

Considerations regarding the constitutional obligation determining the financing source for budgetary expenditures¹

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Abstract

This study examines the relation between constitutionality and opportunity in order to adopt regulations in matters of economy and finance. The analysis concerns in particular the regulation process on budgetary expenditures, respectively the constitutional obligation to indicate the source of financing for these expenses. The legal and jurisprudential landmarks identified are likely to reveal the delicate issues of balancing the concurring interests, as well as the constitutionalisation tendency of certain obligations imposed by the law of public finances and, respectively, the Fiscal Responsibility Law in the sense of transforming them into “constitutional criteria” through the application of Article 138 (5) of the Constitution.

Keywords: *financing source, budgetary expenditures, constitutional review, opportunity, national budget.*

JEL Classification: K10, K34

1. Introduction

Considering their importance, a number of principles on the economy and public finances are established at the constitutional level, being subject to special titles. We refer to Title IV - *Economy and public finances*, governing, in separate articles, the basic rules on economic, property, financial system, the national public budget, taxes, duties and other contributions, the Court of Audit and the Economic and Social Council (Articles 135-141 of the Constitution). The development of these principles at the legislative level is a difficult task for the primary / delegated legislature, as appropriate, both in terms of providing fair balance between the general and the individual interest, and in terms of detecting and assessing, therefore, issues of constitutionality and of opportunity in the adoption of reference rules in this matter.

On another occasion we approached³ the issue of guaranteeing the fundamental rights and freedoms in the context of the state’s obligation to protect

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national interests in the economic activity, in order to underline the need and the difficulties to ensure the fair balance to which we referred above. Entrenching at that time the analysis under the regulation of Article 135 (2) b) of the Constitution, according to which “*The State must ensure [...] protection of national interests in economic, financial and currency-related activities*”, we show that the significance of the constitutional rule is that the state has a constitutional obligation to ensure the protection of the interests mentioned above in order to ensure its economic and financial stability. Only in this way it may become a credible factor nationally and internationally and able to comply with Article 126 of the Treaty on the Functioning of the European Union⁴. At the same time, the State’s action in accordance with the national interest constitutes a guarantee of citizens regarding the protection of their own rights and freedoms⁵.

But what is the discretion of the State or, in other words, which is the border of constitutionality and opportunity to adopt regulations in matters of economy and finance, especially in order to ensure a fair balance between the general and the individual interest? In the present study we will try to answer this question, presenting the analysis of the regulation process on budgetary expenditure, with special reference to the constitutional obligation to indicate the source of financing for these expenses. This fact and considering the dynamics of the regulations in the matter and the trend that the discretion in determining the budgetary expenditures shall become laxer in periods such as election years, with the consequence of the frequent appeal to the constitutional judge in order to define its limits.

2. The obligation to establish the sources of financing for budgetary expenditures. Constitutional and legal basis

For a good organization and coordination of public finances, the State must lead, through Government, the budgetary activity. Thus, the budget is “the State’s modern instrument of intervention in economic and social activities” and “the collection by the State of the funds needed to cover public expenditure” shall be possible through the State⁶.

The constitutional provisions regarding the national public budget are contained in Article 138, which establishes the composition of the budget, the authorities which have the main competencies in its development and approval, as

³ Stoica, C.F., Safta, M., *Guarantee of fundamental rights in the context of the state’s obligation to protect national interests in economic activity*, 10th International Conference Accounting and Management Information Systems (ASE, Bucharest), <http://www.cig.ase.ro/amis2015/image/AMIS2015program.pdf> .

⁴ Constitutional Court’s Decision no.1533 of 28 November 2011, published in the Official Gazette of Romania, Part I, no.905 of 20 December 2011.

⁵ Constitutional Court’s Decision no.80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no.246 of 7 April 2014.

⁶ Minea, M.S., Costaş, C.F., *Dreptul finanțelor publice (Law of public finances)*, volume I – *Drept financiar (Financial law)*, Universul Juridic, Bucharest, 2013, p.91.

well as the basic principles regarding the establishment of the budgetary expenditures. In what follows, we will refer in particular to these principles which result from the provisions of Article 138 (5) of the Constitution stating that “*No budgetary expenditure may be approved without establishing its financing source.*”

In this respect, the constitutional framework is developed by the Law no.500 / 2002 on Public Finances, published in the Official Gazette of Romania, Part I, no.597 of 13 August 2002, as subsequently amended and supplemented, which, referring to the regulation on budgetary expenditures, establishes in Article 15 (1) and (3) as follows: “(1) *Where the proposals are to develop draft laws / measures / policies whose application results in a decrease in income or increase of expenses approved in the budget, a financial statement shall be drawn up, which complying with the provisions of Law no. 69/2010. This statement shall contain the financial effects on the general consolidated budget, which must take into account: a) the anticipated changes in the budgetary revenues and expenditures for the current year and the next 4 years; b) the estimations on the divisions of the budgetary loans and the commitment loans, in case of annual and multiannual actions which lead to an increase of expenditures; c) the measures envisaged to cover the expenditures increase or the revenue minus as not to influence the budget deficit. [...]*(3) *After filing the Annual Budget draft in Parliament, laws / measures / policies may be approved only under paragraph (1), but specifying the sources covering the lower revenues or the budgetary expenditures increase for the financial year for which the budget was drawn up*”.

The provisions of the Fiscal Responsibility Law no. 69 / 2010, republished in the Official Gazette of Romania, Part I, no. 330 of 14 May 2015, to which the cited rules refer, are set forth in Article 15, according to which “(1) *The proponents of new legislative measures / policies / initiatives that involve an increase of public spending are required to provide: a) A financial statement referred to in Article 15 of Law no.500/2002, as amended and supplemented, together with the assumptions and calculation methodology used; b) A statement that the proposed increase in spending complies with the strategic objectives and priorities specified in the fiscal budgetary strategy and with the annual budget and the expenditure ceilings specified in the fiscal budgetary strategy. (2) The Ministry of Public Finance is required to verify the financial sheet provided under paragraph (1). In doing so, the Ministry of Public Finance may request the opinion of the Fiscal Council.*”

Article 21 of the same law is also incident, according to which “*Proposals for any legislation leading to a reduction of budgetary revenues must provide a financial statement according to Article 15 of Law no. 500/2002, as amended and supplemented, and meet at least one of the following conditions: a) to have the endorsement of the Ministry of Public Finance and the Fiscal Council, confirming that the financial impact was taken into account in the budget revenue forecast and does not affect the annual budget targets and medium term targets; b) to be accompanied by proposals for measures to compensate the financial impact, namely by increasing other budgetary revenues.*”

Correlative obligations of Parliament and Government, established in principle by Article 138 of the Constitution, are developed by the Law no. 500/2002 on public finances.

Thus, according to Article 17 of the Law, *Parliament* shall adopt the annual budget laws and the laws of rectification, developed by the Government in the context of macroeconomic strategy undertaken by it. Likewise, Parliament shall adopt the laws of the annual general execution account.

As for the *Government*, in accordance with Article 18 of the same law, it shall ensure the fiscal-budgetary policy that takes into account the economic perspectives and the policy priorities contained in the government program accepted by Parliament, ensuring:

- a) the report on the macroeconomic situation for the current financial year and its projection for the next 3 years;
- b) drafting the annual budget laws and filing them to the Parliament in order to be approved, within the deadline prescribed in this Law;
- c) exercising the general management of executive work in public finances, for which purpose it shall periodically review the budget execution and establish measures for maintaining or improving the budget balance, as applicable;
- d) submission to the Parliament the draft laws of rectification and of the annual general account in order to be approved;
- e) the use of the budget reserve fund and the intervention fund at its disposal, based on Rulings.

A key role in this process belongs to the *Ministry of Public Finance*, namely the role to coordinate the actions which lie with the Government, regarding the budgetary system, *inter alia*: to prepare the draft annual budget laws, the laws of rectification, as well as the laws on the approval of the annual general execution account, to order the necessary measures to implement fiscal policy, to develop budget forecasts; to approve budget classifications, and amendments thereto; to analyse the budget proposals in the budgeting stages; to provide Parliament, at its request, with the support of the main authorising officers in respect of the appropriations, the documents that were the basis of the drafts annual budget laws; to ensure the monitoring of budget execution, and if irregularities are found regarding the authorized revenues and expenditures, it shall propose the Government measures in order to settle the situation; to block or reduce the use of budget appropriations which have been found to be without a legal basis or justification in the budgets of authorising officers in respect of the appropriations; to order the necessary measures for managing and tracking the use of public funds for co-financing in cash, resulting from the contribution of external financing granted by the Government of Romania; to collaborate with the National Bank of Romania in order to prepare the balance of external payments, the balance of receivables and external commitments, regulations in monetary and exchange field; to submit to the Government and the Committee for Budget, Finance and Banks of Parliament, together with the National Bank of Romania, biannual, information regarding the balance of external payments and the balance of receivables and

external commitments and to suggest solutions in order to cover the deficit or the use of the surplus in the current account of the balance of external payments, etc.

The mentioned authorities must undertake the duty of loyal cooperation, established implicitly by Article 1 (4) of the Constitution, whereas the principle of loyal cooperation is, as stated within the constitutional review, an extension of the principle of separation and balance of powers.

3. Jurisprudential developments of the constitutional rule that requires the establishment of the financing source for budgetary expenditure

Analysing the case-law of the Constitutional Court which ruled on the interpretation and application of Article 138 (5) of the Constitution, we should firstly mention the distinction between **the establishment of the financing source** and **the adequacy of financial resources** from the source thus established.

Only the first issue relates to the imperatives of Article 138 (5) of the Constitution. As for assessing the adequacy of financial resources, according to the Court, it “has no basis in Article 138 (5) of the Constitution and it is exclusively a matter of political expediency which concerns essentially the relations between Parliament and Government. If the Government has no sufficient financial resources, it may propose the necessary amendments in order to ensure them, by virtue of its right of legislative initiative.”⁷

Regarding the meaning of the obligation established by the same constitutional text, analysing the same case-law we find the following rules:

a). Article 138 (5) of the Constitution **requires the concurrent establishment of both the budgetary allowance, which signifies an expenditure, and the financing source**, which signifies the revenues necessary for its support, in order to avoid negative consequences, economically and socially, of establishing budgetary expenditure without coverage⁸;

b) The allowances for expenditure, being established only through the budget, shall be subject to the principle of annuality and, as a consequence, **the establishment by law of a permanent budget allowance is unconstitutional**⁹;

c) **Increasing expenditure from the indicated source can be achieved during the financial year, provided that such increase is maintained within the allowance related to the source**¹⁰;

⁷ Constitutional Court’s Decision no.47 of 15 September 1993, published in the Official Gazette of Romania, Part I, no.233 of 28 September 1993, or Decision no.64 of 16 November 1993, published in the Official Gazette of Romania, Part I, no.310 of 28 December 1993.

⁸ Constitutional Court’s Decision no.36 of 2 April 1996, published in the Official Gazette of Romania, Part I, no.75 of 11 April 1996.

⁹ Constitutional Court’s Decision no.562 of 16 December 2004, published in the Official Gazette of Romania, Part I, no.202 of 10 March 2005.

¹⁰ Decision no.6 of 24 January 1996, published in the Official Gazette of Romania, Part I, no.23 of 31 January 1996.

d) **The text of the Constitution speaks only about the establishment of the financing source before the approval of expenditure and not about the obligation to indicate that source in the law¹¹;**

e) **The lack of the express mention of the financing source does not imply the absence of the financing source¹²;**

f) **The indicated financing source should be actually able to cover the expenditure, according to the annual budget law; Article 138 (5) of the Constitution does not refer to the existence *in concreto* of sufficient financial resources when adopting the law, but to the fact that **that expenditure should be projected in full knowledge in the State budget in order to be clearly covered during the financial year¹³.****

4. The role of public authorities in the process of setting budget expenditures/ financing sources. Constitutionality, legality, opportunity

We note that both the constitutional and legal framework in the matter, and the mentioned jurisprudential developments establish a number of obligations for the authorities involved in the law-making process in budgetary matters, aimed at ensuring effectiveness to the constitutional norm, respectively at ensuring that any indication of the financing source into a normative act does not have a formal character. They set out the legislature's will, establishing limits of its discretion in budgetary matters, being the more important to determine as the issues of opportunity are more essential, in themselves, for the budget preparation / rectification. As shown above, "the State's interference in the economy through the budget is - at the same time - constant and cyclical: it is constant due to the nature of the budget as an act of decision and authorization for public revenue and expenditure in each financial year, that is conjectural if we consider the State's intrusions in certain moments – into the activities involving economic restructuring, modernizing public services, etc."¹⁴

Likewise, at jurisprudential level, we distinguish between the opportunity and constitutionality issues in establishing financing sources. The adequacy of financing sources appears clearly circumscribed to the concept of opportunity, at the Government's discretion, the best position to know and appreciate (including

¹¹ Constitutional Court's Decisions no.173 of 12 June 2002, published in the Official Gazette of Romania, Part I, no.492 of 9 July 2002, Decision no.320 of 19 June 2013, published in the Official Gazette of Romania, Part I, no.411 of 8 July 2013, or Decision no.105 of 27 February 2014, published in the Official Gazette of Romania, Part I, no.371 of 20 May 2014).

¹² Decision no.1.056 of 14 November 2007, Decision no.320 of 19 June 2013, Decision no.1.092 of 15 October 2008, published in the Official Gazette of Romania, Part I, no.712 of 20 October 2008, or Decision no.1.093 of 15 October 2008, published in the Official Gazette of Romania, Part I, no.711 of 20 October 2008.

¹³ Decision no.22 of 20 January 2016, published in the Official Gazette of Romania, Part I, no.160 of 2 March 2016.

¹⁴ Minea, M.S., Costaş, C.F., *op. cit.*, p.91-92.

by virtue of the particular duties of the Ministry of Public Finance, mentioned above) on this feature.

As concerns the issues of constitutionality, respectively the rules circumscribed to the interpretation of Article 138 (5) of the Constitution, analysing the evolution of the Constitutional Court's considerations and the review that it exercised in relation to the provisions of Articles 138 (5) of the Constitution, an increase of its activism is noted. From these considerations, we may say, rather from an examiner point of view, which contain the content of the constitutional rule, that this case-law has evolved to establish a condition related to "forecasting in full knowledge of the facts" of the budgetary expenditures so that they can be "certainly" covered during the financial year. The latter condition, developed in the recent decisions, namely in 2016, constitutes an obvious expression of this activism and, in our view, it raises an issue regarding the relation of constitutionality and opportunity to which we have referred above.

This is because the assessment of the feature of "capability", "actually" of the financing source to cover the expenditures belongs, in our view, to the legislature who, depending on the purpose in establishing the budgetary expenditure (aspect aiming at the opportunity measure), makes a corresponding allocation of resources. Thus, being the only objective landmark that is quantifiable in this respect within the constitutional review for the assessment of the capability of the financing source to be genuinely able to cover the forecast expenditure which is, in our view, the compliance with the provisions of Article 15 of Law no.500 / 2002, respectively of Articles 15 and 21 of Law no. 69/2010, in the drafting process of the law. In other words, we believe that the verification by Court regarding the fulfilment of such conditions concerns only the existence of financial statement provided for by these texts and any other aspect adjacent to its preparation shall be the competence of the initiators of the law / of the legislature and certainly their responsibility. From this perspective, we consider that the "key" condition which has been recently imposed judicially in relation to the interpretation and application of Article 138(5) of the Constitution shall be constituted by the phrase "in full knowledge of the facts". This means that for the approval of budgetary expenditure the legislature shall know exactly the possibilities so that the forecast expenditure can be covered in the financial year.

Moreover, this idea transpires from the Constitutional Court's recitals, which held in the Decision no. 22/2016 in reference to the new condition resulted from the interpretation of Article 138 (5) of the Constitution, that "in the absence of a financial statement updated at the moment of the adoption of the law in accordance with Article 15 (3) of Law no. 500/2002, given that the Government's point of view was expressed prior to the submission to Parliament of the Budget Law for 2016 (9 December 2015) that the Budget Law had been adopted a few days before the analysed law, without covering, obviously, the new voted budgetary expenditure, and in the absence of a true dialogue between the Government and Parliament (in this case represented by the Senate), we can only conclude that, for the adoption of the law, an uncertain financing source was taken

into consideration, a general one and lacking an objective and effective feature, therefore not real”.

5. Conclusions

The budgetary planning raises delicate issues of balancing the concurring interests¹⁵ as well as the limits of constitutionality and opportunity.

Lately, we have been witnessing an increase in the number of the referrals of unconstitutionality which invoke the non-compliance with Article 138 (5) of the Constitution, in the sense of the lack of financing sources for budgetary expenditures, resulting in a set of “conditions” developed by the Constitutional Court in interpreting the constitutional rule of reference. As the Constitutional Court’s decisions are generally binding, in their entirety given by the recitals and the operative part, such conditions rule equally as the interpreted constitutional text¹⁶.

As in the substantiation of some of the conditions legal rules appear together (contained in Law no. 500/2002 on Public Finances and in the Fiscal Responsibility Law no. 69/2010), we believe that these rules have become constitutional criteria to be observed under Article 138(5) of the Basic Law. We consider as applicable, *mutatis mutandis*, the Constitutional Court’s recitals according to which “the compliance with the provisions of Law no. 24/2000 on the legislative technique rules for drawing up regulatory acts laws constitutes a genuine criterion of constitutionality through the application of Article 1 (5) Constitution.”¹⁷ Under the same legal reasoning, which is based on the use of a rule in developing the constitutional reasoning, we can interpret that the compliance with the rules set forth in Law no. 500/2002 constitutes a genuine criterion of constitutionality through the application of Article 138 (5) of the Constitution.

However, this fact has only the significance of establishing the constitutional framework, in compliance with the powers of public authorities which are competent in the matter, since, as the same Court held, “the State budgetary planning and the implementation of State financial and budgetary policies and measures at a legislative level shall be issues that are not subject to the constitutional review exercised by the Constitutional Court, otherwise it may appear an interference of this Court in the powers of the legislative and executive powers of the State, which would contravene to the principle of the separation and balance of powers enshrined in Article 1 (4) of the Constitution¹⁸.”

¹⁵ Tushnet, M., *Advanced introduction to comparative constitutional law*, Edward Elgar, USA, 2014, pp. 71-83 (*Balancing, proportionality and rules compared*).

¹⁶ See in this regard Marieta Safta, *The role of dissenting and concurring opinions in the constitutional jurisdiction*, „Perspectives of Business Law Journal” vol. 5, Issue 1, November 2016, p. 208-210.

¹⁷ Minea, M.S., Costaş, C.F., *op. cit.*, p. 91-92.

¹⁸ Tushnet, M., *op. cit.*, pp.71-83.

The increasing number of referrals with this subject-matter, as well as the fact that, at least in 2016, the author of their quasi-majority is the Government, raise also an issue in respect of the loyal cooperation between the two main institutions which are mainly responsible in the budgetary process, namely the Parliament and the Government.

Bibliography

1. Marieta Safta, *The role of dissenting and concurring opinions in the constitutional jurisdiction*, „Perspectives of Business Law Journal” vol. 5, Issue 1, November 2016, p. 207-213;
2. Minea, M.S., Costaş, C.F., *Dreptul finanțelor publice (Law of public finances)*, volume I – *Drept financiar (Financial law)*, Universul Juridic, Bucharest, 2013;
3. Stoica, C.F., Safta, M., *Guarantee of fundamental rights in the context of the state’s obligation to protect national interests in economic activity*, 10th International Conference Accounting and Management Information Systems (ASE, Bucharest), <http://www.cig.ase.ro/amis2015/image/AMIS2015program.pdf> ;
4. Tushnet, M., *Advanced introduction to comparative constitutional law*, Edward Elgar, USA, 2014;
5. Constitutional Court’s Decision no.1533 of 28 November 2011, published in the Official Gazette of Romania, Part I, no.905 of 20 December 2011;
6. Constitutional Court’s Decision no.80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no.246 of 7 April 2014;
7. Constitutional Court’s Decision no.47 of 15 September 1993, published in the Official Gazette of Romania, Part I, no.233 of 28 September 1993;
8. Constitutional Court’s Decision no.64 of 16 November 1993, published in the Official Gazette of Romania, Part I, no.310 of 28 December 1993;
9. Constitutional Court’s Decision no.36 of 2 April 1996, published in the Official Gazette of Romania, Part I, no.75 of 11 April 1996;
10. Constitutional Court’s Decision no.562 of 16 December 2004, published in the Official Gazette of Romania, Part I, no.202 of 10 March 2005;
11. Constitutional Court’s Decision no.6 of 24 January 1996, published in the Official Gazette of Romania, Part I, no.23 of 31 January 1996;
12. Constitutional Court’s Decision no.173 of 12 June 2002, published in the Official Gazette of Romania, Part I, no.492 of 9 July 2002;
13. Constitutional Court’s Decision no.320 of 19 June 2013, published in the Official Gazette of Romania, Part I, no.411 of 8 July 2013;
14. Constitutional Court’s Decision no.105 of 27 February 2014, published in the Official Gazette of Romania, Part I, no.371 of 20 May 2014;
15. Constitutional Court’s Decision no.1.092 of 15 October 2008, published in the Official Gazette of Romania, Part I, no.712 of 20 October 2008;
16. Constitutional Court’s Decision no.1.093 of 15 October 2008, published in the Official Gazette of Romania, Part I, no.711 of 20 October 2008;
17. Constitutional Court’s Decision no.22 of 20 January 2016, published in the Official Gazette of Romania, Part I, no.160 of 2 March 2016.