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Administrative Liability of EU Funding Recipients for Breach of Procurement Rules

Emphasis on the Cases of Romania and Italy

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Demis-M. Sparios

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INTRODUCTION

1.1. Prolegomena

The importance of the Cohesion Policy[1], developed by the European Union in order to reduce the economic disparities between its various regions, for the newest, as well as for the oldest of its Member States, is indisputable.

The weighting of this policy within the balance of main interests of the EU is also an important one and is reflected in the big number of general and specific legal norms that regulate this field at the EU level. These norms are aimed at ensuring the effective assistance provided by the EU to the less developed regions, as well as the proper protection of the financial interests of the Union[2]. This protection is ensured mainly by sanctioning the illicit behaviours of the beneficiaries of the financial assistance, the procedure and conditions of this sanctioning being regulated in detail both at EU level and, especially, at the national level, in the Member States.

The regulation of the management and use of the financial assistance delivered through the EU's Cohesion Policy, including the sanctioning of unlawful behaviours of the beneficiaries, is mostly technical and practical. It is thus not easy to define from the point of view of the legal theory, meaning

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[1] For an extended assessment of the importance, advantages and deficiencies of the Cohesion Policy, with specific data from the previous programming periods, see Bachtler, J., Berkowitz, P., Hardy, S., Muravska, T. (editors), „*EU Cohesion Policy*", „Routledge Taylor & Francis Group", London and New York, 2017. Also, in respect of the dependence of the cohesion policy on the compliance with the economic governance rules, see S. Verhelst, „*Cohesion Policy and Sound Economic Governance: A Loveless Marriage*", in „Polish Quarterly of International Affairs", Volume 23, Issue 3 (2014), pp.113-126.

[2] In the sense that the protection of the financial interests of the European Union is a complex construct, having a dimension of administrative practice, generated by the working procedures of the managing authorities and of the other competent authorities , as well as a judicial dimension, transposed in the administrative or criminal litigations, see I.M. Costea, „Despre măsuri și sancțiuni administrative în materia fondurilor europene" (*„On Administrative Measures and Penalties in the Field of European Funds"*), in „Analele Științifice ale Universității Alexandru Ioan Cuza Iași" („Scientific Annals of the Alexandru Ioan Cuza University Iași", Tome LXIII, Legal Sciences, 2016, nr. II, pp.273. This study looks pre-eminently at the administrative dimensions, both practical and judicial.

that the illicit deeds sanctioned by the EU and national law in this field, as well as the sanctions themselves are not expressly attributed to a widely recognised pattern, such as the legal responsibility (liability).

Neither the legislation, at EU or national levels, nor the judicial practice (with very few exceptions[3]) refer to the existence of a liability triggered by the occurrence of irregularities during the use of EU financial assistance. As regards the doctrine, although there have been some references to such a liability, one cannot consider that there is already a theory built in this regard.

The present study aims, in these conditions, at bringing a contribution to the construction of the theory of the liability entailed by the commission of irregularities in the public procurement procedures used within the projects financed by EU structural and investment funds (ESIF).

In order to achieve its aim, the book will look at the concept and nature of this liability, at its elements, as well as at the procedure to be complied with in the process of triggering this liability. The liability will be looked at in general, but also its specificities at the national levels of Romania and Italy will be analysed.

The present study has its importance not only from a theoretical point of view, but also from a practical one. Thus, the clarification of what the nature of the liability at hand is, will help to the identification of the principles applicable to this type of liability. Therewith, following the identification of elements of the liability and of their specific features, the finding of irregularities and the determination of the applicable sanctions (financial corrections) will become more accurate and easier. Furthermore, by establishing the nature of the sanctions (financial corrections), the identification of the legal rules applicable to them will be easier and clearer.

1.2. The Relevance and the Limits of the Research

The area of Structural and Investment Funds has been approached by the doctrine, more from economic and political points of view[4], and less from a legal perspective[5]. Moreover, the liability entailed by breach of procurement rules within the expenditure of the EU Funds has been even much less

[3] There are some references in the Romanian judicial practice and doctrine to the the liabiliy at hand, as will be shown later in the book, especially in the sections regarding the legal nature of the liability.

[4] The political and economic perspective has less relevance for this study. Thus, the doctrine adopting this perspective will be only cited where this perspective overlaps with the legal perspective.

[5] The legal perspective is the one adopted in this study, thus the doctrine adopting this perspective will be always cited where relevant.

approached by the scholars, which avoided the subject probably because this area is seen as being excessively technical.

The objective of the study is to provide a comprehensive analysis of the nature and of the elements of the liability entailed by breaches of procurement rules in the expenditure of ESI Funds, both from a theoretical and a practical perspective. My study also aims to analyse the administrative proceedings applicable for the finding of these breaches and for the application of the measures necessary for repairing the damage.

The breaches of law in this field may be more or less severe, so they entail either a criminal liability (where they are considered crimes, thus of increased gravity), or a non-criminal one (in all the other cases).

The research will be limited to and focused on the *non-criminal liability*, but the similarities and differences as opposed to the criminal form of the liability will be analysed, especially where the irregularity, as the sole objective ground of the liability, will be looked at.

Moreover, it must be stressed that the research will be limited to the breaches of *procurement rules*, committed by the beneficiaries of the financial aids, even though there are also breaches of other legal provisions which entail the application of measures or penalties by the competent authorities. This limitation is justified by the fact that these kinds of breaches are the most numerous in practice, and also by the multiple specificities that characterize them, leading even to issuance of normative acts or guidelines regarding the performance of controls over the public procurement procedures followed within the EU funds expenditure, and the types of measures or penalties applicable thereto.

The relevance of the research for the legal field, both from a theoretical view and from a practical one, consists in that it seeks to answer certain questions of interpretation and application of the law, raised in theory and practice, both at the EU level and at the national level. As regards the national level, having regard to the fact that Romania, one of the newest EU member states, and Italy, one of the oldest members, are amongst the most important beneficiaries of the EU funding[6], the case of Romania will be looked at in detail, but reference will also be made to the national legislation and practice in Italy, especially with regard to the most important research questions.

Even if the EU Law or the Romanian and Italian domestic Laws do not contain provisions with regard to the concept of liability for breaches of law in the process of expenditure of EU Funds, and in the case-law of the

[6] Italy and Romania are placed second and sixth, respectively, in respect of total allocated budget of ESIF for the programming period 2014-2020, according to the updated data provided by the European Commission at the following internet address: *https://cohesiondata.ec.europa.eu/overview* (last accessed on the 30 May 2019).

ECJ or of the national courts this liability is not mentioned, its elements can be found both in the legal provisions and in the case-law, allowing thus to outline and conceptualise the said liability.

Given the fact that such a detailed outlining and conceptualisation has not been done until now, the relevance of this research appears to be evident. In terms of relevance, it is also important to emphasize that the topic of accessing and use of the ESIF is very important for Romania. During the first decade of its EU membership[7], despite its rate of economic growth, which was the biggest in EU, Romania has lagged behind the great majority of the other Member States in restructuring and modernising its economy, also because of a too small rate of EU funds' absorption[8]. Given that, a study subjecting the liability for misuse of EU Funds by breaching procurement rules, in the light of the previous experiences in Romania, as well as of the legislation and the practical experience of a much older Member State, namely Italy, could be helpful in identifying the mistakes of the past and trying not to repeat them, in order to improve the absorption of funds[9] and to achieve a more useful implementation of projects and/or programmes financed by European Funds.

Summarising, given that the liability entailed by the misuse of EU funds through infringing public procurement rules has been poorly theorised in the relevant legal doctrine and case-law, this study aims to address this gap in the theory and also to offer a framework for possible further developments.

1.3. The Structure of the Book.

In order to cover all the substantive law and procedural law aspects relevant to the research, the book is structured in six chapters, each of them containing several sections. The last section of each chapter will be reserved for the conclusions to that chapter.

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[7] As known, Romania is a member of the European Union as from the 1st of January 2007.

[8] For an opinion in the sense that Romania's poor absorption of the funds stems from its systemic problems, caused by corruption, poor legislation, inefficient management and control, bureaucracy and conflicts of interest, see A. Dumitrescu, I. Tache, *„The Absorption of UE Funds in the Current Context of the Cohesion Policy"*, in „Bulletin of the Transilvania University of Brasov", Vol.4 (53), No 2, 2011, pp 215-220. Also, for an analysis of the causes of the poor absorption of the funds, and proposals for the improvement of this absorption, see M.G. Gherman, „*An Examination of the Romanian State Budget Regarding the European Funds: Co-Financing Provisions*", in „Procedia - Social and Behavioral Sciences", Volume 116, February 2014, pp 3391-3394.

[9] The effective EU Funds' absorption rate achieved by Romania on 31 March 2017 has amounted to 79,23% (EUR 14.880.743.577), within the Operational Programmes included in the programming period 2007-2013 (see, in this respect, the information published on fonduri-ue.ro – last accessed on 30 May 2019).

The *first chapter* has the role of outlining the contents of the book, and of determining the limits, the relevance and the methodology of the research, as well as highlighting the research questions to be answered and their importance for the legal doctrine.

The *second chapter* looks at the legislative framework regarding the structural and investment funds, with special regard to the part that concerns the mistakes made by the beneficiaries in public procurement award procedures and execution of contracts within projects or programmes financed by EU structural and investment funds. The assessed legislative framework will be both those at the EU level and at the level of the two Member States subjected by this study (Romania and Italy).

The third chapter features the main subject of this research: the concept of liability of EU Funding recipients for breach of procurement rules. First of all, the chapter will look at the reasons supporting the idea that the liability is a suitable concept in the context. Further, the concept of liability will be looked at from the perspective of its legal nature and its elements, as well as of its place among the other types of liability.

Within a section dedicated to the elements of the liability, each element of this liability will be looked at in detail, with reference to issues arisen in administrative or judicial practice, and also to the interpretation brought by the European Court of Justice or by national constitutional and judicial courts on some of these issues. The first element of the liability to be looked at, in the first subsection, is the irregularity, with all its components: the illicit deed, the prejudice, the causal link between them and the guilt. The concept of *irregularity* will be delineated and the similarities and differences from the concept of *fraud* in public procurement financed by EU Funds will be analysed. The types of irregularities provided for in the normative acts and those most often met in practice will be scrutinised. Therewith, the classification of irregularities will be also looked at, from the perspective of their regulation and of the relevant interpretation brought by ECJ and national courts. Subsequently, each element of the irregularity will be looked at separately. Thus, the illicit deed is to be analysed in terms of the different types of infringed normative provisions and of different kinds of infringements, committed within the award procedure of public procurement contracts or during the performance of those contracts. It will be shown, in this respect, that the illicit nature of the deed has to be assessed by taking into consideration different legal and normative provisions, depending on the wrongdoer's capacity of public contracting authority or of a mere private beneficiary of EU Funding. Thus, as regards the beneficiaries having the capacity of public *contracting authorities* pursuant to the public procurement legislation, a distinction will be made according to the value of

the contract, namely if this value stands above or below the legal thresholds, set out by the public procurement directives and by the national legislation, different legal regimes being applicable in each situation. With regard to the *private beneficiaries* that do not have the capacity of public contracting authorities, the specific provisions for procurement award procedures set out in the domestic legislation are applicable, based on the financing agreement concluded by these beneficiaries with the designated national authorities. As regards the *prejudice*, there will be an analysis on its nature, namely if it must be effective or it may also be latent, in the light of the legal provisions and of the interpretation brought by the Union's and/or national judicial courts. The analysis of the element of *causation* will provide the opportunity of discussing to what extent the requirement of a causal link between the illicit deed and the prejudice can be considered to have been met, in circumstances where the deed of the perpetrator (the grant recipient) is concurring with another person's deed or with other circumstances which determine, along with the perpetrator's deed, the damage. Another element of the liability, which will be looked at, is the *guilt*. The analysis will aim to answer the questions whether the guilt is a veritable element of this liability, and if there are differences in terms of the legal regime depending on the specific degree of guilt.

Furthermore, the analysis in the next subsection will regard the consequences of the commission of irregularities, with an emphasis on the financial corrections that can be applied by the Member States, through their designated authorities and, subsequently, by the European Commission. The different types of financial corrections (i.e. specifically quantified, extrapolated or flat rate corrections) will be analysed. A detailed look in this subsection will be taken to the guidelines issued by the European Commission and, respectively, by the Romanian Government, with regard to the rates of financial corrections applicable where breaches of procurement rules occur within the expenditure of EU Funds. At this subsection the application of the principle of proportionality in finding irregularities and, especially, determining the financial corrections, as a core principle, will be scrutinized. At the end of this chapter, before the conclusions, a section will be reserved for a summary of the comparative aspects between the Romanian framework and the Italian model, discussed within the chapter.

The next two chapters will discuss the procedural aspects. A detailed analysis will be made with regard to both the administrative procedure of audit and control performed in order to find the commission of irregularities in public procurement procedures financed by EU Funds, and the administrative and judicial remedies and appeals open to the persons

allegedly aggrieved by the administrative acts of finding irregularities and determining the financial corrections.

Then, within the *fourth chapter* a review of the competent authorities, both at national levels, in Romania and Italy, as well as an analysis of the administrative proceedings applicable to the finding of irregularities and determination of financial corrections will be performed.

The *fifth chapter* will look at remedies, including avenues of administrative appeal available to the recipients of EU Funds allegedly aggrieved by acts of finding irregularities and applying financial corrections. Both Romanian framework and Italian model will be looked at, emphasizing the similarities and differences between the systems developed by the two Member States. Within the analysis of the administrative procedures of audit and control, an examination of the acts issued as a result of the performance of these procedures will be also performed, in terms of their legal nature and of the applicable regime. A different section of the chapter will be reserved to the analysis of the actions available to the Member States allegedly aggrieved by the acts of determining financial corrections, issued by the European Commission with regard to projects or programmes financed by EU Funds. As regards the audits and controls, the competent authorities and bodies will be identified, as well as their corresponding prerogatives.

The *sixth chapter* will feature the summarising observations with regard to all the aspects discussed within the book, as well as the drawing of the general conclusions to the book. Some *de lege ferenda* suggestions and indications about the importance of the study to the legal research will be also included in this final chapter.

1.4. The Research Methodology and Questions.

The research aims, as already shown above, at approaching the concept of liability of the beneficiaries of EU Funding for breaches of procurement rules within the financed projects or programmes, from theoretical and practical perspectives, and also to critically assess the administrative and judicial practice on this matter. In this respect, the legislative framework and the administrative and jurisdictional practice at the EU level, as well as at the national levels in Romania and Italy, will be looked at. As regards the national levels, a comparative assessment of the scrutinised aspects in Romania and Italy will be performed.

Given these objectives, the methodology of research used in order to attain them shall be, in a great measure, based on the doctrinal method[10].

[10] „Doctrinal exegesis remains important, as scholars map the relevant legal and quasi-legal terrain, seeking to identify points of consistency and coherence, as well as inconsistencies

Thus, most of the content of the book will be the result of the analysis of the legislation at the European Union's level, as well as at the national level. Therewith, the doctrine and case-law on the matter will be examined, in order to find the right and correct answers to the research questions.

I agree with the view that the doctrinal method must always be the basis of a solid and well-founded research[11]. Indeed, valid research has to be "built on sound foundations, so before embarking on any theoretical critique of the law or empirical study about the law in force, it is incumbent on the researcher to verify the authority and status of the legal doctrine being examined".[12]

The topic of the book requires also a historical assessment of the legal framework, in order to draw the right conclusions and to understand how this framework evolved to what we have in place today.

The research will also feature a critical approach[13] to the matters in hand. There are a series of legal provisions, but also interpretations given by the Romanian national judicial courts and even by the Romanian Constitutional Court, that are arguable and must be seen from a critical perspective, based on reasoned arguments. In Italy, as well, there are some disputable aspects in the process of applying the relevant legislation.

The research will look at certain subject-matters of the book also from an interdisciplinary perspective. This will be the case, for instance, of the similarities and differences between the criminal liability and the non-criminal one and between the concept of irregularity and that of fraud. These concepts belong to different legal disciplines and justify, thus, an interdisciplinary approach.

The comparative law method has also its place and reason in the architecture of the research, in order to provide an assessment of the differences and similarities between the systems of control and management of EU Funding expenditure, designed by the two EU Member States.

All the above methods will be used in order to answer the questions of the research.

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and incoherencies in legal regimes" - J. Shaw, J. Hunt, „*Fairy Tale of Luxembourg?: Reflections on Law and Legal Doctrine in European Integration*", in D.Phinnemore&A.Warleigh (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome*. Palgrave Studies in European Union Politics, Palgrave Macmillan 2009, p 99.

[11] See T. Hutchinson, „Doctrinal research" in „*Research Methods in Law*" (edited by D. Watkins and M. Burton), „Routledge" Publishing House, New York, 2013, p. 7.

[12] *Ibidem*.

[13] For an analysis of what „critical approach" means, see Cryer, R., Hervey, T., Sokhy-Bulley, B., Bohm, A., "*Research Methodologies in EU and International Law*", Hart Publishing, 2011, pp 59-60.