

THE EFFICIENCY OF LEGAL NORMS REGARDING THE FISCAL SURVEILLANCE AND PRUDENCE. CONSTITUTIONAL CHALLENGES FOR ROMANIA

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Abstract

Without any doubt, the biggest challenge of the last decade for the international community had been the economic crisis which emerged in 2008 and generated a set of effects still felt by the states today.

Although the European Union had rules designed to maintain a balanced public debt and deficit, they proved inefficient and easy to avoid. Therefore, when the crisis debalanced the world economy, the EU member states found themselves with a set of rules which failed to secure the recovery of their economies.

Under this circumstance, the European Union developed a new agreement regarding the fiscal governance, having as main purpose the maintenance of a fiscal balance by ensuring a public debt no higher than 60% of the Gross Domestic Product (GDP) and a public deficit no higher than 3% of the national GDP.

Considering the length and the complexity of the European crisis, the European Union recommended for the states to establish these limits which should assure not just the fiscal balance, but the equilibrium of the entire economy in their constitutions in order to give much more power to these European rules.

Analyzing this context, is Romania, as member of the European Union, able to provide an efficient constitutional framework for the limitations of the public debt and deficit determined by the EU? This is a question which remains to receive an answer in the following paper.

Keywords: *constitutional framework, fiscal surveillance, fiscal governance, economic crisis*

1. Conceptual framework

The issue of tax normativity efficiency is a very complex one which is hard to achieve because the different backgrounds of the member states, the cultures and the different values, the economic and social context generates multiple factors of obstruction. Also, this matter brings into discussion the situation of the European fiscal governance, which is supposed to be an efficient one that manages to bring together the legal systems of all the member states.

The interaction between the national fiscal policy and the one of the European Union can be translated either through a governance which implies the delegation of competences, or the coordination of the fiscal policies.

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Mark Hallerberg had identified two types of fiscal governance: one based on the idea of delegation of competences and the other one on the idea of a contract.

In the first context a transfer of competences is being done towards the minister of finances in order for him to solve the problems of coordination which can occur during the European decision process.

In this type of government, one central actor with great decision-making power is to ensure the cooperation of all the other actors. Applying this type of fiscal governance in the European Union, the system would be difficult to accept by the Member States because it would force them to give much more fiscal powers than they would have agreed to. Also the central actor should receive sanctioning force.

Although the European Commission, in certain cases, may impose sanctions to the Member States, this institution does not have the coercive power necessary to implement the sanctions established. Therefore, the type of governance based on delegation did not have an effective enforcement in the case the European Union.

Also the success of this type of fiscal governance implies that the national parliament has to give its budgetary powers to the single central actor. EU states are not willing to give these powers to the EU level.

One may think that, although the states are reluctant to this type of fiscal governance, it appears to be the best option to ensure the efficiency of the fiscal norms. However, at a closer look we can observe that normative efficiency also means capacity to adapt to a certain context which differs from one country to another. Applying the same set of fiscal rules may not have the desired effects.

The governance that is based on the idea of the contract depends on budgetary objectives and pre-tax rules. A multitude of actors in the field of fiscal policy negotiate a contract to form a coalition that will comply with the tax regulations established.

"Therefore, the contractual approach seems to be more compatible with the European tax framework than the one of states which delegate because state budgets are based on establishing multi-annual objectives required by the European fiscal framework."¹

This type of governance, involving a coalition cannot bring into question the penalties for collaborators. None of the participants cannot penalize or exclude from the coalition another, at most, the sanction may consist of dissolving the coalition.

EU Member States, although they can be penalized, because there is no coercive force of European constructions, the states do not feel the effects of a sanction. EU members are more oriented towards cooperation in tax matters than to delegate authority, duties and tasks.

Furthermore, the Economic and Monetary Union is a set of requests designed to monitor the fiscal efficiency which complies with a form of fiscal governance based on rules. Therefore, the contractual approach is easier to accept by the Member States considering that it only implies the coordination of the national fiscal policies and not the transfer of competences towards the European structure.

¹ Hallerberg, M., Strauch, R., Hagen von, J., *The design of fiscal rules and forms of governance in European Union countries*, European Central Bank, Working Paper Series, No. 419/December 2004, p. 7, information accessed on the site <http://www.ssrn.com/>.

However, it would be quite difficult to bring to a common denominator the fiscal policies of 27 European states through a set of general rules compatible with each policy.

Beyond these two types of fiscal governance, we cannot talk about efficiency of European norms without legitimacy.

2. The European fiscal norms efficient without legitimacy?

European Union, when it is regarded as a system that integrates social relations, economic and political between Member States, must be analyzed in terms of the principle of legitimacy. Authority in the field of taxation - currently limited - enjoyed by the communitary structure is a *sui generis* one, based on the consent of the Member States.

Legitimacy is "the principle that indicates acceptance of decisions of the government leaders and officials (most) by the public because obtaining and exercising power by those leaders was in accordance with the procedures and moral or political values generally accepted of the society."²

We believe that the legitimacy exists where there are the following three aspects cumulated: citizens approve / accept the actions of the leading organisms, they are responsible for the actions carried out and their actions are based on normative justification of their existence.

Acceptance from the citizens is a very important aspect that governing bodies are inclined to consider primarily because it provides them with reinvestment with the power to lead. Also legitimacy is an attribute of sovereign power in functional democracies, belonging to citizens of a state, therefore, in the process of legitimizing leading institutions, citizens should have the final say.

This component of legitimacy would be perfectly explained in tax matters by the slogan "No taxation without representation"³ that justifies the idea that citizens should give their trust to institutions that will be able to impose taxes on revenues.

But how can we believe that the European Union enjoys the confidence of European citizens while it is difficult, if not impossible, to take into account the preferences of the citizens of all Member States.

On the other hand, EU member states do not have all the same decision-making power. Therefore, citizens of countries with less decision-making power will be neglected compared to those of countries with greater decision-making power.

The responsibility of authorities for actions performed is important because it provides a control mechanism that aims to avoid situations of discretionary power. Also authorities are vested with power which is not unlimited, they must always bear in mind the social needs of citizens in the process of policymaking.

² A Glossary of Political Economy Terms, 1994-2005 Paul M. Johnson Department of Political Science, 7080 Haley Center, Auburn University, Auburn, AL 36849, information accessed on the site www.auburn.edu/~johnspm/gloss/legitimacy

³ Expression used in the United States of America to protest against the tax imposed by the British Parliament in 1765 through the Stamp Act.

At EU level, the decision-making mechanism is one in which its institutions mutually limit their powers and in which, after the entry into force of the Lisbon Treaty, the European Commission may impose pecuniary penalties to states for non-compliance with the provisions on supervision and budgetary prudence. So there is the possibility for the European Union to hold Member States accountable for their actions. However, it is easy to see that there is no real way for the Member States to hold the EU accountable for its actions.

In other news, we could consider, from the model of the democratic state that its authorities are held accountable by the citizens' representative bodies, national parliaments. At EU level, the European Parliament representing the citizens should solve this problem, but the power of this institution is, and remains even after Lisbon Treaty, a limited one.⁴

To the two components of the legitimacy mentioned, we must add the fact that that the actions of the authorities must be justified by the existence of a legal framework to regulate them. In the absence of legal framework we cannot speak of rule of law where citizens' needs come first. The lack of this element would lead to arbitrary actions by the authorities.

The legal framework established by the entry into force of the European treaties give general attributes to the European Union in the field of public policy development and the functioning of the Common Market, but do not empower it to intervene directly in the fiscal policy of member states.

European Union Member States have chosen to give up both monetary policy and exchange rate mechanisms for the operation and development of the Common Market. Thus, the common European fiscal policy, being a transfer of powers from the national to the EU level, supports the premise that the EU fiscal power is legitimized by the will of the Member States.

We affirm that legitimizing the EU currently is based on the Treaty on European Union and the Treaty on the Functioning of the European Union, but they become enforceable through the will of the signatories parties, the Member States.

However, at a more detailed analysis we find that the European Union does not enjoy sufficient legitimacy especially in tax matters. "The rejection of the Constitutional Treaty by French and Dutch voters in 2005, the ongoing budget crisis and the rapid decline of the support for the European project (as reflected in the public opinion polls) all indicate a serious problem of legitimacy for the EU".⁵

Thus aspects of economic and fiscal policy of the European Union continue to have a special procedure that requires intergovernmental cooperation in decision-making. In these areas the EU acts as a union of states, not a single well-defined and homogeneous entity.

⁴ Fabbrini, S., *After the Euro Crisis: The President of Europe – A new paradigm for increasing legitimacy and effectiveness in the EU*, p. 4, *EuropEos Commentary*, No. 12/ 1 June 2012.

⁵ T. Warren, *Legitimising discourses and the Reform Prospects for Fiscal Governance in Europe*, p. 2, Conference „Beyond Austerity vs Growth: The Future of the European Political Economy” Halifax Hall, University of Sheffield, 1-3 July 2013, Sheffield Political Economy Research Institute, information accessed on the site <http://speri.dept.shef.ac.uk/conference-2/previous-conferences-2/>.

If the first paragraph of article 114 of the Treaty on the Functioning of the European Union mentions that the European Union has general decisional competences regarding the proper functioning of the Common Market, the second paragraph clarifies that tax provisions are exempted, Member politicilor publice.

In the context of an acute economic crisis, the European Union fully felt the need to reform the entire European mechanism to ensure efficient fiscal rules that will reduce imbalances caused by the economic crisis and will lead to fiscal union. But EU dilemma is how these efficient fiscal rules will be adopted, given that Member States continue to refuse to legitimize the European Union to act as the main authority in the field of fiscal policymaking process.

At the same time, we note that the reluctance of states to legitimize the European Union so it can act directly on fiscal policy has determined the latter to focus on fiscal governance reform agenda by strengthening existing legislation (in particular the Stability Pact and growth in Six-Pack), not by replacing it. This makes us believe that the European fiscal rules are far from being efficient.

Although there is the desire to get closer to a fiscal union, the EU is far from achieving this goal because this form of union would involve two issues currently impossible to accept for Member States: giving the EU right to charge also a higher degree of fiscal capacity.

Under the Treaty of Lisbon, the European Parliament remains a weakly outlined institution regarding the fiscal policy of member states. Therefore, the well-known phrase "No taxation without representation" is no longer valid.

As Stefan Collingnon⁶ claims in the absence of authoritative institutions of the European citizens, only national governments have a democratic mandate, they being the only ones who can decide on the budget and fiscal policy.

In this situation, citizens smaller and less powerful will be governed by leaders who they did not choose. In this context, can we say that the European Union has legitimacy fiscal policy? Furthermore, are the European fiscal rules efficient as long as they neglect the needs of a certain set of citizens?

Considering legitimacy as a source of power, we cannot deny that the EU enjoys its own decision-making powers. However, there are areas where it has little to say, such as fiscal policy.

If the legitimacy of the European Union has its source in the ability of the EU to solve problems effectively and to provide public goods, we observe, as Stefan Collingnon noted, that the benefits of EU accession are temporary and inversely proportional to the length of time that elapsed from the date of accession. Therefore, when the first members that joined have more disadvantages than advantages, as a logical action, will withdraw the legitimacy of the European Union, be it large or very limited.

Presenting these aspects, we conclude that the European Union is quite far from having efficient fiscal rules and still needs a „large transfer” of sovereignty from the national level to its own level in order to make some drastical changes.

⁶ *The three sources of legitimacy for European Fiscal Policy*, p. 14, information accessed on the site www.stefancollignon.de.

3. Romania and the constitutional challenges regarding the fiscal surveillance

Now, that we have analyzed the European context, we can start taking a good look at Romania's situation.

The economic crisis brought a new perspective on the European fiscal framework, surfacing the need for an entire reform of the fiscal policy, including the normative level.

The easiest option for this reform, which has already been implemented by the European Union, aims to link fiscal governance reform agenda to objectives for which the European Union has already been legitimized.

Thus, goals such as greater resistance to economic shocks and increasing fiscal capacity of the European Union are related to the primary objective of the European Union, which seeks sustainable growth. In this way states are willing to accept EU actions affecting only indirectly national fiscal policies.

Beyond the issue of legitimacy, we have to admit that the need for rules establishing a firmer fiscal surveillance is pithy and far from being neglected. This aspect is reflected in the recommendation made by the European Union to include measures of accountability and fiscal stability in the very Constitutions of the states. The expected effect is that once stipulated in the Constitution, these measures will be more efficient and rarely violated, giving to the accountability in public finances management constitutional importance.

Under these circumstances, the changes should target the articles which refer to economy, economic mechanisms and, in particular, that referring to national budget - Article 138 (regarding the national budget).

The Romanian Constitution should ensure not just the coherence of the national fiscal policy with the stability and accountability mechanisms developed in the European Union as a result of the economic crisis, but also the reduction of economic disparities caused by corruption and lack of competitiveness.

Only in the conditions of all sources of income being included in the state budget conditions for a thorough analysis of fiscal policy pursued by the state are ensured. Without a precise and imperative statement of this issue in the national Constitution is virtually impossible to have a clear look at the national income and to apply efficient fiscal surveillance measures. The tax regime should be well defined in the Constitution before the drafting of the state budget law. This condition is partially fulfilled by the Romanian Constitution.

Paragraph 1 of Article 138 states that "The national public budget shall comprise the State budget, the state social security budget and the local budgets of communes, towns and counties."

This regulation leads to the impression that the Romanian fundamental law is based on the principle of budgetary unit, whereby all revenues and expenditures necessary should be entered in a single document, which is the national budget.

Constitutional provisions, particularly those that define *national budget*, are extremely important to define the very concept of *public finance* and *fiscal policy*. From the provisions of art. 138 of the Constitution, we understand that the *public finances*

are reflected nationally in the national public budget governed by "the national public budget law". Therefore, this rule is essential for the entire state economy.

Deduct that all the funds forming the state's revenue are embedded in the national public budget, in order to have efficient fiscal norms, we mustn't leave room for interpretations and this is the reason why it would be best to clearly state in the Constitution that there mustn't be any budgets outside the national public budget.

Furthermore, since this fiscal norm is so important, excluding the European construction from this field would make the fiscal surveillance virtually impossible. Therefore, we can only agree with the suggestion made by the renowned researcher in the field of taxation in practice, Grigorie Lăcrița, that the Article 138 should mention that when drafting the state budget and the budget of state social insurance, the Government should transmit this draft to the EU institutions as well.

The expected effect of this change we believe to be that of a higher fiscal transparency promoted by the state, the stability and consistency in tax law, attributes likely to generate trust for both business and the mass of taxpayers.

Also, the revision of the Constitution, beyond the commitments made by Romania in the Treaty on Stability, Coordination and Governance in Economic and Monetary Union, and other mechanisms for responsible economic governance of the EU, should ensure responsible and sustainable economic and social development on medium and long term.

The introduction of this element of transparency and accountability regarding the spending of the public revenue which is in accordance with the commitments taken by Romania regarding the monitoring of budgetary-fiscal objectives will ensure not only an efficient fiscal system, but also a solution for the economic crisis.

At the same time, the Romanian Constitution, to be able to guarantee an efficient fiscal policy, needs to be calibrated with the multiannual budget of the European Union. Therefore, the new changes must take into account even more principles such as: predictability and stability, equity and the impact on future generations, efficient use of resources which are limited in order to have sustainable development.

The final aspect that the Romanian Constitution should embed is the obligation commitments taken under the Europlus Pact. These obligations refer to the limits of the national debt which should not exceed 60% of the Gross Domestic Product (GDP) and those of the national deficit which should not exceed 3% of the GDP.

These are the changes we consider necessary to take the efficiency of the Romanian fiscal norms a step forward. However, the suggestions which were made throughout this paper will be quite difficult to fulfill for various reasons, out of which the most important we can think of is the national sovereignty which will be almost gone if the measures suggested will be applied.

4. Conclusions

The lessons of the financial crisis should be learned not only by automatic application of European rules of fiscal responsibility, but by stipulation in the

constitutional context the commitment to create the structural conditions for sustainable economic growth.

New and effective fiscal norms must take into account the need for restructuring and accountability of public expenditure, creation of preconditions for budgetary planning and medium-term investment and strengthening of fiscal discipline so that public debt and public deficit requirements can ensure a healthy economic growth.

This would be the desired context, one where the trend in the European Union is to strengthen the institutional framework regulating fiscal policy. But this process is complex and lengthy, fact confirmed by the failure of the "Treaty on Stability, Coordination and Governance in Economic and Monetary Union".

Through this treaty on the one hand it is tried to impose budgetary discipline (under Article 3, paragraph 1, letter a budgets of Member States must be at least balanced, if not surplus) and, on the other hand to avoid fiscal destabilization of Member States, which would lead to the destabilization of Europe Union (Article 3, paragraph 3 lit. b states that Members may only in exceptional circumstances deviate from the medium-term objectives, but only provided that these deviations do not affect fiscal sustainability).

We can only conclude that a reform of the fiscal norms is necessary which should increase the capacity of the European Union to enforce fiscal policy, the capacity to coordinate national fiscal policies and the fiscal autonomy.

Nonetheless the European fiscal system reform cannot be achieved suddenly, but rather gradually because Member States accept more easily the loss of sovereignty in some areas, such as money for example, than in the field of taxation.