Certain Remarks regarding the Recommendation of the European Parliament from 13 December 2017 Addressed to the Council and the Commission Further to the Inquiry Regarding the Money Laundering, Avoidance of the Tax Duties and Fiscal Evasion

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Abstract: “Panama papers” before becoming a media subject, is a subject worth analyzing from the perspective of the legislative preoccupations in the matter of the European Parliament. Otherwise, the “Panama papers” becomes the title of an investigation and reference subject within the Recommendation of the European Parliament from 13 December 2017 addressed to the Council and the Commission further to the inquiry regarding the money laundering, avoidance of tax duties and fiscal evasions 2016/3044 (RSP).

Starting from the much-advertised case, the inquiry in the matter stirred assumed concerns of the European Parliament as to the deterioration of the citizens’ confidence in the financial and fiscal instruments.

The assessment generated by the subject that became public imposed an evaluation of the fiscal systems, an analysis of their reasonableness and transparency as well as the need to redesign the concept of fiscal and social justice. In an interesting manner, in the Recommendation text itself, the regret regarding the poor administration is assumed and officially expressed, as to the enforcement of the European Union law in the matter of money laundering and the violation of the Directive regarding the fight of this phenomenon. The text adopted on 13 December 2017 at Strasbourg lists a series of unfavorable considerations concerning the legislative shortages from the law of the European Union and the national law as to the fight against tax evasion phenomenon and formulates appreciations regarding the increase of the EU member states concerns in the matter after the “Panama papers” phenomenon became public.

Keywords: *European; money laundering; Panama papers; fiscal; law.*

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1. Introduction

“Panama papers”, besides the concrete fact of being a public scandal, an intensely exploited media subject, generated attitudes, solutions and concerns regarding the concepts of “excessive transparency” and “necessary transparency”. Addressing this issue in the context of the collision between antagonistic currents, that support, on the one hand, a harsh and even “aggressive” legislation against money laundering, terrorism and organized crime, and, on the other hand, the need to protect professional secrecy, privacy and “private security personal space”, requires complex approaches and research of all values that may be altered or need to be protected.

“Panama papers” scandal has undoubtedly global effects, generating resignations, such as the Prime Minister of Iceland, investigations, such as the President of Argentina, protests in Malta, public accusations and debates in political and professional forums. In particular, the “Panama Papers” file contains detailed information on 214,000 offshore businesses that hide financial assets from tax authorities, leading to annual public finance losses of approximately one billion euros.” (European Parliament, ***)

In this context, “the Commission has developed an action plan to combat fraud and tax evasion (2012), containing measures to help Member States protect their tax revenues against aggressive tax planning, tax havens and unfair competition, while pursuing the tightening of tax rules across the EU starting with November 2014.” (European Parliament., ***)

It is interesting to note that “However, today, the EU fiscal framework provides Member States with the competence to deal with tax issues, which leads to a lack of strict EU regulation. “Panama Papers” has given, however, new impetus to the issue of tax evasion, giving the Commission an opportunity to promote more vigorously the regulation of tax issues at EU level.”(European Parliament., ***)

On the 19th of April 2018, in Brussels, the statements of the First Vice-President Timmermans, Vice-President Dombrovskis and Commissioner Jourovà on the adoption by the European Parliament of the 5th Anti-Money Laundering Directive clearly shows the position of the European forum towards this issue. “We welcome the adoption by the European Parliament of the 5th Anti-Money Laundering Directive. The new rules will increase transparency to strengthen the fight against money laundering and terrorism financing across the European Union.” (European Parliament, ***)

Such proposal was presented by the Commission in July 2016, was generated by the terrorist attacks and disclosures in the “Panama Papers” scandal, which is an integral part of the Commission's Action Plan of February 2016 aimed at strengthening the fight against terrorism financing. The action plan aims to:

- a) strengthen the competences of EU financial intelligence units and help them identify, through greater transparency, the real beneficiaries of companies and trusts, by creating registers of real beneficiaries;
- b) prevent risks associated with the use of virtual money to finance terrorism and limit the use of prepaid cards;
- c) improve guarantees for financial transactions to and from high risk third countries;
- d) increase the access of financial intelligence units to information, including centralized bank accounts registries;
- e) ensure the creation of centralized bank accounts and payment accounts registries or central data collection systems in all Member States.

2. Theoretical Background

Effects of “Panama papers”

In addition to the political media effects of attitudes or strategies, naturally and inevitably there have also been legislative effects. In this context, according to certain legislative initiatives, the companies registered in Romania will be compelled to declare under whose control they are actually established and who are the real beneficiaries of the transactions and activities carried out by it.

The connection between the text of the legislative initiative and the “Panama papers” scandal can be found right in its explanatory memorandum. “An element of absolute novelty is given by the establishment of the registers of the real beneficiaries of legal entities; the decision to create such registers was taken at European level in response to “Panama papers” attacks and terrorist attacks occurred in the capitals of the Member States... at European level it is expected that in 2019 these national registers will be interconnected, thus allowing for improved transparency of both national and transnational financial circuits” (Scărișoreanu, 2017).

Perhaps one of the most interesting aspects worth considering is the fact that notaries, lawyers and bailiffs are included in the category of those compelled to provide information on money laundering and terrorism financing.

3. Argument of the paper

European reactions

On the 5th of July 2016, the European Commission adopts a proposal aimed at structuring and strengthening EU rules in terms of fighting money laundering and terrorism financing and promotes transparency about the real owners of companies and professionals and those in the fiduciary area. Thus, in the field of fighting terrorism and its financing, there are launched objectives such as:

a) enhancing the competences of the financial information units of the European Union and facilitating their cooperation;

b) addressing the issue of the risks posed by virtual money in the field of terrorism;

c) addressing the risks related to pre-paid anonymous instruments;

d) thorough and rigorous checks on states that pose risks in combating money laundering and terrorism.

Regarding transparency measures in order to prevent tax evasion and money laundering, there are proposed measures that continue to reinforce the mechanisms established by the 4th Anti-Money Laundering Directive, as follows:

a) public access to the registers of real beneficiaries, in full format;

b) interconnection of registers;

c) extending the information available to the authorities. (European Union ,***).

4. Arguments to support the thesis

a. Professional secrecy and the obligation to report suspicions in the matter by independent professionals in the legal field

Starting with European regulations in the field, namely European Directive no. 205/849 of the European Parliament and Council dated the 20th of May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorism financing, amending the EU Regulation no. 648/2012 of the European Parliament and Council and repealing Directive 2005/60/EC of the European Parliament and Council and Directive 2006/70/EC of the Commission, legal professions, notably lawyers and notaries, have tried to combine fundamental and binding professional secrecy with the limitations or obligations imposed by both European rules and current and future transpositions into the national legislation. To this end, the Romanian lawyers' congress, carried out on the

topic “Professional secrecy in the context of the obligation to report lawyers' suspicions” provided by the regulations on the prevention of the use of the financial system for the purpose of money laundering or terrorism financing, as well as the efforts of the National Union of The Public Notaries, the Chambers of Notaries Public and the Romanian Notary Institute, in order to find solutions to problems that seem unresolved, show that, on the one hand, the professional bodies recognize and understand the importance of the fight against money laundering and terrorism financing, but are also concerned about the consolidation of professional secrecy in this context precisely to increase citizens' confidence in the quality and professionalism of these professions' representatives.

In this context, it must be clearly defined what the reporting obligation implies, and especially when such obligation enters into force. EU Directive 2015/849, in paragraph 9, provides that the members of the independent legal professions, as defined by the Member States, should be subject to this Directive (EU Directive 2015/849, point 9). “When participating in financial transactions or in transactions between trading companies, including through the provision of tax advisory services, as it presents the highest risk that the services provided by the members of the independent legal professions are misused, for the purpose of laundering of products resulting from criminal assets or for the purpose of financing terrorist activities. However, there should be exemptions from any obligation to report the information obtained either before or after a judicial procedure, during or after such procedure, or during the assessment of the legal status of a client

It is interesting to note that the provisions of the Directive are not imperative using terms such as “should be subject to this Directive”. In fact, expressions demonstrating the non-imperative nature of the text are used for balance when it comes to limiting the fulfillment of these recommendations, also, namely “there should be exemptions”.

b. Transactions involving reporting obligations

Art. 2 paragraph 1 of the Directive provides a limited description of the transactions that generate this reporting obligation from “notaries and other persons exercising independent legal professions when participating for and on behalf of the client in any financial or real estate transaction, or when providing assistance for planning or performing transactions for the client”(EU Directive 2015/849) To this end, we identify the following transactions in accordance with the above-mentioned Directive:

- a. purchase and sale of immovable property;

- b. purchase and sale of commercial entities;
- c. management and administration of money, securities or any assets of the client;
- d. opening or management of bank accounts, savings accounts or securities accounts;
- e. organization of the necessary contributions in order to establish, operate and manage companies;
- f. establishment, operation and management of companies, foundations, trusts or other similar mechanisms and structures;

If regarding the situations in which this reporting obligation arises, art. 5 paragraph 1 of the Directive also determines who such reporting entities or professionals are, letter f) states that they are “public notaries, lawyers, bailiffs, and other persons exercising independent legal professions”, if they perform one of the activities set forth in the Directive.

The question that arises and generates different responses from legal practitioners and other actors involved in the prevention and fighting against money laundering and terrorism activities is whether the independent legal professional in the full context of their competences has this reporting obligation or the obligation is generated only by those activities limitedly provided and indicated by art. 5 paragraph 1 of the Directive, namely, in the event they provide assistance in the preparation or completion of transactions relating to the purchase or sale of immovable property, shares, social shares, or other elements of the trading fund, manage financial instruments, securities or other assets in the clients' patrimony, perform operations involving transactions with money or transfer of property, constitute or manage bank accounts, savings accounts, financial instruments, organize the subscription process for the constitution, management or operation of a company, constitute, manage or establish such companies or collective investment undertakings in securities or other similar structures, as well as in case they participate on their own behalf or on behalf of the client in any financial transaction or operation related to immovable property.

Most of the independent legal professionals argue that those activities carried out in the professional field that are not identified in the activities covered by the Directive do not generate reporting obligations, although the terms and expressions used in the Directive leave very few activities uncovered by the sphere of obligations.

In order to strengthen the theory that professional secrecy cannot oppose the reporting obligation, the Directive transposition project states in a much less permissive form than the text of the Directive that “professional and banking secrecy undertaken by the reporting entities, including those

covered by special laws, are not opposable to the office or authorities and public institutions covered by the transposition law”[7].

5. Arguments to argue the thesis

If the “Panama Papers” scandal was initially regarded as a media scandal tasted by public opinion and appreciated by journalists, we believe it is worth an approach to this scandal in terms of impact generated. Against this background, we find that besides political and financial scandals, the journalistic approach has generated concern at the level of both European Legislature and Executive.

As expected, such a concern was rapidly transposed at a national level, the concerns in this field being materialized through investigation committees, legislative initiatives, European directives, national transposition legislation, amendments to normative acts.

In this overall picture, in which we identify both the need to strengthen the fight against money laundering and terrorism, and the need to respect fundamental rights and professional secrecy in relation to the independent legal professionals, we need to find the equilibrium solution, that extremely delicate and important thread by which professional secrecy, a fundamental and undisputed value in the matter, is respected, and social security as well as individual safety in society, remain a concrete value, purpose for which all possibilities of financing acts of terrorism must be suppressed.

Professionals in this field of activities related to money laundering and terrorism activities matter, whether considering state representatives or independent legal professionals, together with law theorists, complying with fundamental principles, human rights and the objective of eradicating terrorist activities, must find solutions to all the questions raised, solutions that will gain increasing power as they will be accepted by a larger or even unanimous number of those mentioned above.

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