

# REMARKS REGARDING THE CRIMINAL IMPLICATIONS OF THE DIVERSION OF EUROPEAN FUNDS IN ROMANIA

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## **Abstract**

*The author proposes for analysis some of the criminal implications that may affect beneficiaries of funds allocated from the general budget of the European Union, or from the budgets managed by them or on their behalf by other institutions habilitated in the case of the non-compliance with the legal provisions regarding the destinations of the funds or of the advantages resulting from the usage of Community funds.*

**Keywords:** *European funds, financial discipline, offenses on the European Union budget etc.*

One of the major problems the European Union faces is the one of fraud performed to the detriment of the European Union budget, the latter being defined by experts as the concrete expression of a veritable common patrimony of the EU citizens and as the instrument of excellence of the European politics<sup>1</sup>.

Already during the pre-accession phase, the Romanian State adopted the legislation necessary to the protection of the financial interests of the European Union. Thus, through the Law 61/2003 a new article 18<sup>2</sup> was introduced into the Law 78/2000 on preventing, discovering and sanctioning corruption offences, with its subsequent amendments, through which the offence of diversion of funds is stipulated<sup>2</sup>.

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<sup>1</sup> *Corpus Juris*, containing certain criminal provisions on the protection of the financial interests of the European Union, edited by Mirelle Delmas-Marty, Ed. Carl Haymanns, Koln, Berlin, Bonn, München, 1998, p. 103, *apud* G. Antoniu, *Protecția penală a intereselor financiare ale Comunităților Europene* RDP nr. 2, 2002 p. 9.

<sup>2</sup> Article 18<sup>2</sup>: (1) The modification, without complying with the legal provisions, of the destination of funds obtained from the general budget of the European Communities or from the budgets managed by them or on their behalf is punished with imprisonment from 6 months to 5 years.

(2) If the deed stipulated by par. (1) led to very serious consequences, the punishment is the with imprisonment from 5 to 15 years and the forbiddance of certain rights.

(3) The modification, without complying with the legal provisions, of the destination of a legally obtained advantage, if the deed resulted into the illegal diminution of the resources from the general budget of the European Communities or from the budgets managed by them or on their behalf is sanctioned with the punishment stipulated by par. (1).

The existence of this crime, which represents a special incrimination according to the provisions of article 307 of the Criminal Code, is conditioned by the necessity that the source of the funds should be the general budget of the European Union or the budgets managed by it or on its behalf by other habilitated institutions. Moreover, it results that every time the diversion of funds pertains to funds from other sources, other legal provisions shall apply and not those of article 18<sup>2</sup> of Law 78/2000.

From the interpretation of the legal text subjected to our analysis, we can point out the existence of two crimes within the same article, more precisely, *the modification, without complying with the legal provisions, of the destination of funds obtained from the general budget of the European Communities or from the budgets managed by them or on their behalf* stipulated by par. (1) and the crime of *modification, without complying with the legal provisions, of the destination of a legally obtained advantage, if the deed resulted into the illegal diminution of the resources from the general budget of the European Communities or from the budgets managed by them or on their behalf* sanctioned by par. (3) of article 18<sup>2</sup> of the Law specified above.

As agreed also in the specialized doctrine<sup>1</sup>, the crime stipulated by par. (1) is a crime in terms of expenses, while the incrimination stipulated by par. (3) is a crime in terms of income.

### **Constitutive Elements of the Crime**

*The legal object* consists in the social relations regarding the financial discipline within the European Union whose compliance requires the usage of funds and of the legally obtained advantages in compliance with the legal provisions<sup>2</sup>.

*The material object* of the crime of diversions of funds is formed of the amounts of money that were received and whose destination was changed in order to answer other purposes than those stipulated in the project, violating the legal provisions.

In the assimilated variant stipulated by par. (3) the material object of the crime is formed of the legal advantage that was obtained and whose destination was changed by violating the legal provisions.

### **Subjects of the crime**

*a) The active subject.* The crime can be performed by any natural or legal person, and the criminal participation is possible in all its forms, unlike the deed

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<sup>1</sup> Constantin Duvac *Deturnarea de fonduri din bugetul Uniunii Europene în dreptul penal roman - Analele Universității "Constantin Brâncuși" din Tg. Jiu, Seria Științe Juridice nr. 3/2010, p. 79.*

<sup>2</sup> Norel Neagu, *Infraacțiuni prevăzute de legi speciale* Ed. C.H. Beck, Bucharest, p. 685

of diversion of funds stipulated by article 307 of the Criminal Code, where an active subject of the crime can be a public servant.

**b) *The passive subject.*** Mainly, the passive subject is the European Union as holder of the own budgets, managed by them or on their behalf by other institutions.

### **The objective side**

***The material element*** consists in an action of modification of destination of the funds or of the obtained legal advantage, respectively, the usage thereof for other purpose disregarding the legal provisions.

It is well-known the fact that with the submission of projects for obtaining European funds are also drawn the directions towards which such funds shall be directed, which does not mean that it is impossible that during the implementation of the projects certain modifications may occur regarding the destination of the funds or of the obtained legal advantage, but such modifications must be performed in compliance with the legal conditions.

In doctrine as well as in practice the problem was raised as for the legal classification in case the advantage whose destination was changed disregarding the legal provisions, was illegally obtained from the budget of the European Union, such as through the usage of inexact declarations<sup>1</sup>. More precisely, the question was asked whether such a situation shall be considered as a mix of crimes or as a single crime.

From our point of view, in compliance with the doctrine in the field<sup>2</sup>, in such a situation we are in front of a crime unit, and an additional argument in this regard results from the very form of elaboration of the incriminating text stipulated by article 18<sup>2</sup> par. (3), which, for the existence of the crime of modification of the destination of the obtained advantage requires the existence of a premised situation, more precisely that good was obtained in legal conditions. As long as the *sinequa non* condition is not fulfilled, the existence of the incrimination stipulated in par. (3) cannot be maintained.

Furthermore, the legislator understood to maintain the condition of legality regarding the obtaining of the funds in the form stipulated by par. (3) of article 18<sup>2</sup> while this condition is not stipulated in the hypothesis contained by par. (1) of the same article.

### ***Immediate Consequence***

In the variant stipulated by article 18<sup>2</sup> par. (1) of Law 78/2000 the deed is a dangerous crime and the immediate consequence consists in a state of danger regarding the general budget of the European Union or the budgets managed by it or on its behalf.

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<sup>1</sup> Norel Neagu, *op. cit.*, p. 686.

<sup>2</sup> Milu Constantin Timocea, [www.juridice.ro](http://www.juridice.ro); Norel Neagu, *op. cit.*, p. 687; Norel Neagu, RDP nr. 3/2008.

In the variant stipulated in par. (2) it is requested that the modification of destination of the funds shall produce very serious consequences. According to article 183 of the Criminal Code, “very serious consequences” mean a material damage of more than 2.000.000 de lei.

In the assimilated variant, stipulated in par. (3) of the same article, is stipulated the condition that the modification of the destination of the legally obtained should result into the illegal diminution of the resources of the general budget of the European Union or the budgets managed by it or on its behalf.

### ***Causality relation***

In the base variant, the deed being a dangerous crime, the immediate consequence results *ex re*.

In the assimilated variant, a causality relation must be established between the incriminating action and the immediate consequence.

### **Subjective side**

***The subjective element.*** The analysed deeds can occur due to a direct or indirect intention.

In the variant stipulated in par. (1) the deed can be performed due to a direct intention or an indirect one.

In the variant stipulated in par. (2) the deed can be performed due to a direct intention, an indirect intention, or praeterintention<sup>1</sup>.

In the variant stipulated in par. (3) the deed can be performed due to a direct or indirect intention.

***The motive and purpose*** are not of interest for the existence of the crime, but only for establishing the degree of concrete social danger of the performed deed and the individualization of the sanction.

Procedurally, in the criminal investigation phase, the competence of investigating such deeds belongs with the National Anticorruption Directorate<sup>2</sup>, and in the judgment phase the competence belongs with the Court<sup>3</sup>.

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<sup>1</sup> Norel Neagu, *op. cit.*, p. 691.

<sup>2</sup> According to article 13 par. (2) of the GEO 43/2000 as modified through Law no. 255/2013 “(...) crimes performed against the financial interests of the European Union are the competence of the National Anticorruption Directorate”.

<sup>3</sup> According to article 36 letter c) of the Criminal Code “*The Tribunal judges in the first court the crimes for which the criminal investigation was done by the National Anticorruption Directorate(...).*”