

**CONSIDERATIONS ON THE FIRST  
REGISTRATION TAX AND ON THE  
POLLUTION TAX FOR MOTOR VEHICLES AS  
STATED BY THE ROMANIAN LAW  
ACCORDING TO THE RECENT DECISIONS OF  
THE E.U`S COURT OF JUSTICE AND TO THE  
E.U`S TREATIES**

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**Abstract in original language**

According to the article 214/2 Romanian Tax Code, as it was amended by the Government Emergency Order No 110/2006, a special tax on motor vehicles had to be paid on the occasion of their first registration in Romania, whether it should have been a temporary or a permanent registration. This tax, named first registration tax was instituted since January 1st 2007 and its effects have occurred in the period near after the Romanian accession to the E.U.

The compatibility of the first registration tax with the stipulations of Art.90 of EC Treaty was verified by the Romanian national Courts, who have constantly established that it was indeed contrary to the EU law on the free movement of goods. The Romanian Courts stated that, in the case of second hand motor vehicles brought into Romania from other EU countries, due to the fact that the first registration tax has been previously paid on the territory of one of these countries, another taxation which would have been imposed by the Romanian national law should have the effect of discouraging the free trade with this type of vehicles.

Since July 1st 2008, the Government has renounced to the first registration tax on the second hand vehicles coming from the EU countries. Trough the Emergency Order No 50/2008 was instituted instead the pollution so named tax. The pollution tax ought to be paid at the first registration of a motor vehicle in Romania. Our legislation does not distinguish between vehicles manufactured in Romania and the ones manufactured abroad. Similarly, it does not distinguish between freshly issued and second-hand vehicles. This first national regulation in this matter has suffered several successive modifications, including the one of diminishing its amount. Thereby, the Government tried to avoid a possible incompatibility of the pollution tax with the EU law.

In resolving the pollution tax problem, the Romanian Law Courts had formulated preliminary questions able to debate upon the compatibility of this tax with EU law. In three recent cases–law: Tatu, Nisipeanu and Ijac v Romania, EUCJ has stated that the pollution tax introduced by the Romanian legislation, applied to vehicles on the occasion of first registration in Romania, was contrary to EU law,

having the effect of discouraging the import and the traffic insertion of second-hand vehicles purchased in other Member States. The EUCJ, also, has established that the Article 110 TFEU ought be interpreted as forbidding to a Member State the establishment of a pollution tax imposed on motor vehicles on the occasion of their first registration in the respective Member State whenever the respective tax should be shaped in such a way that it would impeach the placing in circulation in the respective Member State of second-hand vehicles purchased in other Member States, yet without discouraging the purchase of second-hand vehicles bearing the same manufacturing year and technical condition on the domestic market.

Following these EUCJ judgments, most Romanian Law Courts have decided to refund to applicants the amounts previously paid according to Romanian national rules, because all of these tax variants were contrary to EU law. Until the end of this year, is also expected a decision of the Romanian High Court of Cassation and Justice concerning the interpretation, application and unification of the judicial practice in the matter of refunding pollution tax.

#### **Key words in original language**

first registration tax, pollution tax, free movement of goods, EU law, preliminary ruling

### **1. CONSIDERATIONS ON THE TAXES LEVIED ON MOTOR VEHICLES ON THEIR FIRST REGISTRATION AND ON THEIR LEGISLATIVE EVOLUTION**

In State has always had an administrative policy for the registration of motor vehicles, as they represent an economical value and the numerous transactions with vehicles, either used or new, could represent a significant budgetary source. Registration taxes were paid directly in a State's bank account, and the evidence of the payment had to be shown to the Police before the registration and before making the vehicles available for traffic or in the situations of ownership transfer over second-hand motor vehicles, when it were erased from the Police databases as being owned by the seller and registered under the name of the new owner. The value of such taxes was not prohibitive, as taxation on public services is generally admitted as long as it does not infringe fundamental rights.

The Governmental Emergency Order (GEO) nr.110/21.12.2006, modified Romanian Fiscal Code just one day before Romania's Accession to the European Union (EU). This Order levied a new special tax on first registration of second-hand motor vehicles in Romania, which were previously registered in other EU Member States (MSs). The tax had to be paid for motor vehicles, which did not exceed the authorized maximum mass of 3.5 tones. There were also exceptions, such as special equipped vehicles for persons with disabilities, vehicles pertaining to diplomatic missions, consular offices and their members, and other foreign organizations and persons with diplomatic status that work in Romania.

When GEO 110/2006 entered into force, Romania's Government announced that if this tax did not have been levied on the first registration of second-hand vehicles in Romania, the direct consequence would have been facilitating the entrance into Romania of numerous second-hand motor vehicles more than 10 years old, due to their low price. Therefore, the environment would have been affected, as these vehicles are not properly equipped with modern filters to exhaust gas emissions. They would have soon become waste, for which Romania should have found solutions to deposit and recycle.

With all good publicity for this statement of reasons, there have been several public debates regarding the compatibility of this tax with the Treaty on the European Union. In order not to bring upon itself an infringement procedure in the first year as a Member State (MS) of the EU, Romania, through its authorities, had modified the tax and established certain technical criteria, such as the cylinder capacity and the European emissions standards (Euro 1, 2, 3 or 4). These criteria were established to justify environmental protection and to apply the "polluter pays" principle.

Therefore, starting with July 1st, 2008, GEO 50/2008 entered into force and changed the tax on the first registration of motor vehicles in a pollution tax. The statement of reasons, which was annexed to the law project presented before the Parliament, maintained the environmental protection's argumentation. It showed that the enforcement of this legislative project was justified by the purpose of environmental protection, which was to be made through programs and projects to improve air quality and to maintain it in the limits provided by EU law. Also, taking into account the necessity of adopting legal measures in order to comply with EU law and the jurisprudence of the Court of Justice of the European Union (CJEU), GEO 50/2008 established that the funds raised from the tax will be directed to environmental projects, such as the program for renewing the national auto fleet, the national program of environmental improvement through the creation of parks and other green spaces, projects for the replacement of classic heating systems with systems that use solar energy, geothermal energy, wind energy and as well projects that generate electricity from renewable sources: wind, geothermal, solar, biomass, micro-hydroelectric power plants, projects of renewal the forestation of highly damaged or drained fields, projects of re-naturalization of lands which used to belong to the natural patrimony, projects of making bicycle lanes.

The tax provisions laid in GEO 50/2008 envisaged all motor vehicles, either new or second-hand, according to their technical details, such as the cylinder capacity, the pollution standard, the type of filters for the exhaustion of gas emissions, for their first registration in Romania, but it also included some exceptions which were initially laid down in the previous GEO.

Nevertheless, GEO 50/2008 was not considered the perfect formula, as it suffered several changes brought by GEO 208/2008. In order to

lay down the latter GEO, the Government tacked into account the budgetary results developed in the first 10 months of 2008, the conclusions of the analysis of the degree of economical crisis deepening in October 2008 – which shown an important decrease of cars` markets and of the production of suppliers` industry, and also the sustainable measures of the cars` production sector affected by the international financial crisis and the fact that the Romanian Government is preoccupied with implementing measures in order to secure jobs in the Romanian economy (for a job in the cars` industry, four other jobs are created in the suppliers` industry).

The new GEO provided that motor vehicles with a cylinder capacity that does not exceed 2000 cm<sup>3</sup> and which are registered for the first time in Romania or in other Member States, starting with December 15, 2008, are exempted from paying the pollution tax according to GEO 50/2008.

GEO 208/2008 entered into force on December 10, 2008 and it was repealed on the next day by GEO 218/2008, which also modified GEO 50/2008. According to GEO 218/2008, Euro 4 vehicles with the cylinder capacity which does not exceed 2000 cm<sup>3</sup>, and as well as all the Euro 4 vehicles that are registered for the first time in Romania or in other MSs between December 15, 2008 and December 31, 2009, are exempted from the pollution tax enforced by GEO 50/2008. Euro 3 motor vehicles with the cylinder capacity which does not exceed 2000 cm<sup>3</sup>, as well as Euro 1, 2 and non-Euro motor vehicles that are registered for the first time in Romania are not exempted from the pollution tax.

## **2. THE SPECIAL TAX FOR FIRST REGISTRATION AND ITS COMPATIBILITY WITH ART 110 TFEU (FORMER ARTICLE 90 EC); THE SOLUTIONS IN THE CASE-LAW**

The entering into force of the pollution tax provisions, as they were enforced between January 1st, 2007 and July 1st, 2008, has generated numerous trials between the tax payers and the state, the former seeking for reimbursement of the tax. They mainly argued that the tax was not legal, as it infringes article 90 EC, and the national judge is obliged to apply with priority EU law provisions. The Romanian fiscal authorities insisted that the tax is legal, as a result of the application of internal law – the Fiscal Code. The Romanian courts have established that art. 90 EC and the case - law of the Court of Justice of the European Union (CJEU) are applicable in these disputes.

According to Article 90, no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. In Weigel (2004), CJEU established that the purpose of the EU law, in normal conditions of competition, is the elimination of any type of discrimination that could appear due to the enforcement of internal discriminatory taxes applied to products from another Member State. Therefore, the purpose of this Treaty Article is to forbid fiscal discrimination between imported and local products.

The national courts observed that in Romania the tax is not levied on vehicles of internal production and registered here. The national courts, as well, observed that the provisions of EU law in this subject matter are directly applicable. Taking into consideration that from January 1st, 2007 Romania has become an EU Member State, according to art. 148 of the Romanian Constitution, as a consequence of Romania's accession to the EU, the provisions of the EU treaties, as well as all the other EU law provisions which are binding, shall apply with priority over contrary national laws, in accordance with the accession Treaty (Art. 148(2)). Parliament, President and Government of Romania and the judicial authority guarantee the compliance with the obligations resulting from the accession Treaty. Moreover, the provisions of Law no. 157/2005 on the ratification of the accession of Romania and Bulgaria to the European Union state that the Romanian state shall also apply the provisions of the constitutive treaties of the EU, before the accession.

National courts also looked at CJEU's case-law, in cases such as *Costa/Enel* and *Simmenthal*. In *Costa/Enel* (1964), CJEU established that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question". In the same judgment the Court defines the relation between EU law and national law, showing that EU law is an independent judicial order, which is applied with priority even in front of subsequent national law. Law no. 343/2006 on the Fiscal Code first enforced the Romanian first registration special tax.

In *Simmenthal* (1976), CJEU established that the national judge is obliged to directly apply EU law, if it is contrary to national provisions, without waiting their elimination from the legal order.

Considering these arguments, and also taking into account that in Romania, as a MS, there was no tax levied on the vehicles produced and registered or re-registered in the country, while such a tax was levied on vehicles already registered in other MSs and re-registered in Romania after being brought inside its borders, the national courts observed a difference in treatment, which constitutes discrimination in the context of the fiscal judicial system and which is contrary to EC Treaties' provisions. These stipulations prohibit a special registration tax for intra-communitary vehicles acquisitions which are not registered in the receiving state, such a tax being contrary to the free movement of goods – the vehicles from other MSs are directly or indirectly disadvantaged in the competition with similar national products.

Regarding the argument that the tax has a protective nature towards the import of highly damaging vehicles for the environment, the national courts did not admit this justification of the state authorities, as from the legal provisions relating to the tax and from the means of calculating its value result that the tax has purely fiscal nature, no

environmental dimension being in the criteria for establishing its value. The first legislative act introducing such criteria was enforced in 2008 – OUG 50/2008.

In conclusion, the national courts applied directly the EU law, without asking for an interpretation from the CJEU using the preliminary rulings procedure, and decided that the incomes brought to the public budget from the special tax on first registration of motor vehicles had no legal basis between January 1st, 2007 and June 30, 2008, because the provisions relating to this tax are contrary to EU law. The tax also could not have any effects, as those effects would have infringed the fundamentals of the European Community. As a consequence, the state has no right in keeping the amount of money collected from taxes between January 1st, 2007 and June 30, 2008 and all the individuals who paid the tax should receive a reimbursement.

### **3. THE POLLUTION TAX. NATIONAL COURTS' DIFFICULTIES TO ESTIMATE ITS COMPATIBILITY WITH ARTICLE 110 TFUE (FORMER ARTICLE 90 EC). THE THREE JUDGMENTS OF CJEU: C-402/09 TATU, C-263/10 NISIPEANU AND C-336-10 IJAC.**

Starting with July 1st, 2008, OUG 50/2008 enforced the pollution tax on the first registration of a vehicle in Romania. By transformation of the first registration tax into a pollution tax, Romania did not solve the disputes relating to the compatibility of the provisions with EU law. Therefore, the trials continued, the individuals trying to obtain the reimbursement of this new named - pollution tax.

According to national law, the special auto pollution tax is paid on the first registration of the motor vehicle in Romania and it was conceived by the state as a transition alternative, due to the fact that, after its accession to the EU and according to the principle of free movement of goods, Romania eliminated from its legal system the legislative acts that restricted the registration of non-Euro, Euro 1 and (starting with January 1st, 2002) Euro 2 motor vehicles.

The Government justified the entry into force of the provisions of GEO 50/2008 regarding the pollution tax by the need for harmonization of national law and EU law relating environmental protection. The other justification was that this tax is an economical and financial mechanism based on the "polluter pays" principle.

The authorities have shown that the pollution tax is collected from all the individuals who wish to register and to use a motor vehicle, regardless of its origin and age. Therefore, the idea of a discriminatory nature of the tax cannot be sustained. Taking into account the arguments deriving from the environmental protection and the setting of an algorithm to find the amount of the tax depending on exhaust gas emissions, the national courts used the preliminary ruling procedure of the CJEU for the interpretation of the compatibility of the pollution tax with EU law.

On April 7, 2011, CJEU pronounced a preliminary judgement in Case-402/09 of Ioan Tatu v. Romanian State by Finances Ministry and Others, after receiving a preliminary question from Sibiu District Court on June 18, 2009.

The European Court interpreted the question sent by the national court in that it refers only to the initial system of taxation introduced by GEO 50/2008, system which will be compared to the former Article 90 EC - the current Article 110 TFEU, considering that in the main proceedings the appellant paid the pollution tax on October 27, 2008. The interpretation made by the Court envisages the conformity of the system of taxation introduced by OUG 50/2008 in its initial form, applicable between July 1st, 2008 and December 14, 2008, with Article 110 TFEU.

The European Court of Justice decided in case C-402/09 Tatu v. Romania that "Article 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 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."

On July 7, 2011, The Court of Justice of the European Union decided in the case C-263/10 Nisipeanu upon the interpretation of Article 110 TFEU after receiving several preliminary questions sent by the Gorj District Court, which had to respond to a request of a reimbursement of the pollution tax.

In its judgment, the Court reiterated the arguments used in case C-402/09 Tatu, considering that the successive changes brought to GEO 50/2008 by GEO 208/2008, GEO 218/20083, GEO 7/2009 and GEO 117/2009 maintain a taxation system that discourages the registration in Romania of second-hand vehicles bought in other Members States, characterized by a high rate of usage and age, while similar vehicles sold on the national market of second-hand vehicles are not subject to such a taxation system. In these conditions, it discourages the purchase of second-hand vehicles of the same age and condition on the national market.

According to the Court, the competence of the Members States to establish new taxes is not unlimited, the prohibition of applying higher taxes on products from other MSs compared to the taxes applied on national products, as it is encompassed in Article 110 TFEU, must be applied every time when a tax discourages the import of goods bought in other MSs, protecting domestic goods on the national market.

The Court stated that all the modified versions of GEO 50/2008 maintain a taxation system that discourages the registration in Romania of second-hand motor vehicles bought in other Member States, similar to those from the national market of second-hand motor vehicles.

The Court reiterated that the purpose of environmental protection could be realized without putting the national products on a more favorable position, by establishing an annual tax applicable to every registered motor vehicle in Romania.

Therefore, the Court ruled that Article 110 TFEU must be interpreted as that setting of a pollution tax levied only on motor vehicles for their first registration in Romania after the entering into force of GEO 50/2008, even though the tax is not discriminatory, creates a protectionist effect on the market, discouraging the import of second-hand motor vehicles without discouraging the purchase of second-hand vehicles which were already on the national market before the entering into force of OUG 50/2008.

In case law C-336/10 Ijac, CJEU ruled that Article 110 TFEU must be interpreted as precluding a Member State from introducing a pollution tax affecting motor vehicles on their first registration in that Member State, if that fiscal measure is so designed as to discourage the putting into service, in that Member State, of second-hand vehicles bought in other Member States, without, however, discouraging the purchase of second-hand vehicles of the same age and condition on the national market.

Regarding the national case-law, the national courts unanimously agreed that, indeed, in such cases, the provisions of EU law are directly applicable, as they have priority in front of the national law according to Article 148 of Romanian Constitution, to law ratifying the accession Treaty to the EU and to case-law of CJEU and principles established in cases: Costa/Enel and Simmenthal.

According to cases - law of the Court, the meaning of a tax with equivalent effect is every pecuniary tax unilaterally imposed on goods due to the fact that they cross the border, no matter its name or means of application. A taxation system which is compatible with Article 90 EC (Article 110 TFEU) must exclude any possibility for the imported products to be subject of higher taxes than similar national products and must not have discriminatory effects under any circumstances. The text of Article 90 EC envisages products made in other MSs and which are subject to internal taxes of any nature, higher than the taxes directly or indirectly applied to similar national products. The Romanian state does not collect the pollution tax levied on similar national products – motor vehicles already registered in Romania after they are sold again.

Analyzing the provisions of GEO 50/2008 with the subsequent changes, it is clear that for a motor vehicle produced in Romania or in other MSs, the state does not collect such a tax if it was previously registered in Romania. On the other hand, such a tax is levied on a motor vehicle produced in Romania or in another MS if that vehicle is registered for the first time in Romania. Being legally organized in this manner, the pollution tax diminishes the introduction on the Romanian market of second-hand vehicles already registered in



another MS, the buyers being fiscally oriented to purchase second-hand vehicles already registered in Romania.

As a consequence of the entering into force of GEO 218/2008, the will of the legislator to influence the choice of consumers became evident: the pollution tax levied on new vehicles, Euro 4, with a cylinder capacity less than 2.000 cm<sup>3</sup> (and it is a well-known fact that, in Romania, vehicles with such characteristics are produced on the local market) which are first registered in Romania between December 15, 2008 and December 31, 2009, was eliminated, so that the consumers are directed towards either a new motor vehicle or a second-hand motor vehicle already registered in Romania which have such technical characteristics. In this manner the national production of motor vehicles is protected, such as it appears even in the Statement of reasons of GEO 208/2008 and 218/2008: The Romanian Government is preoccupied with taking measures to preserve jobs in the Romanian economy, and one job in the cars production industry represents four jobs in the supply industry.

Therefore, it was concluded that GEO 50/2008 is contrary to Article 90 EC (Article 110 TFEU), as it is destined to diminish the introduction in Romania of second-hand motor vehicles already registered in another MS, encouraging the sale of second-hand vehicles already registered in Romania and, more recently, of the new motor vehicles produced in Romania. After Romania's accession to the EU, this is inadmissible for imported goods from other Member States, as long as the national fiscal law diminishes or is able to diminish, even potentially, the consumption of imported goods, thus influencing the choice of the consumers (ECJ, the judgment of 7 May 1987, case 193/85, Co-Frutta Srl cooperative).

The Court ruled that the infringement of Article 90 EC can also be made through the creation of a similar difference of treatment, in the judgments of 11 August 1995, Joined Cases C-367/93 la C-377/93, F. G. Roders BV s.a. v. Inspecteur der Invoerrechten en Accijnzen (discrimination between the wines of Luxembourg and the wines made of fruits from other Member States), of 7 May 1987, case 184/85, Commission v. Italy (bananas imported in Italy and fruits cultivated in Italy). Considering these arguments, national courts have admitted the claims of reimbursement made by the pollution tax payers. Because there are no legal provisions to rule a partial reimbursement, the requests had been fully admitted .

#### **4. NO LIMITATIONS IN TIME FOR CJEU JUDGMENTS' EFFECTS**

It is important that the state's claim regarding the limitation in time of the effects of the CJEU judgments was rejected, which means that Nisipeanu case, as well as Tatu, will apply retroactively, thus eliminating the legal basis of the collection of the pollution tax between July 1st, 2008 and December 31, 2010.

According to a constant jurisprudence of CJEU, the interpretation that the Court gives to a provision of EU law based on Article 267 TFEU clarifies or defines, where it is necessary, the meaning and the extension of the provision as it is supposed to be understood, or it was supposed to be understood and applied since its entry into force. [Judgment of 27 March 1980, Case 61/79, *Denkavit italiana*, par. 16; Judgment of 2 February 1988, Case 24/86, *Blaizot*, par. 27; Judgment of 15 December 1995, Case C-415/93, *Bosman*, par. 141; Judgment of 5 October 2006 in joined cases C-290/05 (*Nadasdi*) și C-333/05 (*Nemeth*), par. 62].

## **5. THE INTERVENTION OF HIGH COURT OF CASSATION AND JUSTICE (HCCJ) THROUGH ITS PROCEDURE OF JUDGMENTS IN THE INTEREST OF THE LAW**

Until CJEU gave its judgment in the cases regarding the pollution tax, HCCJ did not intervene in the matter through the procedure provided by law for interpreting and applying the provisions of GEO 50/2008, by analyzing their conformity with EU primary law, even though there were national courts that admitted fully reimbursement claims basing their decision on Article 90 EC (Article 110 TFEU) and other national courts had suspended the proceedings until CJEU to give a preliminary ruling judgment.

Through the decision no. 24 from November 14, 2011 HCCJ established that the claim having as object the obligation of public authorities to register of second-hand motor vehicles purchased from another Member State, without previous payment of pollution tax provided by GEO 50/2008 and without completing the procedure provided in art. 7 of the OUG 50/2008, is admissible. HCCJ also ruled that the previous fiscal procedure against the decision of calculation, does not apply to the situation of reimbursement claims of the pollution tax based.

In other words, the eventual procedural incidents which could leave individuals without access to a substantial assessment of their claim according to the CJEU case-law were set aside. HCCJ gave the national courts the possibility to directly judge on the substantial claim, without having to verify if the individual previously contested the act which determines the amount to be paid, based on the fiscal procedure, or if he or she paid the established amount of the tax.

## **6. CONCLUSIONS**

Even if the reason of protecting the environment can be considered justified when a Member State enforces restrictions for a certain category of goods, the manner in which the taxation system was regulated, the manner in which the amount to be paid was calculated, as well the amount itself, which often exceeded half of the vehicle's value, almost reaching it, and the disguised protection of the internal cars production industry have weighted more in the interpretation of conformity of national law with the EU Treaties' stipulations regarding the free movement of goods.

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