



THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

**The Criminal Protection of the Financial
Interests of the European Union in the Romanian Legislation**

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Abstract: The idea of criminal protection of the financial interests of the European Communities appeared as a result of allotting their own funds by means of the first project of amending the Treaty of August 6th 1976 which modified the Treaties regarding the establishment of the European Communities. Nowadays, one of the major problems that the European Union is facing is the frauds committed to the detriment of the Union budget. The offences bilking the Union budget are extremely dangerous, not only by the amount of the damage caused, but also by the high degree of organizing such offences. Romania has made significant efforts to align its legislation in this matter to the community legislation, such efforts resulting in the introduction of a new section in Law no. 78/2000 regarding prevention, discovery and sanction of corruption offences – section named “Offences affecting the financial interests of the European Communities”. This work will analyze those offences provided in Law no. 78/2000, committed against the financial interests of the European Communities, such analyze including also the relevant judicial training in the matter.

Keywords: European Union; offenses; financial interests

1. Introduction

Preventing and sanctioning offences affecting the financial interests of the European bodies is a main concern which has been materialized in many acts at the level of European institutions³. Such concern was caused both by the need to improve the criminal legislation regarding corruption prevention and control, and by the proliferation of corruption offences - a phenomenon manifested in Romania, too.

The most important legal measure adopted by our country was adding new articles to Law no. 78/2000 (the framework law regarding corruption sanctioning in Romania⁴), aiming at new incriminations, on the one hand, and at extending the area of the active subject of corruption offences to some categories of persons provided in the Criminal convention regarding corruption, in the Convention regarding the protection of the financial interests of the European Communities⁵ and in its additional protocols. This significant and original addition for the Romanian legislation was made by means of Law no. 161/2003⁶ by introducing section 4¹ named „*Offences against the financial interests of the European*

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³ The criminal convention regarding corruption, of the European Council, ratified by Romania by Law no. 27/2002 or the Convention regarding the protection of the financial interests of the European Communities and its additional protocols, drawn up based on article K.3 from the Treaty of the European Union.

⁴ Law 78/2000 published in Official Journal no. 219/18 May 2000, but the text of the initial document suffered subsequently a series of modifications and additions. They appeared by Government ordinance no. 83/2000, approved with modifications by Law no. 334/2001, the Emergency Government Ordinance no. 43/2002, approved with modifications by Law no. 503/2002, with further modifications, Law no. 161/2003, with further modifications, Law no. 521/2004, the Emergency Government Ordinance no. 124/2005, the Emergency Government Ordinance no. 50/2006, Law no. 69/2007.

⁵ According to art. 46 it introduced in TUE by the Treaty of Lisbon “The union has legal status” replacing the European Communities; see (Vilcu, 2010, p. 119)

⁶ Law no. 161/2003 regarding some measures to ensure the transparency in exerting public dignities, public positions and in the business environment, preventing and sanctioning corruption, published in Official Journal no. 279 of 21 April 2003.

Communities". Each offence included in this section will largely be analyzed below.

2. The Offence of Failure to Comply with the Rules Related to Obtaining Funds from the European Community Budgets (Art. 18¹ from Law 78/2000)

It is an offence – using of presenting of false, inexact or incomplete documents or declarations, which has as result the illegitimate obtaining funds from the general budget of the European Communities or from the budget administrated by them or on their behalf [para. (1)].

It is also an offence – The deliberately overlooking of providing the information required according to the law, with the purpose of obtaining funds from the general budget of the European Communities or from the budget administrated by them or on their behalf [para. (2)].

If the deeds provided above generated particularly serious consequences, the punishment shall be higher. (3)¹.

The specific legal object is represented by the social relationships appearing and developing with reference to the financial interests of the European Communities. In the legal literature, they said that subsidiarily the social relationships are defended, relationships regarding the public trust in the authenticity and credibility of the documents and declarations made to obtain such funds. (Dobrinioiu, 2004, pp. 651-664)

The material object is represented by false documents used or by those acts recording false declarations when the declaration is accompanied by an act, too. It is to mention that the aimed funds do not represent a material object of the offence because they intend to obtain them by the criminal-related activity. If they are obtained illegally, they could be considered as a product of the offence.

Paragraph 1 does not provide any condition regarding the *active subject*. We think that, not depending on circumstances, it could be an executive within an economic organization, state institution, but also a natural or legal person private law who aims at obtaining funds from the European Communities budget following the representation of some false documents.

As for the *passive subject*, it is represented by the European Communities whose budget is defrauded by the active subject's deed.

The *material element* of this first offence is alternative, being represented by an action and inaction. The action can take two forms: *using* of false documents and *presenting* false declarations.

Regarding the offence to forge the documentation submitted or used to obtain illegal funds from the general budget of the European Communities or from the budgets managed by them or on their behalf, the legal practice decided that it is the offence of forgery under private signature provided by art. 290 of Criminal Code – offence which is not merged in the offence provided by art. 18¹ from Law 78/2000 – case when the author is liable for both offences considered multiple offences.² Also, the legal practice decided that the offence of forgery under private signature provided by art. 290 of Criminal Code can be committed in a continuous form, if the author, based on the same criminal-related resolution, forges several documents (i.e. 94 farming agreements) that he/she subsequently uses to obtain the funds (i.e. of SAPARD funds).³

For the offence provided by art. 18¹ from law 78/2000 to exist, it is necessary that the deeds committed to have as result getting of funds from the general budget of the European Communities or from the

¹ According to art 146 of Criminal Code., by particularly serious consequences, one understands a material damage higher than ROL 200,000 lei or a particularly serious disturbance of the activity, caused to a public authority or to any of the units referred to in art. 145 C. pen., or to other legal or natural person.

² Criminal judgment no.161 of 7 March 2008 of the Court of Sector 2 Bucharest – final by criminal decision nr. 1673 of 21 October 2010 of the Court of Appeal Bucharest. See in this regard (Trancă, 2011, p.170 – 177)

³ Criminal decision no. 607/R of 16 March 2011 of the Court of Appeal București. See (Trancă, 2011, p.206 – 217) There is also the criminal decision of the Court of Appeal Pitești no. 1092/R of 18 October 2011 – non-published.

budgets managed by them or on their behalf, thus affecting the „costs” section of such budgets, meaning „subsidies” or „aids”.¹ It is also to be mentioned that such subsidies or aids are not provided to be granted to satisfy personal interests, but to satisfy the common general interest of financing the common policy in agriculture or of contributing to the renewal or reinforcement of economic, social or cultural cohesion in the European Union, being included in certain programmes, such as: PHARE², ISPA³, SAPARD⁴. To get such funds, a certain procedure should be followed. The natural or legal persons interested should perform certain projects and submit a particular documentation. Documentation should include a series of acts, deeds or circumstances to be analyzed by the competent authorities of the European Communities, and the funds requested shall be granted based on them. That is why all declarations, documents and any other acts used should correspond to the reality.

As for the inaction by means of which the material element of the offence is achieved, according to paragraph (2) – it is an offence the *overlooking* of providing certain data requested by law, thus aiming at obtaining illegal funds. It is the situation when the active subject knows that he/she has to provide such data, but he is aware that by providing them, he/she will not get such funds. In such alternative modality, the offence exists only if the overlooking has as result the getting of illegal funds.

The *immediate follow-up* is materialized in effectively getting such illegal funds. As it is a result offence, they have to prove the cause-effect link. So, they have to prove that the incriminated action or inaction has as result getting illegal funds from the budget of the European Communities.

The subjective side. The form of guilt used to commit this offence is the direct or indirect intention for committed offences and just direct intention for overlooked offences. In case of very serious consequences produced, the offence is committed with *praeterintention*.

The *preparation acts* for such offence are possible, but not incriminated, and *attempt* is punished. We consider that the offence is consumed at the moment when such funds are actually delivered from the general budget of the European Communities or from the budgets administrated by them or on their behalf into the beneficiaries’ accounts. If the offences are committed as continuous offence, there will also be a depletion moment, the legal practice being relevant in this regard.⁵

The offences provided in para. (1) and (2) will be punished with imprisonment from 3 to 15 years, and the one provided in para. (3) will be punished with imprisonment from 10 to 20 years. In all cases, the lawmaker provided the application of the additional punishment of restraining of certain rights, too.

¹ They are paid from the European fund of orientation and agricultural guarantees and from the Structural Funds: the European social fund, the regional development European fund etc.

² PHARE (Pologne et Hongrie — Aide à Restructuration Economique) is a programme launched by the European Community in 1990, whose destination is Poland and Hungary. Subsequently, it extended to the other candidate states from the Central and Eastern Europe to join EU, becoming the major instrument of technical financial assistance offered by UE to restructure the economies of those countries and to create the infrastructure necessary to join the European Union.

³ ISPA (Pre-Joining Structural Instrument) is a programme came into force starting with 2000. Its objective was the development of the transport infrastructure and environment protection in the candidate states.

⁴ SAPARD is an operational programme from 2000. Its purpose is to support the agriculture and the rural development in the countries from the Central and Eastern Europe.

⁵ Criminal judgment no.161 of 7 March 2008 of the Court of Sector 2 Bucharest – by criminal decision nr. 1673 of 21 October 2010 of the Court of Appeal Bucharest. See in this regard (Trancă, 2011, p. 170 – 177)

3. The Offence of Illegal Diminishing of Resources from the Budgets of the European Communities¹ (Art. 18³ from Law 78/2000)

According to art. 18³ para. (1) it is an offence - Using or presenting of false, inexact or incomplete documents or declarations, if the deed has as result the diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.

Para. (2) sanctions the overlooking of deliberately providing the information required according to the law, if the deed has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.

According to para. (3) they sanction even more the offences provided in para. (1) and (2), if they generated particularly serious consequences.

Compared to the previous offence, this offence has several differences, as follows:

- Although the incriminated deeds are identical to the ones within the previous offence, we have to take into account they are committed under a different context. Such deeds affect the income section of the budget of the European Communities.
- The immediate follow-up is the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.²

As for the previous offence, the offence can be committed under the form of attempt which is also punished. The offence is consumed at the moment when the illegal diminishing of the resources was produced, from the general budget of the European Communities or from the budget administrated by them or on their behalf.

The punishment for the simple normative modalities [para. (1)] and assimilated [alin. (2)] is imprisonment from 3 to 15 years and restraining of certain rights. The offence provided in para. (3) is punished with imprisonment from 10 to 20 years and restraining of certain rights.

4. The Offence of Changing the Destination of Funds from the Budget of the European Communities (art. 18² from Law 78/2000)

According to art. 18² para. (1) it is an offence - Changing the destination of the funds obtained from the general budget of the European Communities or from the budget administrated by them or on their behalf, without observing the law.

According to para. (3) it is also an offence - Changing the destination of a legal obtained benefit, without observing the law, if the deed has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.

According to para. (2), the offence is more serious as the deed provided in para. 1 generated particularly serious consequences.

¹ The offence provided in art 18³ was taken from din art. 1 pt. 1 let. b from the Convention regarding the protection of the financial interests of the European Communities, providing: „For this convention, the fraud affecting the financial interests of the European Communities shall be, in terms of resources, any deliberate action or overlooking regarding using or presenting of false, inexact or incomplete documents or declarations, which has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf, non-communication of any information by breaching a specific obligation, with the same result, changing the destination of a legally obtained benefit, with the same result”.

² It is to be mentioned that the main “resources” of the European communities are: a percent of VAT collected at national level, a percent from the gross domestic product and traditional own resources (customs rights charged for the import in the European Union of products originating in other countries than third countries; the fees provided within the common organization of markets; fines on competitive matter, etc.).

The *specific legal object* is represented by those social relationships appearing and developing with reference to the defense of the budget of the European Communities and of the budgets administrated by them or on their behalf. (Neagu, 2009, p. 651-664)

It is also to be mentioned that by the deed incriminated in para. (1), the budget is defrauded at its income section.

The *material object* is represented by the funds obtained or by the legally obtained benefits (according to the final paragraph).

The *active subject* is qualified and can be:

- the person who obtained funds from the general budget of the European Communities or from the budgets administrated by them or on their behalf and to whom he/she changes their destination illegally;
- the person who obtained any other benefit legally.

Thus, the active subject can be both a public servant and a natural person, because such funds can be obtained *based on projects* both by state institutions (for example, FARE funds) and by natural persons (foe example, SAPARD funds).

The *passive subject* is represented by the European Communities.

The *material element* is represented by an action, i.e. changing the destination of funds, committed without observing the law. For the offence to exist, it is essential that such funds should come from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

According to para. (5), it is also an offence changing the destination of a legal obtained benefit, without observing the law. The benefit should not necessarily come from the European Communities as subsidies or aids. It can come from any legal activity of the author, but obtaining such benefit should create to the author the obligation to pay some duties to general budget of the European Communities or to the budgets administrated by them or on their behalf (for example, import customs duties). Getting a legal benefit generates the payment obligation of a duty. If such duty is not paid and the money is used in other purposes, then we have the offence we are analyzing. So, there will be an offence only if the deed has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf. The criminal-related activity consists in taking out the funds or the legal obtained benefits from the patrimony area where they belonged, which can result in producing some possible damages to the European Community or can even cause the illegal diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf [in case of para. (3)].

The *immediate follow-up* represents the establishment of the fact that the destination of the funds was changed – in which case the budget of the Unions is affected at the „costs” section. For para. (3), the follow-up is represented by the actual diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf. The follow-up influences the above mentioned budgets under the “income” or “resource” sections.¹

The *cause effect link* comes from the materiality of the deed. For para. (3), it should be proved the fact that the mentioned action produced an illegal diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

The *subjective side*. The form of guilt is direct or indirect.

¹ The resources referred to by this offence (and the one provided in art. 18³) are considered only the customs duties charged for the import in the European Union of products originating in other countries than third countries, agricultural fees charged for the import of agricultural products originating from third countries and the fees stipulated within the common market.

The *preparation acts* for such offence are possible, but not incriminated, and attempt is punished. The offence is consumed when illegal change of destination of funds or of other legal obtained benefits takes place. The analyzed offence is susceptible of depletion if the offence was committed in a continuous form. The legal practice decided that the change of destination of two succeeding tranches of one single financing, obtained following a single contract, determines the conclusion that both material actions were committed based on the same criminal-related resolution.¹

The punishment for para. (1) and (3) is punishment from 6 months to 5 years, and for para. (2) is from 5 to 15 years and restraining some rights.

5. The Carelessness Affecting the Financial Interests of the European Communities (art. 18⁵ from Law 78/2000)

According to art. 18⁵, it is an offence – the guilty non-observing of an office duty, by non-performing it or deficient performing it, by a director, administrator or the person with decisional or control attributions within an economic agent, if it had as result the commission of one of the offences provided in art. 18¹-18³ or the commission of a corruption or money laundering offence in connection with the funds of the European Communities, by a person subordinate to him/her and who acted on behalf of that specific economic agent.

The *special legal object* is represented by the social relationships regarding the assurance that the persons with decisional or control attributions within an economic agent observe the obligation to accomplish correctly the attributions they have in order not to affect the financial interests of the European Communities.

In case the action representing the material element exerted over a thing (the careless of some assets – computer, cars – the offence has a *material object*.

The *active subject* is qualified, depending on circumstances mentioned in the text. Thus, the offence can be committed by the director, administrator or the person with decisional or control attributions within an economic agent.

The *passive subject* is represented by the European Communities.

The *material element* is represented by non-observing an office duty by the director, administrator or the person with decisional or control attributions within an economic agent, by non-performing it or deficient performing. Non-performing an office duty means overlooking, non-performing an action that should have been performed or the state of passivity of the author. Non-performing of a duty can be total or partial, it can aim at one single duty or more. Deficient performing of an office duty supposes its performance in other ways.

The *immediate follow-up* is explicitly shown in the incrimination rule and consists in committing one of the offences provided in art. 18¹ – 18³. Being a result offence, it is necessary to establish the *cause effect link* between the author's action, inaction and the follow-up requested by the incrimination rule. They have to establish that, following the author's activity, his/her subordinate committed one of the above mentioned offences.

The form of culpability is guilt. The subjective element is achieved in all cases where the author foresaw the possibility of occurring the specific consequences of such offence, but he/she thought that they would not occur or did not foresee them, although he/she should have and could have foreseen them. Being committed without guilt, the offence is not susceptible of any preparatory acts or attempt. This offence is consumed at the moment when the incriminated action was performed or when the deadline for performing it expired and one of the requested immediate follow-ups took place. The punishment is imprisonment from 6 months to 5 years and restraining certain rights.

¹ Criminal judgment no.2062 of 6 November 2009 of the Court of Sector 4 Bucharest – final by criminal decision no. 390 of 21 February 2011 of the Court of Appeal Bucharest. See in this regard (Trancă, 2011, p.201 – 206).

5. Conclusions

As a conclusion of the above, we consider that the analysis of those offences provided by Section 4¹ of Law no. 78/2000 is timely. Although introduced in April 2003, the analyzed offences have a more and more frequent application in judicial practice, both in the activity of the Anticorruption National Department – as a structure of the prosecutor’s office specialized in performing the criminal investigation for such offences, and in the activity of the courts of law, where fighting the corruption phenomenon is made by final decisions.

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