

## **ECONOMIC AND LEGAL IMPLICATIONS OF THE FISCAL CODE**

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### **Summary**

*This article aims to analyze the legal regime of Codes, in general, and of the Fiscal and Fiscal Procedure Codes, in particular. There are presented the applicable constitutional norms, the principles resulting from those rules and, in relation to these, the shortcomings in the practice of lawmaking registered in Romania. These deficiencies are relating to the adoption of the codes, the way of implement them, the frequent modifications that are brought, and the terms of entry into force of the amending law.*

**Keywords:** codes, enactment, complex laws, modification, adoption, entry into force, legal consequences, legal regime.

### **I. Overview on codification**

Codification is the operation of systematizing the specific provisions of a branch of law in a legal act which is called **code** and which has as peculiarities, on the one hand, **generality** and **its degree of complexity**, and on the other hand, **its stability**<sup>1</sup>.

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<sup>1</sup> Ion Santai, Administrative Codification - requirement of the rule of law and of the European integration of Romania, in the Public Law Magazine, no. 1/2003, pp 58 -63;

The most relevant example of the embodiment in a code of both features is the Civil Code from 1804 of Napoleon Bonaparte, who later inspired other European codes, including the Romanian one from 1864<sup>1</sup>.

We can find provisions for codes even in the Romanian Constitution<sup>2</sup>, revised and republished in 2003, where the art. 75 paragraph (2) consecrates the 45 days as being the period within which the first Chamber seised must decide but, "*for codes and other extremely complex laws, the term is 60 days.*"

From the contents of this constitutional text we can find:

- a) on the one hand, the recognition of codes as a category of laws;
- b) on the other hand, the consecration of one of the codes' features : that they are "**extremely complex laws**". Such a conclusion is drawn from literary and grammatical interpretation, the conjunction "*and*" linking "*codes*" of "*other extremely complex laws,*" causing the conclusion that **the codes are placed in the category of extremely complex laws**<sup>3</sup>.

In technical and legal terms, the codes are also laws, involving **the law on adoption of codes**. Invoking the Law no. 287/2009 adopting the Civil Code<sup>4</sup>, the Law no. 53/2003 adopting the Labour Code<sup>5</sup> and the Law no. 571/2013 for the adoption of the Fiscal Code<sup>6</sup>.

There are situations when the codes are adopted by acts with similar force of law, respectively **Government Ordinances, simple or emergency ones**. Going through such a procedure, it was adopted the Fiscal Procedure Code by Government Ordinance no. 92/2003<sup>7</sup>.

Since this is a "*simple*" ordinance, the Government needed enabling in order to adopt the Fiscal Procedure Code, which was done by Law no.

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<sup>1</sup> The Civil Code was decreed on 26th of November 1864, promulgated on 4th of December 1864 and implemented on 1st of December 1865. In the Official Gazette no. 271 from 1964 were published the articles from 1-347 inclusively, and the articles from 348 to 1914 were published in the Official Gazette no. 7, 8, 9, 11 and 13 of 1865;

<sup>2</sup> The Romanian Constitution was published in the Official Gazette of Romania, Part I, no. 233 of 21st of November 1991. It was revised by Law no. 429/2003 published in the Official Gazette of Romania, Part I no. 758 of 29th of October 2003 and republished in the Official Gazette of Romania, Part I no. 767 of 31st of October 2003.

<sup>3</sup> Regarding a review of the Article 75 of the Constitution, see Ioan Vida, Ioan Muraru, Elena Simina Tanasescu (coordinators) - Romanian Constitution, Comment on articles, Publishing House CH Beck, 2008, pp. 712-716;

<sup>4</sup> Published in the Official Gazette, Part I no. 511 from 24th of July 2009

<sup>5</sup> Published in the Official Gazette, Part I no. 72 from 5th of February 2003

<sup>6</sup> Published in the Official Gazette, Part I no. 927 from 23rd of December 2003;

<sup>7</sup> Published in the Official Gazette, Part I no. 941 from 29th of December 2003;

559/2003<sup>1</sup> on empowering the Government to issue ordinances, which lists on the art. 1 pt. II.5 among the areas in which the government is entitled to regulate also the "*Fiscal Procedure Code*".

Some problems arose in practice regarding **the implementation of codes**, identifying two main situations:

- a) codes that have been implemented **by laws**, in which we find **the Civil Code** implemented by Law no. 71/2011<sup>2</sup>, **the Criminal Code** implemented by Law no. 187/2012<sup>3</sup>, **the Code of Civil Procedure** implemented by Law no. 76/2012<sup>4</sup>, **the Criminal Procedure Code** implemented by Law no. 255/2013<sup>5</sup>.
- b) **codes that have been implemented by Government Decisions**, such as **the Fiscal Code** implemented by the Government Decision no. 44/2004<sup>6</sup> and the Fiscal Procedure Code implemented by the Government Decision 1050/2004<sup>7</sup>.

Relating to the two techniques, the one that has legitimacy in terms of the procedures provided in the Constitution, is the second technique, referred to in art. 108 paragraph (2) of the Constitution<sup>8</sup>, because **the legal act that implements the laws is the Government Decision**.

Therefore, in our opinion, **the implementation of codes, which are themselves laws, other laws is a questionable procedure in terms of the constitutional text mentioned above**.

Returning to the two codes (fiscal and fiscal procedure), they regulate matters of fiscal law, substantial and procedural law, fiscal law itself being derived from the branch of public law in general, and from the administrative law in particular.

Adopting an administrative code and an administrative procedure one, is a goal that is often shout aloud, both politically and institutionally, but

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<sup>1</sup> Published in the Official Gazette, Part I no. 909 from 22nd of December 2003;

<sup>2</sup> Published in the Official Gazette, Part I no. 409 from 10th of June 2011;

<sup>3</sup> Published in the Official Gazette, Part I no. 757 from 12th of November 2012;

<sup>4</sup> Published in the Official Gazette, Part I no. 365 from 30th of May 2012;

<sup>5</sup> Published in the Official Gazette, Part I no. 515 from 14th of August 2013;

<sup>6</sup> Published in the Official Gazette, Part I, no. 112 from 6th of February 2004;

<sup>7</sup> Published in the Official Gazette, Part I, no. 651 from 20th of July 2004;

<sup>8</sup> Art. 108 of the Constitution has the following content: "(1) The Government shall adopt Decisions and Ordinances. (2) The Decisions shall be issued to organize the execution of laws. (3) The Ordinances shall be issued under a special enabling law, within the limits and under thereof. (4) The Decisions and ordinances adopted by the Government are signed by the Prime Minister, are countersigned by the Ministers who are bound to carry them into execution, and shall be published in the Official Gazette. Failure to publish entails the non-existence of the decision or the ordinance. The Decisions of a military character shall be conveyed only to the institutions concerned."

unfortunately has not yet materialized by adopting the two codes. And so it is that **the fiscal law, which is a sub-branch of the public law (administrative) benefits coding before the branch of law to which it belongs, itself, have been codified<sup>1</sup>.**

## II. Critical Considerations on the Fiscal Code and the Fiscal Procedure Code

The fact that both fiscal code and fiscal procedure code were adopted before existing an administrative code or administrative procedure code **is acceptable**, given that the fiscal law is an applied law both in the public economy and the private one, in equal measure, in the life of the state and individuals.

What is objectionable, in our opinion, are the following:

a). **the adoption procedure** and here we refer specifically to the Fiscal Procedure Code, which was adopted by simple Government Ordinance under legislative delegation under art. 115 para. (1), (3), (7) and (8) of the Constitution, in relation to art. 108 para. (1), (3) and (4) thereof.

The legislative delegation, as can be appreciated in the literature, is an atypical procedure for adoption of a law, that when is based on an law empowerment concerns, as a rule, the situation where Parliament is on vacation and there is a special situation that requires a certain emergency, which attracts the adoption of this type of ordinance.

Adopting a code, whatever the branch of law targets it and the nature of its rules, substantive or procedural law, is a very serious problem, that does not justify the adoption of a "*simple*" Government Ordinance and neither **the legislative delegation procedure**.

Ordinances shall be presented as a collaboration between **the legislative and the executive power**, borrowing features which individualize from each of them. They are **executive acts** under organic aspect and legislative acts from material point of view. In other words, they are acts belonging to an executive authority, but which relates to some matters that normally are of a legislative nature. From this distortion between the author and their content, the ordinances acquire a hybrid character, which affects the whole legal existence<sup>2</sup> of them.

Therefore, we consider that **the adoption of the Fiscal Procedure Code would have to go through the normal procedure as in other cases**. We refer in particular to the provisions of Law no. 571/2003 regarding the Fiscal Code, this because through the usual procedure of adoption, the

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<sup>1</sup> Verginia Vedinas, Administrative Law, Ninth Edition , Legal Publishing House, Bucharest, 2015, pp 78-81 .;

<sup>2</sup> Antonie Iorgovan, Dana Apostol Tofan, The Legislative Delegation in Romania, in RDP no. 1, p. 70 ff.

parliamentary committees have enough time to analyze and define the text's content, creating the premises for the law that is adopted, to be closer to the social relations content that governs them.

b). The second criticism aims the instability of the Fiscal Code and also of the Fiscal Procedure Code and the civil and criminal codes recently adopted, that have undergone, from the adoption date, countless changes. Thus, the Fiscal Code has undergone about 89, and the Fiscal Procedure Code, about 32 amendments and additions;

c). A third criticism concerns **the period** within the changes **take effect to the Fiscal Code and the Fiscal Procedure Code**, the two codes establish the provision that the entry into force of the amendments is **usually** made from next fiscal year, as required by art. 4 of the Fiscal Code, as amended and supplemented<sup>1</sup>, art. 3 of Fiscal Procedure Code, republished, as amended and supplemented<sup>2</sup>.

This wording **"generally" turned into exception, and the exception in rule**, the most of the amendments made to the Fiscal Code and the Fiscal Procedure Code, causing legal effects even during the fiscal year, which has led to a dangerous and disturbing practice on the subjects of law covered by them. We have in mind that a legal person predicts a budget of income and expenses during a fiscal year, and the changes during a fiscal year, undoubtedly affects the activity of the legal person.

### III. Other possible legal consequences of the Fiscal Code.

In addition to those already expressed, but in close connection therewith, the provisions of the Fiscal Code, in general, and the amendments that are made to it, in particular, produce economic, legal and even social consequences, depending of the concrete regulatory object.

The unexpected change of the Fiscal Code creates the situation of being adopted a law that does not allow the citizens to arrange their behavior so as to comply with that law, beyond his will to respect it. Example: changes to upwards of property taxes, on movable and immovable property, obviously disrupts a person's ability to comply with the new rules established in the sense of having the financial resources to enable this. As a legal person, the

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<sup>1</sup> Article no. 4 of the Fiscal Code has the following content: "(1) This Code shall be amended and supplemented only by law, promoted **usually** 6 months before the date of entry into force.

(2) Any amendment or addition to this Code shall take effect from the first day of the year following that in which was adopted by law. "

<sup>2</sup> Article no. 3 of Fiscal Procedure Code, republished, has the following content: "Amending and supplementing the Fiscal Procedure Code : (1) This Code shall be amended and supplemented only by law, promoted **usually** 6 months before the date of entry into force. (2) Any amendment or addition to this Code shall take effect from the first day of the year following that in which was adopted by law. "

physical person also conduct its own plans by planning the expenditure in relation to the income.

The Constitution, as the fundamental law of the State, contains rules to protect both the citizen and the property it owns, the property being guaranteed by art. 44 and 136 of the Constitution, in both its forms, public or private.

Ensuring ownership of the asset is reflected not only on the asset subject to it, but also on its holders, in the exercise of ownership right.

Secondly, the Fiscal Code **affects private initiative and investment in the private economy and the services sectors**, which may take equally both public and private form, as authorized by law.

The Constitution, through art. 45 guarantees "*the free access of persons to an economic activity, free enterprise, and their exercise under the law.*" This requires a legislative framework that should be characterized not only by **stability** but also by rules that encourage the exercise of these fundamental rules.

Another aspect, with legally and economically character equally, **aims the influence that the Fiscal Code has on the work of public authorities in general, and on local authorities**, in particular.

The Constitution places by the art. 120 para. (1) on the base of the organization and functioning of public administration in the administrative - territorial units, **the principles of local autonomy, decentralization and deconcentration of public services**. Based on these principles, the autonomous authorities draw up and run their own local budgets, through which they establish a settlement for the development of a locality and the lives of citizens for each year.

The permanent legislative mutations disrupt, equally, the citizen and also the work in local public administration. Depending on **national fiscal policy**, also the deliberative local authorities may have **a local fiscal policy** that contributes to the economic development in the area of administrative - territorial units, to the increase of the quality of life for citizens and the collection of taxes owed to local and county budgets. They are all interrelated to each other.

#### **IV. Conclusions.**

We aimed through this material to reveal some of the peculiarities that the encoding process make in fiscal matters, both in terms of substantive law and of the procedural one.

It is a positive aspect that was desired and achieved, since 2003, the codification in both aspects.

What we appreciate that is another **poor aspect** for the legal normativity system in Romania, is the way of legislating. These deficiencies concern all

levels and types of laws, but reveals pronounced aspects, even critical, in terms specific areas of legislating, such as:

- a). **exercising the right of legislative delegation by the Government**, characterized by **excess of emergency ordinances**;
- b). **the legislative instability phenomenon** as a whole, which take the form of **frequent changes in legislation**, made on the usual procedure or on atypical procedures (ordinances, assuming responsibility by the Government);
- c). **particular aspects of the legislative instability**, both in terms of frequent changes and derogations from the adoption procedure in the matter of the codes;

As we have already shown, a code is a law that must be characterized by stability, but the Romanian experience of the past 25 years has made them to customize, notably by **instability**, with negative consequences on the State's live and individuals life equally.

Therefore, we think that for the future it will have to pay attention to these issues and to understand that **legislative stability not only elevates one nation, but helps it to function in a balanced, consistent, seamless and fully interest of the state itself and of its citizens.**

