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CHALLENGING THE LEGAL CHARACTER OF THE FINANCIAL CORRECTIONS APPLIED TO SOME TRANSGRESSIONS RELATED TO THE USE OF THE EUROPEAN UNION FUNDS
(ICCJ , Decision No. 1353 from 18th March 2014, the Administrative-Contentious and Fiscal Department)

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Abstract

The current analysis will debate the grounds and lawfulness of the financial corrections applied to the transgression of the procedure for purchasing assets/works/services using the European Union funds. For this purpose, the reference point is the special legislation and legal literature in the field, mainly Decision No. 1353 from 18th March 2014 of the High Court of Cassation and Justice (ICCJ), the Administrative-Contentious and Fiscal Department.

In their essence, financial corrections are regulated by the Government Emergency Ordinance No. 66/2011 pm the prevention, acknowledgement and punishment of irregularities emerging in the use of European Union funds and/or national public funds corresponding to them[4], they constitute a novelty element which the legal act mentioned above brings, in comparison to the former regulation. Special law, at article 2 letter o) speaks of "administrative measures taken by the competent authorities (…), consisting in the exclusion from the European Union funds and/or national public funds corresponding to them of the expenses for which an irregularity was noted".

The definition mentioned above points out that the essential condition for applying the financial correction is the existence of an irregularity in the use of European Union funds, which receives the following meaning according to special law: "action or inaction of the beneficiary or the authority with competences to administer European Union funds, which caused or can cause prejudices to the European Union budget/the budgets of international public donors and/or the national public funds corresponding to them, as a result of an amount of money which was unworthily paid". Irregularities are taken into

[1] ICCJ - High Court of Cassation and Justice.

[2] *www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=ide&customQuery%5B0%5D.Value=115752*

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[4] Official Gazette, Part I, No. 461 from 30th June 2011.

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account as transgressions and not as a fraud, the latter having another legal regime according to law.

At the same time, the law also includes the condition for the EU budget to be prejudiced or potentially prejudiced by the transgression committed, an aspect which will also be subsequently analysed.

Corrections are applied by means of the transgression finding and financial corrections enforcement reports, issued by the authority administering EU funds, according to the procedure provided for by the special law; these are qualified by the special law as administrative acts (with financial character – our note) – debt titles.

The immediate effect of applying the correction resides in the exclusion from the EU funds/national public funds corresponding to them of the expenses in regard to which a irregularity was noticed. Concretely speaking, the exclusion (financial correction) consists in the total or partial diminishment by percentages of the amounts of money coming from the EU Funds, which were used by infringing the law, according to the Methodological Norms for Enforcement of the Government Emergency Ordinance No. 66/2011. The diminishment percentage is different, in relation to the transgression committed.

In a case file which will be subsequently discussed, the Ministry of Regional Development and Tourism (MDRT – the authority for the funds management), by means of its authorized control structure, acknowledges that the Regional County of Buzau (CJBz) – which was the beneficiary of the contract financed from EU Funds, having the objective "Modernisation of infrastructure of access to tourist areas with proven potential of Buzau county") – had vitiated the procurement procedure organized for attributing the contract in question for being enforced, by transgressing the provisions of G.E.O. No. 34/2006 on the attribution of public procurements contracts, contracts for concession of public works and the contracts for concession of services, enforceable in the case file involved.

For this reason, MDRT issued the transgressions finding and financial corrections enforcement report, amounting to 5% of the value of the financing contract under litigation.

The grounds and lawfulness of enforcing such corrections will be subsequently analysed in the present work.

Keywords:

Ministry of Regional Development and Tourism, High Court of Cassation and Justice (ÎCCJ), European Union, measures instituted by the transgressions finding and financial corrections enforcement report and makes an appeal.

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Reference points taken from the legal practice

The beneficiary of the EU funds – CJBz – does not take note of the measures instituted by the *transgressions finding and financial corrections enforcement report* and makes an appeal, according to article 46 of G.E.O. No. 66/2011, at the Commission for the Appeals Settlement within the Ministry of Regional Development and Tourism. With the Settlement Decision from 18th April 2012, the Commission rejects the appeal as ill-founded and illegal.

By not accepting the decision given by the Commission, the beneficiary CJBz goes to the Bucharest Court of Appeal, with an application for summoning the Minister of Regional Development and Tourism, but also the Court of Accounts, demanding the annulment of the Decision on the Appeal Settlement, but also the transgression finding and financial corrections enforcement report.

The Court of Appeal, after settling this case file brought before it, rejects the plaintiff's action as illegal and ill-founded.

Seized with the appeal application of the recurrent plaintiff CJBz, the High Court of Cassation and Justice (ÎCCJ) dismisses its appeal, by considering unjust the reasons invoked by it. Consequently, the transgressions finding and financial corrections enforcement report will be enforced according to special law.

This case file points out *several aspects*, taken into account by the courts when giving their judgments, which will continue to be subsequently analysed by us.

a) the processual quality of the entity which issued the audit report – the Court of Accounts. In the case file involved, the Audit Authority within the Court of Accounts issued an Audit Report, which was notified to the authority administering EU funds, in this case the Ministry of Regional Development and Tourism (MDRT). The report contained the irregularities noted during the audit activity, which were committed by CJBz when using EU funds. Having the duty to implement the measures contained by the report, even if they had a recommendation character, the management authority (MDRT) organized the control activity related to the transgression found ("recommendations"), which was ended by issuing the transgressions finding and financial corrections enforcement report.

On this ground, the plaintiff also summoned the Court of Accounts. But the court admitted the exception regarding the lack of passive processual quality of the Romanian Court of Accounts, rejecting the action of the plaintiff in opposition to this. The object of the appeal was the finding report issued by MDRP, which had a passive processual quality. In

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other words, the audit report constituted only the ground for exerting the control related to transgressions.

Thus, the court correctly mentioned that the provisions of article 16^1 of Law No. 554/2004, according to which the court can also introduce other law subjects in the case file, could not be applied in the involved circumstance.

b) the type of the term in which the finding report must be issued. Special law, at article 21 paragraph (3), corroborated with the provisions of article 21 paragraph (26), provides a 60 days term for issuing the finding report, which starts to elapse in this case from the notification of the Audit Report to the Audit Authority within the Court of Accounts. In fact, the challenged act (the finding note) was issued after this term expired; considering that the 60 days term is a termination of rights one, the plaintiff claimed that the issue of the finding note was *illegal* also from this perspective (the transgression of a procedural term – our note).

Yet, both the first instance court and the appeal court qualified the term in question as a *recommendation* one, and not a termination of rights one, as the lawmaker foresaw no sanction for its transgression – the termination of rights of the person enjoying the rights or a similar action capable to affect the validity of the act concluded.

Going over the term recommended by law is regulated as transgression by article 60 paragraph (1) letter d) of G.E.O. No. 66/2011, being capable to trigger the sanctioning of the public servant guilty of this transgression; going over the term provided does not also influence the act involved by the litigation. Consequently, the procedure for issuing the finding note is not vitiated under this aspect, the courts appealed in the case file considering unjustified this reason invoked by the plaintiff.

In our opinion, the terms instituted at article 21 by the special law have a recommendation character and the courts have made a correct assessment.

c) the transgression committed by the recurrent plaintiff (the deed). The plaintiff – contracting authority (CJBz) did not observe the period which was supposed to be between the transmission of the participation announcement to be published in the European Union Official Journal and the deadline for filing the offer, of at least 52 days, provided at article 75 paragraph (1) of the G.E.O. No. 34/2006. In fact, it reduced the minimum period of 52 days to 43 days, without benefitting from the reduction of the term provided at article 75 paragraph (4) of the G.E.O. No. 34/2006, a reduction invoked as

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not justified by it. On this ground, the court ruled that a transgression had been committed, and rejected the action of the plaintiff as not justified.

Without a doubt, we can speak here of the vitiation of the procedure for the attribution of the public procurement contract. In the way it is regulated, the regular procedure has been transgressed and must be subject to financial corrections, both courts involved considering that a transgression was involved. According to the Annex to the G.E.O. No. 66/2011, Part 1A), the transgression can be classified at point 1.3. and called "the non-observance (by the contracting authority) of the deadline for filing the offers or of the date for receiving candidatures (from the potential offerers)".

d) prejudicing the EU budget as a result of the transgression committed. The special law contains the following condition: the transgression (irregularity) found "has caused or can cause prejudices to the European Union budget (…) as a result of an amount of money which was unworthily paid". "Has caused prejudices" signifies already the existence of a prejudice which must be proven; "which can cause prejudices to the European Union budget" points out only a *potential prejudice*.

Concretely speaking, which is the prejudice caused to the EU budget by vitiating the procedure for the attribution of the public procurement contract – in this case by not observing the term provided by the G.E.O. No. 34/2006? In terms of the prejudice, the case file mentions the *unworthy payment* of an amount of money. According to the pieces of the file and the interpretation given by the courts, the unworthy payment concerns the amount of money itself corresponding to the public procurement contract from 14th September 2009, attributed on the basis of a procurement carried out by transgressing the procedures of G.E.O. No. 34/2006. By doing this (vitiating the procedure), it was considered that the plaintiff caused a prejudice to the European Union budget, the court assessing that his defences[5] according to which no prejudice existed, did not have a ground.

The Supreme Court (ÎCCJ) ruled first of all on the basis of the interpretation of the provisions of article 2 paragraph (1) letter a) of special law, which includes in the field of irregularities "*any transgression* (action, inaction – our note) from legality, regularity and conformity, which prejudiced or can cause prejudices to the European Union budget (…)". For

[5] The plaintiff has even tried to prove that the way in which he behaved was aimed at saving his actions and not causing prejudices to the EU budget, mentioning an amount of 35000000lei, that is about 48% of the budget allocated to its project. The defence was considered groundless by the court.

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this purpose, ÎCCJ concludes: "Consequently, the prejudice caused to the European Union budget or national budgets can be real or potential, while the existence of an irregularity and the inadequate use of the accessed funds can trigger the sanction of their partial or total restitution".

Then, in order to decide the rejection of the appeal made by the CJBz, ÎCCJ used the solutions of CJEU as argument, according to which "even when they do not have a certain financial impact, transgressions can affect the European Union financial interests, a fact which entitles the state to demand to the beneficiary involved the reimbursement of the financing". In brief, the general rule is that "any transgression must lead to the withdrawal of the advantage illegally obtained".

On the basis of these normative and practical arguments, ICCJ considered the finding note legal, rejecting the appeal made by CJBz.

This assessment is however not deprived of any criticism. It should be mentioned that for the enforcement of the contract thus attributed no unjustified or illegible payments were made. In this hypothesis, which is the prejudice caused by transgression? In this context law, and the authority for its enforcement – the one administering the EU funds – sanctions the transgression itself, by applying a 5% correction out of the value of the work attributed. Why? For the simple reason that the transgression is regulated by the special law and that by means of it a *regularity* demand is transgressed.

In our opinion, we cannot speak of a transgression with a certain financial impact, but which must be nonetheless sanctioned. The irregularity committed cannot be ascribed either to the provisions of article 6 paragraph (3/3), corroborated with article 27 paragraph (3) of the G.E.O. No. 66/2011, referring to the "transgressions having no potential financial impact" and for which corrections are not applied (percentage reductions). Consequently, the action of the plaintiff of enforcing them is justified.

At the same time, it should not be forgotten that financial corrections constitute a novelty element according to the G.E.O. No. 66/2011. They have replaced criminal accountability for the transgressions of the regime related to the use of EU funds from the former regulations. Financial corrections, as they were conceived, have a different enforcement regime and involve different conditions as compared to criminal accountability, subject to common law.

G.E.O. No. 66/2011 qualified corrections as administrative measures, enforceable if a transgression under its incidence takes place, having or not a certain financial impact on the European Union budget.

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In this moment, instituting financial corrections is an act meant to discourage transgressions. On the contrary, not applying these corrections would encourage illegal attitudes, on the reason that there is no certain financial impact.

Nonetheless, we consider that if corrections are not attached to a certain prejudice, their enforcement points out rather their sanctioning character than the recovery one.

e) the jurisdiction to which the finding and corrections enforcement note under litigation can be subject to. The finding note has the quality of administrative act – debt title, with the possibility of making it subject to:

- the administrative jurisdiction, to which special law refers to – the administrative appeal, which is here under the competence of the Commission issuing the act – the Ministry of Regional Development and Tourism;

- the judicial jurisdiction, with the possibility of a double jurisdiction degree: the settlement by the Court of Appeal which rejected the action of the plaintiff as not justified (the civil sentence No. 5958 from 22nd October 2012, the administrative contentious and fiscal section VIII); the appeal, which is under the competence of the High Court of Cassation and Justice, which rejected the appeal of CJBz as ill-founded, mentioning the solution of the first court (Civil Decision No. 1353 from 18th March 2014, the administrative contentious and fiscal section).

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