Between National Application and European Harmonization: A Comparative Legal Analysis of the Margin Scheme for Second-Hand Vehicles in Romanian and European Union Law

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Abstract

This comparative study examines the application of the margin scheme in second-hand car transactions, juxtaposing Romanian national implementation against the broader European Union legal framework. Beginning with common factual scenarios involving cross-border vehicle transactions by natural persons, the research systematically analyzes both Romanian legislation and European directives, identifying areas of convergence and divergence. By contrasting interpretations adopted by Romanian fiscal authorities with European Court of Justice jurisprudence, the study reveals significant differences in implementation approaches. The research demonstrates that while European law establishes that the margin scheme application requires only conditions inherently linked to this VAT regime, Romanian administrative practice has sometimes imposed additional requirements not supported by EU precedent. Through logical and comparative methodological approaches, this analysis contributes to understanding how differential interpretations between Romanian and EU frameworks can lead to competitive distortions and potential double taxation in the second-hand vehicle market. The findings highlight the ongoing challenge of harmonizing national fiscal practices with overarching European legal principles in specialized VAT regimes.

Keywords: *margin scheme, second-hand cars, European Union, tax, jurisprudence, Directive 2006/112/EC.*

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1. Introduction

The concept of value added tax (VAT) was created and perfected in the 20th century[2]. The origin of this tax is still currently debated between two possible sources[3]. Thus, the invention of the value added tax is due either to the work done by the American economist Thomas S. Adams[4], or to the vision outlined by the German businessman Wilhelm Von Siemens[5].

In Europe, value added tax was first introduced in France in 1954, covering a limited range of activities[6]. The year 1967 brought the adoption of the value-added tax by five of the six Member States[7]. After the seventies, a series of successive legislative were implemented[8] with the desire to achieve harmonization of the value-added tax by all Member States[9]. Currently, more than 170 countries in the world (including all European countries) apply value added tax to goods and services, which is why the author agrees with Sijbren Cnossen, who states "*The nearly universal introduction of the value added tax should be considered the most important event in the evolution of tax structure in the last half of the twentieth century.*[10]"

The study does not aim to present a global picture of the concept of value added tax, fully understanding that such research would exceed the inherent limits of a specialized article. The analysis the author proposes will be limited to outlining the taxation regime of the margin scheme, with the indication of the Romanian and European legislative framework, respectively with the detailing of the jurisprudence, in the issue of trade in second-hand cars carried out within the

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[2] Kathryn James (2011), "Exploring the Origins and Global Rise of VAT," *The VAT Reader (Tax Analysts)* 1: 15, http://dx.doi.org/10.2139/ssrn.2291281.

[3] William H. Oakland (1967), "The Theory of the Value-Added Tax: I A Comparison of Tax Bases," *National Tax Journal* 20, no. 2: 119.

[4] For details, see Thomas S. Adams (1921), "Fundamental Problems of Federal Income Taxation", *Qarterly Journal of Economics* 35, no. 4: 528-553.

[5] Details on the initial concept developed by Wilhelm Von Siemens, see C. F. von Siemens (1921), *Veredelte Umsatzsteuer* (translated as 'improving the sales tax'), Siemensstadt, 14-18.

[6] *„The latest innovation is the value-added tax. Its emergence in France illustrates the process by which a sort of continuing ferment of improvisation now and then gives rise to an invention of the first order"* (Carl S. Shoup (1955), "Taxation in France", *National Tax Journal* 8, no. 4: 328, http://www.jstor.org/stable/41790191).

[7] Michel Aujean (2012), "Harmonization of VAT in the EU: Back to the future", *EC Tax Review* 21, no. 3: 134, https://doi.org/10.54648/ecta2012014.

[8] Among which we mention: Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes, Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State, Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

[9] James, "Exploring the Origins", 16.

[10] Sijbren Cnossen (1998), "Global Trends and Issues in Value Added Taxation," *International Tax and Public Finance* 5, no. 3: 399.

European Union.

The article will also take into account the practical challenges that the application of the margin scheme generates in the national administrative practice, without omitting the explanation of concrete situations of application and erroneous understanding of the legal provisions incident to this matter by the control bodies. Last but not least, the analysis will present the considerations of court rulings issued in annulment actions filed against some administrative-fiscal acts through which the control bodies defectively established the main fiscal obligations regarding the value added tax.

The importance of this article lies in the unique way of approaching and combining in a single study several elements that have as a starting point concrete facts, frequently encountered in Romania - trade of second-hand cars by individuals. To this, the author added the process of identifying the relevant national and European legislation and jurisprudence. The aim is to expose the way the positive law is understood and applied by the fiscal bodies, respectively the interpretation given by the national courts of this type of cases.

An in-depth knowledge, detailing and interpretation of the legal elements requires an appropriate research methodology to materialize a full understanding of the legal mechanism and its links with the society. Thus, in order to achieve the objectives pursued, the author proposes to use the logical and comparative method. Using the logical method, the author aims to identify the structure and dynamics of the relationships between different components of the legal system, operating with specific tools like deduction, induction, analysis, definition, etc. To add complexity to the research, the author will also turn her attention to European legislation and jurisprudence.

The article will be structured in several sections which are desired to combine the factual element with the legal one. To begin with, the legal issue that triggered a whole odyssey at the level of administrative practice in Romania will be exposed, highlighting the way of carrying out fiscal control (Section 2). In Section 3, the author will analyze the conditions for applying the margin scheme, and Section 4 will include the considerations of the national courts, with an indication of the practice of the Supreme Court. Section 5 will be dedicated to some brief conclusions.

2. From Trading Second-Hand Cars Within the European Union to Tax Control

In recent years, the control bodies have reported on the activities carried out on the territory of Romania by certain natural persons, which consist in the purchase of second-hand cars from a member state of the European Union, followed shortly by their sale in Romania. The persons in question were not owners of enterprises (within the meaning of the provisions of art. 3 paragraph (3) of the

Romanian Civil Code[11] and not being authorized by the state to carry out an economic or professional activity. All transactions were concluded in the name of the seller as a natural person and were declared at the administrative-territorial unit where the seller was domiciled, but there was no fiscal registration of the respective transactions. Finally, the tax authorities self-reported and started several tax controls.

The series of fiscal controls started from the suspicion of the administrative bodies related to the existence of a tax fraud regarding the value added tax, through the non-declaration of the incomes. Thus, several tax controls were carried out, which essentially had an almost identical path: after the receipt of the tax inspection notice, the taxpayer was invited to hand over to the control bodies all the documents attesting to the car transactions. Most of the time, the taxpayer was not in possession of these documents, which is why the tax inspection was suspended. During the suspension period, the control bodies requested the documents related to the purchases and sales of second-hand cars from the administrative-territorial unit where the seller had his domicile. Following the analysis carried out by the tax inspection bodies, they assessed that the person in question is a taxable person due to the fact that he made intra-Community purchases of second-hand cars from natural persons, goods that he later resold to other natural persons, thus carrying out, in their opinion, an economic activity for the purpose of obtaining income with a continuity character. The tax inspection team also found that the exemption cap for the sale of second-hand cars had been exceeded, as it was necessary for the person in question to become a VAT payer. Thus, taxation decisions were issued in which the control bodies established value added tax payment obligations by applying the standard VAT rate on the tax base, related to car sales operations. Since the administrative appeal filed by the taxpayer against the taxation decisions was rejected, the only way to rectify the situation remained to file an action to annul the administrative-fiscal acts issued following the fiscal control.

3. The Illegality of the Standard VAT Taxation Regime Applied by the Control Bodies. The Margin Scheme Requirements in Romanian and EU Law

The tax inspection bodies have assessed that the trading of a number of second-hand cars (most of which were considered taxable operations from the point of view of VAT) represents a taxable operation from the point of view of

[11] Art. 3 para. (3) of the Romanian Civil Code provides: "The exploitation of an enterprise is the systematic exercise, by one or more persons, of an organized activity that consists in the production, administration or alienation of goods or in the provision of services, regardless of whether or not it is for profit."

VAT. Therefore, starting from the date on which it was considered that the taxpayer had to become a VAT payer, they proceeded to establish the VAT tax obligations for the transfer of ownership of second-hand cars.

After determining the tax base, the control body proceeded to apply the standard VAT rate of 24%, 20% and 19% respectively on the tax base[12].

The tax authorities claimed that the margin scheme taxation regime is not applicable in this case, since the condition provided for in art. 152^2 of Law no. 571/2003 regarding the Tax Code[13], respectively art. 312 of Law no. 227/2015[14] - the reseller is a taxable person - is not met. In the justification, it is stated that the tax regime of the margin scheme is not incidental, because the tax payer did not fulfill the obligations imposed by art. 153^1 of Law no. 571/2003 regarding the Tax Code (special registration for VAT purposes)[15], respectively art. 153 para.

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[12] The VAT rate of 24% was applied in Romania between 01.07.2010-31.12.2015, according to the provisions of Emergency Government Ordinance no. 58/2010. Then, between 01.01.2016-31.12. 2016, the VAT rate was reduced to 20%, according to art. 291 of the Tax Code (Law no. 227/2015). Starting from 01.01.2017, the VAT rate in Romania is 19%.

[13] Art. 152^2 of the Tax Code (Law no. 571/2003), entitled: "Special regimes for second-hand goods, works of art, collectibles and antiques", provides in the content of para. (2): "The reseller taxable person will apply the special regime for deliveries of second-hand goods, works of art, collectibles and antiques, other than works of art delivered by their authors or legal successors, for which there is an obligation to collect tax, goods that he purchased from within the Community, from one of the following suppliers: a) a non-taxable person; b) a taxable person, to the extent that the delivery made by said taxable person is exempt from tax, according to art. 141 para. (2) g); c) a small enterprise, to the extent that the respective acquisition refers to capital goods; d) a reseller taxable person, to the extent that the delivery by him was subject to tax under a special regime."

[14] The text of art. 312 of Law no. 227/2015 is almost identical to art. 152^2 of Law no. 571/2003 regarding the Tax Code. Para. (2) of art. 312 provides: "The reseller taxable person will apply the special regime for deliveries of second-hand goods, works of art, collectibles and antiques, other than works of art delivered by their authors or legal successors, for which there is an obligation to collect tax, goods purchased from within the European Union, from one of the following suppliers: a) a non-taxable person; b) a taxable person, to the extent that the delivery made by said taxable person is exempt from tax, according to art. 292 para. (2) g); c) a small enterprise, to the extent that the respective acquisition refers to capital goods; d) a taxable person reseller, to the extent that the delivery by him was subject to tax under a special regime."

[15] According to paragraph (1) of art. 153^1 of Law no. 571/2003 regarding the Tax Code: "It has the obligation to request registration for VAT purposes, according to this article: a) the taxable person whose economic activity is based in Romania and the non-taxable legal person established in Romania, unregistered and who does not have the obligation to register according to art. 153 and which is not already registered according to letter b) or c) or para. (2), who makes a taxable intra-community purchase in Romania, before making the intra-community purchase, if the value of the respective intra-community purchase exceeds the cap for intra-community purchases in the calendar year in which the intra-community purchase takes place; b) the taxable person whose economic activity is based in Romania, unregistered and who does not have the obligation to register according to art. 153 and which is not already registered according to letter a) or c) or para. (2), if he provides services that take place in another member state, for which the beneficiary of the service is the person obliged to pay the tax according to the equivalent of art. 150 para. (2) in the legislation of another member state, before the provision of the service; c) the taxable person who has established his seat

(1) lit. b)[16] from the same normative act (registration for VAT purposes, when exceeding the cap of 65,000 euros).

The author considers that it is clearly illegal to apply the standard VAT rate on the taxable base, since the taxpayer had the status of a taxable reseller to whom the special regime for supplies of second-hand goods (the margin scheme taxation regime) should be applied.

3.1. The Reason for Implementing the Margin Scheme in European and National Law

The margin scheme was established by Directive 94/5/EC and integrated into art. 311-343 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter Directive 2006/112/EC). Moreover, the aim of the margin scheme was to harmonize the regimes applicable to new goods purchased and subject to VAT, later resold as a second-hand object, and to avoid double taxation[17], as well as distortion of competition between taxable persons in the field of second-hand goods[18]. These aspects emerge from recital (51) of Directive 2006/112/EC[19], as well as from the Judgment of March 3,

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of economic activity in Romania, who is not registered and does not have the obligation to register according to art. 153 and which is not already registered according to letter a) or b) or para. (2), if he receives from a provider, a taxable person established in another member state, services for which he is obliged to pay tax in Romania according to art. 150 para. (2), before receiving the respective services."

[16] Art. 153 para. (1) sect. b) from Law no. 571/2003 regarding the Tax Code states: "The taxable person who has the seat of economic activity in Romania and carries out or intends to carry out an economic activity that involves taxable operations, exempt from value added tax with the right to deduct and/or operations resulting from economic activities for which the place of delivery/service is considered to be abroad, if the tax would be deductible, if these operations were carried out in Romania according to art. 145 para. (2) sect. b) and d), must request registration for VAT purposes with the competent fiscal body, as follows: b) if during a calendar year it reaches or exceeds the exemption cap provided for in art. 152 para. (1), within 10 days from the end of the month in which it reached or exceeded this cap."

[17] Madeleine Merkx (2021), "A New (Circular) Economy: A New Special Arrangement for Second-Hand Goods!", *EC Tax Review* 30, no. 2: 65, https://doi.org/10.54648/ecta2021008.

[18] For a doctrinal approach regarding the extension of the applicability of the margin scheme to other categories of transactions, see Sijbren Cnossen (2021), "The C-inefficiency of the EU-VAT and what can be done about it", *International Tax and Public Finance* 29, no. 1: 215–236, https://link.springer.com/article/10.1007/s10797-021-09683-0.

[19] "*It is appropriate to adopt a Community taxation system to be applied to second-hand goods, works of art, antiques and collectors' items, with a view to preventing double taxation and the distortion of competition as between taxable persons."* Full text available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32006L0112 (last accessed November 20, 2022).

2011, Auto Nikolovi C-203/10, para. 47[20], Judgment of April 1, 2004, Förvaltnings AB Stenholmen, C-320/ 02, para. 25[21], Judgment of 8 December 2005, Jyske Finans, C-280/04, EU:C:2005:753, para. 37[22]. The Court of Justice of the European Union noted that the establishment of derogatory rules for second-hand goods are even more important in the second-hand car trade, due to the frequency of these types of transactions in day to day business[23].

The provisions established at the European level regarding the margin scheme were also implemented in the Romanian legislation, in the content of art. 152^2 of Law no. 571/2003 regarding the Tax Code, respectively of art. 312 of Law no. 227/2015 regarding the Tax Code.

3.2. Meeting the Conditions Related to the Application of the Margin Scheme

According to art. 152^2 paragraph (2) of Law no. 571/2003 regarding the Tax Code, respectively of art. 312 para. (2) from Law no. 227/2015 regarding the Tax Code "*The reseller taxable person will apply the special regime for the supply of second-hand goods, (...), for which there is an obligation to collect the tax, goods that he purchased from within the Community, from one of the following suppliers: a) a non-taxable person; (...)".*

In the auhor's opinion, from these legal provisions it can be deduced that the application of the margin scheme is conditional on the cumulative achievement of the following conditions: the quality of a taxable reseller person (i), making deliveries of goods second-hand (ii), goods that were purchased from within the European Union (iii) and, last but not least, the supplier of the goods is one of the persons provided for in letters a)-d) (iv).

(i) By "taxable reseller" is meant "the taxable person who, in the course of the economic activity, acquires or imports second-hand goods and/or works of art, collectibles or antiques for the purpose of resale, regardless of whether the said taxable person acts in his own name or on behalf of another person in the context of a purchase or sale commission contract." (art. 152^2 par. (1) sect. e) of Law no. 571/2003 regarding the Tax Code, respectively of art. 312 para. (1) lit. e) from Law no. 227/2015 on the Tax Code).

In European law according to art. 311 para. (1) point 5 of Directive 2006/112/EC this notion has the equivalent of "taxable dealer", that is defined as

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[20] CJEU 3 March 2011, C-203/10 (Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna v. Auto Nikolovi OOD), ECLI:EU:C:2011:118.
[21] CJEU, 1 April 2004, C-320/02 (Förvaltnings AB Stenholmen v. Riksskatteverket), ECLI:EU:C:2004:213.
[22] CJEU, 8 December 2005, C-280/04 (Jyske Finans A/S v Skatteministeriet), ECLI:EU:C:2005:753.
[23] CJEU 10 July 1985, 17/84 (Commission v. Ireland), ECLI:EU:C:1985:310, para. 14.

"any taxable person who, in the course of his economic activity and with a view to resale, purchases, or applies for the purposes of his business, or imports, second-hand goods, works of art, collectors' items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale".

Taking into account the definitions established by the European and national legislators, the author considers that the status of reseller taxable person, respectively taxable dealer is applicable in the facts previously presented. Thus, as part of the economic activity carried out, the persons subject to tax control purchase second-hand cars from within the European Union, with the aim of reselling them on the territory of Romania.

(ii) The notion of "second-hand goods" includes "movable tangible goods that can be reused in the condition in which they are or after carrying out repairs, other than works of art, collectibles or antiques, precious stones and other goods provided in the rules" (art. 152^2 par. (1) sect. d) of Law no. 571/2003 regarding the Tax Code, respectively of art. 312 para. (1) sect. d) from Law no. 227/2015 on the Tax Code).

However, both from the conclusions drawn by the tax inspection bodies and from the documents made available by the local administrative authority, it emerged that second-hand cars were purchased from the European Union, which were later resold on Romanian territory.

(iii) Regarding the purchases of second-hand goods within the European Union, there is no controversy, as the fiscal inspection bodies found that all cars were purchased from suppliers located in the European Union.

(iv) All cars traded during the period subject to fiscal control were purchased within the European Union from suppliers, non-taxable persons (natural persons). All sales contracts were concluded with natural person suppliers, a fact also established by the fiscal inspection bodies in the content of the fiscal inspection report. Therefore, the author considers that this necessary condition for the application of the special regime is also met.

3.3. Tax base[24]

According to art. 152^2 para. (1) sect. g) from Law no. 571/2003 regarding the Tax Code, respectively of art. 312 para. (1) sect. g) from Law no. 227/2015 regarding the Tax Code, "the profit margin is the difference between the selling price applied by the reseller taxable person and the purchase price, in which:

1. the sales price is the amount obtained by the reseller taxable person from the buyer or from a third party, including subsidies directly related to this

[24] For a definition of the tax base, see Emilian Duca (2018), *Codul fiscal comentat și adnotat*, Bucharest: Universul Juridic, p. 430.

transaction, taxes, payment obligations, fees and other expenses, such as those of commission, packaging, transport and insurance, charged by the taxable person reseller to the buyer, except for price reductions;

2. the purchase price represents everything that constitutes the amount obtained, according to the definition of the selling price, by the supplier, from the reseller taxable person"

In this case, the tax base is the actual profit margin, a base that is lower than that determined by the tax inspection team by applying the standard tax regime.

Example: *Let's imagine that a natural person buys a car from Germany and pays the price of 1000 euros. Shortly after, he sells it in Romania for 1,500 euros. The VAT due is 19%.*

	VAT due	**Method of calculation**
Tax control – standard VAT regime tax	VAT (19%) = 240 EUR	VAT was determined by reference to the sales price (1.500 EUR), considering that it includes VAT, based on the following formula: VAT = (1.500x19) / 119
Margin scheme	VAT (19%) = 80 EUR	VAT has been calculated on the margin between the selling price (1.500 EUR) and the purchase price (1.000 EUR) = 500 EUR, based on the following formula: VAT = (500x19) / 119

The explanation lies in the fact that the VAT is included in the purchase price, being paid by the final consumer at the time he bought the good. VAT cannot be refunded because it is included in the price of the good, and the seller cannot include this tax in the invoice. The margin scheme allows the taxation of VAT for the difference between the selling price and the purchase price.

3.4. The Application Rules of the Margin Scheme

The appeal resolution bodies reasoned that the special charging regime provided for by art. 152^2 of Law no. 571/2003 regarding the Tax Code, respectively art. 312 of Law no. 227/2015 would not be applicable, since "the petitioner did not fulfil the condition that the reseller is a taxable person, respectively he did not comply with the provisions of art. 153 para. (1) sect. b) to request registration for VAT purposes upon exceeding the cap of 65,000 euros and to become a VAT payer." At the same time, the bodies that proceeded to resolve the appeal assessed

that another imperative condition for the application of the special taxation regime would be the authorization of the taxpayer according to the provisions of art. 6 of Emergency Government Ordinance no. 44/2008 regarding the conduct of economic activities by authorized natural persons, individual businesses and family businesses[25].

The author cannot accede to the conclusions of the fiscal body, as both national and European law do not condition the application of the margin scheme on the fulfilment of formal conditions.

First of all, according to art. 152, point 62 para. (2) sect. a) from Government Decision no. 44/2004 for the approval of the Methodological Norms for the application of Law no. 571/2003 regarding the Tax Code, in the situation where the taxable person does not register with the tax authorities for VAT purposes according to art. 153 of the Fiscal Code, the control bodies will "request the payment of the tax that the taxable person should have collected if he had been registered normally for tax purposes according to art. 153 Tax Code". Therefore, the tax inspection bodies establish tax obligations regarding VAT that the taxable person would have had to pay if he had been properly registered in the administration's records.

Secondly, according to the provisions of art. 310 point 84 paragraph (2) sect. c) from Decision no. 1/2016 regarding the approval of the Methodological Norms for the application of Law no. 227/2015 regarding the Tax Code, "if non-compliance with the legal provisions is identified by the tax inspection bodies before the registration of the taxable person for VAT purposes according to art. 316 of the Fiscal Code, the competent fiscal body ex officio registers these persons for tax purposes".

The author notes that, in this case, the secondary legislation does not distinguish between the regimes applicable to the calculation of VAT (the standard regime and the regime of the margin scheme). It only decides on the legal prerogative of the tax inspection bodies to proceed with the registration in the administrative record of a person who carried out economic activities and met all the legal conditions to become a taxable person, from the perspective of the provisions of the Tax Code. Another interpretation of the cited legal provisions would be in contradiction with the general principles in the matter of VAT, but also with European jurisprudence.

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[25] Art. 6 of Emergency Government Ordinance no. 44/2008 provides: "(1) Any economic activity carried out permanently, occasionally or temporarily in Romania by authorized natural persons, individual businesses and family businesses must be registered and authorized, under the conditions of this emergency ordinance. (2) The authorization of operation, under the conditions of this emergency ordinance, does not exempt authorized natural persons, individual businesses and family businesses from the obligation to obtain, before the start of the activity, the authorizations, notices, licenses and the like, provided for in special laws, for carrying out certain economic activities."

Registration for VAT purposes by the tax inspection bodies, on the occasion of the identification of a person who did not comply with the legal provisions regarding this registration, cannot have the meaning of a forfeiture of the taxpayer's right to have a tax regime applied to him to which he is entitled, in this case that of the margin scheme.

Thirdly, the fiscal bodies that proceeded to resolve the appeal considered, in an unjustified way, that due to the fact that the authorization procedure at the Trade Registry provided for by art. 6 of Emergency Government Ordinance no. 44/2006 regarding the conduct of economic activities by authorized natural persons, individual businesses and family businesses, there is no possibility of applying the special margin scheme. However, in the normative act indicated by the administrative bodies (Emergency Government Ordinance no. 44/2008) there is no provision indicating the application of such a sanction.

Moreover, according to art. 2 para. (1) from Law no. 12/1990 on the protection of the population against illegal production, trade or service provision activities, the performance of production, trade or service provision activities, as the case may be, not complying with the conditions established by law constitutes a contravention, if they were not carried out in such conditions to be considered, according to the criminal law, crimes.

Therefore, the author could not identify a legal provision that explicitly establishes that, in the absence of an authorization of the activity, the fiscal body will proceed to forfeit the taxpayer's right to apply the special margin scheme. Application of legal provisions by analogy is clearly illegal.

It is also necessary to point out the fact that in the content of art. 152^2 paragraph (2) of Law no. 571/2003 regarding the Tax Code, of art. 312 para. (2) from Law no. 227/2015 regarding the Tax Code, respectively of art. 313 para. (1) of Directive 2006/112/CE the indicative ("shall apply") is used. Thus, it is illustrating that both the Member States and the administrative bodies have no margin of appreciation in the matter regarding the application of this special regime. The same opinion is expressed by Advocate General Yves Bot, in paragraph 43 of his conclusions presented in Case Sjelle Autogenbrug I/S v. Skatteministeriet, C-471/15[26]. The General Advocate also adds "I recall that Article 313(1) of that directive provides that 'in respect of the supply of second-hand goods … carried out by taxable dealers, Member States *shall apply* a special scheme for taxing the profit margin made by the taxable. The use of the verb 'shall' in that paragraph does not, in my opinion, allow the Member State any discretion as regards the application of the special scheme.".

At the same time, in the Judgment of March 3, 2011, Auto Nikolovi (C-203/10, EU:C:2011:118), the Court of Justice of the European Union claimed that

[26] CJEU 16 September 2016, C-471/15 (Sjelle Autogenbrug I/S v. Skatteministeriet), ECLI:EU:C:2016:724, para. 43.

"In Article 314 of Directive 2006/112, the definition of the cases covered by the application of the margin scheme is in unequivocal terms and does not require the intervention of any other measures, either of the European Union institutions or of the Member States."[27]

Also, the persons subject to tax control did not express their option for the normal taxation regime in terms of VAT, as provided by the provisions of art. 152^2 para. (7) from Law no. 571/2003 regarding the Tax Code, respectively of art. 312 para. (7) from Law no. 227/2015 regarding the TaxCode, which is why the only regime that can be legally applied is the special one[28].

From the way the legislator regulated the provisions of art. 152^2 para. (2), para. (7) from Law no. 571/2003 regarding the Tax Code, respectively of art. 312 para. (2), para. (7) from Law no. 227/2015 regarding the Tax Code, it follows that, in reality, in the case of second-hand goods, the margin regime is common law, the normal regime being applied as an exception, in the event of the existence of a manifestation of will in this regard. However, in the absence of an option on the part of the taxpayer, the administrative body cannot substitute itself in its rights.

In considering the arguments invoked, it follows, therefore, that the tax inspection bodies do not have the option to choose, discretionarily and unilaterally, the regime applicable in the case, but it is absolutely necessary that, once the quality of a taxable person has been established and the conditions of the special regime have been met[29], to automatically apply these provisions. A contrary interpretation would conflict with the purpose for which the margin scheme was established.

With regard to the principle of VAT neutrality, the margin scheme aims to avoid double taxation and distortion of competition between taxable persons, among others in the field of second-hand goods. The Court of Justice of the European Union recalled the dual objective of this regime in paragraphs 47 and 48 of the Judgment of March 3, 2011, Auto Nikolovi (C-203/10, EU:C:2011: 118)[30].

In the Judgment of 10 November 2011, The Rank Group (C-259/10 and C-260/10[31]), the Court of Justice of the European Union decided that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment

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[27] CJEU 3 March 2011, C-203/10 (Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna v. Auto Nikolovi OOD), ECLI:EU:C:2011:118, para. 62.

[28] The taxpayer has the right to opt for not applying the margin scheme. Merkx, "A New (Circular) Economy", 65.

[29] It is true that, according to the jurisprudence of the CJEU, the conditions for the application of the special taxation regime should be construed narrowly. CJEU 29 November 2018, C-264/17 (Harry Mensing), ECLI:EU:C:2018968, para. 22.

[30] See CJEU 3 March 2011, C-203/10 (Direktsia 'Obzhalvane i upravlenie na izpalnenieto' – Varna v. Auto Nikolovi OOD), ECLI:EU:C:2011:118, para. 47-8.

[31] CJEU, 10 November 2011, C-259/10 (Commissioners for Her Majesty's Revenue and Customs v. The Rank Group plc.), ECLI:EU:C:2011:719.

with regard to value added tax between two supplies of services that are identical or similar from the point of view of the consumer and that meet the same needs of the consumer is sufficient to establish a violation of this principle. It indicated, in addition, that that principle opposes the provision of similar services, which are therefore in competition with each other, to be treated differently from the point of view of VAT (Judgment of 19 July 2012, A (C-33/11, EU:C:2012:482, paragraph 32 and case-law cited[32]) and Judgment of 15 November 2012, Zimmermann (C-174/11, EU:C:2012:716, paragraph 48[33]). CJEU added that the principle of fiscal neutrality includes the elimination of distortion of competition resulting from differential treatment from the point of view of VAT[34]. Distortion is therefore demonstrated as soon as the provision of services is found to be in competition and treated unequally from VAT point of view.

Thus, by taxing not the selling price of the good, but only the profit margin, the regime avoids, on one hand, that this resold good is affected by double taxation and, on the other hand, that the trader, a taxable person, is obliged to pay the member state a VAT rate from which he could not have deducted the amount he paid upstream, which would have the effect of creating a distortion of competition. Therefore, since the good is reintegrated into the commercial circuit, the taxable trader is obliged to pay VAT when he proceeds to sell the good. However, given that he did not pay VAT when buying the second-hand good from the non-taxable individual, he cannot deduct it from the amount that must be paid to the state, an amount constituted exclusively in this case from the VAT collected at the sale of this good. This results in a breach of the VAT neutrality principle and a double taxation for the respective good[35].

With regard to the objective of avoiding distortion of competition between taxable persons, it must be pointed out that recital (7) of Directive 2006/112/CE provides that the common VAT system is necessary to lead, even if the quotas and exemptions are not on fully harmonized, to a neutrality in the field of competition, so that, on the territory of each Member State, similar goods and services bear the same tax burden, regardless of the length of the production and distribution chain.

However, the refusal to apply the margin scheme regarding an activity

[32] CJEU, 19 July 2012, C-33/11 (A Oy), ECLI:EU:C:2012:482.
[33] CJEU, 15 November 2012, C-174/11 (Finanzamt Steglitz v Ines Zimmermann), ECLI:EU:C:2012:716.
[34] We must not lose sight of the fact that VAT fraud also disturbs competition, but this situation involves, most of the time, a criminal activity on the part of taxpayers, an aspect that differs from the factual situation analyzed in this study. For more details on European VAT imperfections, see Madeleine Merkx, John Gruson, Naomie Verbaan & Bart van der Doef (2018), "Definitive VAT Regime: Stairway to Heaven or Highway to Hell?", *EC Tax Review* 27, no. 2: 75.
[35] For the example prosed by the author, see section 3.3 above.

such as the one in question would have the effect of leading precisely to a distortion of competition on the second-hand car sales market between taxable traders who sell said cars and taxable traders who bought the second-hand cars as such.

4. The Echo of Arguments in National Jurisprudence. The Intervention of the High Court of Cassation and Justice of Romania

Courts in Romania have been invested with a series of cases aimed at annulling the administrative-fiscal acts concluded by the control bodies. The plaintiffs' request was based on the argument of the wrong application of the standard VAT tax regime, ignoring the incidence of the margin scheme.

On April 14, 2021, the Cluj Court of Appeal, in resolving the appeal, ordered in Decision no. 449/14.04.2021: "*The special tax regime is in line with the principle of VAT neutrality, as the court of first instance held. However, as found by the trial court, for the part of the price of the cars that did not represent the plaintiff's profit margin, respectively for their residual value compared to the factory price, VAT was collected twice, once in the member state where they were first sold, and the second time in Romania, at the time of their resale, thus violating the principle of VAT neutrality. If VAT had been calculated in Romania only with regard to the plaintiff's profit margin, the principle of neutrality would not have been violated, because this margin is a new element, which only appeared when the plaintiff carried out commercial operations and for which, therefore, no VAT was previously paid*."

In the same sense, the Cluj Court of Appeal ruled in Decision no. 944/22.09.2021 in the following manner: "*However, applying the relevant CJEU jurisprudence, the Court held that the plaintiff can benefit from the special tax regime provided by art. 152[2], respectively art. 312 of the Tax Code, failing to fulfill the obligation to register for VAT purposes cannot be considered as a valid argument. Neither the Tax Code nor the application rules refer to obtaining the authorization to carry out economic activities, provided by Emergency Government Ordinance no. 44/2008, and the CJEU held in case C-324/11 Gabor Toth that "the notion of "taxable person" is broadly defined, based on factual circumstances. On the other hand, from the mentioned Article 9 paragraph (1) it does not appear that the quality of taxable person depends on any authorization or any license granted by the administration in order to exercise an economic activity. Of course, the first subparagraph of Article 213(1) of Directive 2006/112 states that any taxable person declares when he starts, changes or ceases his activity as a taxable person. However, despite the importance for the proper functioning of the VAT system of such a declaration, it could not constitute an additional necessary condition for the recognition of the quality of taxable person within the meaning of Article 9(1) of the same directive, given that this article 213 appears under title XI thereof, chapter 2, entitled "Identification"*."

On December 13, 2021, the High Court of Cassation and Justice was called to rule on the application of the rules of law regarding the intra-Community trade of second-hand cars. By Decision no. 84/2021, from file no. 2482/1/2021, the Panel for resolving some legal issues of the Supreme Court ordered: "*1. The special tax regime regulated by art. 152[2] para. (4) from Law no. 571/2003 regarding the Tax Code, with subsequent amendments and additions for second-hand operations, also applies to natural persons who have not fulfilled the obligation provided by art. 6 para. (1) from Government Emergency Ordinance no. 44/2008 regarding the carrying out of economic activities by authorized natural persons, individual businesses and family businesses and who carried out the economic activity of reselling second-hand cars, when registration as a VAT payer was carried out ex officio by the fiscal body, if it is proven that the taxable person met the basic conditions provided by art. 152[2] para. (2) from Law no. 571/2003 regarding the Tax Code, with subsequent amendments and additions. 2. Application of the special regime provided by art. 152[2] para. (4) from Law no. 571/2003 regarding the Tax Code, with subsequent amendments and additions, by the fiscal body that ordered the ex officio registration of the person as a VAT payer is not conditioned by the fulfillment of the formal conditions established by art. 152[2] para. (13) from Law no. 571/2003 regarding the Tax Code, with subsequent amendments and additions, and point 64 para. (7) from the methodological norms for the application of Law no. 571/2003 regarding the Tax Code, approved by Government Decision no. 44/2004, with subsequent amendments and additions, if it is proven that the taxable person fulfills the substantive conditions provided for by art. 152[2] para. (4) from Law no. 571/2003 on the Tax Code, with subsequent amendments and additions.*"

From our perspective, the intervention of the High Court of Cassation and Justice was not necessary considering that the application of the margin scheme regarding intra-Community trade in second-hand cars was already clarified by European and national legislation. The idea can be supported all the more since the CJEU applied and explained the incidental provisions in the matter of the margin scheme in a constant jurisprudence, which the author detailed in the previous paragraphs. Of course, the decision of the High Court of Cassation and Justice strengthens the author's arguments, but, as it was shown, the practice of the lower courts was beginning to crystallize even before the High Court of Cassation and Justice issued the Decision no. 84/2021.

5. Conclusions

In this article, the author addressed the special provisions for second-hand goods in the internal market. Thus, as long as all the conditions provided by European and national legislation are met, the margin scheme must apply to transactions regarding second-hand goods, without the tax authorities being able to

impose additional formalities (such as registration as a payer of VAT or business authorization). However, it remains to be seen how the margin scheme will face the new challenges of the 21st century, in the context of the circular economy that has become Europe's target for 2050[36].

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