Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

14 October 2021 *

(Reference for a preliminary ruling – Protection of the European Union's financial interests – Article 325 TFEU – Fight against fraud and other illegal activities – Convention on the protection of the European Union's financial interests – Definition of 'fraud' – Unlawful conduct during the sustainability phase of a project)

In Case C-360/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunalul Argeş (Regional Court, Argeş, Romania), made by decision of 4 August 2020, received at the Court on 4 August 2020, in the proceedings

Ministerul Lucrărilor Publice, **Dezvoltării şi Administrației**, formerly Ministerul Dezvoltării Regionale și Administrației Publice

v

NE,

THE COURT (Eighth Chamber),

composed of J. Passer, President of the Seventh Chamber, acting as President of the Eighth Chamber, L.S. Rossi and N. Wahl (Rapporteur), Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Ministerul Lucrărilor Publice, Dezvoltării și Administrației, formerly Ministerul Dezvoltării Regionale și Administrației Publice, by I. Ștefan, acting as Agent,

– the European Commission, by J. Baquero Cruz, L. Mantl and I. Rogalski, acting as Agents,

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

* Language of the case: Romanian.

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, read in conjunction with Article 325(1) and (2) TFEU, of Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 (OJ 1995 C 316, p. 49; 'the PFI Convention'), and also of Article 57(1) and (3) and Article 98 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund [ESF], the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25), as amended by Regulation (EU) No 539/2010 of the European Parliament and of the Council of 16 June 2010 (OJ 2010 L 158, p. 1; 'Regulation No 1083/2006').

2 This request has been made in proceedings brought by the Ministerul Lucrărilor Publice, Dezvoltării şi Administraţiei (Romanian Ministry of Public Works, Development and Administration), formerly known as the Ministerul Dezvoltării Regionale şi Administraţiei Publice (Romanian Ministry of Regional Development and Public Administration) ('the Ministry') against an order by which the prosecutor declared that no further action would be taken in the criminal proceedings brought against NE in respect of offences relating to the misappropriation of funds from the general budget of the European Union.

Legal framework

European Union law

The PFI Convention

3 Article 1(1)(a) of the PFI Convention provides:

'1. For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:

(a) in respect of expenditure, any intentional act or omission relating to:

– the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

– non-disclosure of information in violation of a specific obligation, with the same effect,

– the misapplication of such funds for purposes other than those for which they were originally granted;

…'

Regulation No 1083/2006

4 Under point 7 of Article 2 of Regulation No 1083/2006, entitled 'Definitions':

'For the purposes of this Regulation, the following terms shall have the meanings assigned to them here:

…

(7) "irregularity": any infringement of a provision of Community law 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.'

5 Article 57(1) of that regulation, entitled 'Durability of operations', provides:

'1. The Member State or managing authority shall ensure that an operation comprising investment in infrastructure or productive investment retains the contribution from the Funds only if it does not, within five years from its completion, undergo a substantial modification which is caused by a change in the nature of ownership of an item of infrastructure or the cessation of a productive activity and which affects the nature or the implementation conditions of the operation or gives to a firm or a public body an undue advantage.

Actions falling within the scope of assistance from the ESF shall be considered as not having retained the contribution only where they are subject to an obligation for maintenance of investment under the applicable rules on State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union and where they undergo a substantial modification as a result of the cessation of productive activity within the period laid down in those rules.

Member States may reduce the time limit set out in the first subparagraph to three years in cases concerning the maintenance of investments by small and medium-sized enterprises.'

6 Article 98 of that regulation, entitled 'Financial corrections by Member States', reads as follows:

'1. The Member States shall in the first instance bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.

2. The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. The Member State shall take into account the nature and gravity of the irregularities and the financial loss to the Funds.

The resources from the Funds released in this way may be reused by the Member State until 31 December 2015 for the operational programme concerned in accordance with the provisions referred to in paragraph 3.

…

3. The contribution cancelled in accordance with paragraph 2 may not be reused for the operation or operations that were the subject of the correction, nor, where a financial correction is made for a systemic irregularity, for existing operations within the whole or part of the priority axis where the systemic irregularity occurred.

4. In the case of a systemic irregularity, the Member State shall extend its enquiries to cover all operations liable to be affected.'

Romanian law

7 Article 18[1](1) of the legea nr. 78/2000 pentru prevenirea, descoperirea și sancționarea faptelor de corupție (Law No 78/2000 on the prevention, discovery and punishment of corruption offences) of 8 May 2000, as amended by the legea nr. 187/2012 pentru punerea în aplicare a Legii nr. 286/2009 privind Codul penal (Law No 187/2012 on the implementation of Law No 286/2009 on the Criminal Code) ('Article 18[1](1) of Law No 78/2000'), provides:

'The use or presentation in bad faith of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation of funds from the general budget of the European Union or budgets managed by, or on behalf of, the European Union, shall be punishable by imprisonment for a term of two to seven years and deprivation of rights.'

8 Under Article 2(1)(b) of the Ordonanța de urgență nr. 66/2011 privind prevenirea, constatarea și sancționarea neregulilor apărute în obținerea şi utilizarea fondurilor europene şi/sau a fondurilor publice naționale aferente acestora (Government Emergency Order No 66/2011 on the prevention, discovery and punishment of irregularities in obtaining and using EU funds and/or related national public funds) of 29 June 2011:

'For the purposes of this emergency order, "fraud" shall mean an offence committed in connection with the receipt or use of EU funds and/or the related national public funds, punishable under the Criminal Code or under other special laws.'

9 Article 26 of that order provides:

'With the exception of cases in which the rules laid down by the international public donor provide otherwise, the authority competent to manage the European funds is responsible for drawing up the report of the finding of irregularities and of the assessment of the budgetary debts by applying Articles 20 and 21, where:

(a) during the follow-up period, it finds that the project does not comply with the durability/sustainability requirements laid down by the applicable rules;

(b) at the end of the follow-up period, it finds that the indicators/objectives of the projects financed by the European funds or the related national public funds have not been achieved or have been only partially achieved.'

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

10 The case in the main proceedings concerns the implementation of a project entitled 'Mănăstirea Cetățuia Negru Vodă – Legendă și tradiție' (Negru Vodă Monastery – Legend and tradition). The project was co-financed by European funds, under a financing agreement the beneficiary of which is the Unitatea Administrativ Teritorială C. (Municipality of C., Romania), represented by the mayor, NE.

11 That agreement provided, inter alia, that the beneficiary, during the period following execution of the project, namely the sustainability period, would, using its own funds, print and distribute promotional material such as leaflets, postcards, brochures, photo books and tourist guides, in order to publicise the project.

12 The beneficiary submitted a report on the sustainability of the investment and a report on the distribution of the promotional material.

13 The Ministry considered that there were discrepancies between the content of those reports and evidence provided by the beneficiary during an on-the-spot inspection. Although the beneficiary stated that it had produced and distributed the promotional material in accordance with the agreement, it was unable to provide sufficient proof, giving rise, according to the Ministry, to a reasonable suspicion as to the accuracy of the documents submitted. The Ministry maintains that it had clear evidence of the presentation of false, incorrect or incomplete statements or documents.

14 After the Ministry lodged a complaint, the Parchetul de le pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție – Serviciul teritorial Pitești (Prosecutor at the High Court of Cassation and Justice – National Anti-Corruption Directorate – Regional Office, Pitești, Romania) initiated criminal proceedings on 14 February 2017 for a possible offence under Article 18^1(1) of Law No 78/2000, namely the use or presentation in bad faith of false, incorrect or incomplete statements or documents which has as its effect the misappropriation of funds from the general budget of the European Union.

15 By order of 12 May 2017, the Direcția Națională Anticorupție – Serviciul teritorial Pitești (National Anti-Corruption Directorate – Regional Office, Pitești, Romania) brought a criminal prosecution *in rem* for the offence provided for in Article 18^1(1) of Law No 78/2000.

16 On 1 August 2019, the prosecutor issued an order for no further action to be taken on the case, considering that the existence of the acts referred to in Article 18^1(1) of Law No 78/2000 had not been established. As grounds for that decision, the prosecutor stated, first, that, according to the provisions of the financing agreement, the activities intended to ensure the maintenance and continuance of the promotion of the tourism product for the five years following the execution of the project, including the printing and distribution of promotional material, was financed by the beneficiary's own budget and not with the help of the EU budget.

17 The prosecutor then stated that the reports, the accuracy of which is disputed by the Ministry, were submitted by the beneficiary following completion of the project, as part of the *ex post* control. According to the prosecutor, the objective elements constituting the offence under Article 18^1(1) of Law No 78/2000 are not made out, since in this case there is no causal link between the presentation or use of the documents and misappropriation of EU funds. The prosecutor therefore considers that, since the EU funds were received during the execution phase

of the project and were not contingent upon the presentation of documents relating to the sustainability phase of the project, it could not be considered that the EU budget had been affected.

18 On 29 August 2019, the Ministry lodged a complaint with the chief prosecutor of the Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție (High Court of Cassation and Justice – National Anti-Corruption Directorate, Romania) against that decision for no further action to be taken, claiming that it was unlawful and unfounded. That complaint was dismissed as unfounded.

19 In those circumstances the Ministry brought an action before the Tribunalul Argeș (Regional Court, Argeș, Romania) against the order of 1 August 2019 for no further action to be taken.

20 In support of its action, the Ministry maintains that the presentation, after the project execution phase, of documents containing incorrect information may constitute an offence under Article 18^{1}(1) of Law No 78/2000. It considers that the misappropriation of funds from the EU budget, as a result of presentation of those documents, must be assessed in the light of the terms of the financing agreement, so that the activities relating to the sustainability phase, despite being subsequent to the period of actual execution of the project, were part of the agreement and carried out during the period of its validity.

21 In those circumstances the Tribunalul Argeș (Regional Court, Argeș) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the concept of fraud affecting the [European Union’s] financial interests, as provided for in Article 1(1)(a) of the [PFI Convention] encompass an offence committed to give a semblance of compliance with Article 57(1) of Regulation (EC) No 1083/2006, so as to prevent the application by the Member State of the rules laid down in paragraph 3 of that article, in conjunction with those laid down in Article 98 of that regulation, or only an offence committed prior to the completion of the execution phase, excluding acts committed in the sustainability phase?

(2) May EU law, and in particular the provisions of Article 4(3) TEU, in conjunction with those of Article 325(1) and (2) TFEU, [and] Article 1(1)(a) of the [PFI Convention] be interpreted as precluding a national provision that exempts from punishment a person accused of an offence committed after completion of the project execution phase – in other words, during the sustainability phase, and with regard to the obligations assumed by that person under the financing agreement – and as further precluding the national rule from being interpreted as meaning that the concept of fraud affecting the [European Union’s] financial interests does not also include the unlawful conduct of the beneficiary of the funding during the project sustainability phase, with regard to the obligations assumed under the financing agreement, regardless of the origin of the funds or the amounts disbursed in fulfilment of the obligations assumed by the beneficiary to ensure the sustainability of the project (the beneficiary’s own resources or [EU] funds)?’

The procedure before the Court

22 In its order for reference, the Tribunalul Argeș (Regional Court, Argeș) requested that the reference for a preliminary ruling giving rise to this judgment be determined under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice. In support of its request, that court stated in essence, that there was a risk that the limitation period for criminal liability in the dispute in the main proceedings would expire.

23 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure, where the nature of the case requires that it be dealt with within a short time.

24 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 19 and the case-law cited).

25 In the present case, on 14 September 2020, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, that it was not necessary to grant the request for an expedited procedure, since the order for reference did not contain sufficient arguments for establishing exceptional circumstances to justify giving a ruling on the request for a preliminary ruling within a short time. Indeed, the referring court, in support of its request for an expedited procedure, merely provided the date of the acts and cited the national rules applicable to the limitation period for criminal liability, without, however, stating its views on the application of those rules to the dispute in the main proceedings.

The questions referred for a preliminary ruling

The first question

26 By its first question, the referring court asks, in essence, whether the concept of 'fraud affecting the [European Union's] financial interests' as provided for in Article 1(1)(a) of the PFI Convention is to be interpreted as including the use of false or incorrect statements presented after execution of the project being financed, in order to give a semblance of compliance with the obligations laid down during the sustainability phase of the project.

27 According to Article 1(1)(a) of the PFI Convention, 'fraud affecting the [European Union's] financial interests' is to consist of, in respect of expenditure, any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the budget of the European Union.

28 Thus, 'fraud affecting the (European Union's] financial interests' as provided for in Article 1(1)(a) of the PFI Convention, covers not only the misappropriation, but also the wrongful retention of funds from the EU budget. Therefore, fraud the objective of which is the wrongful retention of funds may take the form of a failure to fulfil the reporting requirements after acquiring those funds.

29 Consequently, the concept of 'fraud affecting the [European Union's] financial interests', as provided for in Article 1(1)(a) of the PFI Convention, must necessarily be interpreted as including the intentional use of false or incorrect statements presented after the execution of the financed project, in order to give a semblance of compliance with the obligations laid down during the sustainability phase of the project by the financing agreement, in order wrongfully to retain funds from the EU budget. It therefore covers the whole period during which the financing agreement imposes obligations on the beneficiaries, including the sustainability phase.

30 Moreover, the origin of the funds used to fulfil an obligation under the financing agreement is irrelevant, since compliance with such an obligation is a precondition for the grant and maintenance of funds from the EU budget.

31 It follows from all the foregoing considerations that the answer to the first question is that the concept of 'fraud affecting the [European Union's] financial interests', as provided for in Article 1(1)(a) of the PFI Convention, must be interpreted as including the use of false or incorrect statements presented after the execution of the financed project, in order to give a semblance of compliance with the obligations laid down during the sustainability phase of the project.

The second question

32 By its second question, the referring court asks, in essence, whether the principle of primacy of EU law must be interpreted as requiring a national court to interpret the provisions of national law in accordance with the obligations under Article 325(1) and (2) TFEU, read in the light of Article 1(1)(a) of the PFI Convention.

33 In order to answer that question, it must be borne in mind, first of all, that the principle of primacy of EU law requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 54 and the case-law cited).

34 In that regard, it should be pointed out that the principle that national law must be interpreted in conformity with EU law, by virtue of which the national court is required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, is inherent in the system of the Treaties, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 55 and the case-law cited).

35 It will, therefore, be for the referring court to assess, in the present case, whether the national law may be interpreted as referring not only to the misappropriation, but also to the wrongful retention of funds where this may constitute fraud affecting the European Union's financial interests as defined in Article 1(1)(a) of the PFI Convention.

36 In that context, it should also be pointed out that Article 325(1) and (2) TFEU imposes on Member States a precise obligation as to the result to be achieved, that is not subject to any condition, regarding the adoption of dissuasive and effective measures and their obligation to take the same measures to counter fraud affecting the European Union's financial interests as they take to counter fraud affecting their own financial interests. That provision therefore has the effect, in accordance with the principle of the primacy of EU law, in its relationship with the

domestic law of the Member States, of rendering automatically inapplicable, merely by its entry into force, any conflicting provision of national law (see, to that effect, judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraphs 51 and 52).

37 Therefore, in the light of the answer to the first question referred for a preliminary ruling, an interpretation of national law after which action may be taken in respect of statements likely to be classified as 'fraud' within the meaning of EU law only where they have been made during the execution phase of the project and not during the sustainability phase is, irrespective of the origin of the funds used, insufficient, and therefore contrary to the obligations under EU law, since it risks preventing the adoption of effective and dissuasive penalties for cases of fraud affecting the European Union's financial interests.

38 Lastly, when interpreting national provisions in conformity with EU law, the referring court must also ensure that the fundamental rights of the persons concerned are respected and prevent the imposition on those persons of penalties which they would have avoided if those provisions of national law had been applied, in accordance with the obligations stemming from the principle that offences and penalties must be defined by law (see to that effect, judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 53).

39 Accordingly, if the national court were to consider that an interpretation consistent with EU law of national provisions conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allows a national situation incompatible with EU law to be remedied. It is, therefore, for the national legislature to adopt the necessary measures (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 61 and the case-law cited).

40 It follows from all the foregoing considerations that the answer to the second question is that the principle of primacy of EU law must be interpreted as requiring a national court to interpret the provisions of national law in accordance with the obligations under Article 325(1) and (2) TFEU, read in the light of Article 1(1)(a) of the PFI Convention, provided that such an interpretation does not lead to an infringement of the principle that offences and penalties must be defined by law.

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:

1. **The concept of 'fraud affecting the [European Union's] financial interests', as provided for in Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, must be interpreted as including the intentional use of false or incorrect statements presented after the execution of the financed project, in order to give a semblance of compliance with the obligations laid down during the sustainability phase of the project.**

2. **The principle of primacy of EU law must be interpreted as requiring a national court to interpret the provisions of national law in accordance with the obligations under Article 325(1) and (2) TFEU, read in the light of Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, provided that such an interpretation does not lead to an infringement of the principle that offences and penalties must be defined by law.**

[Signatures]