, our logical conclusion is that this clause of non-punishment provided by Article 10 (1¹) of Law no. 241/2005 for preventing and combating tax evasion is also applicable if the damage is covered by a third party (for example, the damage is covered by the civilly liable person) or as a result of an involuntary activity, such as in the case of a foreclosure procedure.

This conception of the legislator, which puts the recovery of the damage in the foreground, starts from the fact that in the case of tax evasion crimes, the rules of criminal law are adopted to support the rules of tax law. The aim is thus the criminal protection of the state's right to collect the tax debts it has towards taxpayers. Under these conditions, when the purpose envisaged for the adoption of these criminal rules is achieved by collecting tax debts, the state is no longer very interested in applying the criminal rules.

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