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SUMMARY
of the PhD Thesis entitled:

„Administrative Liability of EU Funding Recipients for Breach of Procurement Rules. Emphasis on the Cases of Romania and Italy"

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1. OVERVIEW OF THE THESIS' MAIN ASPECTS.

The thesis looks at the liability of the persons, institutions or bodies who benefit, for their projects, from the financial assistance provided from the European Structural and Investment Funds (ESIF), but commit irregularities consisting in breaches of public procurement rules during the implementation of the financed projects. The research regards the liability mentioned above, as it stems from the analysis of the general framework, established at the EU level, as well as it arises from the national framework of two EU Member States, Romania and Italy. The choice of this two Member States (MS) to be analysed in this respect allows a comparative approach from both the perspective of one of the oldest MS (Italy) and one of the newest (Romania).

The thesis has been divided in six chapters.

The first chapter contains introductory information, meant to establish the framework of the research, by mapping its limits, as well as by discussing on the relevance of the research, by presenting the research methodology, and by formulating the research questions. The second chapter subjects an analysis, and also a critical view, of the previous and current legal framework both at EU level and at national levels of Romania and Italy, with regard to the European Structural and Investment Funds (ESIF) and public procurement.

The third chapter produces the analysis of the subject-matter of the thesis in its very substance. Thus, the concept of liability and its suitability to the subject of the research, as well as the type of liability entailed by breaches of public procurement rules committed by the EU funding recipients within the financed projects are looked at. Further, the elements of the liability at hand (the illicit deed, the prejudice, the causal link and the guilt) are identified and analysed by turn, with their specificities and their interrelations, but not before the concept of irregularity, as the sole ground of the liability envisaged, is properly analysed. A delimitation between the two forms of illicit prejudicing the financial interests of the European Union and of the Member States involved in the implementation of operational programmes financed by ESIF, namely the irregularity and the fraud, is carried out in a subsection of the third chapter. Therewith, in a separate section of the chapter, the administrative measure provided for as a sanction for the liability at hand, namely the financial correction, is analysed. Finally, the chapter provides an analysis of the importance and applicability of the principle of proportionality with regard to the subject-matter of the thesis.

The fourth chapter of the thesis looks at the administrative controls and oversight. Within this chapter, first of all, the authorities having the competence in performing controls

with regard to the management and use of the ESIF, and their prerogatives, are identified. Further in this chapter, the administrative proceedings carried out for the finding of irregularities and the application of financial corrections are analysed. In the fifth chapter, the remedies available to the recipients sanctioned with financial corrections, in Romania and Italy, are looked at. Therewith, a separate section of the chapter looks at the right to action provided for in favour of Member States envisaged by decisions of financial corrections issued by the European Commission. The last chapter of the thesis subjects the overview of the research and the general conclusions.

As already mentioned, the thesis looks at a type of liability, entailed by breaches of public procurement rules, committed by EU funding recipients during the implementation of funded projects. In principle, this liability is of administrative nature, but there are also situations where the breach of procurement rules, committed in certain conditions, entails the triggering of a criminal liability. From the very first chapter of the thesis, though, is made clear that the focus of the research will be on the non-criminal (administrative) liability, references to the criminal liability being made only within the section regarding the delimitation between irregularity and fraud. Another limitation of the research is given by the fact that it regards only the breaches of procurement rules as grounds for the liability at hand, even though there are also breaches of other legal provisions which entail the application of measures or penalties by the competent authorities. The limitation is justified by the fact that the breaches of public procurement rules are the most numerous in practice, and also by the multiple specificities that characterise 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.

In terms of the methodology used in carrying out the research, the doctrinal method has been mostly used, most of the outcome of the research being the result of the analysis carried out with regard to the legislation, the doctrine and the case-law at the EU level, as well as at the national level. The historical approach had also its role within the methodology used, a historical assessment of the legal framework being necessary, in order to draw the right conclusions and to understand how this framework evolved to what we have in place today. A critical approach of the matter at hand has been also used, given that there are certain legal provisions, at the national level, in Romania and in Italy, that are arguable and needed this kind of approach. The interdisciplinary approach has been used, too, for instance in order to analyse the similarities and differences between the criminal liability and non-criminal liability, and between the concepts of fraud and, respectively, irregularity, which belong to different legal

disciplines. The comparative approach has been used in order to provide an assessment of the differences and similarities between the systems of management and control developed by the two Member State based on the common EU legislative framework.

Being part of the EU's Cohesion Policy, the EU Funds may be subjected by the terms of Union legislation to the principles of „complementarity" and „additionality"[1], but also of „concentration", „partnership" and „programming"[2]. The principle of *complementarity* entails that the provision of Union assistance implies complementary national assistance. This principle arises from the necessity to avoid „fiscal illusion"[3] and to ensure that spending reflects needs within Member States[4]. In turn, the principle of *additionality* implies that Union assistance should not lead Member States to reduce their own cohesion efforts but should be additional to these efforts[5]. As regards the *concentration,* it connotes the idea that funding should be allocated to the areas in greatest need, whilst the *programming* means that the funding is given for a period of years, which helped the Commission to gain some significant control over policy formulation and the identification of priorities[6]. The way of implementing these two principles, of concentration and programming, led the doctrine to the conclusion that the cohesion policy in this respect could have been evolved towards a „renationalization" of the prerogatives of identifying the regions in greatest need of financial assistance[7]. *Partnership* entails, in formal legal terms, a relationship between the Member States and the Commission in the application of regional policy. The concept of partnership also captures the idea that when devising a development plan the Member State should involve regional bodies, local authorities and the like.[8] In the design of the financial and operational framework of Cohesion Policy for the period 2014 to 2020, the partnership principle has again gained in importance and also now

[1] In this respect, see A. Evans, "*The EU Structural Funds*", Oxford University Press, 1999, p.5.
[2] See P. Craig, „*EU Administrative Law"*, 2nd edition, Oxford University Press, 2012., p. 225.
[3] Fiscal illusion is a public choice theory of government expenditure, which seems to have been first developed by the Italian economist Amilcare Puviani in his 1903 book „*Teoria della illusione finanziaria"* („*Theory of Financial Illusion"*), although there are certain claims (see R. Dell`Anno, B.E. Dollery, „*Comparative fiscal illusion: a fiscal illusion index for the European Union*", in „Empirical Economics", Volume 46, Issue 3 - May 2014, p 939) in that „the intellectual genesis of this proposition goes back at least as far as McCulloch (1845) in his *Treatise on the practical influence of taxation and the funding system*". „Fiscal illusion refers to a systematic misperception of fiscal parameters and an associated pattern of over- and under-estimation of expenditure and taxation liabilities which is persistent, recurring and consistent through time and which gives rise to biases in budgetary decisions at all levels of government". (R. Dell`Anno, B.E. Dollery, *loc.cit.*).
[4] See A. Evans, *op.cit.*, p.5.
[5] *Ibidem*.
[6] *Ibidem*, p.222.
[7] See J. Bachtler, C. Mendez, „*Who Governs EU Cohesion Policy? Deconstructing the Reforms of the Structural Funds*", in „JCMS: Journal of Common Market Studies", Volume 45, Issue 3, September 2007, pp.537-539.
[8] P. Craig, *op.cit.*, p.227, and Pociovălișteanu, D.-M., Thalassinos, E., „*Fondurile structurale şi procesul de coeziune economică şi socială"* („Structural Funds and the Process of Economic and Social Cohesion), in Analele Universităţii "Constantin Brâncuşi" din Târgu Jiu, Seria Economie, Nr. 1/2009, p 319.

includes the so-called Partnership Contracts (or Partnership Agreements) between the European Commission and the EU Member States.[9] These Partnership Agreements have set out the national authorities' plans on how to use funding from the European structural and investment funds between 2014 and 2020.

Within the management of ESI Funds, the Commission and the Member States shall also respect the *principle of sound financial management*[10], which includes the principles of economy, efficiency and effectiveness.[11]

In order to ensure the effective protection of the financial interests of the Union, the funding is managed in accordance with strict rules, able to guarantee that there is tight control over how funds are used, and that the money is spent in a transparent, accountable manner.

The public procurement rules that have to be complied with by the recipients of the funds are, in principle, those set out in the public procurement directives, as they were transposed in the national legal orders by Member States. Public procurement directives apply, unless otherwise stated, only to the contracts whose value amounts above the thresholds set out by them. As from 17 April 2014, a new set of public procurement directives entered into force: the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. The deadline for the transposition of these two directives in the national legal order of the Member States expired on 18 April 2016. In Romania, the transposition of the directives has been materialised within the Law No 98/2016 (for the Directive 2014/24) and Law No 99/2016 (for the sectoral procurements - Directive 2014/25), whilst in Italy the transposition of the two directives, and of the concessions directive (2014/23/EU), was embedded in the new Public Contracts Code, approved by the Legislative Decree No 50/2016.

There are no special provisions with regard to the public procurement award procedures carried out within the projects financed by EU Funds, and this means that the general rules apply. More accurate, according to the interpretation given by ECJ[12] to the provisions of Regulation No 1083/2006[13] in its Judgment rendered on 26 May 2016, adjudicating on the

[9] See A. Pánovics, „*Fostering Partnership in EU Cohesion Policy for the Period 2014-2020*", in „Studia Iuridica Auctoritate Universitatis Pecs Publicata", Volume 151, pp. 167-182.
[10] Art 4(8) of Regulation No 1303/2013 and Art 14(1) of Regulation No 1083/2006.
[11] See Art 33(1) of Financial Regulation No 1048/2018.
[12] ECJ stands for „European Court of Justice".
[13] Regulation laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund

joined cases C-260/14 and C-261/14, the failure to comply with national provisions by a contracting authority, the beneficiary of Structural Funds, in connection with the award of a public contract of an estimated value below the threshold laid down in public procurement directives may constitute, at the time the contract is awarded, an „irregularity" within the meaning of Article 1(2) of Regulation No 2988/95[14] or Article 2(7) of Regulation No 1083/2006, if that breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure[15]. The conclusion that stems from this interpretation is that not only the infringement of the public procurement directives, but also of the national legislation relating to their application, may constitute an irregularity. Moreover, it stems, from the same judgment of the ECJ, that the beneficiary of the financial assistance coming from the EU Funds has the obligation to comply with the provisions of the applicable EU and national legislation also when the value of the public procurement contract that is to be awarded amounts below the thresholds set out by the directives and/or by the national legislation.

In the process of EU Funds' expenditure, a legal relationship is established between the provider (usually, the Member State through its authorities) and the recipient (legal or natural persons, but also public authorities or state bodies), which entails rights and obligations for each of these parties. The legal relationship thus born is a synallagmatic one, meaning that in exchange to the right of using the funds for implementing the project they proposed, the recipient has certain obligations. The main obligation of the recipient is to comply - within the entire process of implementation of the project - with the relevant legislation, including the public procurement rules - where a procurement procedure must be followed in order to award the execution of works and services or the provision of goods to an executant or, respectively, provider. The obligation of the recipient to comply with the relevant procurement rules stems directly from the law. Provided that the obligation to comply with the applicable rules is breached by the recipient, they shall support the application of financial corrections or other sanctions for the unjustified item of expenditure generated by their conduct.

The question that arises is whether we are in the presence of a type of liability in this case and, if the answer is affirmative, what the legal nature of this liability is and which its

[14] Regulation on the protection of the European Union financial interests.
[15] Paragraph 46 of the mentioned Judgment.

elements are. Traditionally, the liability is treated as a fundamental institution of the Law, tending to occupy the forefront of the Law in its entirety[16].

In order to answer the question whether the concept of liability can be used to define the legal relationships born as a consequence of the infringement of public procurement rules during the implementation of the projects financed by ESI Funds, it is necessary to assess the existence of the elements of the liability, in general. As known, these elements are generally agreed to be the following: an illicit deed, a prejudice, a causal link between the illicit deed and the prejudice (objective elements) and, only in case of subjective liability, the guilt (the subjective element of liability)[17].

De lege lata, in spite of the fact that this is not expressly provided for, the liability for the misuse of European funds exists and all of its objective elements are gathered under the concept of „irregularity". From the legal definitions of the concept of irregularity, mainly provided for in the EU law (Regulation No 2988/95; Regulation No 1083/2006; Regulation No 1303/2013 of the European Parliament and of the Council), but also in the Romanian national law (Emergency Government Ordinance No 66/2011), flows that this concept comprises the following elements of a liability:

a. the illicit deed, consisting in an act or omission that infringes the relevant EU or national law, including the public procurement rules;

b. the prejudice, which consists in an effective or potential damage caused to the budget or to the financial interests of the European Union. The fact that the prejudice may be also potential, not necessarily effective, results from the ECJ`s case-law[18];

c. the causal link between the illicit deed and the prejudice. The existence of this element results directly from the definition of the irregularity, according to which the infringement of the law shall have or would have the effect of prejudicing the budget of the European Union.

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[16] See A. Iorgovan, „*Tratat de drept administrativ"* („Treatise of Administrative Law"), Vol.II, 4th edition, „All Beck" Publishing House, Bucharest, 2005, p.329.

[17] For an in-depth analysis of the legal liability: G. Mihai, „*Fundamentele dreptului – Teoria răspunderii juridice*" („Foundations of the Law – Theory of Liability"), vol. V, „C.H. Beck" Publishing House, Bucharest, 2006. Therewith, for an analysis with regard to the specific liability in the public financial law, see: C.F. Costaș, „*Drept financiar. Finanțele naționale, finanțele locale, finanțele asigurărilor sociale, finanțele Uniunii Europene"* („Financial Law. National Finances, Local Finances, Social Security Finances, European Union Finances"), "Universul Juridic" Publishing House, Bucharest 2016, pp 112-113; D.D. Șaguna, "*Drept financiar public*" („Public Financial Law"), Fifth edition, „C.H. Beck" Publishing House, Bucharest, 2012, pp 308-311.

[18] In this respect, Judgment of the Court in case C-199/03 (*Ireland vs. The Commission)*, paragraph 31, reads that „*(...) even irregularities which do not have a specific financial impact may be seriously prejudicial to the financial interests of the Union and to compliance with Community law and for that reason justify the application of financial corrections on the part of the Commission*.".

As regards the guilt, this sole subjective element of the liability is not expressly mentioned in the definition of the irregularity. The Regulations regarding the management and use of European funds provided for a difference between irregularity and negligence[19] or between fault and negligence[20] of the State, necessary to engage its responsibility/liability for the amounts of contribution unduly paid.

The liability for the misuse of European funds in public procurement procedures has, on the one hand, a criminal nature - in case of fraud and, on the other hand, a non-criminal nature - in case of non-intentional commission of an irregularity. The thesis focuses on the non-criminal type of liability. The delimitation between the two types of liability is not a very easy task. Thus, as the European Court of Auditors (ECA) maintained in one of their Reports[21], whilst the *irregularity* is an act which does not comply with EU rules (and I should add, in the light of the above, also with national rules related to the application of EU rules), and which has a potentially harmful impact on the EU's financial interests, *fraud* is a deliberate act of deception intended for personal gain or to cause a loss to another party. The ECA also maintains that if an irregularity is committed deliberately it is classed as fraud. In the light of the above, I am of the opinion that it means that fraud is, in essence, still an irregularity, in the wider sense of this concept (*lato sensu*), which comprises all the illicit deeds against the financial interests of the European Union. Thus, it must be stressed that we should talk of a concept of irregularity *lato sensu*, which covers all the infringements of EU Public Procurement Law and of national Law related to its application, committed by the beneficiaries of financial assistance absorbed from the EU Structural and Investment Funds, in the process of implementation of the financed project or programme, and within this comprehensive concept of irregularity *lato sensu* are included the concepts of irregularity *stricto sensu* and of fraud, as they were defined above.

As regards the legal nature of the non-criminal liability entailed by the commission of an irregularity it must be said that it has been the subject of certain arguable allegations. Thus, within its consolidated case-law, the Romanian High Court of Cassation and Justice held that the substantial and procedural law applicable to finding and correcting irregularities committed in the process of use and management of the ESIF has a fiscal nature and, therefore, in the interpretation of the law, the principles of the tax law are applicable[22]. In my opinion, the nature

[19] Art 23 (1) of Regulation No 4253/88 (in force until 1 January 2000).
[20] Article 70(2) of Regulation No 1083/2006 and Art 122(21) of Regulation No 1303/2013.
[21] Special Report No 10/2015, issued by the European Court of Auditors and entitled „*Efforts to address problems with public procurement in EU cohesion expenditure should be intensified*", p 6.
[22] In this respect, ICCJ maintained, in its Decision No 1785 of 4 April 2014, that the application of financial corrections is governed by the principles of fiscal law.

of the liability based on the commission of irregularities cannot be a fiscal one. The Fiscal (Tax) Law, as a branch of the Public Law, regulates the legal relations that appear in the process of collecting taxes from the natural or legal persons who earn incomes or own taxable goods. From this definition follows that the debts resulting from the application of the financial corrections do not have a fiscal nature, because this application of corrections aims at the recovery of the misused funds, and not at the collection of taxes or other budgetary contributions. The fact that, in Romania, the execution of acts of finding irregularities and application of financial corrections is conducted according to the fiscal procedure does not change the nature of the debt, because all of the budgetary debts are executed according to the fiscal procedure law, but this cannot turn them all in fiscal (tax) debts. Moreover, the fiscal law deals with taxes, which are constant revenues of the budget and being collected regularly, whilst the financial corrections represent the recovery of items of expenditure misused by the beneficiaries, their collection not being possible to be foreseen when the budgetary law is adopted, as is the case of the tax incomes. The relation between budgetary debts and tax debts is a whole-part relationship, meaning that all the tax debts are included within the concept of budgetary debts, whilst this latter concept comprises other types of debts in addition to the tax debts. The concept of tax debts is limited to taxes and contributions, which are only a part of the public revenues. The amounts that have to be recovered as a result of finding irregularities and applying financial corrections are public revenues, but are neither taxes, nor fiscal contributions to the budget. They represent, in essence, the recovery of the prejudice caused to the financial interests of the Union, by unlawful expenditure of the funds provided from the Union's budget.

As a consequence of the above, in my opinion the liability undertaken as a result of the commission of irregularities in the management and use of the ESIF cannot be considered as being a fiscal liability. The same conclusion has been reached by ICCJ - Department for Administrative and Tax Litigation (ICCJ - SCAF, hereinafter) in one of its judgments[23]. The Court held that the litigation regarding the request for the annulment of the administrative act of finding irregularities and applying financial corrections has not a fiscal nature, because the financial correction is, according to the provisions of Art 2(1)(o) of EGO No 66/2011, an administrative measure taken by the competent authorities and thus the provisions regarding the competence for adjudicating the tax litigation do not apply.

[23] Judgment of ICCJ-SCAF No 7705/11.12.2013, unpublished.

Another opinion that may be found in the Romanian judicial practice is that the liability entailed by the commission of irregularities is a type of civil tort liability, having a specific regime[24]. This opinion has its drawbacks, having regard that the parties of the legal relation are not on an equal footing, the administrative authority being the one that controls the conduct of the recipient of the financial assistance and applies the financial correction by the instrumentality of an administrative act.

I take the opinion that, having regard to the fact that the irregularities represent infringements of the rules governing the financial discipline related with the budgetary execution of the EU and of the Member State, they are, in fact, financial offenses, which are found during administrative controls performed by competent authorities and are sanctioned with the applications of administrative measures called financial corrections[25]. Therefore, the liability for breaches of procurement law committed by the beneficiaries of the financial aid provided from ESIF has an administrative nature.

EU Law and Romanian or Italian Law do not offer a definition and a specific regulation of this administrative liability, thus resting on the behalf of the jurisprudence and doctrine to delimit this concept. In the ECJ's case-law the administrative liability has been regarded only from the perspective of the accountability of Member States' and Union's institutions for the unlawfulness of the administrative acts issued by them. Therewith, within the Romanian and Italian doctrine usually the analysis of the administrative liability regards only the liability of administrative authorities for issuing illegal acts, the individual liability for commission of demeanours and the liability of public clerks for actions or omissions occurred in the exercise of their duty.

In a more widened view, though, the administrative liability shall include also the situations where administrative measures are taken, by the instrumentality of administrative acts issued by competent authorities, against individuals who breached the law and thus prejudiced the administrative authority or the public interest.[26] This is the case of the liability in hand, which must be considered, therefore, an administrative liability.

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[24] Judgment of Bacau Court of Appeals No 200 of 16 October 2012, unpublished.

[25] In the sense that the financial corrections are administrative measures, see the Judgment delivered by the ECJ, on 26th of May 2016, in joined cases C-260/14 and C/261/14 (*Județul Neamț a.o.)* - ECLI:EU:C:2016:360.

[26] For an opinion in the sense that nowadays we are witnessing a semantic deepening of the concept of administrative liability, see also: M. Deguergue, „Regard sur les transformations de la responsabilité administrative" („*A Look at the Transformations of Administrative Liability*"), in „Revue française d'administration publique", 2013/3 (No 147), pp.575-587; P. Duran, „La responsabilité administrative au prisme de l'action publique" („*The Administrative Liability from the Perspective of Public Action*"), in „Revue française d'administration publique", 2013/3 (No 147), pp 589-602; P. Gonod, „À propos de la responsabilité administrative" (*„About the Administrative Liability"*), in „Mouvements" No 29 (2003/2004), pp 30-35.

As regards the classification in contractual and non-contractual (tort) liability, it has been argued, in the Romanian doctrine[27], that the liability for irregularities is a *contractual liability*, because even though the specific penalties and measures provided for in the law are of administrative nature, they are being applied only on the ground of the contractual provisions comprised in the financing contracts concluded between the recipient and the competent national authority after a selection procedure developed according to an Applicant Guide.

Therewith, within the judicial practice of the Italian courts, the liability at hand is considered to be contractual, this being one of the reasons laying behind the conclusion that the competence of adjudicating on disputes regarding the lawfulness of the acts issued in the process of finding irregularities and determining financial corrections belong to the ordinary judges, and not to the administrative ones[28].

I am of the opinion that, at least in Romania, given the way how it is regulated, the liability for the misuse of ESIF by the recipients of the funds who are committing irregularities consisting in infringements of public procurement rules, should be seen as an *extra-contractual liability*, because the grounds for this liability stems from the legal obligation to respect the relevant provisions, not from the contractual provisions (in Romania, for instance, the recipients of the funds who have the capacity of contracting authorities in the meaning of public procurement law have the obligation to apply this law, whilst the private beneficiaries not having the capacity of contracting authorities have to comply with similar rules, provided for in secondary legislation, such as procedures approved by orders of the ministers). Moreover, the sanctions for the infringement of this obligation are provided for in the law, under the form of financial corrections.

The infringement of other obligations, provided for within the contract concluded between the parties attracts a contractual liability, but this is a different liability, not subject to this study. Thus, the financing contracts concluded between the recipients of the funds and the authorities in charge with the management of these funds provide for specific obligations and in case of infringement of these provisions, the recipient will be *contractually* liable. For instance, where the beneficiaries of the financial assistance are private persons or economic

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[27] M.V. Cârlan, "*Răspunderea juridică pentru nereguli în atribuirea contractelor de achiziţii publice finanţate din fonduri europene - aspecte de drept substanţial*" („The Liability for Irregularities within the Award of Public Procurement Contracts Financed by European Funds – Substantive Law Issues"), in Revista "Dreptul", nr.11/2013, p.137.; O. Puie, "*Discuţii privitoare la aspecte în legătură cu contractele de finanțare din fonduri europene și natura juridică a răspunderii pentru neregulile constatate în atribuirea acestor contracte*" („Discussions with regard to the financing agreements and the legal nature of the liability for the irregularities found in the award of these contracts"), in Revista "Dreptul" No 5/2014, pp 257-279.

[28] See, for instance, Judgment No 2698/730/14.03.2017 rendered by TAR (Regional Administrative Tribunal) Campania, available online, at *www.giustizia-amministrativa.it*.

operators not having the capacity of contracting authority pursuant to the relevant law, their obligation to comply with the procurement law is set out directly by the financing contractual provisions, which must, though, comply with the normative provisions in force. Nevertheless, given that pursuant to the provisions of Art 2(1)(a) of EGO No 66/2011, the irregularity exists also in case of infringement of the contractual obligations, we will have, in these circumstances, a contractual liability.

Thus, there are two types of liability generated by breaches of law within the process of ESI Funds expenditure: a) an extra-contractual (tort) liability – which is the rule and implies the infringement of the relevant law, committed by the recipient of the financial contribution; and b) a contractual liability – only by exception, where the irregularity is committed by breach of contractual provisions.

Both types of infringements constitute irregularities and, therefore, entail the application of administrative measures or penalties. The contractual liability is much less common in practice.

We should stress out that in case of infringements of public procurement rules the liability can be only extra-contractual, having regard that for all the categories of beneficiaries the obligation to comply with the public procurement law stems directly from the law, even though the contract also provides for this obligation. Moreover, it cannot be considered a contractual liability, given that such a liability is not possible to be triggered directly by an administrative decision, but the failure of one party of the contract (the beneficiary of the fund) to perform one or more contractual obligations must be found by the court upon the request of the opposing party (the finding authority).

In terms of guilt, one will see that the liability in this field exists regardless of culpability, which makes it to be closer to a strict liability. The degree of guilt is only relevant in order to distinguish the irregularity *stricto sensu* from fraud, or the guiltless irregularity, sanctioned by administrative measures, from the intentional irregularities or irregularities committed by negligence, sanctioned by administrative penalties.

In terms of the illicit deed - the first element of the irregularity - it consists in an act or an omission that infringes the relevant procurement rules and is detrimental to the financial interests of the European Union and of the co-financing Member State.

As shown in one of the reports recently issued by the European Court of Auditors (ECA)[29], there are different types of errors that constitute irregularities in public procurement

[29] Special Report No 10/2015, *cit.supra*.

procedures financed by ESI Funds, namely:

a) *serious errors*, which are defined by ECA as being serious breaches of the rules, with the result that competition was impeded and/or contracts were deemed to have been awarded to those who were not the best bidders;

b) *significant errors*, defined as being significant breaches of the rules, but nevertheless it is deemed that the contracts were awarded to the best bidders;

c) *minor errors,* which are less serious, and often formal, errors which have not had a detrimental impact on the level of competition.

The European Commission Decision C (2013) 9527 of 19.12.2013[30] provides for the main types of irregularities met in practice with regard to the public procurement contracts awarded by the grant recipients within the granted projects or programmes. The alleged purpose of these guidelines is to provide guidance to the relevant Commission services on the principles, criteria and scales that should be applied in respect of financial corrections made by the Commission concerning expenditure financed by the Union under shared management, for non-compliance with the applicable rules on public procurement.

At national level, in Romania, EGO 66/2011 also provides for the most frequent types of irregularities, in its Annex. Correspondingly, for all these types of irregularities, the Government Decision (HG) No 519/2014 sets out the percentage reductions and the financial correction applicable.

In Italy the administrative acts of control and finding of irregularities refer, for the establishment of the financial corrections, to the Guidelines approved by the European Commission, and mentioned above.

Within the thesis an extended analysis of all the categories and types of irregularities regulated by the above-mentioned acts is performed.

The second element of the irregularity is, as already seen, the prejudice. This element is expressly mentioned in the definitions of the irregularity, provided for in the EU Regulations and also in the Romanian domestic legislation, and consists in an effective or presumed damage caused to the budget or to the financial interests of the European Union. Within the thesis, the discussions regarding the prejudice and, especially, its potential or presumed nature, are extensively presented.

[30] The Decision on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement.

The third element of the irregularity, stemming from its definition, is the causal link between the first two elements (the illicit deed and the prejudice). Although this element is not expressly provided for in the definition of the irregularity, it undeniably results from the phrase comprised in the same definition, stating that the breach of law has, or would have, the effect of prejudicing the budget of the Union. The issues with regard to this element are, also, widely discussed within the thesis.

The sole subjective element of the liability is the guilt, although it is not expressly mentioned in the definition of the irregularity. The discussions on the degree of guilt necessary for the existence of the irregularity are also presented, with pros and cons, within the thesis.

Any type of liability entails the application of a coercive measure. In case of infringements of rules set out for the protection of the financial interests of the European Union, these coercive measures may be either administrative measures, or administrative penalties. According to Art 4 par 1 of Regulation No 2988/95, the administrative measure may consist in the withdrawal of the wrongly obtained advantage: by an obligation to pay or repay the amounts due or wrongly received, or by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance. The second paragraph of the same Article provides that the application of the administrative measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis. The fourth paragraph of Art 4 underlines that the measures provided for in this Article shall not be regarded as penalties. The administrative penalties entailed by acts or omissions prejudicial to the financial interests of the Union are regulated in Art 5 of the Regulation No 2988/95. According to the first paragraph of this Article, the administrative penalties are applicable in case of commission of intentional irregularities or of those caused by negligence.

The financial corrections are administrative measures, within the meaning of Article 4 of Regulation No 2988/95, as ECJ itself maintained within the Judgment rendered on the joined cases C-260/14 and C-261/14. The conclusion drawn by ECJ is of utmost importance, because of the difference in terms of legal regime between the administrative measures and the administrative penalties.

Once the existence of the irregularity is ascertained, the application of financial correction is mandatory for the competent authority. There are different types of financial corrections that may be applied. In principle, the financial corrections that may be applied represent the amount of the prejudice caused to the EU and national budgets. Sometimes though, especially in cases where the prejudice is only potential, the financial impact of the

irregularity cannot be quantified. In these latter situations, the financial corrections are established on a flat-rate basis or extrapolated. Where the financial corrections are established, always the principle of proportionality must be observed. Within the thesis, the application of the principle of proportionality in the specific case of type liability at hand is analysed in detail, reference being made to the EU Law, but also, to the national laws of Romania and Italy.

With respect to the administrative controls and oversight, the thesis makes clear that the primary obligation to perform administrative controls on the legality and regularity of the spending of ESI Funds belongs to the Member States. Due to the importance of the financial assistance granted from the budget of the European Union, the system of control with regard to the use of the Funds is strictly regulated. The EU legislature has set out the general principles with regard to these systems of control, the Member State having the specific task of setting up in concrete these systems. Within the thesis, the general principles set out by the European legislator, as well as the establishment and the operationalisation of the systems of management and control at national levels in Romania and Italy were analysed in detail.

As regards the administrative proceedings followed by the competent authorities in order to find irregularities and apply the financial corrections, they are dealt with in detail within section 4.3 of the thesis. All the legal procedural frameworks in place within the national legal orders of Romania and Italy, as well as the relevant procedural framework of the EU are looked at, by turn, within sections 5.2, 5.3 and 5.4. of the thesis.

In terms of theoretical and practical importance of this thesis, it must be stressed that the analysis of irregularities committed by breach of procurement rules within the accomplishment of projects funded by ESIF from the perspective of the liability entailed by them has not been performed in detail until now within the doctrine and, from this, stems the originality of such a study. Withal, given the big amount of financial corrections applied within projects funded by ESIF, especially in Romania, but also in Italy, the issues dealt within this thesis are very important in practice, also, and hopefully the work provides some answers to the problems that arose until now or will arise in the future.

2. KEYWORDS:

European Structural and Investment Funds; Public Procurement; Liability; Irregularity; Financial Correction; Fraud; Administrative Acts; Remedies; Judicial Protection; EU Law; Romanian Law; Italian Law; Principle of Proportionality.

3. THESIS' TABLE OF CONTENTS: