

FINANCIAL CORRECTIONS ESTABLISHED BY THE EUROPEAN COMMISSION FOR PUBLIC PROCUREMENT PROCEDURES FOR THE 2007-2013 PROGRAMMING PERIOD

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ABSTRACT

The Member States and the European Commission, for the funds set for the previous 2007 - 2013 programming period have established corrective mechanisms addressing any deviations from legality and regularity, such measures being applied when any type of deficiencies related to the effective functioning of the management and control system have been identified and when individual irregularities have been identified at project level.

This article aims to present these corrective mechanisms in the context of irregularities related to public procurement procedures. In Romania, it is well known that most of the irregularities found on the projects financed by the Structural and Cohesion Funds have been identified in the area related to public procurement. This phenomenon of many corrections in one area, that of the public procurement, was caused by the lack of ex-ante checks due to an inadequate institutional framework, the lack of guidance from the regulator in the field, and the failure to correlate the national and European legal frameworks.

The issue remains quite current, and now that the closure of operational programs is yet to be finalized, the final balance being outstanding, the European Commission considers that the current organization does not provide enough assurance that this will not happen again. If the financial situation is accepted by the European Commission as of 31 March 2017, Romania has to reimburse Euro 256,712,276, according to the state of play presented by the Ministry of European Funds.

KEYWORDS: *corrections, irregularities, management, public procurement,*

1. INTRODUCTION

The management and control systems, set up at the level of the operational programs approved by the European Commission for the 2007-2013 programming period, had to operate on the principle of sound financial management of European funds. Any deviation from an effective operation thereof leads to the following sanctions:

- interruption and suspension of the deadline for the payment of expenditure declared to the European Commission by the Member State;
- financial corrections applied by the Member State and the European Commission.

The European Commission Regulation No 1605 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, defines the principle of sound financial management applicable to the 2007-2013 programming period, namely that the European funds made available to the Member States by the European Commission are used in accordance with the principles of economy, efficiency and effectiveness.

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The European Commission implements the budget allocated to different destinations through shared management, with the implementation related tasks being delegated to the Member States. In the framework of shared management, Member States were compelled to issue at national level all the necessary laws, regulations or administrative provisions to protect the financial interests of the Communities.

The European Council Regulation No 1083 of 11 July 2006 laying down the general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) Regulation 1260 of 21 June 1999 clearly defined the obligations of the Member State and the European Commission in the context of the shared management.

The European Commission needed to ensure that the Member States had legally and regularly used the allocated European funds, and that on the basis of the audits carried out by the audit authority within the Member State and its own audits carried out by its own officials.

It was the responsibility of the Member States to identify irregularities, to take actions to apply the financial corrections necessary for individual or systemic deficiencies found at the level of projects financed from different operational programs. The financial corrections were applied to the whole funding for the project or through partial cancellation of the public participation and would have taken into account the nature and gravity of the found irregularities. The resources from the funds thus released could have been used again by the Member State within the operational program concerned. The canceled participation could not be used again for the projects which were subjected to a financial correction. In the event of a systemic irregularity, the Member State had the obligation to extend the checks to all projects that might have been affected.

The European Commission applied financial corrections by partially or totally canceling the Community participation in an operational program if it considered that:

- a) there has been a serious deficiency in the functioning of the program's management and control system;
- b) there was an expenditure found in a statement that has not been corrected by the Member State after the correction procedure has been initiated.

The European Commission has based its financial corrections on individual cases of identified irregularities, taking into account the systemic nature of the irregularity. It also took into account the recommendations established by auditors other than those of its own departments and reached its own conclusions, after examining the measures taken in the Member State and assessing these measures required by the audit authority in that Member State.

The European Commission aimed at drawing up guidelines for establishing the financial corrections to be applied to all the detected deficiencies relating to the application of Community rules on procurement procedures co-financed by the Structural Funds and the Cohesion Fund during the 2000-2006 and 2007-2013 programming periods. The typology of irregularities and the correction rates that can be applied for:

- contracts covered by the Community directives on public procurement;
- contracts which either are not covered or are only partially covered by the Community directives on public procurement.

2. PENALTIES ESTABLISHED BY THE EUROPEAN COMMISSION AND CORRECTIVE MEASURES UNDERTAKEN BY ROMANIA

The European Commission has considered the irregularities related to the public procurement procedures as a major risk area. Romania did not realize this risk at that time, as the national legal framework was not adapted to the new European Commission guidelines.

At the beginning of the operational programs the Ordinance no 79 of 28 August 2003 on the control and recovery of Community funds and the corresponding co-financing funds incorrectly used and establishing the mechanism for identifying and finding irregularities was in force. This regulatory act

did not mirror the guidelines in the Committee of the Coordination of Funds Guideline no 07/0037/03 of 2007 regarding irregularities in the area of public procurement.

Subsequently, through the Emergency Ordinance no 66 of 29 June 2011 on the prevention, detection and sanctioning of irregularities related to the obtaining and use of European funds and/or the related national public funds, the previous normative act was modified so that to take into account the European Commission's guide, and therefore included the situations in which the financial corrections at the project level must be applied, replacing the old type of irregularities and correction rates, The European Commission, following its own checks, sanctioned Romania on each operational program by applying a correction rate at the priority axis level. All programs with the investment component have been suspended until the Member State has taken all necessary steps to remedy the deficiencies. The highest correction percentage was 25% for the Sectoral Operational Program Increase of Economic Competitiveness, on the IT priority axis.

The financial corrections applied related to deviations identified at different stages of the public procurement procedures:

- Deviations at the stage of publication of the tender notice and award documentation
- Deviations in the bidding stage;
- Deviations in the implementation phase of the contract:

I will exemplify a series of irregularities identified by European Commission auditors as well as by the Managing Authority and the Audit Authority:

- Deviations in the stage of publication of the contract notice and award documentation
 - > No advertising:
 - o Non-publication of a contract notice in accordance with the applicable rules;
 - o The deadline for submission of tenders is shorter than the deadlines set by European directives or national legislation;
 - o Extending the deadline for submission of tenders, without publishing a corrigendum;
 - o The Call for Proposals does not clearly and sufficiently describe qualification requirements and / or evaluation factors.
 - > Use of minimum restrictive qualification requirements
 - o Demonstrate the similar experience by presenting proof of works executed with greater value than the estimated value;
 - o The equipment required to execute the contract should be the property of the bidder;
 - o The minimum personnel available to the economic operator for the performance of the contract to be employed or permanently employed on the date of submission of the offer:
 - o The balance of the financial years for the last 3 years is positive;
 - o Requirement of certificates issued by the national authorities in order to prove the membership in certain professional categories without any clarification regarding the moment of presentation of these documents and no explanations as to how these requirements will be fulfilled by potential foreign bidders;
 - o The request to establish the participation guarantee by submitting a guarantee issued by an insurance company.

- Deviations in the tender evaluation stage

> Selection criteria have been changed during the evaluation phase against the criteria included in the Call for Proposals and the Awarding Documentation

> The evaluation was carried out according to criteria other than those included in the Call for Proposals and the Awarding Documentation

> Violation of the principle of transparency and equal treatment:

- o Accepting an offer that does not meet the minimum qualification requirements;
- o Unjustified rejection of an offer that meets the minimum qualification requirements;
- o Reject a bid with an unusually small price without asking for clarification;

- Accepting a bid change during the evaluation;
- Insufficient scoring of the score awarded to each offer;
- The evaluation report does not contain all the elements provided for by the legal regulations.
- > The Authority negotiates with the bidders during the evaluation process, causing substantial changes to the conditions included in the awarding documentation
- > The use of selection criteria as evaluation factors (exp. Term of execution)
- > Existence of possible conflict of interest / detection of fraud indicators:
 - Participation of an economic operator in the procedure both as a bidder and as a subcontractor in the case of an offer submitted by another economic operator;
 - The existence of links between bidders in the procedure and / or between bidders and the contracting authority.
- Deviations at the implementation stage of the contract
- > Modification of the contract during implementation (term of execution, used materials, nature of works, etc.);
- > Supplementing the contract with additional works / services that exceed the amount stipulated by the legislation and are not the result of unforeseeable events;
- > Reducing the object of the contract.

In case of reported irregularities, the Emergency Ordinance no 66 of June 29, 2011, fixes the correction rates, which may in some cases be even 100% of the value of the public procurement contracts, but usually the maximum percentage is 25%, which can be reduced to 10% or even 5%. In determining the final correction rate, the following elements should be considered, which may lead to a higher or lower correction rate:

- Competitive framework - given by the number of bidders;
- Decisions issued by the National Council for Solving Complaints or by judicial Courts;
- Clarifications issued by the beneficiaries to the requests of potential bidders;
- Recalculate the rating grids in order to determine if a bidder who has been declared inappropriately could have been the winner tenderer.

For the irregularities identified in a public procurement procedure, a single correction rate is applied, there is no collective rate for adding up each distinct irregularity.

In addition to the financial correction rates set for each program, the European Commission also imposed the inclusion of the National Authority for Regulating and Monitoring Public Procurement and the Public Procurement Coordination and Verification Unit in the management and control system with a well-defined role in the Ex- ante procedures for public procurement. Basically, the years 2011 and 2012 have been years defining the implementation of operational programs, thus reinforcing the control area of public procurement procedures.

To unblock the situation, Romania had to take the following measures:

- To undertake changes to the legislative framework
- To recheck all public procurement contracts signed up to that point and to apply financial corrections for the identified irregularities
- To deduct from the following expenditure declared to the European Commission the identified irregularities.

The National Authority for Regulation and Monitoring of Public Procurement, the Unit for the Coordination and Verification of Public Procurement and its specialized structures at the territorial level were designated to support the work of the Managing Authorities in order to comply with the Community and national rules on public procurement. The changes to the legislative framework clarified the role and attributions of the institutions involved in the process of verifying public procurement. Cooperative and collaborative elements have been included among the internal procedures of the main institutions in the field to identify and prevent the risks of violating public procurement legislation for projects funded by structural instruments.

The National Agency for Public Procurement was established by the Emergency Ordinance no 13 of 20 May 2015 regarding the establishment, organization and functioning of the National Agency for Public Procurement, as a public institution with legal personality, subordinated to the Ministry of Public Finance, and has taken over the duties, the activity, the posts and the staff from the National Authority for Regulation and Monitoring of Public Procurement from the Unit for Coordination and Verification of Public Procurement within the Ministry of Public Finance and from the Public Procurement Verification Departments within the Regional Directorates General for Public Finance. In the case of beneficiaries who did not meet the definition of the contracting authority according to the provisions set by the Emergency Ordinance no 34 of 19 April 2006, the simplified procurement rules developed by management authorities were applied.

According to the provisions of the Emergency Ordinance no 66 of 29 June 2011, the Managing Authority has the obligation to verify the notifications received from inside and outside the institution, including those included in the audit reports and the control reports of the other institutions responsible for control of the Community funds (Audit Authority, Department for Anti-Fraud, etc.). As I was mentioning, in order to unblock the situation, at certain times a series of normative acts to correct the expenditure declared to the European Commission on the main operational programs affected by the irregularities regarding the public procurement procedures were issued, respectively:

- Regional Operational Program;
- Sectoral Operational Program Environment;
- Sectoral Operational Program Transport;
- Sectoral Operational Program Increase of Economic Competitiveness.

All the aforementioned normative acts stated in the text the correction rate to be applied on each priority axis of the operational program concerned, namely the amounts to be deducted from the next payment application to be sent to the European Commission. The amounts presented are related to the balances calculated by the managing authority and the certifying authority, respectively the value obtained by applying the correction rate to the total amounts declared on those priority axes, the individual financial corrections applied by the national authorities have decreased. In practice, the impact on the state budget of these corrections set by the European Commission and the individual corrections applied by the national authorities cannot be established, as a situation in this regard is not public.

For all the correction percentages set by the European Commission, Romania did not dispute any of them, although some areas could bring arguments that would even lead to their reduction.

The Ordinance no 14 of 17 July 2013 and Ordinance no 15 of 24 July 2013, set series of measures regulating the payment from the state budget of the financial corrections applied for the irregularities identified in the public procurement procedures. This has created the possibility for beneficiaries of European funds under the 2007-2013 Regional Operational Program and the 2007-2013 Sectoral Operational Program Environment to request from the national budget the financial corrections applied by the managing authorities.

The beneficiaries of these two ordinances are in particular local public authorities. Beneficiaries are exempt where criminal investigations are conducted at the level of the Anti-Fraud Department, National Anticorruption Directorate or Prosecutor's Office, and for those irregularities identified by the Managing Authorities and the Audit Authority for those procedures that have not been subject to ex ante verification to the National Authority for Regulating and Monitoring Public Procurement and the Unit for the Coordination and Verification of Public Procurement.

For the other operational programs, no similar normative acts were issued to support the beneficiaries and have borne financial corrections from their own budget. The impact on the budget on the application of these two ordinances is unknown at this time.

The main causes for the applied financial corrections identified by the European Commission and the national authorities and that also brought along major delays in the implementation of the projects are:

- inconsistencies between the national and Community legal frameworks for regulating public procurement;
- lack of guidance from the regulator on the situations to be avoided by contracting authorities, with examples from practice;
- lack of adequate ex-ante control over public procurement procedures;
- poor quality technical projects;
- blocking projects in different phases of implementation, in the case of fraud suspicions, which led to major delays, subsequently being classified by the Anti-Fraud Department, the National Anticorruption Directorate or the Prosecutor's Office;
- very long administrative and judicial procedures such as deadlines for finding irregularities, leading to major delays in the implementation of projects, and lack of cash flow for their continuing implementation;
- lack of guidance on how financial corrections applied by management authorities are being established.

If the financial situation is accepted by the European Commission as of the 31 March 2017 of the public information made available by the Ministry of European Funds, Romania has to reimburse Euro 256,712,276. From my point of view, this amount is the optimistic variant in the context in which the final application to Romania included a series of expenses that are affected by irregularities or possible frauds and are in administrative or judicial proceedings of investigation as mentioned below:

- Suspected irregularities in the investigation to the managing authority, which has to carry out its verifications according to Emergency Ordinance no 66 of 29 June 2011;
- Reports on the establishment and settlement of budgetary claims issued by management authorities in administrative appeal or in court;
- Fraud suspicions investigated at the level of the Anti-Fraud Department, National Anticorruption Directorate or Prosecutor's Office;
- Court actions on suspicions of fraud;
- Final decisions of the Romanian courts in favor of the beneficiaries, which were not included in the interim payment applications up to that point.

3. CONCLUSIONS

For the current 2014 – 2020 programming period, Romania shows that it has yet to learn from the lessons of the past, as within the current organization of the management and control system of operational programs, the National Agency for Public Procurement is still not a part hereof.

Virtually that part of the system can no longer be audited according to the requirements of the European regulations, in order to ensure that they have the legal and procedural framework and institutional capacity to carry out the ex-ante checks of the public procurement procedures.

The Emergency Ordinance no 98 of 14 December 2017, established that the ex-ante verification carried out by the National Agency for Public Procurement should be done selectively for 15% of the total award procedures initiated by the contracting authorities during a calendar year. In the context in which most irregularities were identified at the stages of the publication of the contract notice and tender documentation and at the tender evaluation stage, the sampled verification results lead to a major risk with potential financial corrections by the European Commission and the national authorities.

As the managing authority and the audit authority do the ex-post verification after the signing of the procurement contracts and the related payments, basically the preventive function is no longer ensured. Part of this expenditure is already reported to the European Commission in such unchecked way, which is the basis for verification for the audit authority, therefore it shall be affected by a

number of sanctions through financial corrections and that shall have to be adjusted annually for the current 2014-2020 financial framework.

In this context, it is necessary to modify the legal framework and the working procedures at the level of the management and control system, as it follows:

- Changing the public procurement legislation to ensure a much higher percentage of ex-ante verification based on statistical methods that can allow extrapolation of verification results;
- amendment of Government Emergency Ordinance no 66 of 29 June 2011, in order to shorten the stages of finding the irregularities and establishing the budgetary debts, not to interrupt the payments to the beneficiaries for suspicion of fraud until all the judicial steps are completed and a decision of the final court is issued;
- Clearly determine what kind of irregularities cannot be sanctioned through financial corrections;
- Setting precise deadlines for investigating suspected fraud by the Anti-Fraud Department;
- Accountability of designers and project verifiers, as many deviations have occurred due to design errors;
- Publishing an up-to-date guide on possible irregularities, which should be avoided and communicated to all major beneficiaries of funds.

In the situation where Romania accepts the budgetary corrections applied by the European Commission, it is necessary to apply equal treatment to all beneficiaries of European funds from all operational programs that fall into the category of contracting authority as defined in the public procurement law.

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