

cover article

„Anti-banking laws”. Where from, Why, and Where to?

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In the shadow of the highly publicized ordinance on **"The tax on banks' greed"** (officially the tax on the assets of banking institutions according to Emergency Ordinance No. 114/2018 regarding the establishment of measures in the field of public investments and fiscal-budgetary measures, on amending and supplementing certain acts and the extension of some deadlines), the end of 2018 brought another surprise for the banking system, partly foreseen but with the hope that it would eventually not happen, or at least not too soon.

After having been lost through committees and other parliamentary procedures, on December 18, 2018, these legislative initiatives, having a major, toxic impact on the financial and banking sector, were surprisingly accelerated through the most important commissions for these legislative measures (banking and finance budget and legal) and then also through the plenary session of the Parliament.

I refer to what some journalists have long called, more or less rightly, the **"Anti-Banking Package"** or **"Zamfir's Laws"**, namely:

1. Draft Law supplementing the Government Ordinance no. 13/2011 regarding the compensatory and penalizing legal interest for money obligations, as well as for the regulation of fiscal - financial measures in the banking field.

Link: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=16892

2. Draft Law supplementing the Government Emergency Ordinance no. 50/2010 on loan agreements for consumers.

Link: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=16893

3. Draft Law amending and supplementing the Government Ordinance no. 51/1997 on leasing operations and leasing companies as well as for supplementing Article 120 of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy.

Link: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=16969

Where from and Why ?

The history of these legislative initiatives, enjoying the support of more than governmental lawmakers, began about a year and a half ago. They target interest rate capping (annual percentage rate of charge) applied to consumer loan agreements (at various caps), limitation of recovery amounts by collection agencies and repayment to a maximum of double the assignment price and others (the route of the legislative procedures and the content of the initiatives can be seen by following the links above).

Following the so-called explanatory statement, we find that these are only formal and succinct documents, unsupported by actual data and analysis. They include axiomatic and populist references, which are obviously

erroneous, to excesses, speculation, abuses, toxic contracts and misleading practices on the part of banks and other creditors, or debt collection agencies.

We believe that such axiomatic statements, and ultimately the existence of such legislative initiatives, should have been based on carefully grounded analyzes and findings on the deviant behaviors of targeted traders, analyzes and findings made by the institutions having the role of supervision and control in the financial-banking field, the good and correct functioning of the market or the protection of consumers in the sector in question (National Bank of Romania, Competition Council, Consumer Protection Authority).

These institutions should have formally issued findings on any deviant behaviors and applied coercive measures within the limits of their duties (which do not include social protection mechanisms). The measures could have been accepted by the targeted entities or, if challenged, should have also withstood the control of legality done by the courts. As far as I know, such analyzes and findings either do not exist or are marginal in impact.

From the point of view of the economic opportunity, the draft law denotes either a lack of knowledge of the mechanisms and functioning of the financial-banking market or that they were ignored.

We can conclude that lawmakers initiating these draft laws, in a populist way, they assume the role of social protector in a toxic and destructive way for a vital sector of the economy - the financial and banking market - with boomerang negative effects on the "protected" categories themselves, by limiting lending and by possible widespread negative effects in the economy (such considerations have already been presented and debated in the public space).

Where do we stand?

Approved by the Senate in February 2018, the draft laws entered the parliamentary procedure in the Chamber of Representatives, a route finalized by the sudden approval on December 18, 2018.

Notable is the last-minute change in the initial interest rate capping (annual percentage rate of charge) on mortgage and real estate loans from 2.5 multiplied by legal interest to the fixed rate of 3 percent. An unfortunate and unclear phrasing, which denotes a possible intention to refer to the applicable margin above a reference rate, but unfortunately it remained as a total and absolute cap on this value, without distinction on the loan currency or other considerations.

Where to?

On December 27, 2018, a significant number of representatives and senators filed unconstitutionality complaints about these draft laws. The cases were filed with the Constitutional Court under nos. 2359A/2018, 2360A/2018 respectively 2361A/2018, the deadline for debates being set for February 27, 2019.

The unconstitutionality complaints include both extrinsic reasons (i.e. procedural aspects and legislative technique, including lack of clarity) but also intrinsic reasons (merits).

Among the intrinsic reasons (merits), there is the violation of the principle of free initiative and market economy, the fact that consumer protection can not be achieved by limiting or even annihilating the economic and contractual freedom or the right to private property. By applying these laws, either directly and unequivocally or in a qualified manner (i.e. conditional upon considering a situation of unpredictability) to ongoing contracts also, the principle of nonretroactivity in civil matters is also breached.

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On 29.12.2018 all these draft laws were sent to the President of Romania for promulgation, but it is necessary to await the judgment of the Constitutional Court on the raised issues.

We look forward professionally to the solution of the Constitutional Court.