Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

4 October 2024*

(Reference for a preliminary ruling – Own resources of the European Union – Protection of the financial interests of the European Union – Regulation (EU) No 1303/2013 – Article 2(36) – Concept of 'irregularity' – Article 143(2) – Prejudice caused to the budget of the European Union by charging an unjustified item of expenditure – Determination of the applicable financial correction rate – Scale of flat-rate correction rates – Principle of proportionality)

In Case C-175/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria), made by decision of 8 March 2023, received at the Court on 21 March 2023, in the proceedings

Obshtina Svishtov

v

Rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020,

THE COURT (Eighth Chamber),

composed of N. Piçarra (Rapporteur), President of the Chamber, N. Jääskinen and M. Gavalec, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Estonian Government, by M. Kriisa, acting as Agent,

– the European Commission, by D. Drambozova and J. Hradil, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: Bulgarian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(36) and Article 143(2) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

2 The request has been made in the context of a dispute between Obshtina Svishtov (municipality of Svishtov, Bulgaria) and Rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020 (Head of the Managing Authority of the operational programme 'Regions in Growth' 2014-2020) ('the Managing Authority') concerning the latter's decision imposing a financial correction on that municipality, due to a breach of the rules on selecting a tenderer when awarding a public contract.

Legal context

European Union law

Regulation No 1303/2013

3 Recital 120 of Regulation No 1303/2013 states that, 'in order to provide legal certainty for Member States, it is appropriate to lay down the specific arrangements and procedures for financial corrections by Member States and by the [European] Commission in respect of the Funds … respecting the principle of proportionality'.

4 Article 2 of that regulation, entitled 'Definitions', provides, in paragraphs 36 and 37 thereof:

'For the purposes of this Regulation, the following definitions apply[:]

(36) "irregularity" means any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the … Funds, which has, or would have, the effect of prejudicing the budget of the [European] Union by charging an unjustified item of expenditure to the budget of the [European] Union;

(37) "economic operator" means any natural or legal person or other entity taking part in the implementation of assistance from the … Funds, with the exception of a Member State exercising its prerogatives as a public authority'.

5 Article 143 of that regulation, entitled 'Financial corrections by Member States', provides, in paragraphs 1 and 2 thereof:

'1. The Member States shall in the first instance be responsible for investigating irregularities and for making the financial corrections required and pursuing recoveries. In the case of a systemic irregularity, the Member State shall extend its investigation to cover all operations potentially affected.

2. Member States shall make the financial corrections required in connection with individual or systemic irregularities detected in operations or operational programmes. Financial corrections shall consist of cancelling all or part of the public contribution to an operation or operational programme. The Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Funds … and shall apply a proportionate correction. …'

6 Article 144 of that regulation, entitled 'Criteria for financial corrections', provides, in paragraphs 1 and 2 thereof:

'1. The Commission shall make financial corrections, by means of implementing acts, by cancelling all or part of the Union contribution to an operational programme …, where, after carrying out the necessary examination, it concludes that:

…

(b) the Member State has not complied with its obligations under Article 143 prior to the opening of the correction procedure under this paragraph;

…

The Commission shall base its financial corrections on individual cases of identified irregularity and shall take account of whether an irregularity is systemic. Where it is not possible to quantify precisely the amount of irregular expenditure charged to the Funds …, the Commission shall apply a flat rate or extrapolated financial correction.

2. The Commission shall, when deciding on a correction under paragraph 1, respect the principle of proportionality by taking account of the nature and gravity of the irregularity and the extent and financial implications of the deficiencies in management and control systems found in the operational programme.'

The Commission's 2019 Guidelines

7 Under point 1.4 of the Commission Decision C(2019) 3452 final of 14 May 2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement ('the Commission's 2019 Guidelines'), entitled 'Criteria to consider when deciding a proportionate rate of correction', 'where due to the nature of the irregularity, it is not possible to quantify precisely the financial impact but the irregularity is capable, as such, to have a budgetary impact the Commission may calculate the amount of the correction to apply by taking into account three criteria, namely the nature and gravity of the irregularities and the resulting financial loss to the Funds. This implies that the financial corrections made on the basis of a scale of flat-rates listed in Section 2 of these guidelines (5%, 10%, 25% and 100%) respect the principle of proportionality. This is without

prejudice to the fact that the calculation of the final amount of the correction to be applied should take account of all the characteristics of the irregularity found in relation to the elements taken into consideration for the establishment of that flat-rate'.

Bulgarian law

8 Article 70(1)(9) of the Zakon za upravlenie na sredstvata ot evropeyskite fondove pri spodeleno upravlenie (Law on the Management of European Funds with Shared Management; DV No 101 of 22 December 2015, amended title – DV No 51 of 1 July 2022), in the version applicable to the main dispute (DV No 52 of 9 June 2020) ('the ZUSEFSU'), provides that 'financial support from the [European Structural and Investment Funds] may be cancelled in full or in part by a financial correction for an irregularity constituting a breach of the rules on selecting a tenderer referred to in Chapter 4, resulting from an act or omission of the beneficiary, which has, or would have, the effect of prejudicing the resources of the European Structural and Investment Funds'. Article 70(2) of the ZUSEFSU states that 'the cases of irregularity giving rise to financial corrections under paragraph 1, point 9, shall be referred to in a normative act of the Council of Ministers'.

9 Article 1(1) of the Naredba za posochvane na nerednosti, predstavlyavashti osnovania za izvarshvane na finansovi korektsii, i protsentnite pokazateli za opredelyane razmera na finansovite korektsii po reda na Zakona za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Decree on the detection of irregularities that constitute grounds for making financial corrections, and the percentage indicators for determining the amount of financial corrections under the Law on the Management of European Funds with Shared Management) (DV No 27 of 31 March 2017), in the version applicable to the main dispute ('the decree'), lists the 'cases of irregularity consisting of breaches of the rules on selecting a tenderer under Chapter 4 [of the ZUSEFSU], resulting from an act or omission of the beneficiary, which has, or would have, the effect of prejudicing the resources of the European Structural and Investment Funds … and which constitute grounds for financial correction under Article 70(1)(9) [of the ZUSEFSU]'.

10 Pursuant to Article 2(1) and (2) of the decree, the irregularities referred to in Article 1(1), and the financial correction rates applicable to them, are set out in Annex No 1 to that decree, including those which occurred before the entry into force of the Law on Public Procurement.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Under an agreement concluded with the Managing Authority, the municipality of Svishtov received a grant for a project under the operational programme 'Regions in Growth' 2014-2020, partly financed by the European Regional Development Fund (ERDF).

12 In order to implement that project, the municipality of Svishtov, as contracting authority under the national Law on Public Procurement, conducted an open call for tenders for two lots. At the end of that procedure, two contracts were signed with the two selected economic operators, each being awarded one of those lots.

13 During an inspection carried out following a notification, the Managing Authority found an irregularity in that procedure. By decision of 18 February 2022, that authority therefore applied to that municipality a financial correction amounting to 10% of the amount of the awarded grant.

14 By judgment of 28 April 2022, the Administrative sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo, Bulgaria), hearing an appeal brought by the municipality of Svishtov, annulled that decision on the ground that no provision of the national Law on Public Procurement had been breached and that the procedure for awarding the public works' contract was therefore not vitiated by any irregularity.

15 The Managing Authority brought an appeal on a point of law against that judgment before the Varhoven Administrativen sad (Supreme Administrative Court, Bulgaria), which, without setting aside that judgment, considered that the disputed facts constituted a different irregularity, resulting from a failure to comply with the provisions of Annex No 1 to the decree, for which another rate of financial correction was provided.

16 Following a further notification, the Managing Authority carried out a further audit of the project management, which led it to find an irregularity resulting from a breach of the rules on public procurement. By decision of 14 November 2022, it applied to the municipality of Svishtov a financial correction corresponding to 5% of the eligible costs of the two contracts concluded with the economic operators.

17 That municipality brought an appeal against that decision before the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo), which is the referring court.

18 That court notes that the Managing Authority found that there was an irregularity, within the meaning of Annex No 1 to the decree, without examining whether the budget of the European Union had suffered, or was likely to suffer, a loss and without taking into account the gravity of the infringement in question, applying the corresponding rate of financial correction provided for in that annex.

19 According to the referring court, although Article 70(1)(9) of the ZUSEFSU is consistent with Article 2(36) of Regulation No 1303/2013 as regards the definition of the concept of an irregularity, Article 70(2) of the ZUSEFSU and Article 2 of the decree 'introduce a de facto irrebuttable presumption according to which the breaches of national law (including the rules governing public procurement) listed in [that decree] are considered irregularities [within the meaning of Article 2(36) of Regulation No 1303/2013] from the outset, which also entails the presumption of loss caused or likely to be caused by those breaches and the presumption of a causal link between the breach and the loss or risk of loss'.

20 Since, according to that court, the applicable national legislation requires the Managing Authority to set the amount of the financial correction due solely on the basis of the flat rate provided for in the abovementioned annex, that court questions whether such legislation fully guarantees the application of the principle of proportionality, as set out in Article 143(2) of Regulation No 1303/2013.

21 In those circumstances, the Administrativen sad Veliko Tarnovo (Administrative Court, Veliko Tarnovo) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In view of the logical and purposive interpretation of Articles 2(36) and 143(2) of [Regulation No 1303/2013], is [national legislation] such as that of Article 70(2) of the ZUSEFSU in conjunction with Article 2(1) and (2) of the [decree], which always assumes that there has been an irregularity in the event of a breach of the rules on the award of public contracts that are laid down in a schedule contained in a legislative act, compatible [with EU law]?

(2) In view of the need to individualise each concrete and specific breach of a rule applicable in the field of public procurement, does [national legislation resulting from the combined provisions of] Article 70(2) of the ZUSEFSU [and Article 2(1) and (2) of the decree] comply with the principle of proportionality laid down in the [third] sentence of Article 143(2) of [Regulation 1303/2013]?’

Consideration of the questions referred

22 By its two questions, which should be examined together, the referring court asks, in essence, whether Article 143(2) of Regulation No 1303/2013 must be interpreted as precluding national legislation under which any breach of the public procurement rules constitutes an ‘irregularity’, within the meaning of Article 2(36) of that regulation, which automatically triggers the application of a financial correction, the amount of which is determined on the basis of a pre-established scale of flat-rate correction rates.

23 In the first place, the concept of ‘irregularity’ is defined in Article 2(36) of Regulation No 1303/2013 as any infringement of a provision of EU law or national law relating to the application of that provision, resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget. The existence of such an irregularity presupposes the combination of three conditions, namely an infringement of the applicable law, an act or omission by an economic operator which caused that infringement, and actual or potential prejudice to the budget of the European Union (see, by analogy, judgments of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraphs 50 and 51, and of 8 June 2023, *ANAS*, C-545/21, EU:C:2023:451, paragraphs 27 and 29).

24 The first condition covers not only infringements of a provision of EU law as such, but also infringements of the provisions of national law which are applicable to operations supported by the Structural Funds of the European Union and thereby contribute to ensuring the correct application of EU law relating to the management of projects financed by those funds (judgments of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 52, and of 8 June 2023, *ANAS*, C-545/21, EU:C:2023:451, paragraph 30).

25 As regards the second condition, namely that the irregularity in question arises from an act or omission by an economic operator, Article 2(37) of Regulation No 1303/2013 defines an ‘economic operator’ as any natural or legal person or other entity taking part in the implementation of assistance from the Funds, with the exception of a Member State exercising its prerogatives as a public authority.

26 The third condition requires that the infringement of the applicable law by an economic operator 'has, or would have' the effect of prejudicing the general budget of the European Union. It follows from the wording of Article 2(36) of that regulation, in particular from the words 'would have the effect of', that, while the 'irregularity', within the meaning of that provision, does not require a specific financial impact on the budget of the European Union to be demonstrated, a failure to comply with the applicable rules constitutes an 'irregularity', in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the Funds concerned (judgments of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraphs 60 and 61, and of 8 June 2023, *ANAS*, C-545/21, EU:C:2023:451, paragraph 38).

27 It follows from the foregoing that only an infringement which 'has or would have the effect' of prejudicing the budget of the European Union can be characterised as an 'irregularity' within the meaning of Article 2(36) of Regulation No 1303/2013. Accordingly, that provision precludes the consideration of any infringement of EU law or of the national law applicable to operations supported by the European Structural Funds as automatically prejudicing the budget of the European Union or as always being likely to prejudice that budget, irrespective of the effects of such an infringement on that budget.

28 In the second place, as regards the determination of the amount of the financial correction, it follows from Article 143(1) and (2) of Regulation No 1303/2013 that the Member States are responsible in the first instance for investigating both individual and systemic irregularities, and making proportionate financial corrections in relation to the irregularities detected in operations or operational programmes. Those corrections are to consist of cancelling all or part of the public contribution to the operational programme, by applying criteria relating to the nature and gravity of the irregularities and the financial loss to the Fund concerned.

29 It follows, moreover, from Article 144(1) and (2) of Regulation No 1303/2013 that, if the Commission concludes that a Member State has not complied with its obligations under Article 143 of that regulation, the Commission is to make financial corrections and cancel all or part of the EU contribution to the operational programme in question, on the basis of individual cases of identified irregularity and taking into account whether or not the irregularity is systemic. Where it is not possible to quantify precisely the amount of irregular expenditure charged to the Funds, the Commission is to apply a flat-rate or extrapolated financial correction, in compliance with the principle of proportionality, taking into account inter alia the nature and gravity of the irregularity. To that end, the Commission may establish a scale of flat-rate correction rates applicable to infringements of EU or national law which are to be characterised as 'irregularities' within the meaning of Article 2(36) of that regulation.

30 Member States are also free to establish such a scale of flat-rate correction rates on the basis of Article 143 of Regulation No 1303/2013, read in the light of recital 120 thereof, in order to provide legal certainty, '[whilst] respecting the principle of proportionality'.

31 In order to specify the criteria applicable to financial corrections made on the basis of a scale of flat-rate correction rates, Member States may take into consideration a document such as the Commission's 2019 Guidelines, even though those guidelines are not binding on them. In point 1.1 of those guidelines, Member State authorities are recommended to 'apply the criteria and financial correction rates set out in these guidelines when correcting irregularities detected by their own services' (see, by analogy, judgment of 8 June 2023, *ANAS*, C-545/21, EU:C:2023:451, paragraph 45).

32 It follows from point 1.4 of those guidelines that, where it is not possible to quantify precisely the financial impact for the market concerned, the application, provided for in Article 144(1) of Regulation No 1303/2013, of a flat-rate financial correction rate of 5%, 10%, 25% or 100% must nevertheless take into account the nature and gravity of the irregularity found and the resulting financial loss to the Fund, so that the application of such a rate complies with the principle of proportionality (see, by analogy, judgment of 8 June 2023, *ANAS*, C-545/21, EU:C:2023:451, paragraph 46).

33 Furthermore, while it is open to the Commission and the Member States to rely on a scale of flat-rate correction rates, the fact remains that determining the final amount of the correction to be applied necessarily involves conducting an individualised and detailed examination, taking into account all of the characteristics of the irregularity found in relation to the elements taken into consideration for the establishment of that scale and which are liable to justify the application of an increased or, on the contrary, a reduced correction (see, to that effect, judgment of 14 July 2016, *Wrocław – Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraphs 48 and 49).

34 It follows from the foregoing that, as a rule, the amount of a financial correction must not be determined automatically on the sole basis of a pre-established scale of flat-rate correction rates.

35 In the third place, in so far as the referring court considers that the application of the national legislation at issue in the main proceedings amounts, in practice, to considering that any breach of the public procurement rules constitutes an 'irregularity', within the meaning of Article 2(36) of Regulation No 1303/2013, which must be penalised by the automatic application of a pre-established flat-rate correction, it must be borne in mind that the principle that national law must be interpreted in conformity with EU law requires inter alia that national courts take the whole body of domestic law into consideration and apply the interpretative methods recognised by that law, with a view to ensuring that EU law is fully effective and achieving an outcome consistent with the objective pursued by that law (see, to that effect, judgments of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33, paragraph 27, and of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraph 34).

36 A national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law or is applied in such a manner by the relevant national authorities (see, to that effect, judgments of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 34, and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraph 61).

37 That obligation to interpret national law in conformity with EU law is, however, limited by general principles of law, including the principle of legal certainty, and cannot serve as the basis for an interpretation of national law *contra legem* (see, inter alia, judgments of 14 January 2014, *Association de Médiation Sociale*, C-176/12, EU:C:2014:2, paragraph 39, and of 21 January 2021, *Whiteland Import Export*, C-308/19, EU:C:2021:47, paragraph 62).

38 It is therefore for the referring court, first, to examine whether the national legislation at issue in the main proceedings can be interpreted as meaning that only infringements of EU law or national law which have, or would have, the effect of prejudicing the budget of the European Union can be characterised as an 'irregularity', within the meaning of Article 2(36) of Regulation No 1303/2013.

Secondly, it is for that court to determine whether that legislation makes it possible to take into account, inter alia, the nature and gravity of the irregularity and to apply a 'proportionate correction' within the meaning of Article 143(2) of that regulation.

39 In the event that such an interpretation in conformity with EU law is not possible, it should also be borne in mind that any national court, hearing a case within its jurisdiction, has the obligation, pursuant to the principle of sincere cooperation set out in Article 4(3) TEU, to disapply any provision of national law contrary to directly applicable EU law, such as the provisions of a regulation, and thus to protect the rights which that regulation confers upon individuals (see, to that effect, judgments of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 55, and of 21 January 2021, *Whiteland Import Export*, C-308/19, EU:C:2021:47, paragraphs 31 and 63).

40 In light of the foregoing, the answer to the questions referred is that Article 143(2) of Regulation No 1303/2013 must be interpreted as precluding national legislation under which any breach of the public procurement rules constitutes an 'irregularity', within the meaning of Article 2(36) of that regulation, which automatically triggers the application of a financial correction, the amount of which is determined on the basis of a pre-established scale of flat-rate correction rates.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 143(2) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006

must be interpreted as precluding national legislation under which any breach of the public procurement rules constitutes an 'irregularity', within the meaning of Article 2(36) of that regulation, which automatically triggers the application of a financial correction, the amount of which is determined on the basis of a pre-established scale of flat-rate correction rates.

[Signatures]