COMBATING ECONOMIC AND FINANCIAL CRIMINALITY AT THE EUROPEAN LEVEL

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Abstract:

The procedures concerning the protection of European financial interests are contestably of first interest for the European Union. The central issue is a matter of residency of the compatibility of criminal law with European law, which infers two levels of analysis: the etatic approach and the communitarian approach respectively.

To this extent, the European Community Treatises, on one side, introduce steadily the working instruments particular both in the matters of judicial cooperation and of criminal law in what concerns the protection of the EU financial interests. On the other side, the adjustment of communitarian politics and the insurance of their effective implementation has lead to a new separation of competences between the Union and the Member States, by such means consolidating the juridical instruments of action of the Union in the plan of combating criminality of all kind, including economical and financial.

The attempt of constitution of a criminal protection of EU financial interests lasts since the '70, and the idea has been once more brought into attention, by the assembly of treatises successively adopted in Maastricht, Amsterdam, Nice and Lisbon which represent the legal framework of the European Union of our present days.

The Lisbon Treaty brings a new dimensioning to communitarian law, such issue regarding the compatibility of criminal law to the juridical communitarian order persisting in being on top among debates and developments at a European level in what concerns the effective protection of EU financial interests.

Key words*: economic and financial criminality, communitarian fraud, tax evasion, European criminal law, European economy.*

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INTRODUCTION

One major issue which the EU deals with is that of frauds committed in the detriment of the Union's budget, defined firstly as the concrete expression of a veritable patrimony that the EU citizens share and secondly as the instrument by excellence of the European policy (Delmas-Marty, 1998).

The idea of constituting a criminal protection of the EU financial interests has appeared since the '70, becoming the scope of several normatives. According to this perspective, Report Theato (1991) is of a particular importance since it proposes the attribution of the Community's competence to adopt regulations and directives related to the criminal protection of its financial interest in the purpose of harmonising criminal measures of the Member States and applying certain penalties aiming to protect the European Community's financial interests. Such idea has been reconsidered, with certain alterations, by the assembly of treatises successively adopted in Maastricht, Amsterdam, Nice and Lisbon, which represent the legal framework of our present days European Union.

Besides the necessity of insuring the protection of the European economy, combating economic and financial criminality at a European level presents a different importance due to the difficulties risen in distributing the competence of incriminating the fraud between the communitarian law and the internal law of the Member States.

THE PREMISES OF COMBATING COMMUNITARIAN FRAUD

The Treaty of Maastricht on European Union (TEU) in February 1992 established the premises of combating communitarian fraud, as long as it comprised the fundamental provisions concerning the cooperation between the police and the juridical authorities in criminal matters.

The treaty comprises criminal provisions, among which the most important is being enlisted in art. 28 in which it is presented that, both the community and its Member States combat the fraud and any other illicit activity in the detriment of the Community's financial interests, by applying decisive sanctions for the effective protection of the Member States. As a consequence, the Member States adopt the same measures in order to combat fraud in the detriment of the Community's financial interests on the same grounds on which they adopt them in order to combat acts in the detriment of their own financial interests (Antoniu, 2007).

Due to TEU, cooperation in criminal matters is an area including the fight against fraud, either communitarian or international. The premise of work, in what concerns the distribution of competences in criminal matters is given by the game between the first and the third pylons [1]. The distinction between them is of relevance when related to the distribution of competences of legislation and action. Thus, the first pylon refers to domains of action in the exclusive competence of the Community, while the third pylon refers to domains of action in the exclusive competence of Member States. By tradition, issues related to justice and internal affairs are part of the third pylon (Costea, 2008).

Consequently, in the perspective of the Treaty of Maastricht, the financial and criminal law's sphere derives from the tough nucleus of national competences. In a subsidiary point of view, the diversity of legal systems of the Member States renders much more difficult a uniform or common approach, as in the light of the present Treaty, there exists no relationship between criminal law and European Union.

In such conditions, the main obstacle that hinders a repressive and efficient action against economical and financial criminality is the lack of continuity of such actions, the competence of repressive authorities being limited, mainly, at national frontiers, together with the existing differences between criminal regulations in different Member States.

On this purpose, according certain competences to communitarian law in criminal matters means breaking the fundamental Treatises of the European Union, which leaves in exclusive competence of the Member States the attributions of criminal regulations; such fact would lead to creating a supranational criminal law which would not be capable of guarantying the observance of the fundamental principles of criminal law and would bring into discussion the national sovereignty of the criminal law.

Starting from the premise of national sovereignty in criminal matters, in order to put aside such obstacles, there have been made great efforts in three directions, sorting out several solutions: *the assimilation technique*, in other words adopting a criminal treatment of the actions in the detriment of the Union's budget, similar to the one used in internal law for the sanction of facts in the detriment of the national financial interests. Another way would be *the cooperation technique* of the states on the purpose of developing certain effective actions of combating the phenomenon mentioned, and, in the last, *the technique of harmonization* of national legislations, which means their proximity by means of abolishing their most important differences and creating a juridical background, if not identical, at least with smaller differences destined to insure a corresponding repression to the aggressions to the European Union's budget.

The continual increasing of the criminal phenomenon and the breadth taken by the fraud in detriment of the European Union have outlined that the methods undertaken didn't bring any result. The harmonization and the assimilation have continuously bumped against the striking differences between the legal systems of the Member States and against the impossibility of their correlation

because of which the cooperation has turned out to be hardly achievable in criminal matters, as proven by several projects of international conventions in such matters which haven't yet been ratified by the Member States (Antoniu, 2002).

THE CONVENTION REGARDING THE PROTECTION OF THE EUROPEAN COMMUNITIES' FINANCIAL INTERESTS (PFI 1995)

The PFI Convention, together with its three protocols, has been adopted by the Act of the Council on the 26th of July, 1995, in order to combat in a more efficient way the frauds and all the other illicit activities in the situation in which the efforts made at a communitarian level in such issue – assimilation, cooperation and harmonization of the Member States legislations – haven't offered the desired results.

Communitarian fraud, as shown in the Regulation attached to the Convention, represents an act in the detriment of the European Communities' financial interests, including crimes of financial fraud, crimes of common law – false, fraud, economical crimes and elements of criminal structures – money laundering, black market work, corruption, counterfeits, narcotics trading, traffic of persons (Faletti, 2003).

Communitarian fraud may be committed in relation to provisions of the primary communitarian law [2] or of the communitarian law derived [3].

The P.I.F. Regulations force the states to foresee criminal sanctions against communitarian frauds: "each Member State should take all necessary and appropriate measures in order to transpose in the internal criminal law the previsions stipulated in paragraph 1, in such manner that the endorsed behaviors constitute crimes". If in criminal law there is no possibility of criminal penalty of facts stipulated in the Convention, the Member States are obliged to lay down such incriminations in their own criminal law.

The Member States are obliged to criminally sanction facts of instigation, complicity, fraud attempt, if such acts are not stipulated as autonomous penalties. They are as well obliged to establish their competence on communitarian fraud also in the circumstance under which it is committed by a person outside his/her national territory, on another Member State's territory or on a third country's territory. For the hypothesis in which several Member States become competent of following the same communitarian fraud, the Convention consecrates the principle of *ne bis in idem* [4].

The first Protocol of the Convention [5] makes a distinction between active and passive corruption. It is stipulated that we refer to *active corruption* whenever the official, intentionally, directly or by means of a third party, solicits or receives benefits of any kind, for his own purpose or for a third party's purpose or accepts such promises in order to accomplish, not accomplish or accomplish an act which is contrary to his/her official duties, in the detriment or susceptible to be in the detriment of the European Communities' financial interests. *Active corruption* consists of the intentional act of whomever to promise or offer an official, directly of by means of a third party, a benefit of any kind, for his/her own purpose or for a third party's purpose in order to accomplish or abstain from accomplishing an act contrary to his/her official duties, in the detriment or susceptible to be in the detriment of the European Communities' financial interests.

The scope of the second Protocol of the Convention [6] is money laundering and the liability of the juridical person. The protocol makes references to the definition given to *capital laundering* where there are enlisted the activities susceptible of constituting acts of capital laundering, as follows: the conversion or the transfer of goods about which the person who delivers them is aware of their provenience from a criminal activity or from a participation to such activity, on the purpose of hiding or disguise the illicit origin of such goods or helping any person part in such activity escape from the criminal consequences of his/her acts; hiding and covering the nature, the origin,

the location, the disposal, the movement or the real property of the goods or the respective rights of which the author is aware they come out from a criminal activity or from a participation to such activity; purchasing, obtaining, using the goods while being aware that in the moment of the receipt the goods come from an illicit commercial activity or from the participation to such activity.

In what concerns the *juridical persons' liability,* the Protocol stipulates liability for acts of fraud, active corruption and capital laundering. The text itself does not express *in terminis* that the focus is on a criminal liability, but it stipulates the obligations of the Member States to take all necessary measures in order to ensure that the persons declared liable for the mentioned facts are passable of sanction, effective and proportionate, including criminal and non-criminal penalties and, eventually, of other sanctions (Antoniu, 2001).

COMBATING ECONOMICAL AND FINANCIAL CRIMINALITY IN ROMANIA

In primary communitarian law, the notion used in order to design the damages brought to the communitarian budget is that of *fraud*. The Romanian lawmaker employs the notion of *financial fraud* in terms of national regulation. Thus, terminologically speaking, it is permitted the overlapping of the concept of fraud – communitarian approach – with that of financial fraud, in the sense of incriminated crime by criminal national law of the Member States.

Yet, in a communitarian sense, the notion of fraud has a larger area of coverage than the national concept of financial fraud – including crimes of financial fraud, crimes of common law – false, fraud, economical crimes and elements of criminal structures - money laundering, black market work, corruption, narcotics trading, traffic of persons (Faletti, 2003).

Between the EU accession and adoption processes of the communitarian acquis in Romania, in our internal law, the incrimination of facts affecting the European Communities' financial interests has been realized by adopting Law no. 161/2003 regarding certain measures for the insurance of transparency in executing public dignities, public and business functions, the prevention and the sanction of corruption [7]. By Book II, Title I, art. I, pt. 18 of this specific law, it has been introduced section IV^1 in Law no. 78/2000 for the prevention, the uncovering and the sanctioning of acts of corruption [8], entitled "*Crimes against European Communities' financial interests*".

Consequently, the Romanian lawmaker opts for the creation of a particular criminal protection of the European Communities' financial interests, distinct of the one applicable to similar national values. In such sense, it is observed that countries like Belgium, France, Portugal and the Czech Republic have chosen to assimilate the European Communities' financial interests with the national ones and they didn't create special regulations of incrimination regarding the fraud affecting the communitarian budget (Antoniu, 2008).

In the section "Crimes against European Communities' financial interests" there are incriminated facts such as: use or presentation of documents or false statements, inaccurate or incomplete, which have as result unrighteous obtaining of funds from the general budget of the European Communities or from the budgets administrated by them or on their behalf. Also, it is incriminated the omission of providing, rationally, the information demanded in conformity with the law for acquiring funds from the general budget of the European Communities or from the budgets administrated by them or on their behalf, if the fact has as consequence the unrighteous acquisition of such funds, or the illegal decrease of the resources from the mentioned budgets, as well as the exchange, without respecting the legal provisions of the destination of funds obtained from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

In the same time, by the provisions newly considered it is incriminated the negligence at work of the economic agents' superiors which have as result the commission of one of the crimes

against the European Union's financial interests or the commission of a crime of corruption or of money laundering by the persons in their subordination and who act on the behalf of the economic agents.

The juridical scope of these crimes is represented by the social relationships concerning the European Communities' financial interests in Romania, which shall be protected according to the relevant communitarian regulations. This way are protected those particular social relationships regarding the correct access and administration of the funds from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

The material object of the crimes mentioned consists of the materialization of the social value protected by the incrimination norm, on which refrains directly the action or the inaction of the criminal, more specifically the amounts of money assigned from the European Communities' budget which the criminal misappropriates.

Incident communitarian regulations in such matter stipulate, for the Member States, the obligation of co-financed projects by national financial contribution, public or private.

De lege lata, public co-financed funds do not benefit from the same criminal protection as the communitarian funds, their fiddle being sanctioned by the criminal common law regulations – Criminal Code. In such conditions it may be brought into discussion the problem of the contest of crimes between the crimes in matter in the Criminal Law and in the special law mentioned. But in practice there have been sketched two orientations: one in the sense of only retaining the commission of crimes stipulated in the Criminal Law, the other of retaining only the provisions in Law no. 78/2000. The incriminating norm from the special law protects, for the time being, only the communitarian budget, but not the national co-financing (Dobleagă *et alii, 2008*).

De lege ferenda, the lawmaker should intervene and extend expressly the special criminal protection from Law no. 78/2000, Section IV^1 on national co-financing public funds.

LISBON TREATY - A NEW DIMENSIONING OF THE COMMUNITARIAN LAW

In the context of combating economical and financial criminality, the Lisbon Treaty intervenes in order to conciliate radical distinctions of competence and legislative technique existing in the sphere of fiscal law and in the sphere on criminal law at the European Union level.

Thus, the traditional mechanism of the three pylons is replaced by a two-part classification of the national and communitarian competences in exclusive and shared competences. In matters of exclusive competences, they reside in the domains where the European Union may act, the Member States having the possibility to intervene only with the permission of the Union or in order to put into practice the European policy. In matters of shared competences, the Member States may intervene as long as the Union hasn't reacted yet, thus on the grounds of reverse subsidiarity (Costea, 2010).

In the context of this new classification of competences between the Union and the Member States, the freedom, security and justice policy, the hard kernel of the third pylon is assimilated in the sphere of shared competences. Such fact allows the direct involvement of the Union in the criminal national sphere, or better, the creation of a communitarian criminal policy. Thus, the Union's legal action instruments are being reinforced in the context of combating criminality of any kind, implicitly the economical and financial kind.

In the actual context of the European construction, the necessity of protecting the communitarian financial interests justifies a specific intercession of the legislating process through the *unification technique* which is more energizing [9], insured by the provisions of articles 69A-69E from the Lisbon Treaty.

The normative technique of the unification seems to gain ground in the context of the communitarian policy, attenuating the sovereignty of the Member States in criminal matters. The

treaty insures a political form for the transfer of competences in criminal matters form the exclusive domain of the Member States, yet with certain particularities. “The civil matters, together with the legal matters, inserted in the European field beginning with the Maastricht Treaty are officially recognized as European competences, yet without depriving the States from their margin of maneuver” (Chaltiel, 2008).

There can be identified two formulas of work depending on the domain of action: a general mechanism applicable to criminal domains of certain gravity and a special mechanism applicable to the domain of the European Union's financial interests' protection.

As far as the specific domain of the protection of financial interests is concerned, it must be said that a wide project, disputed at an initiative legislative level and retaken by the provisions of the Lisbon Treaty at a primary law level, concerns the constitution of an European Public Minister. In the actual form, the normative intercession is circumscribed to the preoccupation of safeguarding the European Union's financial interests, the competence of the European prosecutor being limited to surveying the crimes affecting the communitarian financial resources.

CONCLUSIONS

Combating economical and financial criminality at a European level trough the prism of the communitarian law presupposes the analysis of the assembly of treatises which have created the legal-institutional background of today's European Union. The idea of the protection of the EU economical and financial interests has constituted a continuous preoccupation desired to evolve until achieving a balance between the sovereignty of the national criminal law of the Member States and the communitarian law on the purpose of the effective protection of the EU economical and financial interests.

Thus, the new dimension of the communitarian law given by the Lisbon Treaty should be concretized in legal-institutional context in order to establish with exactitude the jurisdictions able to statute over certain crimes at European level, which material scope is the amounts of money from the European Communities' budget. Yet, unification at the procedural level is demanded – either limited exclusively to the protection of the financial interests, or comprising other domains.

NOTES

[1] The structure of the European Union implies three pylons, regarding from the Treaty of Maastricht perspective: the first pylon – competences of the European Community, the second pylon – competences in matters of security and external affairs and the third pylon – cooperation in matters of justice and internal affairs.

[2] Primary communitarian law represents the assembly of treatises, as well as the protocols attached to the treatises, the Conventions and the agreements which complete them.

[3] Derived communitarian law represents the assembly of documents issued by the communitarian authorities: regulations, directives, decisions, recommendations and approvals.

[4] In order to commit a crime, a wrongdoer can be found liable for one single reason.

[5] The Protocol of the P.F.I. Convention from the 27th of September 1996 regarding the corruption acts committed by or against national officials or communitarians liable for the accessing and administrating communitarian funds.

[6] The Protocol of the P.F.I. Convention from 19th of June 1997 regarding money laundering and the liability of juridical persons.

[7] Published in Romania's Official Monitor no. 279 from 21st of April 2003.

[8] Published in Romania's Official Monitor no. 219 from 18th of May 2003.

[9] The technique of the unification, introduced once with the Lisbon Treaty, has proved to be more energizing than the technique of assimilation, cooperation and harmonization, introduced once with the Maastricht Treaty.

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