IS IT POSSIBLE TO TAKE RESPONSIBILITY FOR THE ILLEGAL USE OF PUBLIC FUNDS IN THE ABSENCE OF PROOF OF DAMAGE TO THE ADMINISTRATIVE TERRITORIAL UNIT?

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ABSTRACT: *The study aims to present the conditions of patrimonial administrative and tax liability for the hypothesis of finding formal deviations in the use of public funds, to support the need to supplement the special provisions of the Administrative Code with the general provisions of the institution of contractual and extra-contractual civil liability, regulated in the Civil Code.*

Starting from a critical analysis of the decision no. 105/18.02.2021 of Tg.-Mureș Court of Appeal, Section II, and of administrative and tax contentious, in the file no. 14/102/2018 of Mureș Court of Law, the constitutive elements of the patrimonial administrative and tax liability are analyzed, with a special look at the damage.

The arguments put forward argue for the need to complete the special administrative and tax provisions with the common law rules specific to civil liability, being in question a legal liability of a patrimonial nature in which the essential condition for initiating liability for reparation is the occurrence of damage.

Thus, contrary to the arguments set forth in the motivation of the analyzed decision, we consider that there is no sui-generis patrimonial administrative and tax liability, but, in all situations, patrimonial liability implies the existence of negative effects in the injured person's patrimony, because in the absence of a damage, there can be no patrimonial or civil liability, but even less, an administrative one.

KEYWORDS: *patrimonial administrative and tax liability; civil liability; damage*.
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Ab initio, we note that in the legal doctrine (Terzea, 2021), it has been emphasized the autonomous character of the patrimonial administrative liability that can be incurred when the conditions imposed by law are met, and the injured person can obtain *compensation for the damage* only in the special way provided by the rules of administrative law, and not by an action in tortious civil liability. In this regard, the High Court of Cassation and Justice (H.C.C.J., s. 1 civ., Dec. no. 1016 of 2nd June 2020,

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www.scj.ro, 2020) applied the principle "specialia generalibus derogant", considering that the liability regulated by the provisions of Articles 18 and 19 of the Law of administrative contentious no. 554/2004 is *a special liability*, a hypothesis in which the tortious civil liability cannot be resorted to.

From a terminological point of view, in order to establish the legal nature of liability for repairing the damage caused by public authorities, in the specialized literature (Verdinaș, 2018) is generally used the phrase "patrimonial administrative liability", name also taken by the legislator in the current Administrative Code, approved by GEO no. 57/2019. (Published in the Official Gazette of Romania, 2019)

Regarding the legal nature of this liability, it was considered that the current regulation of the Administrative Code is likely to end the existing controversies regarding the legal nature of patrimonial administrative liability, thus combating the so-called "civilist theory" according to which liability for damages caused by illicit legal acts of the public authorities represents a special, atypical hypothesis of extra-contractual civil liability, that presents certain peculiarities.

In our comment, we will try to analyze this approach of patrimonial administrative and tax liability, in order to emphasize the fact that, insofar as a damage is claimed, a patrimonial liability is incurred, so we must refer to the general provisions of the Civil Code and analyze the constituent elements of extra-contractual civil liability, with a wider scope than tortious civil liability, including any type of civil liability, except for contractual civil liability (Pop, 2020).

1. BRIEF PRESENTATION OF THE PROCESS AND PRONOUNCED SOLUTIONS.

In essence, in the case brought to court, the courts analyzed the legal issue of the execution of a public procurement contract, based on which payments were made to the executors of the works for the construction of a communal public road, but the financial audit found that from the list of supporting documents no site provision was drawn up regarding the cost of the materials used, following the adaptation of the initially approved construction project. Thus, during the execution of works, due to the lack of ensuring full and timely financing of costs, unforeseen situations arose on the spot, being necessary the adaptation of technical solutions in order to complete the work, which added new costs. With regard to such new works, no site provision has been drawn up in accordance with the provisions in force, as a "supporting document". During the judicial debates, in the court of first instance, on the basis of a technical expertise, it was proved that all the settled works were actually performed, being quantitatively and qualitatively received, so that the materials and labour paid to the executors were included in the final work, a situation in which there is no damage.

However, in the appeal, the question has been raised whether the patrimonial liability of the public entity can be engaged in the absence of a damage, in the hypothesis in which the contracted works have been executed, but there are not all the "supporting documents".

By the sentence no. 60/13.02.2020 of Mureș Court of Law, Administrative and Tax Litigation Section in the file no. 14/102/2018, the action filed by the plaintiff A.T.U. COMMUNE B., against the defendants THE ROMANIAN COURT OF AUDIT and

MUREȘ CHAMBER OF AUDIT, as well as the requests for ancillary intervention made by S.C.G...S.A. and S.C. C....S.R.L. having as object disputes with the Court of Accounts (Law no. 94/1992) were admitted. It was ordered the annulment of point 10 of Decision no. 39/20.10.2017 of the Director of Mureș Chamber of Audit, the annulment of the Conclusion no. 11/14.12.2017 issued by the Commission for the settlement of Appeals, as well as the annulment of the measures established in point II, para 2, 3 and 4 of Decision no. 39/2017.

By Decision no. 105/R of 18th February 2021 of Târgu Mureș Court of Appeal, the appeal of THE ROMANIAN COURT OF AUDIT was admitted, the sentence no. 60/ 13.02.2020 was overturned in its entirety, the request in administrative litigation filed by the A.T.U. COMMUNE B., as well as the requests for intervention, were rejected as ungrounded, the decision thus pronounced being final. The following arguments were put forward in the pronouncement of this decision:

1. The first instance misinterpreted the provisions of Law no. 94/1992 on the organization and functioning of the Court of Audit and of Decision no. 155/2014 of 29th May 2014 for the approval of the Regulation on the organization and conduct of activities specific to the Court of Audit, as well as capitalization of the documents resulting from such activities.

Article 2, letter c) of the Law defines the financial audit as the activity through which it is pursued if the financial statements are complete, real and compliant with the laws and regulations in force, providing an opinion in this regard. According to Article 29 paragraph 1 letter a) of Law no. 94/1992, through its personnel verifications provided in Articles 23 and 24, the Court of Audit follows mainly the accuracy and reality of the financial statements, as set out in the accounting regulations in force. According to point 181 letter a) of the Regulation, the decision includes concretely the errors/deviations from legality and regularity and, where applicable, the situations of non-compliance with the principles of economy, efficiency and effectiveness in the use of public funds, and in the administration of public and private patrimony of the state/administrative territorial units, found following the court of audit verification actions, and point 250 letter a) establishes that, based on the provisions of Article 21 paragraph 3, Article 29 and Article 42 paragraph 1 of the Law, the Court of Audit carries out the financial audit activity on the financial statements concluded by the entities under its verification jurisdiction, following mainly the accuracy and reality of the financial statements, as set out in the accounting regulations in force.

Furthermore, according to point 255, letter a), the general objective of the financial audit of public institutions is to obtain reasonable assurance that the audited financial statements do not contain significant misstatements due to deviations or errors, thus allowing an opinion to be expressed on the extent to which they are prepared by the entity in accordance with the financial reporting framework applicable in Romania, they comply with the principles of legality and regularity and provide a true and fair view of financial position, financial performance and other information relating to the activity carried out by such entity.

According to Article 33, paragraph 3 of the Law, in situations where it is found the existence of deviations from legality and regularity, which have determined the

occurrence of damages, this state of affairs is communicated to the management of the audited public entity. Determining the extent of the damage and ordering measures for its recovery become an obligation of the management of the audited entity.

In the light of these legal provisions, the Court noted that the control exercised by the Court of Audit covers "(...) *both the damage caused by the non-existence of works settled from public funds and the deviations from legality and regularity that led to the existence of a damage."*

Following this logical-legal reasoning, the Court considered that "(...) *only the execution of the settled works, as found in this case, is not sufficient to remove the damage and the obligation to repair it*."

2. *Secondly*, the Court argued in the sense that *damage* was caused which "(...) is determined by making illegal payments from the public budget, payments that would not have been made if the legal provisions of the public budget had been complied with, ... which would have had a different value if such documents had been attached to the payment orders or which would have been settled under conditions other than those accepted by the respondent plaintiff without these supporting documents."

It was noted that the deviations from the legality and regularity of the payments made by the respondent plaintiff to the two contractors intervening in this case have been proved, whereas it is apparent from the documents submitted on probation and interpreted correctly by the Court of first instance, that the public authority ordered the settlement of quantities of asphalt mixture without the existence of any supporting documents.

It was emphasized that a public entity has the obligation to comply with both civil law and special financial legislation (with reference to Law 273/2006 on local public finance) and compliance with civil law does not necessarily mean the absence of special liability. The provisions of Article 54 paragraphs 5 and 6 of Law no. 273/2006, according to which the payment instruments must be accompanied by supporting documents were invoked. These documents must certify the accuracy of the amounts paid, the receipt of the goods, the execution of the services and the like, in accordance with the legal commitments entered into. The payment instruments are signed by the accountant and the head of the financial-accounting department. Payments, within the limits of approved budget appropriations, shall be made only on the basis of supporting documents, drawn up in accordance with the legal provisions, and only after they have been contracted, liquidated and ordered.

In this case, the lack of supporting documents was recorded by the Court of Audit's own staff and has not been challenged.

3. As regards the relevance of *the conclusions of the technical expertise*, the decision stated that "(...) *the analysis of the existence of the works, brought by the first instance in support of the idea that there is no damage, took into account the contractual relations between the public authority and the executors*", which, however, "(...) *does not overlap nor does it treat the administrative and tax liability of the public institution from the point of view of the administration and use of public financial resources, in the sense provided by Law no. 94/1992 and by Law no. 273/2006 on local public finance*."

In support of this idea, it has been shown that a public institution of the same nature with the one that has been controlled in this case has the obligation to comply with general civil law (civil code and other normative acts governing the matter of

performance and effects of the contract), but in addition to a simple (private) participant in the civil circuit is also subject to a special regulation from the perspective of how public resources are allocated and spent, and these rules establish different conditions of liability.

It was concluded in the sense that "(...) in relation to the norms regarding the use of public resources, ... there are two types of liability, compared to two distinct types of legal subjects. The civil liability that the appellant owes to the contractor participating in the civil circuit, subject to the principle of contract obligation, but also the administrative liability for the way they allocated budgetary resources, liability due to the state and mediated by the Court of Audit. Civil obligations must be fulfilled not only under the general contractual conditions but also under the special conditions of the legislation governing the use of public money."

2. COMMENT

Examining the considerations of Decision no. 105/R of 18th February 2021 of Tg.-Mureș Court of Appeal, Second Civil Section, of administrative and tax contentious, we consider that it is a decision given in violation of legal provisions, with reference to the provisions of Law no. 94/1992, of Law no. 263/2006, of Article 1349, Article 1350 and Article 1357 of the Civil Code, is an ungrounded decision by not taking into account the conclusions of the technical expertise report that prove the absence of a damage to the local budget, but also in obvious contradiction with the doctrinal and jurisprudential orientation in the matter.

1. As we have shown, by Decision no. 39/2017, in point II, sub-points 2, 3 and 4, measures were established in charge of A.T.U. Commune B. regarding *the repair of the damage*. Or, by the sentence no. 60/13.02.2020, both Decision no. 39/2017 and the measures ordered were annulled, with the motivation that că *it was not proved the occurrence of a damage in the local budget*. This means that the essence of the judicial solution is inextricably linked to *the problem of the existence or non-existence of a damage.*

Moreover, from the sequence of the provisions of Law no. 94/1992 on the organization and functioning of the Court of Audit, it results that the purpose of the financial audit is to identify the deviations of legality and regularity regarding the financial situations. According to paragraph (3), the first thesis of Article 33: "In the situations in which the existence of deviations from legality and regularity is ascertained, which determined *the occurrence of damage(s)* (emphasis added), this state of affairs is communicated to the management of the audited public entity." The role of the financial audit is to notify their existence, leaving the management of the verified entity the task of establishing "*the extent of the damage and ordering measures to recover it*", according to the second thesis of the same paragraph and article.

The text of Article 33 paragraph (3) of the final thesis of Law no. 94/1992 imposes on the audited entity the obligation to establish the extent of the damage and to order the taking of measures for its recovery, without, however, providing any indication, not even

by way of example, on the way to follow, leaving it to the audited entity to choose the most efficient and appropriate ways to recover the damage.

This means that the court notified with the verification of the legality of the issued decision had the obligation to verify *whether or not a real damage occurred*, but this aspect was treated by the court in a unique way, contrary to the legal provisions.

2. Thus, the Court found that there are two distinct responsibilities: *a contractual liability* of A.T.U. Commune B. with the executors of the works, conditioned by the existence of a damage, and *an administrative and tax liability of the public institution* in terms of administration and use of public financial resources, in the sense provided by Law no. 94/1992 and by Law no. 273/2006 on local public finance which would not depend on the occurrence of a damage, being sufficient to establish the illegality of the preparation of the tax statements. It is expressly stated that these two responsibilities "do not overlap".

But the reasoning of this statement is only partially correct, if we take into account the fact that by Decision no. 39/2017 the deviations regarding the preparation of financial statements were notified and it was requested to take measures *to repair the damages*, and then the A.T.U. Commune B. to go against its contractual partners, invoking the contractual liability for the non-execution, in full, of the works. So, we have a main liability, of administrative and tax nature, and a secondary liability, subsequent, the contractual one, which depends on the meeting of the conditions of validity of the main one, especially on the existence of a damage.

Thus, logically, if no actual damage had been notified by the supervisory body, what would be the reason for incurring the contractual liability of third parties conditioned by the proof of fulfillment of the obligations assumed by the contract? In other words, in order to comply with the control body's provision, an action must be brought in liability for the contract which involves proof of the commission of an unlawful act concerning the performance of the contract, damage and connection between them, the guilt being presumed by the non-performance of the contract. Or, if it is noted by the control body that the site disposition has not been drawn up, but in fact it has been proved by expertise that there is no damage, the action in contractual liability has no chance to be admitted.

Likewise, if we discuss the commitment of non-contractual liability of persons who are guilty of causing damage, it should prove to meet the cumulative conditions provided by Article 1357 of the Civil Code, of which the most important is the existence of damage. Without it, it will not be possible to carry out the measure of "reparation" from civil servants or other persons who are guilty and, thus, the content of the decision would have no purpose.

What the court did not take into account is that the "illicit deed" is one, the non-elaboration of the construction site disposition, in connection with which, illegally, it was ordered to take measures to repair the damages, these not being proved. Therefore, only to the extent that damage has been found in the local budget, it will be possible to take further action from the contractors to repair this damage.

Even if the two responsibilities "do not overlap" as stated in the decision, we cannot argue that, depending on the facts of the case, there are two types of fully autonomous legal liability, as there is a close link between them. We cannot analyze Decision no. 39/2017 which imposes measures to repair the damages caused to the local budget, although it retains only formal aspects, if we do not identify *what these damages consist*

of in order to establish based on which legal, contractual or non-contractual provisions must be taken the following repair measures.

Thus, regarding this aspect, we do not agree with the statement in the commented judgment according to the issue of damage would exist only "in the contractual relations between the public authority and the executors", because the liability of the local public authority cannot be entailed *sui generis* only on the formal aspect of the lack of construction site provision, but the actual damage caused must be proved.

3. As regards *the legal nature of the public institution's liability* in terms of the administration and use of public financial resources, the court described it only as "administrative and tax liability", without taking into account that the control body complained of damage and ordered that measures be taken to repair it.

Undoubtedly, in this case we are in the presence of a *extra-contractual patrimonial liability* with the mention that in this so generous sphere is included the administrative liability conditioned by the existence of a damage, aspect that was not taken into account by the court. Although the "*illicit deed*", which is the generating factor of liability, concerns the incorrect way of drawing up the financial statements which must reflect the reality, so as to prevent harmful consequences, we are concerned about a *damage* which could automatically lead to the qualification liability as being of a patrimonial nature.

According to the orientation of the contemporary doctrine, any illicit deed that causes a damage if it was committed outside a contract, engages an extra-contractual patrimonial liability, being subject to the general provisions of the Civil Code, Article 1349, Article 1357. With this wording more comprehensive than "tortious liability", *all illicit acts prejudicial* to those committed in performance of a contract were included in this scope.

3. We do not share the court's view that the damage concerned "(...) *both the damage caused by the non-existence of works settled from public funds and the deviations from legality and regularity which led to the existence of damage."* It follows from the statement that two of the conditions of the patrimonial liability are reunited under the name of "damage", respectively the *illicit deed* and its consequences, respectively the *damage.* By their nature, the "*deviations*" invoked are illicit acts consisting in actions or inactions by which the legal provisions have been violated, not being of the nature to be identified as a damage. In the mechanism of engaging the patrimonial liability, the illicit deed is the cause, and the damage is the negative effect produced, so that the two conditions cannot be cumulated simply in the generic name of "damage".

The court illegally deduced that it would constitute a damage and only the non-elaboration of the supporting documents, even if the works were executed, as it happened in the analyzed case, which contradicts the content of the notion of "damage" outlined in doctrine and jurisprudence.

In this regard, we consider that the entire legal construction of the judgment is deficient in the way in which the "damage" was analyzed as an essential condition for engaging a non-contractual patrimonial liability.

As stated in the doctrine, the *damage* is "not only the condition of liability, but also its extent, in the sense that the perpetrator is liable only to the extent of the damage caused" (Pop, 2000). Paragraph (1) of Article 1349 of the Civil Code regulated *the*

general obligation not to harm or prejudice another person, being invoked any "violation (...) of the rights or legitimate interests of other persons" for which the guilty "is liable for all damages caused, being obliged to repair them completely". This way, the definition formulated in our traditional doctrine was taken, according to which the prejudice or damage represents those "*negative patrimonial (...) and moral effects that a person experiences as a result either of the illicit conduct of another person or of a human act, an animal, a thing or an event that removes the criminal liability of the agent*". (Eliescu, 1970) In order for the victim to obtain compensation from the responsible person, the *damage* must be *certain*, both in terms of its existence, current or future, as well as concrete evaluation possibilities, and *not yet repaired.*

It has rightly been pointed out in contemporary doctrine (Pop, 2020) that "damage is the most important element of reparative civil liability, being a primordial, essential, necessary and independent condition of it".

5. As a result of the brief exposition of the case, the construction works were actually carried out and received, but the preparation of the site provision for additional payments was omitted in relation to the technical solutions that were established during the execution. formal aspect of the supporting documentation that should have existed at the time of payment, but, in concrete terms, this aspect was proved by the documents of receipt and by the technical report damage to the local budget of A.T.U. Commune B.

In this regard, the court misinterpreted the provisions of *Article 54 of Law no. 273/2006 on local public finance* which, after establishing the obligation to complete the four stages in the process of budget execution, commitment, liquidation, ordering, payment (paragraph 1), conditions the payment of "(...) receipt of goods, execution of services and the like, according to the legal commitments concluded" (paragraph 5).

The minutes of receipt of the work were submitted in the file, proceeding to their verification, and then the payments to the contract executors were approved. Or, in such a situation, these documents had to be had by the court, as well as the conclusions of the technical expertise carried out, which concluded in the sense that no damage was caused to the construction of the communal road.

6. Hypothetically, the A.T.U. COMMUNE B., being a legal person of public law, with full legal capacity and own patrimony, a subject of the tax law, holder of a tax code and of accounts opened with the territorial treasury units, as well as at banking units. The Administrative Territorial Unit is the holder of the rights and obligations deriving from the contracts regarding the administration of the goods belonging to the public and private domain in which it is a party, as well as from the relations with other natural or legal persons, under the law.

The provisions of Decision no. 105/R/2021 of Târgu Mureș Court of Appeal led to a confusing legal situation for the A.T.U. COMMUNE B. by the fact that, although the administrative action was rejected as unfounded, being maintained point 10 of Decision no. 39/20.10.2017 of the Director of the Mureș Chamber of Audit, Conclusion no. 11/14.12.2017 issued by the Commission for the settlement of Appeals, the measures established in point II, sub-points 2, 3 and 4 of the Decision no. 39/2017 for the recovery of the "damage" cannot be fulfilled precisely because this damage does not exist, the construction works being actually carried out.

On the other hand, the drawing up of the site provision is part of its obligations as a beneficiary, so that it will not be able to plead its own fault for the liability of the

contractors. In the absence of a contractual illicit deed and without causing damage, their contractual liability cannot be incurred. In addition, there is the issue of prescribing the action, under the conditions of Article 2517 of the Civil Code, if we take into account the fact that on 09.12.2014 the final reception of the work was made and its payment, and on 14.12.2014 the Conclusion no.11 was issued by which the appeal of A.T.U. COMMUNE B was rejected.

In conclusion, we consider that the Decision no. 105/2021 of Târgu Mureş Court of Appeal is an illegal and ungrounded decision, and the legal arguments applicable to the case are those contained in the sentence no. 60/2020 of Mureş Court of Law which qualified liability for illegal use of public funds as a liability of a patrimonial nature, conditioned by the proof of the occurrence of damage. By commenting on this case and the arguments presented, I argued for the need to correlate between patrimonial administrative liability and extra-contractual civil liability, given that their central element is the damage, an essential condition for engaging any patrimonial liability, whether administrative or civil.

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