

Considerations Related to the Incrimination and the Forensic Investigation of the Crime of Illegal Obtaining of Funds in the Romanian Legislation

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ABSTRACT: The study makes an in-depth analysis of the main aspects related to the incrimination and the forensic investigation of the crime of illegal obtaining of funds in Romanian law system. The offence of illegal obtaining of funds is stipulated by the Article 306 of the Romanian Criminal Code, while Article 18¹ of the Law no. 78/2000 for the prevention, detection and sanctioning of corruption provides the offence of illegal obtaining of funds, obtained from the general budget of the European Union or from the budgets administered by it or on its behalf. The crime of illegal obtaining of funds is incriminated in Article 306 of the Romanian Criminal Code in a standard variant and in an aggravated variant and the crime of illegal obtaining of European funds is incriminated in Article 18¹ of the Law no. 78/2000, in a standard variant, in an assimilated variant and in an aggravated variant. The study also makes an analysis on the incrimination of the crime of illegal obtaining of funds at the level of the European Union, more precisely in the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law and the Convention on the protection of the European Communities' financial interests from the year of 1995 We emphasize that this study makes a presentation and an analysis on some essential aspects related to the process of the forensic investigation of the crime of illegal obtaining of funds.

KEYWORDS: illegal obtaining of funds, incrimination, forensic, criminal investigation; Romanian Criminal Code; the Law no. 78/2000; Directive (EU) 2017/1371

Introduction

The crime of illegal obtaining of funds is criminalized in Article 306 of the Romanian Criminal Code in a standard version and in an aggravated variant. The standard variant contained in the Article 306 (1) of the Romanian Criminal Code consists in using or presenting of false, inaccurate or incomplete documents or data to receive the approvals or guarantees necessary for the granting of financing obtained or guaranteed from public funds, if it results in the unfair obtaining of these funds. The Article 309 of the Romanian Criminal Code provides an aggravating circumstance for several office offences, including the offence of illegal obtaining of funds, if they have produced particularly serious consequences.

Thus, it follows from the corroboration of the provisions of Article 306 (1) with those of Article 309 of the Romanian Criminal Code that the illegal obtaining of funds also has an aggravated variant which is realized in the event that the commission of the act provided by the Article 306 (1) of the Romanian Criminal Code produces serious consequences.

In order for the act of illegally obtaining of funds to be included in the text of Article 306 of the Romanian Criminal Code, we consider it necessary to establish the cumulative meeting of the objective and subjective conditions provided in the text of this article.

Therefore, if the committed deed had particularly serious consequences, according to the provisions of Article 183 of the Romanian Criminal Code, then the legal classification of this deed will be Article 306 (1) of the Romanian Criminal Code, in conjunction with Article 309 of the Romanian Criminal Code. By particularly serious consequences, according to the provisions of Article 183 of the Romanian Criminal Code, is meant a material damage of more than 2,000,000 Romanian lions.

Within the Article 18¹ of Law no. 78/2000 for the prevention, detection and sanctioning of corruption includes the crime of illegal obtaining of European funds which has as object the funds obtained from the national budget of the European Union or from the budgets administered by it or on its behalf. The offence of illegal obtaining of European funds is incriminated in a standard variant, in an assimilated variant and in an aggravated variant.

The standard variant is provided by Article 18¹ (1) of Law no. 78/2000 and consists in the use or presentation of false, inaccurate or incomplete documents or statements, if the act results in the unjustified obtaining or unjustified withholding of funds or assets from the budget of the European Union or the budgets administered by it or on its behalf. The assimilated variant is provided by Article 18¹ (2) of Law no. 78/2000 and consists in the failure to knowingly provide the data required under the legal provisions for obtaining or withholding funds or assets from the budget of the European Union or budgets administered by it or on its behalf, if the act results in the unlawful obtaining or unjust retention of such funds or assets. The aggravating variant is provided by the Article 18¹ (3) of Law no. 78/2000 and refers to the situation when the deeds from the previous paragraphs produced particularly serious consequences, the special limits of the punishment being increased by half.

We emphasize that there are some legal instruments at the European Union level which make references, including the offences of illegal obtaining of European funds, such as the Convention on the protection of the European Communities' financial interests from the year of 1995 and the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

Therefore, the two legal instruments aimed at protecting the financial interests of the European Union, the 1995 Convention on the protection of the European Communities' financial interests and the Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law focus on the concept of fraud affecting the financial interests of the Union, especially the facts that actually harm the budget of the European Union, both in terms of revenue and expenditure (Zack 2013, 171-177).

The pre-existing conditions of the crimes of illegal obtaining of funds

The special legal object of the crime of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code is represented by the social relations regarding the normal development of the activity of public financial institutions whose formation and development are conditioned by the correctness of the persons requesting the granting of financing from public funds in order to orient these funds in other directions than the useful ones (Dobrinouiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinouiu and Sinescu 2014, 583).

The special legal object of the crime of illegal obtaining of European funds, provided by Article 18¹ of Law no. 78/2000 is constituted by the social relations regarding the financial interests of the European Union, which refers to the legal use of European funds, according to the initial destination of these funds obtained from the general budget of the European Union or from the budgets administered by it or on its behalf.

We would like to point out that the general budget of the European Union and the budgets administered by it on its behalf include revenue and expenditure. All these illegal acts affect the budget of the European Union or the budgets administered by the European Union or on its behalf, with regard to expenditure (Hotca, Gorunescu, Neagu, Pop, Sitaru and Geamănu 2019, 497).

Expenditure in the budget of the European Union refers to certain subsidies administered from or on behalf of the general budget of the European Union, such as subsidies paid from the European Social Fund, the European Regional Development Fund and the European Agricultural Fund for Rural Development. All these European Union funds subsidize national policies in many areas, such as agriculture, culture, transport, economic and fiscal.

The material object of the crime of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code is the false, inaccurate or incomplete documents or data, which are used to obtain funds from the national budget. The false, inaccurate or incomplete documents or data in order to constitute the material element of the crime of illegal obtaining of funds must have been used to receive the necessary approvals or guarantees for the granting of financings obtained or guaranteed from public funds and to have aimed at obtaining these funds unjustly from the national budget.

The document is false when its content makes something unreal seems true, this content being contrary to the truth. The document is inaccurate when it is incorrect or erroneous. The document is incomplete when it does not provide all the information related to the existence of a certain fact (Dobrinouiu, Pascu, Hotca, Chiș, Gorunescu, Neagu, Dobrinouiu and Sinescu 2014, 583).

The material object of the crime of illegal obtaining of European funds, provided by Article 18¹ of Law no. 78/2000 consists of external funds allocated from the general budget of the European Union or budgets administered by it or on its behalf and which have been unjustly obtained by an applicant who has used false, inaccurate or incomplete documents or statements.

The active subject of the crime of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code it can be any person who fulfills both the general conditions of criminal liability and, in particular, the eligibility conditions provided by that funding program from the national budget. Therefore, the offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code is committed by either a natural or legal person by submitting projects on the basis of which funds are sought from the budgets of the European Union.

Criminal participation is possible in all its forms: co-author, incitement and complicity.

The active subject of the crime of illegal obtaining of European funds, provided by Article 18¹ of Law no. 78/2000 can be any person, and the criminal participation is possible in all its forms. We mention that an active subject of the crime can also be a legal person, which is criminally liable if the deed was committed in carrying out the object of activity, in the name or interest of the legal person, with the form of guilt provided by the criminal law.

The passive subject of the crime of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code is the Romanian state as a financier or guarantor of

the European financing program. There is also a secondary passive subject represented by the public institution that actually provides financing from public funds, or that guarantees such financing with public funds.

The passive subject of the crime of illegal obtaining of European funds provided by Article 18¹ of Law no. 78/2000 is represented by the European Union, and the secondary passive subject of this crime is the institution that manages the affected budget, such as the European Commission that administers the Development Fund.

The constitutive content of the offences of illegal obtaining of funds

The material element of the *objective side*, in the case of the crime of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code consists in an action either to use false, inaccurate or incomplete documents or data, or to present such documents or data in order to receive the necessary approvals or guarantees for the granting of financings obtained or guaranteed from public funds. We point out that the use of false, inaccurate or incomplete documents or data refers to the use of these documents or data in order to obtain subsidies from national funds. Also, the presentation of false, inaccurate or incomplete data means to inform the public institution that grants financing from public funds of untrue situations or conditions.

The use or presentation of false, inaccurate or incomplete documents or data to receive the necessary approvals or guarantees for granting fundings obtained or guaranteed from public funds occurs most often when preparing the funding file or when verifying eligibility conditions by the public institution that grants the funds.

It has been established in the specialty literature that it will not be retained in the contest of offences with the offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code, the offence of forgery provided by Article 322 of the Romanian Criminal Code and the offence of false statements, provided by Article 326 of the Romanian Criminal Code, because the two offences are absorbed in the content of the constitutive element of the offence of illegal obtaining of funds (Dobrinouiu, Pascu, Hotca, Chiş, Gorunescu, Neagu, Dobrinouiu and Sinescu 2014, 585).

If the falsification of documents constitutes in itself an offence, then the perpetrator will be investigated in addition to the offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code, for committing the offence of forgery in official documents provided by Article 320 of the Romanian Criminal Code, for committing the offence of intellectual forgery provided by Article 321 of the Romanian Criminal Code and for committing the offence of forging documents under private signature, stipulated by Article 322 of the Romanian Criminal Code.

The material element of the *objective side*, in the case of the crime of illegal obtaining of funds provided by Article 18¹ of Law no. 78/2000 consists in the use or presentation of false, inaccurate or incomplete documents or statements, as well as in the failure to provide, knowingly, the data required by law to obtain or withhold funds or assets from the European Union budget or the budgets administered by it on its behalf, if the deed results in the unjustified obtaining or unjustified retention of these funds or assets. The act of using by the perpetrator refers to the use of false, inaccurate or incomplete documents or statements, while the omission of the perpetrator to provide intentionally, the data required by law to obtain funds from the budget of the European Union refers to the existence of a legal obligation of information, an obligation that is violated by the action of the perpetrator who does not provide the required data (Hotca, Gorunescu, Neagu, Pop, Sitaru and Geamănu 2019, 503).

Thus, this omission of the perpetrator to provide the data required by law is possible both at the time the grant is awarded and after the grant is obtained, when the conditions

which led to the award of the grant have changed, whereas this change must be brought to the attention of the authorities and the omission constitutes an offence.

The omission to provide, knowingly, the data required under the legal provisions for obtaining or withholding funds or assets from the budget of the European Union or budgets administered by it or on its behalf, stipulated by Article 18¹ (2) of Law no. 78/2000, may also be committed with the complicity or negligence of the officials of the public institution that grants subsidies from the budget of the European Union.

In most cases, the funds coming from the European Union subsidize the projects that are included in the National Plan of Romania together with the national funds, the frauds affecting both the national funds and the funds from the European Union budget. There is a situation in practice to be in the presence of a fact which meets the constituent elements of the crime of Article 18¹ of Law no. 78/2000, which refers to the illegal obtaining of European funds, as well as the constitutive elements of the crime provided by Article 306 of the Romanian Criminal Code, which refers to the illegal obtaining of funds from the national budget.

In the case practice, it was considered that the offence provided by Article 18¹ of Law no. 78/2000 is a special variant of the crime of deceit, provided by Article 244 of the Romanian Criminal Code, the crimes in the field of subsidies being included in the crime of deceit, up to the criminalization of the crime of illegally obtaining European funds. Both the criminal doctrine and the judicial practice analyzed the situation, if in the same case a contest of offences can be retained between the crime of illegal obtaining of European funds, stipulated by the Article 18¹ of Law no. 78/2000, the crime of illegal obtaining of funds, stipulated by the Article 306 of the Romanian Criminal Code and the crime of deceit stipulated by the Article 244 of the Romanian Criminal Code.

Therefore, by Decision no. 4/2016 pronounced by the High Court of Cassation and Justice of Romania, regarding the appeal in the interest of the law promoted by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the existence of a contest of offences between the offence of illegal obtaining of European funds stipulated by the Article 18¹ of Law no. 78/2000, the offence of illegal obtaining of funds stipulated by the Article 306 of the Romanian Criminal Code and the crime of fraud stipulated by the Article 244 of the Romanian Criminal Code, if funds have been unjustly obtained from the budget of the European Union and the national budget, the Romanian High Court of Cassation and Justice has ruled that the existence of the crime of illegal obtaining of European funds alone or in contest of crimes will be retained with the crime of deception, in the situation where the old criminal law (the Romanian Criminal Code of 1968) is more favorable, respectively, the offence of illegally obtaining European funds alone or in contest of offences with the offence of illegally obtaining funds will be retained, if the new criminal law is more favorable, or if the deed was committed under its rule (Hotca, Gorunescu, Neagu, Pop, Sitaru and Geamănu 2019, 515).

The immediate consequence, in the case of the offence of illegal obtaining of funds stipulated by the Article 306 of the Romanian Criminal Code, refers to the creation of a state of danger for the normal development of the public institution that finances the funds from the national budget, which by presenting or using by the perpetrator false or inaccurate or incomplete documents or data, thus causing the allocation of funds from the national budget in other conditions than the legal ones.

The immediate consequence, in the case of the offence of illegal obtaining of European funds stipulated by the Article 18¹ of Law no. 78/2000, consists in illegally obtaining funds from or on behalf of the budget of the European Union. Thus, for the existence of the crime of illegal obtaining of European funds, it is necessary that these funds were obtained unjustly.

Therefore, if the funds were obtained from the budget of the European Union, without complying with the legal provisions contained in the Article 18¹ of Law no. 78/2000, there will be an immediate consequence of the crime, regardless of whether there has been any damage to the budget of the European Union (Gottschalk 2014, 13).

The legal requirements for the offence provided by the Article 18¹ of Law no. 78/2000 will be met, even if the funds from the Union budget were used according to the destination for which they were obtained and the project or program that was financed from the budget of the European Union was carried to the end, according to the provisions of the financing contract concluded between the parties.

We emphasize that the Romanian legislator should in the near future amend the text of the Article 18¹ of Law no. 78/2000, and in the sense of causing damage to the budget of the European Union, in addition to illicitly obtaining funds from the European Union budget as currently stipulated in Law no. 78/2000.

There must be a *causality link* between the activity of the offender of and the consequence produced, which usually results from the materiality of the act.

On the *subjective side*, we emphasize that the offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code is committed with the form of guilt of both direct and indirect intention. This presupposes that the offender realizes that by using or presenting false, inaccurate or incomplete documents or data he will obtain unjustified funding and pursue this purpose. The purpose expressly mentioned in Article 306 (1) of the Romanian Criminal Code, namely the unjustified obtaining of these funds, is a mandatory element of the subjective side of the offence of illegal obtaining of funds.

The offence of illegal obtaining of European funds stipulated by the Article 18¹ of Law no. 78/2000 is committed with the form of guilt of both direct and indirect intention. The offender foresees that by committing the act he will illegally obtain funds from the budget of the European Union or from the budgets administered by it or on its behalf and seeks or accepts the production of this result.

In the aggravated variant stipulated by Article 18¹ (3) of Law no. 78/2000, the act may be committed with direct intent, indirect intent or with outdated intent.

The forms of the offences of illegal obtaining of funds

The preparatory acts are possible, in the case of the offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code, but they are not criminalized and thus they are not punishable. The preparatory acts contribute to the individualization of the punishment, when they were committed by the perpetrator.

The preparatory acts are possible, in the case of the offence of illegal obtaining of European funds stipulated by the Article 18¹ of Law no. 78/2000, but they are not criminalized and thus they are not punishable.

The attempt in the case of both offences of illegal obtaining national and European funds is possible and is punished according to the Article 306 (2) of the Romanian Criminal Code and according to the Article 18⁴ of the Law no. 78/2000.

The offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code *is consumed* when any of the actions in question have been carried out in their entirety and have resulted in the wrongful obtaining of funds from institutions which grant or guarantee funds from national budgets.

The offence of illegal obtaining of European funds stipulated by the Article 18¹ of Law no. 78/2000 is consumed when, as a result of the perpetrator's action, either the wrongful obtaining of funds from the budget of the European Union or from the budgets

administered by it or on its behalf, or when obtaining funds from the European Union budget produces particularly serious consequences.

The offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code shall be exhausted either on the final cessation of the action in question or on the last action in the continued offence, only if the requirements of Article 35 (1) from the Romanian Criminal Code are also met.

The offence of illegal obtaining of European funds stipulated by the Article 18¹ of Law no. 78/2000 shall be exhausted when the last tranche of European funds is obtained, as a result of the submission of false, inaccurate or incomplete reporting documents justifying the issuance of the last tranche.

It has been established in the specialized literature that obtaining European funds is not only obtained by signing the financing contract, this being only a stage by which the amount of financing and the conditions for making these amounts available are established, but also by making the funds actually available in two or more installments, which will be monitored by the financing authority by drawing up verification reports, and after the approval of the final report which means the settlement of the eligible expenses, the last installments for obtaining the funds will be settled.

Sanctions

The offence of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code is punishable by imprisonment from 2 to 7 years. In the situation where the offence of illegal obtaining of funds produced particularly serious consequences, the special limits of the punishment provided by law are increased by half, according to the provisions of the text of Article 309 of the Romanian Criminal Code.

The standard variant of the crime of illegal obtaining of European funds stipulated by Article 18¹ (1) of the Law no. 78/2000 and the assimilated variant of the crime of illegal obtaining of European funds stipulated by Article 18¹ (2) of the Law no. 78/2000 are punishable by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights. For the aggravated variant stipulated by Article 18¹ (3) of the Law no. 78/2000 the special limits of the punishment are increased by half if particularly serious consequences occur.

Forensic investigation aspects of the crimes of illegal obtaining of funds

When the crimes of illegal obtaining of funds, provided by Article 306 of the Romanian Criminal Code are committed, and when the crimes of illegal obtaining of European funds, provided by Article 18¹ of the Law no. 78/2000 are committed, the Article 288 (1) of the Romanian Criminal Procedure Code stipulates that, the competent criminal investigation bodies such as Prosecutor's Offices attached to the County Courts and the National Anticorruption Directorate must be notified in several ways: complaint or denunciation, by the documents drawn up by other finding bodies provided by law or notified *ex officio* (Moise and Stancu 2017, 204).

When the crimes of illegal obtaining of funds provided by Article 306 of the Romanian Criminal Code are committed, we highlight that the criminal investigation phase is carried out by the Prosecutor's Offices attached to the County Courts. Moreover, when the crimes of illegal obtaining of European funds provided by Article 18¹ of the Law no. 78/2000 are committed, we emphasize that the criminal investigation phase is carried out by the National Anticorruption Directorate.

We also mention, that the jurisdiction to judge the offences of illegal obtaining of funds, provided by Article 306 of the Romanian Criminal Code and the offences of

illegal obtaining of European funds, provided by Article 18¹ of the Law no. 78/2000 belongs in the first instance to the Tribunals.

The forensic investigation process uses special forensic techniques for investigating the crimes of illegal obtaining of national funds and European funds, in particular the *special methods of supervision or investigation*, which are contained in the Article 138 (1) of the Romanian Criminal Procedure Code (Buquet 2011, 358-367; Palmiotto 1994, 185; Buzatu 2013, 130).

Within the National Anticorruption Directorate, in addition to prosecutors, judicial police officers and agents, specialists in the economic, financial, banking, customs, IT and other fields, specialized auxiliary staff, as well as economic and administrative staff work. The National Anticorruption Directorate has in its central structure the following sections: The Anti-Corruption Section; The Section for Combating Crimes Assimilated to Corruption Crimes; The Criminal Judicial Section (Moise and Stancu 2017, 205).

We emphasize the role of the Romanian Anti-Fraud Department in the process of forensic investigation of the offences of illegal obtaining of European funds, provided by Article 18¹ of the Law no. 78/2000, which is an institution subordinated to the Romanian Government that acts on the basis of functional and decisional autonomy, independent of other public authorities and institutions. The Romanian Anti-Fraud Department performs the following functions: the anti-fraud function in order to ensure the protection of the financial interests of the European Union in Romania, the control function, in order to identify irregularities, frauds and other illicit activities that harm the financial interests of the European Union in Romania, the regulatory function, which ensures the elaboration of the normative and institutional framework necessary to ensure the protection of the financial interests of the European Union in Romania and the function of representation, which ensures Romania's participation in advisory committees, working groups and communication networks or the exchange of information on the protection of the European Union's financial interests.

An important European investigative body is the European Anti-Fraud Office which plays a role in the forensic investigation process at the European Union level and investigates the frauds against the European Union budget, corruption offences and other serious misconducts committed within the European institutions. The European Anti-Fraud Office also develops anti-fraud policies for the European Commission.

Conclusions

We emphasize that the provisions of the Article 306 of the Romanian Criminal Code and of the Article 18¹ of the Law no. 78/2000, relating to the offences of illegal obtaining of funds and to the offences of illegal obtaining of funds from the budget of the European Union, adapted to the Article 3 and to the Article 4 of the Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law and to the provisions of Article 1 (a)(b) of the 1995 Convention on the protection of the European Communities' financial interests.

We also highlight the very important role of some national and European institutions with attributions in the field of preventing and combating both the crimes of illegal obtaining of national funds, as well as the crimes of illegal obtaining of funds from the budgets of the European Union, these institutions being the following: the National Anticorruption Directorate; the Romanian Anti-Fraud Department; the European Anti-Fraud Office.

The Office European Anti-Fraud Office has the power to investigate acts affecting the financial interests of the European Union, including offences related to the

fraudulent use of electronic payment instruments, as well as offences affecting the financial interests of the European Union, which are also provided by Article 1 of the 1995 Convention on the protection of the European Communities' financial interests.

In accordance with the Article 325 of the Treaty on the Functioning of the European Union, the Romanian Anti-Fraud Department ensures the protection of the financial interests of the European Union in Romania.

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