DEFENDING THE FINANCIAL INTERESTS OF THE EUROPEAN UNION THROUGH CRIMINAL LAW INSTRUMENTS - IMPLEMENTATION IN ROMANIA

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ABSTRACT:*The spread of the fraudulent phenomenon, both quantitatively and qualitatively (through the use of new and increasingly complex means of fraud), has led the European Union to take an increasingly firm position both by establishing structural and legal means of fight against fraud, as well as by raising the fight against tax fraud to the level of an objective taken on by the European Union. It has proved imperative for a more complex system to be outlined that would protect the European Union's financial interests, inclusively through criminal law instruments, given that protection through administrative instruments alone has proved insufficient. In shaping such a protection system, not only the legislative intervention of the European Union (referring to the adoption of Directive (EU) 2017/1371 as ultimate legislative document) is relvant, but also the case law of the European Union Court of Justice and the establishment of the European Public Prosecutor's Office.*

KEYWORDS: *protection of the European Union's financial interests; administrative law instruments; criminal law instruments, Directive (EU) 210/1319; fraud.*
JEL Code: *K14, K33, K34*

The protection of the financial interests of the European Union is also ensured through the legal instruments adopted at union and national level and their implementation by the competent bodies. More recently, attention has been drawn to the need for criminal protection (Neagu, 2008, p. 56) as defending important social values sometimes requires the prompt intervention of the state through the most severe coercion (Bodea, 2019, p. 1). Such a complex and at the same time effective system against the fraud that harms the financial interests of the European Union must be included by the principle of proportionality, as the fight cannot be carried out in the extreme with the risk of discretionary affecting *bona fide* taxpayers (Decision of 1 October 2017, Case C-101/16, Paper Consult SRL v. DGRFP Cluj-Napoca - AJFP Bistrița Năsăud (Vidreanu & Ioan, 2019, pg. 89-92), but also by the principle of the prevalence of the substantive over the formal issues (Decision of 15 July 2010, Case C-368/09; Decision of 15 November

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2017, Case C-507/16 (Vidreanu & Ioan, 2019, pg. 41-43, 98-100), as well as by the respect for the fundamental rights and freedoms of citizens (Decision of 5 December 2017 Case C-42/2017 (Vidreanu & Ioan, 2019, pg. 104-107).

The evasionist phenomenon that harms the financial interests of the European Union is manifested on two levels. Thus, it is possible to be taken into account both a revenue fraud, respectively, less amounts paid to the European budget than those normally due, and a fraud in expenditures (manifested mainly by the embezzlement to destinations other than legal (Neagu, 2008, p. 57) ones).

Revenue fraud represents a serious danger of the European Union general budget. It is recorded mainly for the first two categories of inherent budget revenues (respectively agricultural levies and the product resulting from the common customs tariff).

Frequently used fraudulent techniques:

- non-compliance with preferential agreements - which involves the smuggling of goods into a European partner state in order to avoid the payment of regular duties
- intentionally erroneous and incorrect classification of Extra-Community goods as being in transit, thus avoiding the payment of customs duties
- duty-free purchase of a product from a Member State, for later resale domestically by adding VAT
- evasionist practices[1].

It is estimated that the European Union budget and the Members State losing at least EUR 50 billion in VAT revenue each year due to transnational fraud[2].

Expenditure fraud represents approximately 0.29%[3] of the European Union general budget and consists mainly in the receipt and acceptance by Member States of aid to which - in fact - they were not entitled (often in the field of agriculture, where the granting of aid under the form of premiums is made on the basis of a simple statement[4]). The phenomenon is also favored by the fact that more than half of the European Union's expenditure is managed, paid to the beneficiaries through the Member States (Council Regulation on the protection of the European Communities' financial interests no. 2988 of 18 December 1995 (Costaș, 2008, pg. 116-123).

[1] The establishment by the manufacturer of a network of shell companies that only simulated the performance of a commercial activity (sale-purchase) in order to avoid paying taxes. Such a scheme was used by milk producers to avoid paying tax on milk overproduction. Italian milk producers set up several companies which, on paper, "bought" different quantities of milk from producers and later "sold" them to traders, but in reality it was only a direct relationship between producer and trader. But, due to the existence of these shell companies (which by "buying" they had to pay the tax on milk overproduction and which in fact they did not pay demanding debt compensation), the producer sold its entire milk production without paying the tax on milk overproduction. The Italian Supreme Court of Justice considered that such a scheme to avoid paying taxes is an act of fraud against the financial interests of the European Union, according to Article 640 bis of the Italian Criminal Code (Decision of the Supreme Court of Italy no. 2808 of 2 October 2008 - http://ec.europa.eu/anti_fraud/).

[2] https://www.consilium.europa.eu/ro/policies/eppo/ (September 2020).

[3] https://op.europa.eu/webpub/eca/special-reports/fraud-1-2019/ro/#chapter3

[4] The competent Italian authorities, with the support of OLAF, managed to stop an evasion practice targeting European funds, namely agricultural expenditure, by using false documents, on the basis of which the subsidies were obtained (http://ec.europa.eu/anti_fraud/).

Following the decision of the European Court of Justice in the case "Yugoslav wheat"[5], a debate on the protection of European financial interests was launched, a debate that finally materialized in the adoption of *Council Regulation no. 2988 of December 18, 1995 on the protection of the European Communities' financial interests*, which regulated an administrative liability. This Regulation establishes a series of administrative measures, consisting in the exercise of control and the application of administrative sanctions at the level of the Member States in a unitary manner in what concerns the infringements of Community provisions in this respect. Subsequently, the *Council Regulation no. 2185 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities* was adopted. Member States have estimated that approximately EUR 638 million of the European Union's structural funds were misused in 2015[6].

The fight against fraud is expressly established by the Community Treaties, including by TFEU (Chapter 6, Article 325), provisions which set out the objectives (discouraging such practices, providing protection) and the measures necessary to achieve them (the obligation of the Member States to cooperate with the European Commission, the upcoming European framework law on combating and preventing fraud, the obligation of the European Commission to report annually to the European Parliament and the Council about the measures and provisions adopted for the implementation of the provisions of the Community Treaties).

The European Anti-Fraud Office (OLAF) was set up in 1999. In 2002, the Internal Audit Service (IAS) was set up within the European Commission.

OLAF was set up by the European Commission in order to strengthen the means of preventing fraud within its structure by EU Decision 1999/352/EC of 28 April 1999. The Office was given the task of conducting investigations in fraud cases and was granted special status as an independent body. The Office took over the operations of the "Anti-Fraud Coordination Unit" (UCLAF), set up in 1988 within the Commission General Secretariat. Although it has the status of an independent body in the conduct of investigations, OLAF is also part of the organizational structure of the European Commission, being subordinated to the Commissioner responsible for the Community budget. OLAF fulfills its investigative tasks conferred to the Commission by European law and existing treaties with third countries to promote the fight against fraud, corruption and any other illegal activities detrimental to the European Union's financial interests, including the irregularities within European institutions. Thus, OLAF carries out activities concerning the prevention or detection of fraudulent acts in the field of customs, embezzlement and tax evasion, corruption or any other illegal activities affecting the budget and the financial interests of the Community. The legislative quarters consists of European legislation and treaties with third countries. In achieving

[5] Decision no. 68/1988 of the ECJ - Case: The Greek authorities sold wheat in the Community domestically produced as declared, but in fact it was imported from Yugoslavia, thus benefiting from significant Community subsidies.

[6] https://www.consilium.europa.eu/ro/policies/eppo/(September 2020).

this goal, OLAF supports Member States[7] and coordinates their fight against fraud. OLAF may carry out investigations, inspections and controls, both at the premises of the Community institutions and at the level of the Member States and third countries, usually with the help and cooperation of the national investigation services in this field. OLAF has also other powers, such as access to information and the quarters of the Community institutions and to request information which it considers useful from any authorized person[8].

According to Article 325 TFEU "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken …, measures which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests."

DEFENDING THE EU'S FINANCIAL INTERESTS THROUGH THE INSTRUMENTS OF ADMINISTRATIVE LAW

The Council Regulation on the protection of the European Communities' financial interests no. 2988 of 18 December 1995 represents the framework regulation established for the purpose of protecting the financial interests of the Community/European Union taking into account the uniform controls, measures and administrative sanctions regarding the diversion from the community law.

Diversion means any infringement of a Union law provision as a result of an action or omission of an economic operator which could harm the general budget of the Union, either by diminishing or losing revenue from own resources collected directly on behalf of the Community/ Union, or through unjustified expenses (Article 1 paragraph 2 of Regulation no. 2988/1995).

The procedures for the application of administrative controls, measures and sanctions are, in fact, left to the mercy of the Member States, whose legislation in this field must nevertheless comply with the Union law.

The administrative sanctions provided in the Regulation are (Article 5 paragraph 1 of Regulation no. 2988/1995):

- administrative fine;
- payment of an amount higher than the amount received unjustifiably or stolen, to which the interest is added, if applicable;
- the total or partial withdrawal of an advantage granted by Community rules;
- the exclusion or withdrawal of an advantage for a period subsequent to the commission of the offense;
- temporary withdrawal of the approval or recognition required to participate in a Community aid scheme;

[7] For example, OLAF supported the Italian authorities in the investigation regarding the non-payment of taxes on overproduction of milk by Italian milk producers, support which contributed to temporary confiscation of goods amounting EUR 21 million.

[8] http://ec.europe.eu/anti_fraud/

- loss of a guarantee or a deposit made;
- other purely economic sanctions (established, ordinarily, by sectoral rules).

Administrative sanctions may be applied to those who have committed the offense (natural or legal persons or other entities to whom the national law offers them legal capacity), as well as to all those obliged to assume responsibility for the offense or to ensure that it is not committed (which means, including the state).

The Regulation obliges Member States to take the necessary measures to ensure the legality and veracity of operations involving the financial interests of the Community/European Union.

Controls, measures and administrative sanctions must be effective, proportionate and dissuasive. All these must take into account the nature and gravity of the misconduct, the advantage granted or received and the degree of liability. An administrative sanction may be imposed only if there are provisions laid down in a Community act issued prior to the respective infringement. The limitation period for the offence is four years from the date of the infringement. For continuous or repeated infringements, the limitation period runs from the date on which the infringement ceases. As for the multiannual programs, the limitation period runs until the completion of the program[9].

In parallel with the controls carried out by the national structures and those carried out by the Union institutions, the Commission may, under its responsibility, carry out controls on:

- compliance of administrative practices with the Community rules;
- the existence of the necessary supporting documents and their conformity with the revenues and expenses;
- the circumstances in which these operations are carried out and verified;
- on-the-spot checks and inspections, under the conditions laid down in the Community rules.

However, the main role in the fight against the fraudulent phenomenon through instruments of administrative law (Chiriac & Truța, 2020, pg. 110-122) rests with the Member States, by means of the national law system and of the legal, organizational, procedural and sanctioning mechanisms regulated by these mechanisms.

In what concerns Romania, the current Fiscal Code[10] and the Methodological Norms[11] have taken over and transposed some of the provisions of the European law, including references of Methodological Rules to judgments of the European Union Court of Justice (eg Decision of 22 October 2015 in the Case C-277/14; Decision of 6 December 2012 in the Case C-285/11; Decision of 21 March 2000 in the Case C-110/98; Decision of 14 February 1985 in the Case C-268/83 Decision of 22 November 2017 in the Case C-251-16 (Vidreanu & Ioan, 2019, pg. 13-16, 20-21, 61-63, 76-78, 93-95, 100-104), but not all of them. As the current Code of Fiscal Procedure has failed to transpose all the provisions of European law in this regard (the European Court of Luxembourg has ruled that the lack of access to the administrative file of the tax authority which is the

[9]http://europa.eu/legislation_summaries/fight_against_fraud/protecting_european_communitys_financial_interests/l33018_en.htm (29.04.2015).

[10] Adopted by Law no. 227 of 8 September 2015, published in the Official Gazette of Romania no. 688 of 10 September 2015, with subsequent amendments and completions.

[11] Adopted by Government Decision no. 1 of 6 January 2016, published in the Official Gazette of Romania no. 22 of 13 January 2016, with subsequent amendments and completions.

base of an imposing decision is therefore a violation of the principle of compliance with the right of defence. According to the European Court, this access should be possible in the administrative-fiscal procedure phase, as the requirements of European law (Coman, 2019, pg. 112-115) are not met if access to that information takes place after the issuance of the administrative decision, perhaps in a jurisdictional phase (Decision of 9 November 2017, in the case C-298/16 (Vidreanu & Ioan, 2019, pg. 93-95)).

DEFENDING THE EU'S FINANCIAL INTERESTS THROUGH CRIMINAL LAW INSTRUMENTS

Due to the extension of the fraudulent phenomenon, the insufficiency of the sanctioning measures specific to the administrative law was highlighted and, at the same time, the need to establish some sanctions specific to the criminal law (Neagu, 2008, p. 58).

Under these conditions, it was proposed as a solution the setting of a European regulation of criminal liability for infringements on the financial interests of the European Union. But such a proposal has met and continues to face a strong opposition. The arguments against the establishment of a Union-wide regulation of criminal liability refer to the fact that none of the foundation or amending treaties confers real competence on the European institutions. The only competence is the one provided in Article 29 of the Treaty of Amsterdam according to which "joint action in the field of judicial cooperation in criminal matters aims, *inter alia* ... the progressive adoption of measures establishing minimum rules on the constituent elements of criminal offenses and the applicable sanctions". But the influence of the legal instruments at the disposal of the European Union does not compare with the capacity and competence of the Member States in the field of criminal law. Furthermore, Member States cannot be obliged to incriminate certain acts or to regulate certain sanctions (Neagu, 2008, p. 60).

Based on certain decisions of the European Court of Justice[12], it can be stated that the European legislation may require the adoption of criminal measures to achieve the proposed objectives, if two conditions are met (Neagu, 2008, pg. 64-71):

- necessity - any such measure must be justified by the need to effectively implement a European policy and must be established in compliance with the principles of subsidiarity and proportionality.
- consistency - implies the absence of any contradiction between successive provisions in time.

For the existence of a European criminal law, the direct intervention of the union legislative bodies is necessary.

Instead, the Treaty of Lisbon created the necessary framework for drafting certain Union criminal regulations. Thus, the Treaty provides (Neagu, 2008, pg. 71-74):

- the principle of mutual recognition of judicial and extrajudicial decisions in criminal matters

[12] ECJ Decision C 176/03 of 13 September 2005 on environmental policy and another decision on measures to combat marine pollution.

- the extension of the common minimum rules that will be established by directives (mutual recognition of evidence, definition of criminal offenses and sanctions - but for the time being, the scope of crime does not include tax fraud).

Among the criminal instruments used in the protection of financial interests must be considered (Neagu, 2008, pg. 74-76):

- the Convention on the protection of the European Communities' financial interests of 26 July 1995 (PIF Convention) criminalizing fraud affecting financial interests by establishing the applicable sanctions, establishing the criminal liability of persons with decision-making and control powers within an economic operator

- Protocol 1 to the Convention on the protection of the European Communities' financial interests of 27 September 1996 - which incriminates corruption offenses committed against Community officials or national officials;

- Protocol 2 to the Convention on the protection of the European Communities' financial interests of 19 June 1997 - regulates the incrimination of money laundering, the liability of legal persons, applicable sanctions and procedural provisions.

This was possible because the Treaty of Lisbon abolished the division of competences between the European Union and the Member States within the framework of the 3 pillars, establishing a bipartite classification of Community and national competences, in (Costea, 2010, pg. 218-222):

- exclusive competence - resides in areas where only the European Union can act, "Member States can only intervene with the consent of the European Union"

- shared competence - which means that "Member States can intervene as long as the European Union did not act". The field of security policy and judicial cooperation, tax law and criminal law (areas that traditionally belonged to pillar 3 - the hard core of the exclusive competence of Member States), thus become "accessible" to the direct intervention of the European Union.

As minimum rules were established by the PIF Convention and the protocols mentioned, and which proved to be more or less effective, concrete steps were subsequently taken on several levels:

- adoption of Directive (EU) 2017/1371[13]

- the jurisprudence of the Court of Justice of the European Union which imposed certain benchmarks on the tax fraud phenomenon, including from the perspective of the elements of criminal law with which it interferes: the notion of tax fraud by reference to the PIF Convention and Article 325 of the TFEU (Decision of 2 May 2018, in the case C-575/15 (Vidreanu & Ioan, 2019, pg. 128-135)); the obligation of states, as by internal rules, to ensure that, in the case of dual, administrative and criminal proceedings, the regulated sanctions are correlated, interdependent and mutually limited, within the application of the *ne bis in idem* principle in case of cumulation of sanctions (Decision of 20 March 2018, in the case C-524-15 (Vidreanu & Ioan, 2019, pg. 135-140)); the priority of the principle of legality of criminal offenses and penalties as governed by the domestic law of each Member State, even in relation to offenses which would harm the financial

[13] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, published in the Official Journal of the European Union no. L 198 of 28 July 2017.

interests of the European Union (Decision of 5 December 2017 case C-42/17 (Vidreanu & Ioan, 2019, pg. 104-107)) .

- the set up of the institution of the European Public Prosecutor's Office.

The Directive (EU) 2017/1371 lays down minimum rules for the definition of criminal offenses and sanctions for the fight against fraud and other illegal activities affecting the financial interests of the Union. Basically:

- *intent* was imposed as a form of guilt required in order that the act of fraud to the detriment of the European Union's financial interests would be considered an offense (Article 3 para. 1),

- obligations are imposed on Member States to ensure that other acts of fraud also constitute offenses (money laundering, active and passive corruption, embezzlement), that forms of participation and attempted offenses related to the mentioned offenses are considered offenses and are punished (Article 3-5);

- the Member States are required to regulate effective, proportionate and dissuasive criminal sanctions applicable to natural persons (Article 7) or legal persons (Article 9);

Regarding the transposition in Romania of the aspects of European law regarding the protection of the financial interests of the European Union, it should be mentioned that that the provisions of Law no. 78/2000 for the prevention, discovery and sanctioning of corruption acts[14], also apply to crimes directed against the financial interests of the European Union, crimes presented by Article 18^1-18^5 of the law (Article 5), which ensures a regime of incrimination and sanctioning similar to that applied to crimes that harm the public and financial interests of the Romanian state (Coman R. , 2019, p. 475). Following the adoption of Directive (EU) 2017/1371, in order to transpose it into national law, Law no. 279/2019 was drafted and subjected to the Parliamentary legislative procedure. However the law has not been adopted yet by the Romanian Parliament, (at the time of writing this paper, September 2020).

Another means of combating the fraudulent phenomenon that harms the financial interests of the European Union is the new European institution, the European Public Prosecutor's Office (EPPO). During April 2017, a number of 16 Member States issued a joint notification letter and sent it to the European Parliament, the European Commission and the Council making public and official the intention to initiate cooperation for the establishment of a European Public Prosecutor's Office (EPPO). At that time, a jurisdiction was envisaged to include "investigating, prosecuting and bringing to justice perpetrators of offenses affecting the financial interests of the Union"[15]. On 12 October 2017, the Regulation establishing the European Public Prosecutor's Office (EPPO) was adopted, thus marking the establishment of this new European institution. The actual activity, by assuming the powers of investigation and prosecution, is to be established by the European Commission however not earlier than 3 years after the entry into force of the regulation. Subsequently, on 14 October 2019, the first Chief Prosecutor of the European Public Prosecutor's Office was confirmed in its position, and on 27 July 2020, the first prosecutors in the European Public Prosecutor's Office were appointed.

[14]Published in the Official Gazette of Romania no. 219 of 18 May 2000, with subsequent amendments and completions.

[15]https://www.consilium.europa.eu/ro/press/press-releases/2017/04/03/eppo/ (September 2020).

As an independent body of the European Union, the main role of the European Public Prosecutor's Office will be to be responsible for "investigation, prosecution and arraignment of perpetrators of crimes against the financial interests of the Union (eg fraud, corruption, cross-border fraud in VAT of more than EUR 10 million). For this purpose, the EPPO shall conduct investigations, prosecute and bring proceedings before the competent courts of the Member States"[16].

In conclusion, as noted in the legal literature, there is a change of perspective and attitude at Member State level on the legislative and structural mechanisms to combat fraud affecting the financial interests of the European Union (Neagu, 2008, pg. 269-270). Member States seem to have gradually relinquished some of their sovereignty over the application of criminal provisions in areas of interest for the (so-called) European criminal law and which have a cross-border effect.

Member States seem to be paying increasing attention to the protection of the European Union's financial interests, protection which has also increased through national instruments. This increase is primarily due to the harmonization of national legislation regarding the constituent elements of specific offenses and the sanctions applied. And, secondly, as a result of the application of the assimilation principle provided by the Lisbon Treaty, Member States have regulated fraud against the EU's financial interests in a similar way to those affecting national interests (European funds are provided with protective treatment identical to that of national public funds (Costea, 2010, p. 222)).

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