

THE INCONSISTENCY OF THE OBLIGATION CONDITIONS FOR THE GRANT OF A NON - REPAYABLE CONTRIBUTION AND ITS CRIMINAL LAW CONSEQUENCES IN THE CRIMINAL OFFENSE AGAINST THE FINANCIAL INTERESTS OF THE EUROPEAN UNION



Sergej Romža

*Associate Professor, Doctor of Law, Philosophiae doctor,
Faculty of Law, Pavol Jozef Safárik University
in Košice, Slovak republic*

*This work was supported by the VEGA Scientific Grant Agency,
1/0375/15, within the framework of a solved scientific project
under the title "Tax evasion and tax fraud
and the legal possibilities of their prevention."*

Abstract. The criminal offense against financial interests of the European Union is a form of implementation of the Slovak Republic's obligations under the Treaty on the Protection of the Financial Interests of the European Union into our legal order. This criminal offense (its substance of the matter) affects the various actions relating to the management of European Union funds. The obligatory terms and conditions for which the applicant, respectively the beneficiaries of the funds can be regarded are relatively rigid, especially as regards the efficiency and cost-effectiveness of their management. In order to ensure the efficiency of the handling of these funds, individual contracts for the provision of non-repayable financial contributions, impose on the recipient of the funds provided, to execute the tenders of the suppliers of goods and services. On the other hand, rigid competition rules do not allow recipients to respond sufficiently flexibly to market developments in the supply of goods and services, which inevitably results in inconsistency between the requirements for effective management of the funds provided by beneficiaries and the rigorous obligations of the recipient in selecting suppliers. The alleged inconsistency of the obligatory terms under which European Union funds are provided to the beneficiary establishes the potential but also the real risk of bringing criminal proceedings to the recipient.

Keywords: *Obligation terms; funds of the European Union; the principle of good financial management; OLAF; budgetary rules; economy; docility; effectiveness; embezzlement; the financial interests of the European Union.*

Problem statement

With regard to the issue of the protection of the financial interests of the European Union, it is necessary to deal primarily terminologically with the concept of "the financial interests of the European Union". The financial interests of the European Union should be understood to mean expenditure and revenue deriving from the general and other budgets of the European Union, as well as expenditure and revenue managed directly or under the authority delegated by the Union and its bodies or institutions [1, 2]. The financial interests of the European Union represent an extensive system of collection and subsequent reallocation of funds. For action against the financial interests of the European Union, it can be seen as a mishandling of funds, avoidance of compulsory payment, drawing of funds from the Structural Funds on the basis of non-existent or premeditated programs, misuse of funds, breach of grants or the like. The responsible authorities of the European Union (formerly the European Community), in cooperation with the Member States concerned, have been seeking for a long time to develop a unified system of control, creation and use of the Union funds [3].

The responsible authorities of the European Union (formerly the European Community), in cooperation with the Member States concerned, have been seeking for a long time to develop a unified system of control, creation and use of Union funds [3].

Article 280 of the Treaty establishing the European Community established the principle of assimilation. That provision obliges the Member States to adopt, in order to protect the financial interests of the European Communities, in their national criminal law measures equivalent to measures aimed at protecting their own financial interests. This is one of the few provisions of Community law that contained elements of criminal law [4].

The protection of the financial interests of the European Union at the level of the European Union's first pillar is of an administrative nature. Criminal law is provided (implemented) within the framework of III. pillar, on the basis of the European Union Convention of 26 July 1995 on the protection of the European Communities' financial interests. This is an international treaty which was ratified and declared in the territory of the Slovak Republic under no. 703/2004 Z.z. together with the notification of the Slovak Republic to the Additional Protocols to this Convention which were published in the Collection of Laws no. 704/2004 Z.z. and 705/2004 Z.z.

The wording of Art. I. (1) (a) of the Convention says that, for the purposes of the Convention, fraud affecting the financial interests of the European Communities (European Union) is to be regarded as fraud in respect of any intentional offense or omission relating to:

- the use or submission of false, incorrect or incomplete statements or documents which result in the alienation or unlawful seizure of funds from the general budget of the European Union or from budgets administered by the European Union or on its behalf;
- non-disclosure of information, contrary to a particular obligation having the same effect;
- incorrect use of these funds for purposes other than those for which they were originally allocated [5].

It is clear from the wording of the Convention, which is the nature of an international treaty not only in its form but also because it is a provision issued on the

basis of Article K.3 of the Treaty on European Union, what procedures were intended to be protected by the original agreement of the European Union – it is not the fraud in the sense of an offense as perceived by our criminal law, but it is any fraudulent conduct which results in the alienation or unlawful seizure of funds from the general budget of the European Union or from budgets administered by the European Union or on its behalf.

The obligations arising from both the Treaty establishing the European Union and from the content of the Convention on the Protection of the Financial Interests of the European Union, has already been implemented by the Slovak Republic in our legal order, specifically in the content of criminal codes, 421/2000 Coll., Amending the Criminal Code no. (Act No. 140/1961 Coll., On the basis of which the criminal offenses of the financial interests of the European Communities were infringed) (§ 126; § 126a; § 126b) and these were also taken into account in the Criminal Code as amended by Act No. 300/2006 Z.z.

The offense of damaging the financial interests of the European Union under Section 261 of the Criminal Code (Act No. 300/2006 Coll.) is committed by anyone who uses or submits a falsified, incorrect or incomplete statement or document or does not provide mandatory data or uses funds from the general budget of the European Union from the budget administered by the European Union or on behalf of the European Union, for a purpose other than that originally intended, thereby allowing for the misappropriation or unlawful seizure of funds from that budget.

In the event of uncertainty or incompleteness of the facts in question, it is necessary, in accordance with the wording of § 7 par. 1 of the Criminal Law according to which the criminality of an act is also assessed under this Act even if it is stipulated in an international treaty which has been ratified and proclaimed in the way stipulated by the law binding on the Slovak Republic. The wording of the § 7 par. 1 of the Criminal Law states that the statutory provision in question is a transposition of the constitutional principle of the primacy of some international treaties, before national laws (see Article 7 (5) of the Constitution of the Slovak Republic) [6].

Notwithstanding the above-mentioned rule of interpretation in § 7 par.1 of the Criminal

Law, the application practice fails to solve satisfactorily several application and interpretation problems related to the excessive structure and terminological ambiguity of the individual conceptual features of the objective, in particular, the objective aspect of the offense of damaging the financial interests of the European Union. I believe that the existing inconsistency regarding the definition of the decisive qualifying features of the offense concerning the financial interests of the European Union contained in the Convention on the Protection of Financial Interests and the factual nature of the offense of harm to the European Union's financial interests constitutes a state of legal uncertainty and also the potential for the spread of criminal liability, and consequently the violation of the constitutional principle *nullum crimen sine lege nulla poena sine lege*.

I.

Bodies investigating the damage of the financial interests of the European Union

The main anti - fraud institution detrimental to the financial interests of the European Union is OLAF (fr. Office européen de lutte antifraude; eng. European Anti - Fraud Office). The powers to conduct investigations into the detriment of the European Union's financial interests have been entrusted in particular to the European Commission [7].

However, the European Commission has set up its own independent body, which has removed these powers. The European Commission has set up OLAF, in order to increase the effectiveness of the fight against fraud involving EU funds with the decision 1999/352 / ES of 28 April 1999. OLAF is an independent office responsible for conducting investigations into corruption fraud and other unlawful activities, including misuse of powers within the European institutes.

The main objective of OLAF is to protect the financial interests of the European Union and thus to protect all European taxpayers who finance the budget of the European Union. The protection of financial interests has also become one of the priorities for the Slovak Republic after its accession to the European Union. Under the Cooperation Agreement between the Office of the Government of the Slovak Republic the Anti-Fraud Coordination Office (AFCOB) for the

Protection of the Financial Interests of the European Union for the fight against corruption and the European Anti-Fraud Office (OLAF) and in the sense of Art. 3 (4) of Regulation of the European Parliament and of the Council of the European Union (EUROATOM) 883/2013, of 11 September 2013 on investigations conducted by OLAF, the Central Unit's OLAF Contact Office (OLAF), the Corruption Control and Prevention Section, is the first point of contact for OLAF in the Slovak Republic. Its role is to coordinate activities aimed at protecting the financial interests of the EU at a national level.

In the fight against the damage to the financial interests of the EU, OLAF carries out two fundamental tasks:

1. it is responsible for conducting internal investigations within the institution and other EU bodies. These authorities and institutions have a duty to cooperate fully in investigating OLAF and OLAF with any information relating to suspicion of fraud and irregularities.

2. it has an obligation to assist individual Member States in investigating fraud and irregularities in investigating and collecting intelligence and helping to maintain contact between the various national agencies [8]. In this connection, it is particularly important to recall that OLAF only carries out administrative investigations, but not criminal ones, since it does not have procedural rights to search for and obtain evidence.

II.

Determination of the essence of mandatory inconsistency

The purpose of this contribution is to point to some interpretation and application issues related to the inconsistency of the obligatory terms - the obligations the final beneficiary has committed to under the NFP Grant Agreement. However, the handling of EU funds, not only or exclusively, is the observance of the principle of sound financial management, which is reflected in the Council of Europe's decision in full, in particular in the Council's decision on the financial rules which the individual implementing Council Decisions follow.

The Council of Europe, in this regard, in its Regulation No. 1605/2002 on the Financial Regulations, 27 art. 1 states that *"appropriations shall be used in accordance with the principle of sound financial*

management, in accordance with the principles of efficiency and effectiveness".

According to Art. 27 par. 2 the principle of economy requires that the resources it uses to perform its activities are made available at the best price. Art. 48 par. 2 of the Financial Regulation, obliges the Member States to cooperate with the Commission in such a way that the appropriations are used in accordance with the principle of sound financial management. In that regard, No 2342/2002 lays down detailed rules for the implementation of the Financial Regulation in question.

According to Art. 71 of the regulation No. 1698/2005, *"the eligibility rules for expenditure at national level shall be set to take account of all legislative, regulatory and administrative provisions and, at the same time, include any other measures necessary to ensure the effective protection of the financial interests of the European Union"*.

A Member State of the European Union is required to check compliance with the principles of sound financial management according to art. 9, Regulation No. 1290/2005. Concentrated, a breach of the principle of sound financial management is based on the procurement of goods and services at prices that are substantially higher than market prices, resulting in an inconsistency that directly affects the financial interests of the European Union.

The individual Member States of the European Union implement the obligations arising from international documents by explicitly incorporating them in the contents of the guide to the applicant for the provision of the NFP, which forms an integral part of a specific NFP Treaty, the manual in question contains a detailed methodology for assessing and selecting bids for the supply of goods and services to the final beneficiary, ie the methodology for determining the market price of the supply.

The market price of the individual deliveries is determined on the basis of the choice made by the final beneficiary, of at least three offers submitted by the tenderers, where the criterion of the efficiency of the spending of public resources is satisfied by the choice of the tenderer - the supplier offering the lowest price for the supplies of goods and services.

The same methodology obliges the final beneficiary to conclude with the winner of the

tender procedure, the contract for the supply of goods and services, under the conditions of the contract.

The substance of the notified problem arises in a situation where the OLAF investigating authorities or the specific authorities of the provider, in the exercise of the control activity, find out that during the implementation of the supplies and services to the final recipient there was another economic operator on the market who did not participate in the tender procedure the supply of goods and services to final recipients but supplies identical goods and services to other entities at prices lower than those for which they supplied the goods and services, the winner of the selection procedure with which the final beneficiary has a commercial contract.

A similar problem of application also arises in the situation where control authorities find that subcontractors of the main contractor supply the main contractor with individual partial supplies at a price lower than the price at which these goods and services deliver to the final recipient. The supervisory and investigative authorities, on the basis of the above, factually and legally conclude that the final beneficiary did not find the financial resources provided economically and efficiently because he had an objective possibility to obtain the goods and services supplied at market prices, thereby violating the obligations according to the NFP provision contract to which he has committed, as well as the relevant generally binding regulations.

The notified inconsistency concerns the inconsistency between the general obligations of the beneficiary to treat the funds effectively and the obligations of the beneficiary as regards the beneficiary's declared effectiveness. In other words, it concerns the supplier choosing methodology.

The described mandatory inconsistency of the obligations of the final beneficiary establishes for the beneficiary both a potential and a real threat of criminal prosecution, on the ground of reasonable suspicion of committing a crime of damaging the financial interests of the European Union, Section 261, par. 1 of the Criminal Law, where it is objectively addressed that the beneficiary has been guilty of having used funds from the general budget of the European Union for a purpose other than that originally intended,

thereby allowing the deception or unlawful retention of funds from that budget.

We believe that application practice, i.e. the law enforcement authorities and general courts interpret and apply, conceptually, the objective aspect of the offense in question regarding the purpose of using the funds provided from the budget of the European Union, purposefully, tendentiously and therefore incorrectly, when they claim that the efficiency and cost-effectiveness of handling provided by the European Union funds, is the absolute category that the provider is obliged to ensure, irrespective of its obligations, regarding the application of the market surveying methodology for deliveries under the Contract and the NFP.

We believe that the recipient's approach to fulfilling the declared principle of effectiveness by proceeding strictly in accordance with the methodological guidelines for the selection of bids for the supply of goods and services is stated in a specific contract on providing NFP. We believe that a breach of its own principle of effectiveness to ensure the methodological guidance in question cannot be seen in the recipient's approach.

The final beneficiary does not, in the course of deliveries, refrain in particular from detecting price relationships of deliveries made by other suppliers, in other business cases, or in the case of finding that other supplies are made at lower prices, reviewing the concluded business agreement with him as long as the good old *pacta sunt servanda* principle is in the engagement relationship. In addition, we believe that any other interpretation of the conceptual sign in question would be based on a violation of the fundamental principle of the rule of law, Art. I of the Constitution of the Slovak Republic, the principle of legal certainty.

In the final analysis, we believe that any other interpretation of the conceptual sign in question would entail the widening of the conditions for criminal liability and, therefore, the violation of the principle of *nullum crimen sine lege nulla poena sine lege*.

References:

1. Fenyk, J. Podvod poškozující společné záujmy ES a členských států; vývoj, vymezení, prevence a postih. In: Tomášek, M. *Europeizace skutkových podstat některých trestných činů*. PRAHA: Acta Universitatis Carolinae – Iuridica, 2007, č. 1, s. 48.
2. Boháčková, I., Hrabánková, M.: *Strukturální politika Evropské unie*. PRAHA: C.H.BECK, 2009.
3. Záhora, J. Aktuálne problémy vyšetrovania trestného činu poškodzovania trestného činu poškodzovania finančných záujmov EÚ. In: *Nové jevy v hospodárskej kriminalite – juristický, kriminalistický a kriminologický pohľad (Sborník příspěvku z konference)*; BRNO: Acta Universitas Brunensis.
4. Fenyk, J., Svák, J. *Europeizace trestního práva*. Bratislava: Eurokódex, 2008.
5. *Rozsudok Najvyššieho súdu Slovenskej republiky*, sp. zn: 5Tost 12/2009.
6. Samaš, O., Stiffel, H., Toman, P. *Trestný zákon (stručný komentár)*; Bratislava: IURA EDITION, 2006.
7. *Nariadenie Rady (ES, EUROATOM) č. 2988/95, z 18. decembra 1995 o ochrane finančných záujmov Európskych spoločenstiev; Nariadenie Rady (ES, EUROATOM) č. 2185/96, z 11. novembra 1996 o kontrolách a inšpekciách na mieste, vykonávaných Komisiou s cieľom ochrany finančných záujmov ES pred spreneverou a inými podvodmi*.
8. Quirke, B. *OLAF's Role in the Fight Against Fraud in the European Union: Do Too Many Cooks Spoil the Broth?* In: *Crine, Law and Social Change*, vol. 53 (2010), No. 1.