

ANTI-FRAUD FIGHT – ATTRIBUTE OF THE ACT OF CONTROL

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Abstract: The paper aims to present the control activity carried out by the economic entities, regardless of their specificity and the main objectives pursued within it. On the other hand, emphasis is placed on the anti-fraud fight that is being carried out as a result of the practical applicability of the actual control actions. The research aimed at highlighting both the basic objectives and the correlation that is established for the anti-fraud fight carried out by different institutions, both at national and European Union level..

Key words: fight against fraud; the anti-fraud system, intra-community fraud.

JEL Classification Codes: G32, H26, P45.

1. INTRODUCTION

In accordance with the provisions of the Council Regulation (EC) No 2988/95 from 18th of December 1995 on the idea of the protection of the European Communities' financial interests, the term 'irregularity' is a concept referring to both intentional and unintentional irregularities committed by economic operators.

The article 1, paragraph (2) of the Regulation defines 'irregularity' as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which is likely to be prejudicial to the general budget of the Communities or budgets managed by them, either by reducing or losing the revenue accrued from own resources collected directly on behalf of the Communities, or by means of unjustified expenditure' (**Council Regulation (EC) No 2988/95, Council Regulation (EC) No 1083/2006**).

The Convention drawn up in accordance with Article K.3 of the Treaty establishing the European Union, which also refers to the protection of the European Communities' financial interests, defines "fraud", by reference to expenditure, as any intentional act or omission connected with (**Council Regulation (EC) No 1828/2006**):

- the use or production of false, incorrect or incomplete declarations or documents which has the effect of misappropriating or withholding funds incorrectly from the general budget of the European Communities or from budgets managed by or on behalf of the European Communities;
- failure to disclose information and breach of a specific obligation with the same effect;
- the improper use of such funds for purposes other than those for which they were originally granted.

Thus, it is the component of intentional deception that distinguishes fraud from the general term "irregularity". In accordance with Article 3, letter (e) of the Regulation (EC) No 1681/94, since 2006, Member States have been obliged to identify, when notifying



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irregularities to the Commission, whether those irregularities involve 'suspected fraud' (**Council Regulation (EC) No 1681/1994**).

Under these conditions, the classification of fraud will be made according to the specific conditions and the environment in which the entities operate. The Association of Authorized Fraud Investigation Experts (ACFE) divides fraud into three categories (<https://www.apcf.ro/ro>):

1. Intentional manipulation of financial statements;
2. Any type of diversion of tangible or intangible goods;
3. Corruption.

There are three elements that underlie fraud and form the so-called 'fraud triangle':

– opportunity – the person has reason but must also have the opportunity to act. This is where the deficiencies that exist in the internal control systems on several levels of action arise, namely: supervision and revision, separation of functions, approval by the governing bodies, proper control of the systems.

– justification – the person acting towards fraud also has a reasonable justification from his own point of view;

– financial pressure – personal need for financial sources or "greed".

In order to prevent fraud, it is sufficient to proceed to the "breaking of the fraud triangle" (**H. Cendrowski, Martin, Petro, p. 41**) and the simplest is to intervene towards the elimination of possible opportunities in this direction.

2. THE INSTITUTIONAL ANTI-FRAUD SYSTEM IN ROMANIA

The competent institutions in the field of anti-fraud are represented by:

1. The Public Ministry – according to the existing legal provisions, the Public Ministry includes (http://www.onpcsb.ro/pdf/ghid_in_romana_ok.pdf):

- *the Prosecutor's Office attached to the High Court of Cassation and Justice (PICCJ)*, which is headed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, assisted by a first deputy and a deputy;

- *The National Anticorruption Directorate (DNA)*, headed by a Chief Prosecutor and two Deputies, is organized as an autonomous structure within the Public Ministry and is coordinated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice;

- *The Directorate for Investigating Organized Crime and Terrorism (DIICOT)* is specialized in combating organized crime and terrorism, within the Prosecutor's Office attached to the High Court of Cassation and Justice. The Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice leads the D.I.I.C.O.T. through the Chief Prosecutor of the Directorate for Investigating Organized Crime and Terrorism;

- *the prosecutor's offices attached to the Courts of Appeal;*

- *the prosecutor's offices attached to the Tribunals;*

- *the prosecutor's offices attached to the Judges.*

2. The General Inspectorate of the Romanian Police (IGPR) - The economic crime investigation police operates at central and territorial level, having the following organizational structure:

a) at the General Inspectorate of the Romanian Police there is functioning the Directorate for Investigating Economic Crime, organized in 6 services;

b) at the General Police Directorate of Bucharest municipality operates the Economic Crime Investigation Service, at the level of the General Directorate and correspondent services within the sector polices;

c) at the county police inspectorates there are functioning the economic crime investigation services, organized on lines, coordinated by the management of the county police inspectorates.

3. The General Directorate for Fiscal Fraud (DGAF) - was established within the National Agency for Fiscal Administration (ANAF) on June 26, 2013, by Government Emergency Ordinance no. 74/2013, approved by Law no. 144/2014. The priority objective is to combat tax and customs evasion and fraud. There are 9 directions, respectively:

- a) Anti-Fraud Directorate
- b) Directorate coordination of special cases
- c) Directorate for Inter-institutional Cooperation
- d) Directorate for Intra-Community Operations and VAT (with operational control tasks)
- e) Directorate for Customs Operations, Import-Export and Excise Goods (with operational control tasks)
- f) Directorate for control of activities with fiscal risk and rapid intervention (with operational control attributions)
- g) Directorate for Risk Analysis, Selection and Programming
- h) Directorate for Methodologies, Anti-Fraud Procedures, Synthesis and Reporting
- i) Directorate for Tax Investigations

4. The National Office for Preventing and Combating Money Laundering (ONPCSB) - operates as a financial information unit within the national system for preventing and combating money laundering and terrorist financing (SB/FT) (according to fatf recommendation 29).

5. EUROPOL – the European Police Office – is a European Union agency whose tasks are to collate, analyse information and send analytical material to the competent law enforcement agencies in the Member States. It works with both police organisations in the Member States and customs, tax, immigration, coastguard, etc. authorities.

3. LEGAL FRAMEWORK FOR FRAUD CONTROL

Synthesizing the legislative issue, as a whole, both at national and Community level, we can make the following assessments:

At national level:

- Law no. 61/2011 on the organization and functioning of the Anti-Fraud Department
- HG no. 101/2012 for the approval of the Methodological Norms on the establishment, organization and functioning of the economic and financial inspection
- HG no. 738/2011 for the approval of the Organization and Functioning Regulation of the Anti-Fraud Department
- OUG no. 64/2009 on the financial management of the structural instruments and their use for the Convergence objective, as amended and supplemented;
- Law nr. 78/2000 for the prevention, discovery and sanctioning of corruption acts, with subsequent additions and modifications;
- Criminal Code and other special laws.

At European level:

- Articles 310, 317 and 325 of the Treaty on the Functioning of the European Union;

- Regulation (UE, EURATOM) No. 966/2012 of the European Parliament and of the Council from 25th October 2012 on the financial rules applicable to the general budget of the Union and repealing Regulation (CE, EURATOM) no.1605/2002 of the Council, Title IX, Chapters 1 and 2 and Title X;

- Regulation No 883/2013 on investigations carried out by the European Anti-Fraud Office (OLAF) and repealing Regulation (CE) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999;

- Council Regulation (CE, Euratom) No 2988/95 from 18th December 1995 on the protection of the European Communities' financial interests;

- Council Regulation (Euratom, CE) No 2185/96 from 11th of November 1996 on on-the-spot checks and inspections by the Commission for the purpose of protecting the European Communities' financial interests against fraud and other irregularities;

- Council Decision (UE, Euratom) No 335/2014 from 26th of May 2014 on the system of own resources of the European Union,

- 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 and the 3 protocols thereto,

- other sectoral regulatory acts containing provisions on the protection of the Financial Interests of the European Union;

- Interinstitutional Agreement (IIA) from the 2nd of December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, Part III;

- Procedure regulation of the European Parliament, article 48 – Legislative procedures for initiatives submitted by Member States; Title II, Chapter 8, articles 93 — Discharge to the Commission in respect of the implementation of the budget, 94 — Other discharge procedures and 95 — Parliament's control over the implementation of the budget; Title V, Chapter 1, article 121 — Appointment of the Members of the Court of Auditors, Chapter 2, article 125 — Declarations by the Court of Auditors, Chapter 4, article 132 — Annual reports and reports by other institutions and Annex VI — Competences and attributions of permanent parliamentary committees

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the COM Commission's Anti-Fraud Strategy (2011).

- CE Guide for determining financial corrections applied to Member States in case of irregularities related to public procurement, prepared by the COCOF European Commission 07/0037/02.

- CE information note on fraud indicators for the European Regional Development Fund, the European Social Fund and the Cohesion Fund, prepared by the Commission in 2009: COCOF 09/0037/02 and the annexes.

4. RESULTS AND DISCUSSIONS – TYPES OF INTRA-COMMUNITY FRAUD

Based on the information provided by both the Institutions of Romania and the institutions within the Community, there are three main categories of fraud:

1. Avoiding in full the payment of obligations due to the general consolidated budget of the State;

2. Partial evasion of the payment of obligations due to the general consolidated budget of the State;

3. Illegal reimbursements from the general consolidated budget of the state.

1. Total evasion of the payment of obligations due to the general consolidated state budget

a) Typical Intra-Community Fraud (MTIC) – we are talking about a criminal scheme developed as a support of tax fraud and which involves the use of an economic circuit in which actors are involved – legal entities, paying VAT, who perform different functions:

Ghost Company – Missing Trader – legal person without real economic activity, without financial independence in carrying out the economic activity according to the object of activity declared at the Trade Register Office, its role being to make intra-Community acquisitions and to create a deductible VAT that would permanently allow the exercise of the right of deduction. It is abandoned after a short period of time (20-30 days) to prevent the detection of its activity by the authorities. Thus, this company either does not declare the real activity, or declares its activity, submits the VAT returns, highlights its tax debts, but does not pay them.

Its role is rather a financial one, its accounts being used for the cash withdrawal of the illicit profit, masked in the VAT rate due to the state budget.

Buffer company – taxable legal person, between the missing company and the final beneficiary. Its role is as a supplier of the final beneficiary, who records in his accounts purchases from the national territory, bearing the deductible VAT. It is thus found that the right to deduct VAT comes from the missing company, which collects it but does not pay it to the state budget.

That intermediary does not carry out intra-Community acquisitions, declares its commercial activity on the national territory, practises very small mark-ups, resulting in an amount of the obligations due almost nil. For these "qualities" companies will be used for a longer time, as they are protected from legal controls concentrated in the direction of intra-Community acquisitions. After a certain period of time, buffer firms take on the role of "ghost" firm, for the same period of 20-30 days, before being abandoned.

The final beneficiary is that taxable legal person that makes financial resources available and controls the other legal persons directly or through intermediaries, respectively it can conclude an agreement with an organized crime group that controls them, which is the beneficiary of the tax advantage created by fraud.

Under these conditions, the purchased goods can be sold later in two variants:

- by adding a trade margin for the creation of a taxable base whose value is close to the resale value of the final beneficiary, so that the deduction of VAT also entails a reduction in taxable profit; in the case of verifications, it will be found that the goods are fully paid, but at the missing company a breakdown of the payments will be made (from the amount of illicit money collected, the intra-Community suppliers are paid, and the difference represents the commercial margin and the COLLECTED VAT that had to be transferred to the state budget and which are actually withdrawn in cash).

- if you want only to reduce the VAT collected by creating an artificially deductible VAT, it will also be possible to make the sale at a loss from the missing company to the buffer company and then to the final beneficiary. Payments made in respect of registered invoices cover the expenses of intra-Community suppliers and the transport part (the mere sale at a loss from the missing trader to the buffer company and then to the final beneficiary may be an indication leading to the suspicion of VAT fraud, but this is not enough to prove the tax fraud).

b) *Illegal deduction of VAT (cross-invoicing)* - we are again talking about a criminal scheme for carrying out intra-Community fraud in two ways:

- registration in the accounting records in the periods prior to the intra-Community acquisitions of fictitious expenses (advance on goods or services) that generate deductible VAT.

- the registration of fictitious purchases of goods on the national territory, followed by fictitious intra-Community supplies to a missing trader in another Member State, again appearing the VAT to be reimbursed.

Regardless of the fraud method, the main element is a taxable person, registered in Romania as a VAT payer, and who aims to make intra-Community acquisitions of goods, without paying VAT to the state budget. After the intra-Community acquisition has been completed, the goods are sold to the final beneficiary, subject to VAT, in the form of a national supply. Thus appears the VAT collected, but which is not paid to the state budget being compensated with the amount of deductible VAT previously recorded, on the basis of the fictitious expenses from various phantom companies.

The amounts collected in the form of VAT are withdrawn in cash, for different purposes (payment of transport, personal benefit of the company manager). The final beneficiary no longer pays for the transport of the goods, records a purchase with deductible VAT, which he also recovers later on sale on the domestic market.

c) *Fictitious intra-Community supplies* - imply the existence of stocks of goods, generating deductible VAT, due to acquisitions on the internal market.

Discharge is effected by the registration of fictitious intra-Community supplies to missing traders in other Member States, when in reality the goods are marketed on the internal market without tax documents, their payment being made in cash.

d) *CASH & CARRY fraud* - involves the purchase of goods from cash and carry stores, on behalf of companies from other Member States, which are then sold in Romania, without documents and without paying the obligations to the state budget.

The initiators set up companies in other Member States and went to cash and carry stores where they placed orders. The invoices issued did not contain VAT because an intra-Community supply was to be made, exempted, with the right to deduct, the payment was made by cash deposits directly at the cash and carry store. The means of transport belonged to the organizers of the criminal scheme, who, after loading, went to wholesale units where the goods were capitalized "in black", the value being collected in cash. They then returned to the cash and carry stores the transport documents (CMR) from the foreign company, in order to demonstrate the reception of the goods in the Member State.

(e) *Import operations using customs procedure 42*

The import operation (customs procedure 40) involves the indigenization of goods coming from outside the Community, by presenting them at customs points of the European Union and paying the obligations due (VAT, customs duties, customs commission, etc.). They are collected directly to the European Union budget, and a small part of this is directed to the Member States. VAT is collected by the Member State where the goods are indigenized, according to its own legal provisions.

In Romania, customs obligations are collected at the customs point, before the release of the customs (it cannot be granted until the presentation of the proof attesting the payment of the import obligations). In other Member States of the European Union, VAT is transferred to the national budget, after the indigenization and marketing of the goods.

Customs procedure 42 refers to an import operation through a customs office in one Member State A linked to an intra-Community supply to another Member State B - customs duties are collected in Member State A and VAT in Member State B. The criminal scheme consists of the indigenisation of goods in Member State A, the declaration of an intra-

Community supply to Member State B and their marketing without documents in Member State A, in Member State B or in another Member State C (which is usually on the route between Member State A and Member State B).

2. Partial evasion of the payment of obligations due to the general consolidated state budget

(a) *Undervalued intra-Community acquisitions* – a complex criminal scheme involving the existence of firms controlled by the organiser of the 'transaction' in at least two Member States, through which it carries out an undervaluation of the value of the goods, the ultimate aim being to pay VAT at a value lower than normal.

b) *Margin fraud* - The Fiscal Code of Romania establishes a certain taxation regime for second-hand goods: the VAT rate will be applied only to the profit margin, on the invoice issued being mentioned "VAT included and non-deductible". For the applicability of this exemption scheme, the goods must come either from an end-user, a non-taxable person (natural person) or from a reseller taxable person, who in turn applies the tax on the profit margin.

If the purchases are made by a reseller taxable person, in order to be able to apply the special tax arrangements, it is necessary to mention on the purchase tax invoice that the supplier also applies the margin tax in accordance with the provisions of CE 112/2006 on the common system of value added tax.

Margin Fraud or Margin Fraud was the most common in the case of intra-Community acquisitions of used cars. This type of fraud may consist either in the purchase of used cars for which the normal taxation regime applies, for which the purchase invoices are falsified, in the sense that the seller himself applies the margin charge, or in the purchase of new passenger cars, for which the normal taxation regime applies, for which the purchase invoices are falsified, in the sense of declaring them as second-hand.

In both cases, the seller in Member State A declares intra-Community supplies to the purchaser in Member State B, under the normal taxation regime (exempt with the right to deduct). The buyer in Member State B shall declare intra-Community acquisitions of second-hand goods for which the seller in Member State A charges the margin tax.

3. Illegal reimbursements from the general consolidated state budget (Carousel fraud) - and in this case it is a criminal scheme aimed at obtaining illegal VAT refunds through the successive, fictitious invoicing of goods/services between several firms in at least two Member States.

5. CONCLUSIONS

This study is intended to be an analysis of the phenomenon of fraud in general, but also of its main generating elements. We see the relational framework in the wrong direction – fraud – deception, as well as the role of each institutional component involved in the fight against fraud, in the process of verifying the situations that may represent potential fraud against the national financial interests but also against the European Union. In these aspects lies the need to increase the institutional capacity to detect any suspicion of fraud and to establish the situations that certainly give rise to the fraud itself or to mere suspicions of fraud.

In these circumstances, I consider that action is necessary in at least the following directions:

- better collaboration between all components of the institutional anti-fraud system;
- the orientation of the financial and fiscal policy with priority of the objectives towards the fight against tax fraud and evasion;
- strengthening the position of national institutions in order to act both preventively, correctively, but also coercively until they have the possibility of collaboration at legislative level;
- transparency at organizational level both for the economic and financial objectives at national level within the entities but also within the framework of intra-Community cooperation;
- intensification of national-Community information exchanges on anti-fraud issues: conditions, causes, effects, bodies, operations.

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