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THE CONCEPT OF IRREGULARITY IN THE IMPLEMENTATION OF PROJECTS CO-FINANCED BY EU FUNDS IN THE EUROPEAN UNION LAW: LESSONS FOR THE LEGISLATOR AND THE BODIES INVOLVED IN THE DISTRIBUTION OF EU FUNDS[1]

Abstract

The article aims to comprehensively discuss the concept of irregularity, which is a central category for EU funds. The analysis verifies whether and to what extent in the current normative environment the existing case law relevant for the interpretation of the elements of this concept remains valid and whether the provisions provided for in the new so-called Polish implementing act meet the requirements of the EU law in this regard. The conducted analysis proved, among others, that to this day, the judgment of the Constitutional Tribunal in case P 1/11 has not been reflected. Despite the fact that the Constitutional Tribunal ruled that it is inadmissible to derive the obligations of beneficiaries from the internal law, it is still a common practice that the violation of such acts is the basis for finding irregularities and issuing a decision on recovery. On this

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basis, the author formulates appropriate conclusions for the legislator and the authorities involved in the distribution of EU funds.

SŁOWA KLUCZOWE

nieprawidłowość, fundusze unijne, polityka spójności, rozporządzenie 2988/95, rozporządzenie 1303/2013, rozporządzenie 2021/1060

KEYWORDS

irregularity, EU funds, cohesion policy, regulation 2988/95, regulation 1303/2013, regulation 2021/1060

I. INTRODUCTION

Violations committed by beneficiaries in the course of implementation of projects co-financed from the EU funds are, in a way, inherent in the nature of this type of investments. These breaches are not always intentional, bearing the hallmarks of the so-called subsidy fraud.[2] Often, they are the result of difficulties encountered by beneficiaries in navigating the complicated and complex legal environment governing the rules of spending European funds, which is characterized by far-reaching formalism and rigour. Consequently, the breaches that occur are of varying seriousness and have different legal consequences and effects for beneficiaries. Not every breach entails an automatic sanction in the form of a financial correction, termination of a grant agreement or criminal liability or liability for breach of public finance discipline. Not every infringement during project implementation will constitute an irregularity in the sense of the EU law, which is a central category for spending the European funds.

[2] Article 297 § 1 of the Criminal Code Act (Polish: Kodeks karny): 'Whoever, in order to obtain for himself or for someone else, from a bank or an organisational unit conducting similar business activity pursuant to the Act or from an authority or institution disposing of public funds – a credit, a cash loan, a suretyship, a guarantee, a letter of credit, a grant, a subsidy, a bank confirmation of an obligation arising from a suretyship or from a guarantee or a similar cash benefit for a specific economic purpose, payment instrument or a public procurement contract, submits a forged, counterfeited, false or untrue document or an untrustworthy written statement concerning circumstances of material importance for obtaining the said financial support, payment instrument or procurement contract, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years' (consolidated text: Journal of Laws of 2024, 17).

The new EU financial perspective 2021–2027 and the legislative package adopted for it, including the long-awaited in Poland Act of 28 April 2022 on the rules for the implementation of tasks financed from European funds in the financial perspective 2021–2027[3] [hereinafter: the Implementation Act] (Polish: Ustawa wdrożeniowa), provide the impetus to lean on the notion of irregularities. This category is of key importance for the implementation of EU funds, delineating the responsibilities of Member States, such as including the prevention and detection of irregularities to protect EU budgetary interests.

This article aims to provide a comprehensive discussion of the notion of irregularity in the current normative environment, taking into account the latest case law of the Court of Justice of the European Union, as well as Polish courts and the decision-making practice of national authorities involved in the distribution of European funds to date. The performed analysis serves to verify whether, and to what extent, the hitherto prevailing line of interpretation concerning the elements constituting the notion in question remains up-to-date, and whether the solutions provided for in the new Implementation Act correspond to the requirements posed in this respect by EU law. This, in turn, allows *in fine* to formulate appropriate conclusions for the legislator and the bodies involved in the distribution of EU funds. The author first presents the legal basis and the scope of application of the definition of irregularity (Part II), and then discusses the elements constituting this category (Part III) and the obligations and consequences related to their identification (Part IV). The final part contains conclusions resulting from the analysis, including postulates addressed to the Polish legislator (*de lege ferenda* conclusions) and to the bodies applying the law.

The reflections on this subject are focused on cohesion policy (also referred to as structural or regional policy), which should be understood as ‘all activities of public authorities aimed at the optimal use of the resources of countries and regions, which ensure their sustainable economic and social growth and a high level of competitiveness’.[4] Given the fact that Poland has been one of the main beneficiaries of the Cohesion and Structural Funds,[5] this article will focus on the identification of irregularities that may occur in relation to investments carried out with the assistance of funds granted specifically under the Cohesion Policy.[6]

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[3] European funds in the financial perspective 2021–2027, Journal of Laws of 2022, 1079.

[4] Justyna Łacny, *Ochrona interesów finansowych Unii Europejskiej w dziedzinie polityki spójności*, Warsaw 2010, 91.

[5] European Commission website, <https://cohesion-data.ec.europa.eu/countries/PL>, Cohesion Open Data Platform (accessed 5 February 2023); see more Paweł Churski, Tomasz Herodowicz, Robert Perdał, ‘Rola środków polityki spójności pozyskiwanych przez samorząd terytorialny w rozwoju społeczno-gospodarczym ośrodków regionalnych w Polsce’, Samorząd Terytorialny 2016, No 7–8, 96.

[6] See more about effective EU policy Michael Baun, Marek Dan (eds), *Cohesion policy in the European Union*, Houndmills–Basingstoke–Hampshire–New York, New York 2014; Willem Molle, *European Cohesion Policy*, Londyn 2007.

II. LEGAL BASIS AND SCOPE OF APPLICATION OF THE DEFINITION OF IRREGULARITY

A cursory review of the EU legal acts governing the spending of European funds may lead the reader into some consternation. It appears that in the current state of the law there are two categories of irregularity next to each other. In the literature they are referred to as horizontal and sectoral.[7] The former is defined in Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests[8] [hereinafter Regulation 2988/95]. The aforementioned act regulates general rules on checks, measures and penalties concerning irregularities for the protection of the EU's financial interests.[9] The definition of irregularities contained therein is referred to as horizontal, as it sets out requirements applicable to all EU policies, including the Common Agricultural Policy [hereinafter CAP].[10]

The second category of irregularity is referred to as sectoral, as it was adopted on the basis of regulations that set out rules for the implementation of specific European funds. Such regulations include 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, as well as 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[11] [hereinafter Regulation 1303/2013]. These regulations also include Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021, laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Fair Transition Fund and the European Maritime, Fisheries and Aquaculture Fund together with the financial rules for these Funds and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Financial Support Facility for Border Management and Visa Pol-

[7] Justyna Łacny, 'Przedawnienie nieprawidłowości w wydatkowaniu funduszy Unii Europejskiej w świetle prawa Unii Europejskiej i orzecznictwa Trybunału Sprawiedliwości', Temidium 2022, No 2, 41 –51.

[8] Journal of Laws 23 December 1995, 312, 1.

[9] cf Article 1(1) of Regulation 2988/95.

[10] Justyna Łacny, 'Skutki nieprawidłowego wydatkowania funduszy UE w świetle prawa UE i orzecznictwa sądów UE', part I, Temidium 2017, No 3, 35; see more Justyna Łacny, *Korekty finansowe nakładane przez Komisję Europejską na państwa członkowskie za niezgodne z prawem wydatkowanie funduszy Unii Europejskiej*, Warsaw 2017, 49–61.

[11] Official Journal of the European Union L 347, 20 December 2013, 320.

icy[12] [hereinafter Regulation 2021/1060]. These two regulations (also commonly known as general regulations) share a feature, they formulate the key rules for the disbursement of EU funds ensuring the implementation of cohesion policy, with Regulation 1303/2013 being applied to programs and operations under the 2014–2020 programming period and Regulation 2021/1060 playing a key role from the perspective of cohesion policy implementation in 2021–2027. Therefore, the definitions used under both those general regulations could potentially be applicable, as beneficiaries continue to implement projects that received support under operational programs from the previous programming period. Specifically, the previous programming period, covering the years 2014–2020, is subject to the so-called *n+3* rule meaning that funds must be spent by the end of the third year after their commitment to the programme. Hence, in this case, beneficiaries were required to complete physical, material, and financial aspects of their projects by 31 December 2023. However, for 'unfinished' projects – those not fully completed or financially settled by the end of the programming period – there was an opportunity to submit a final application by 31 March 2024. This means that, as of now, there may still be ongoing projects from the 2014 – 2020 programming period, though the number is gradually decreasing as the final deadlines are approaching. An example illustrating the above-mentioned thesis are projects implemented under the European Regional Development Fund (ERDF), which encountered difficulties resulting from external factors, such as the COVID-19 pandemic, leading to the need to extend their implementation deadlines within permissible frameworks. Such cases demonstrate how both general regulations can still apply during the closure of the previous programming period.

Irregularity (in horizontal terms) is defined in Article 1(2) of Regulation 2988/95 as '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 Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'.[13] Therefore, such a definition requires[14] several conditions to be met cumulatively. Firstly, the occurrence of an act or omission (negligence) by an economic operator, understood under Article 7 as a natural person, a legal person and any other entity having legal capacity under national law who has committed the irregularity, participated in the irregularity or who is responsible for or has an obligation to

[12] Official Journal of the European Union L 231, 30 June 2021, 159.

[13] cf Article 1(2) of Regulation 2988/95.

[14] Justyna Łacny, 'Wydatkowanie funduszy Unii Europejskiej w wyniku nieprawidłowości. Elementy definicyjne pojęcia „nieprawidłowość" – wprowadzenie i wyrok Trybunału Sprawiedliwości z 26.05.2016 r. w połączonych sprawach Judeţul Neamţ i Judeţul Bacău przeciwko Ministerul Dezvoltării Regionale și Administrației Publice', European Judicial Review 2018, No 1, 49, together with the literature cited therein.

prevent the irregularity. Secondly, a breach of Union law. Thirdly, damage to the general budget of the EU or the risk of it being caused by the funding of unjustified expenditure from the general budget.[15]

The definition thus outlined is slightly different from the category of irregularity under the sectoral approach. Regulation 1303/2013 defines irregularity according to Article 2(36) as '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 ESI Funds,[16] which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union'. Under the new General Regulation, minor editorial changes have been made to the wording of this definition. According to Article 2(31) of Regulation 2021/1060, an irregularity is now understood as 'any breach of applicable law, resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the budget of the Union by charging unjustified expenditure to that budget'. Thus, the EU legislator refers to an infringement of any rule applicable in a given case (without differentiating that it is a national or EU regulation). By contrast, invariably under both general regulations, an economic operator is understood 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.[17]

A juxtaposition of the definitions of irregularity in horizontal and sectoral terms shows that they differ in scope, although the differences are not significant.[18] In the personal sphere, they define differently the economic operator whose acts or omissions may be the source of the irregularity. Under the general regulations, it is understood more narrowly by excluding from the scope of the definition the Member State in respect of the exercise of its powers as a public authority. In the material sphere, on the other hand, the General Regulations define the scope of the infringement more broadly by extending it to any legislation and not only to EU law regulations.

In this context, a question arises as to whether potential failures in the disbursement of European funds should be qualified as irregularities on the basis of the horizontal definition in Regulation 2988/95 or on the basis of the sectoral definition in the wording of the general regulations. It follows from the well-established case law of the Court of Justice of the European Union [hereinafter CJEU]

[15] cf the opinion of Advocate General Eleanor Sharpston of 17 November 2015 in Case C-406/14, *Wrocław – Miasto na prawach powiatu v Minister Infrastruktura i Rozwoju,* ECLI:EU:C:2015:761 (46).

[16] i.e., in accordance with recital 2 of the preamble to Regulation 1303/2013 of the following funds: European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund, European Agricultural Fund for Rural Development (EAFRD) and European Maritime and Fisheries Fund (EMFF).

[17] cf Article 2(37) of Regulation 1303/2013 and Article 2(30) of Regulation 2021/1060.

[18] Justyna Łacny (n 7) 43.

that the point of reference should be the provisions of the general regulations serving as a basis for classifying the behaviour in question as irregular and for the conduct of proceedings to recover the misused funds.[19]

This does not change the fact that although the described definitions of irregularities differ, as J. Łacny aptly points out, they remain fundamentally convergent.[20] In addition, as the Court points out, these definitions should be subject to uniform interpretation, taking into account not only the wording but also the context and objectives of the regulation.[21] Thus, it should be assumed that the prerequisites of irregularity in the expenditure of European funds amount to the occurrence of three elements (an act or omission by the economic operator, a breach of law, and damage to or the risk of damage to the general budget of the EU),[22] between which there must be a causal link.

III. GROUNDS FOR IRREGULARITY

1. ACT OR OMISSION BY AN ECONOMIC OPERATOR

The first element constituting the notion of irregularity is the act or omission of an economic operator. In line with the observations made above, in the case of irregularities in the spending of cohesion policy funds, the source of the irregularity can only be an economic operator, which is understood to be any natural or legal person, or any other entity involved in the implementation of assistance from the Funds. In practice, the group so outlined will include primarily the beneficiaries of support but also institutions of the implementation system within a given measure (priority or programme), such as managing, intermedi-

[19] The judgment of the CJEU of 18 December 2014 in Case C 599/13 *Somvao*, ECLI:EU:C:2014:2462, paragraph 37 and the case law cited therein.

[20] Justyna Łacny (n 7) 44; similarly, Rafał Poździk, 'Art. 2' in *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–27*. Commentary, Rafał Poździk, Maciej Perkowski (eds), Warsaw 2023, 71.

[21] Judgment of the CJEU of 26 May 2016 in Joined Cases C-260/14 and C-261/14 *Judeţul Neamţ and Judeţul Bacău v Ministerul Dezvoltării Regionale și Administrației Publice*, ECLI:EU:C:2016:360, 34–38.

[22] However, the CJEU has not been entirely consistent and has sometimes subsumed these elements under two conditions, i.e., the act or omission of the economic operator constituting an infringement of the Union law and the damage or potential damage to the Union budget (see CJEU judgment of 2 March 2017 in Case C-584/15 *Glencore Céréales France*, ECLI: EU:C:2017:160, paragraph 38 and the case law cited therein). Notwithstanding the formal differences in classification, they do not affect the very interpretation of the concept of irregularity and the elements constituting that concept.

ate and implementing institutions.[23] At the same time, in line with the sectoral approach, this definition does not include the Member State exercising public authority powers – that is, in practice, the national authority acting in the imperial sphere. As a result, the activities of national authorities involved in the distribution of EU funds, to the extent that they are related to administrative authority (e.g., assessment of applications for funding, decision to award funding, clearance and control of projects) will not be able to be considered as irregularities.[24] *A contrario*, to the extent that these bodies remain party to relationships of a civil law nature (e.g., as beneficiaries carrying out the procurement of services or products under the project), they can be counted as economic operators whose behaviour is a source of irregularity.[25]

At the same time, the regulations commented on do not enumerate a catalogue of potential behaviour that can be considered as irregularities, which makes the range of potential misconduct extremely wide. The annual report of the European Court of Auditors on the implementation of the EU budget for 2021 shows that one of the main sources of irregularities in the cohesion policy spending can still be attributed to failures in the area of public procurement carried out in connection with the implemented projects, accounting for 14% of all the errors reported by the audit institutions.[26] Thus, in the area of project procurement, the sources of irregularities may in practice be a variety of actions (e.g., awarding a contract in the wrong mode, artificially dividing a project into several contracts, applying discriminatory selection criteria) but also omissions (e.g., failure to publish a contract notice, failure to extend the deadlines for submitting tenders in the event of significant changes in the contract documents, or failure to publish the selection or award criteria in the contract notice).[27]

[23] cf Rafał Poździk (n 20) 73.

[24] Grzegorz Karwatowicz, Jarosław Odachowski, 'Definicja legalna „nieprawidłowości" w kontekście funduszy strukturalnych i Funduszu Spójności', Kontrola Państwowa 2009, No 4, 122; see also CJEU judgment of 15 January 2009 in Case C 281/07 *Bayerische Hypotheken und Vereinsbank*, ECLI:EU:C:2009:6, paras 20-22; CJEU judgment of 21 December 2011 in Case C-465/10 *Chambre de commerce et d'industrie de l'Indre,* EU:C:2011:867, para 44). This does not mean, of course, that from the perspective of EU law such failures are acceptable – indeed, they may be subject to a financial correction imposed on a Member State by the European Commission on the basis of Article 104(1) of Regulation 2021/1060 – see in more detail Rafał Poździk (n 20) 74

[25] Rafał Poździk (n 20) 73–74.

[26] European Court of Auditors, Annual Report on the Implementation of the Budget for the Financial Year 2021 and the Activities Financed by the Eighth, Ninth, Tenth and Eleventh European Development Funds (EDFs) for the Financial Year 2021, Luxembourg 2022 , 171–172.

[27] For more on other possible actions and omissions, see Kamil Łoza, 'Article 26', in *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–27*, Rafał Poździk, Maciej Perkowski (eds), Warsaw 2023, 211 with the case law cited therein.

2. BREACH OF LAW

In order to speak of an irregularity, an act or omission of an operator must constitute a source of breach of law. On the grounds of Regulation 2021/1060, it is made clear that this refers in this context to any violation of applicable law – thus both EU law and national law, which, however, has already been confirmed in the jurisprudential practice of the CJEU.[28] Thus, although the wording of the provision dictates a broad interpretation of the premise of a violation of law as including in its scope both failures of the EU law and national law, it should be limited only to the violations of legally binding provisions. Such a view has so far been represented in the literature[29] and should remain valid. In practice, therefore, the point of reference for ascertaining violations by beneficiaries implementing projects in Poland may be two categories of regulations. First, binding acts of the EU law, i.e., primary law (primarily the founding treaties: the Treaty on European Union [hereinafter TEU][30] and the Treaty on the Functioning of the European Union [hereinafter TFEU][31]), and binding instruments adopted under secondary law (regulations, directives and decisions). Second, universally binding acts of law in Poland, namely the Constitution, laws, ratified international agreements, regulations and acts of local law.[32]

This means, therefore, that the premise of a violation of law will not be met if the subject of the violation included exclusively EU soft law acts, such as the recommendations and opinions listed in Article 288 TFEU but also non-binding non-institutional acts, which include, among others, communications, resolutions, explanations or guidelines,[33] such as guidelines issued by the European Commission in the area of public aid law.[34] On the other hand, in the case of sources of domestic law in Poland, a violation of an act of internal law, such as constitutional internally binding acts (resolution, order),[35] or extra-constitutional acts such as instructions, circulars, statutes, regulations or guidelines will not be considered an irregularity.[36]

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[28] See, e.g., Judgment of the CJEU of May 26, 2016 in Joined Cases C-260/14 and C-261/14 *Judeţul Neamţ and Judeţul Bacău v Ministerul Dezvoltării Regionale şi Administraţiei Publice*, ECLI:EU:C:2016:360, 36.

[29] Justyna Łacny (n 10) 34; Grzegorz Karwatowicz, Jarosław Odachowski (n 24) 119.

[30] Official Journal of the European Union C 202, 7/06/2016, 13 (consolidated version).

[31] Official Journal of the European Union C 202 , 7/06/2016, 47 (consolidated version).

[32] Article 87 of the Constitution of the Republic of Poland.

[33] See more broadly Gráinne de Búrca, Paul Craig, *EU Law: Text, Cases, and Materials*, Oxford 2015, 107.

[34] e.g, Guidelines on state aid for climate and environmental protection and energy-related goals from 2022, Journal of Laws Device C 80 of 18/02/2022, 1.

[35] Article 93 of the Constitution of the Republic of Poland.

[36] For more information on internal law acts, see Justyna Mielczarek-Mikołajów, *Akty prawa wewnętrznego organów administracji publicznej*, Wrocław 2021, 85–99.

The last sentence is of particular importance for beneficiaries implementing projects with the support of European funds. For the assessment of the eligibility of expenses (and, therefore, the possibility of their settlement in the form of an advance or refund), which are incurred in the course of project implementation, a key role is played by the guidelines adopted by the minister responsible for regional development,[37] defining common conditions and procedures for the eligibility of expenses.[38] In practice, it is not uncommon that the basis for issuing a decision ordering the reimbursement of funds by the authority[39] are the above-mentioned guidelines (e.g. in connection with the award of a contract in the project without a market research procedure [40]or in violation of the principle of competitiveness[41]).

However, the imposition of an obligation on the beneficiary to repay part or all of the grant in connection with the failure to comply with provisions that do not constitute universally binding law (such as guidelines for the eligibility of expenditures) should be considered inadmissible. This is determined, on the one hand, by Article 93(2) of the Constitution, according to which acts of internal law may not 'constitute the basis of decisions with respect to citizens, legal persons and other entities', and which is confirmed by the Constitutional Tribunal itself. In the context of the problem at hand, one of the most important judgments of the Constitutional Tribunal in cases involving European funds, i.e. P 1/11,[42] should be remembered. In the legal question posed, the WSA in Łódź raised reasonable doubts regarding, in particular, the constitutionality of Article 5(11) of the Act on the Principles of Development Policy (Polish: Ustawa o zasadach prowadzenia polityki rozwoju)[43] and its compliance with Article 87 of the Constitution, which defines a closed catalogue of acts of universally binding law. The cited Article 5(11) of the Act on the Principles of Development Policy[44] directed, in prac-

[37] i.e., existing guidelines of the Minister of Finance, Funds and Regional Policy on the eligibility of expenditure under the European Regional Development Fund, the European Social Fund and the Cohesion Fund for 2014–2020 [Guidelines 2014–2020] and new guidelines of the Minister Funds and Regional Policy regarding the eligibility of expenditure for 2021–2027.

[38] For more information on the legal nature of guidelines for operational programs financed from European funds, see Jan Podkowik, 'Charakter prawny wytycznych dotyczących programów operacyjnych finansowanych ze środków UE', Zeszyty Naukowe Sądownictwa Administrakcji 2012, No 4, 69–86.

[39] Pursuant to Art. 207 section 1 of the Act of 27 August 2009 on public finances (Polish: Ustawa o finansach publicznych) (consolidated text: Journal of Laws 2002, 1634)

[40] See section 6.5.1 of the Guidelines 2014–2020; see also, e.g., the judgment of the Supreme Administrative Court of 30 July 2020, I GSK 854/20.

[41] See section 6.5.2 of the Guidelines 2014–2020.

[42] Judgment of the Constitutional Tribunal of 12 December 2011, P 1/11.

[43] Act on the principles of conducting development policy (Polish: Ustawa o zasadach prowadzenia polityki rozwoju) (Journal of Laws 2016, 383).

[44] Containing the definition of the implementation system understood as 'principles and procedures applicable to institutions participating in the implementation of development strategies

tice, the determination of the principles of the operational programme (including the selection criteria, the principles of evaluation and selection of applications, the means of appeal) within the internal competition procedure and, thus, the regulation of the rights and obligations of individuals (in the project selection procedure and, in particular, in the appeal procedure) outside the system of universally binding sources.

The Constitutional Tribunal shared the doubts of the Voivodship Administrative Court in Łódź regarding the unconstitutionality of the commented provision and ruled that it was unconstitutional. Although it noted that EU law does not determine in what type of legal acts the rights and obligations of entities applying for funds from regional operational programs are to be normalized. The Tribunal stressed, however, that the freedom of the Polish legislator remains limited due to the obligation to respect the general constitutional principles of the EU, such as the principle of equivalence (according to which national regulations governing the enforcement of claims under the EU law cannot be less favourable to individuals than those governing similar claims based on national law) and the principle of effectiveness (which assumes that national regulations cannot make it practically impossible or excessively difficult to exercise the rights conferred by the EU legal order).[45]

Consequently, in the opinion of the Constitutional Tribunal, it should be considered unacceptable that the rights and obligations of beneficiaries would be regulated by provisions of internal law, not subject to control by the Constitutional Tribunal, in particular, due to their compliance with the principles of decent legislation. The legal situation of the beneficiaries would be less favourable than that of the other addressees of administrative decisions issued solely on the basis of internal law, hindering the exercise by the entitled persons of their rights under the EU law.

Thus, it follows from the Constitutional Tribunal judgment that there is no basis for deriving the obligations of beneficiaries from domestic law. However, the judgment has not been implemented in its entirety, both in the sphere of lawmaking and application. First, at the level of universally applicable law – including neither the previous,[46] nor the current implementation law – adequate provisions that address all the rights and obligations of applicants and beneficiaries have not

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and programs, including management, monitoring, evaluation, control and reporting, as well as the method of coordinating the activities of these institutions'.

[45] On the principle of equivalence and effectiveness as limits to the principle of procedural autonomy of the Member States, see Herwig Hofmann, 'General principles of EU law and EU administrative law' in *European Union Law,* Catherine Barnard, Steve Peers (eds), Oxford 2017.

[46] Act on the principles of implementing cohesion policy programs financed in the 2014–2020 financial perspective (Polish: Ustawa o zasadach realizacji programów w zakresie polityki spójności finansowanych w perspektywie finansowej 2014–2020) (consolidated text: Journal of Laws 2020, 818).

been introduced.[47] Also, as far as the decision-making practice of the relevant institutions is concerned, it is still possible to encounter an approach according to which a violation of the guidelines on eligibility of expenditures is the basis for a finding of irregularity and the issuance of a decision on reimbursement.[48]

At the same time, it is difficult to agree with the view that the obligation contained in the funding agreement to comply with the guidelines eliminates the problem associated with their status.[49] Although the grant agreement is a civil law contract, the competent authority, concluding and controlling the performance of the agreement, performs public tasks and exercises its sovereign powers, including the power to declare an adjustment or obligation to return the grant. Under private law, it is permissible to introduce into the contract provisions that do not have the force of common law. However, despite the civil law nature of the grant contract, the above freedom to regulate the rights of the parties to the contract does not apply to the grant contract as concluded between a public administration body and the beneficiary as an entity occupying a position external to the administration division. Therefore, it would be incorrect to assume that the parties to such a contract could establish that obligations (e.g., the obligation to repay funds) can be ruled on the basis of acts that do not constitute generally applicable law – such as guidelines.[50] Such a practice, moreover, would also be inconsistent with Article 52 of the Charter of Fundamental Rights of the European Union[51] [Charter or CFR], which allows restrictions on the rights and freedoms set forth in the Charter (e.g., the right to an effective remedy) to be imposed only by law.[52]

3. DAMAGE TO THE EU BUDGET

The violation discussed above will constitute an irregularity only to the extent that it may have negative budgetary consequences. Indeed, the last of the mandatory prerequisites for irregularity is the occurrence of actual (real) or potential damage to the EU budget. According to Regulation 2021/1060, an infringement will qualify as an irregularity only if it has caused or could cause damage to the

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[47] Krzysztof Borys and others, 'Art. 6', in *Ustawa o zasadach realizacji zadań finansowanych ze środków europejskich w perspektywie finansowej 2021–27.* Commentary, Rafał Poździk, Maciej Perkowski (eds), Warsaw 2023, 112–113.

[48] In the decision-making practice of the authorities, in the circumstances described, such decisions are most often issued on the basis of Art. 207 section 1 point 2) u.f.p. as an indication of the use of funds in violation of other procedures applicable to their use.

[49] Rafał Poździk (n 20) 92–93.

[50] Similarly, the judgment of the Provincial Administrative Court in Gliwice of 4 July 2016, IV SA/Gl 205/16.

[51] Official Journal of the European Union C 326, 26 October 2012, 391.

[52] Judgment of the Court of Justice of 17 September 2014 in case C-562/12 *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007–2013 Seirekomitee,* ECLI:EU:C:2014:2229.

general budget of the Union through the financing of unjustified expenditure. The damage is, therefore, related to the expenditure of EU funds (e.g., the Cohesion Fund), from which the various operational programs are financed. At the same time, the view should be supported that although the General Regulation refers expressly to the occurrence of damage to the EU budget, this premise should be understood extensively as including in its scope also negative effects on the budget of the Member State in the case of projects co-financed with State funds.[53]

In the framework of the occurrence of the premise of damage, the actual occurrence of financial damage to the EU budget is not necessary and the potential damage is unrelated to the degree of materiality or inevitability.[54] However, it is disputed whether purely formal violations of the law, which, by their very nature, however, cannot have real financial consequences, can be considered irregularities.[55] One should be in favour of the position that deficiencies in the implementation of projects, which are of a purely technical nature (e.g., with regard to the manner of maintaining project documentation), but do not pose a risk to EU finances, cannot be considered an irregularity. Indeed, as it is aptly pointed out: 'institution of irregularities was not created for the mere fact of preventing violations of the law, but violations of the law resulting in damage to the EU budget'.[56] This, in turn, leads to the key observation that not every failure constitutes the occurrence of an irregularity within the meaning of EU law and, thus, that it may not automatically entail the imposition of a financial correction on the beneficiary.

The above relationship is also noticed by administrative courts, emphasizing that the imposition of financial corrections does not result from the mere fact of a violation of procedures by the beneficiary, but from the fact that such an action or omission causes or could cause damage to the EU budget by financing an unjustified expense.[57] Therefore, it is not sufficient for the authority to indicate that a breach of procedures has occurred, but it is necessary to demonstrate the effects or potential effects that this breach may have in the context of the EU general budget.

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[53] Karwatowicz, Odachowski (n 24) 124–125.

[54] See Kamil Łoza (n 27) 210.

[55] This view is shared by Justyna Łacny (n 10) 35. Differently. Poździk (n 20) 74–75, Grzegorz Karwatowicz, Marta Lamch-Rejowska, 'Korekty finansowe jako sankcja za naruszenie przepisów Prawa zamówień publicznych', Zamówienia Publiczne. Doradca 2010, No 1, 30.

[56] Karwatowicz, Odachowski (n 24) 123.

[57] Judgment of the Supreme Administrative Court of 25 September 2015. II GSK 1704/14; Judgment of the WSA in Białystok dated 27 January 2017, I SA/Bk 899/16.

IV. BURDEN OF PROOF AND CONSEQUENCES OF FINDING IRREGULARITIES

As can be seen from the considerations presented above, the mere violation of the law does not automatically determine the occurrence of irregularity, and the demand for reimbursement can justify only such a violation that meets the prerequisites of irregularity discussed above. According to established case law,[58] the occurrence of a total of three elements that make up the concept of 'irregularity', including a causal link between the violation and the damage, must be demonstrated by the authority with the burden of proof. In practice, this means that even if the beneficiary has in fact violated the applicable rules governing the disbursement of funds, the burden of proof is on the competent national authority to demonstrate the damage that such irregularity has caused or may cause to the budget of the European Union and the existing causal link between the failure and the damage.[59]

Determination of irregularities by the authority, in turn, is the premise for imposing a correction. The Supreme Administrative Court has repeatedly emphasized[60] that in determining the amount of the financial correction, the authority must take into account both the nature and gravity of the irregularity, as well as the financial losses incurred by the funds. These assumptions were previously expressed in Article 143(2) of Regulation 1303/2013, which directed Member States to apply proportional corrections. The fact that the new General Regulation does not provide an equivalent to the above provision, however, does not affect the validity of the previous principles under which the imposition of corrections takes place – as the gravity and nature of the irregularity and the financial impact on the EU budget continue to be criteria for determining the proportionality of the correction, as confirmed, among other things, in recital 70 of Regulation 2021/1060.[61]

As a result, the authority cannot limit itself to merely pointing out the legal provision that it believes has been violated, and the financial correction cannot be

[58] This is confirmed both by the jurisprudence practice of administrative courts (cf judgment of the Supreme Administrative Court of 12 October 2017, II GSK 186/16, judgment of the Supreme Administrative Court of 13 December 2016, II GSK 1265/15; judgment of the Supreme Administrative Court of 12 October 2017, II GSK 186/16; judgment of the WSA in Gliwice of 15 April 2019, III SA/Gl 1176/18 judgment of the WSA in Kielce of 29 August 2019, I SA/Ke 249/19) and common law (e.g., judgment of the SO in Toruń of 22 October 2018, I C 545/18.

[59] See also the decision of the Supreme Court of 2 July 2019 in the case of V CSK 60/19.

[60] e.g., Supreme Administrative Court judgment of 7 March 2019, I GSK 1201/18; Supreme Administrative Court judgment of 29 March 2019, I GSK 1147/18; Supreme Administrative Court judgment of 29 March 2019, I GSK 1159/18; Supreme Administrative Court judgment of 10 April 2019, I GSK 1051/18.

[61] See also Łoza (n 27) 219–220.

mechanically and unreflectively imposed on the beneficiary. On the contrary, it should be the result of a careful and independent analysis of the facts of the case by the authority. In turn, the result of such analysis should be a correction appropriate to the circumstances, reflecting both the characteristics and seriousness of the irregularity, taking into account the significance of the damage it caused, or could have caused, under the circumstances of the operation or programme in question. Consequently, in determining the irregularity and adjudicating the amount to be reimbursed, an indispensable element in justifying such a decision is to relate the amount to be reimbursed to the seriousness and severity of the deficiency. This element is considered constitutive of all decisions, and in any such decision the authority, while finding an irregularity, should at the same time make an argument indicating why it adopted the particular amount of financial correction.

The above considerations are worth concluding with the judgment of the Supreme Court of 7 October 2015, I CSK 878/14. In the case in question, the Minister of Economy requested that the defendant company be ordered to pay all of the grant awarded due to the company's alleged implementation of the project in violation of selected provisions of the grant agreement. The Supreme Court took the position that violation of part of the provisions of the grant agreement cannot deprive the entrepreneur of all support. The amount of reimbursement should be adequate and proportional to the severity of the violation. At the same time, it aptly noted that the implementation of aid programs should not lead to an irrational economy of an entrepreneur forced by the fear of losing the entire subsidy, even in the part in which the subsidy was properly used and the public purpose and investment objective were achieved, as was with the specific case. The Supreme Court stressed that: 'the demand for repayment of funds also in the part used correctly cannot be served by a strict view of the relevant EU regulations, if this not only does not correspond to the provisions of Polish law in the relationship between the State Treasury and the party to the contract as to the obligation to repay funds, but also violates the principles of rational economy and reasonable spending of aid funds, and furthermore harms the entrepreneur who is the recipient of the aid granted, used correctly in the essential amount'.[62]

V. SUMMARY

Despite the existence of a kind of dualism in the terminological grid of irregularities in EU law, the analysis carried out showed that the premises of this concept remain convergent. The content of Regulation 2021/1060, adopted as part of

[62] Also Łoza (n 27) 219–220.

the new EU financial perspective for 2021–2027, proves that the EU legislator has not decided to interfere further in the existing scope of the definition of irregularities than purely editorial changes. This means that for the purposes of interpreting irregularities, including the prerequisites that comprise them, the existing jurisprudence and decision-making practice developed both under Regulation 2988/95 and the previous General Regulation remains valid.

Confronting the above with the Polish regulations determining the conditions for implementation of projects with European funding, one must, therefore, conclude that the problems faced by beneficiaries so far also remain relevant. To this day, both in the sphere of lawmaking and law application, the judgment of the Constitutional Tribunal in the case P 1/11 has not been reflected. In light of it, it should be considered unconstitutional to decide on the rights and obligations of beneficiaries on the basis of acts that do not constitute universally binding law. Despite the fact that the Constitutional Tribunal ruled on the inadmissibility of deriving beneficiaries' obligations from the provisions of internal law, it is still common practice that a violation of the guidelines on eligibility of expenses is considered as a basis for determining irregularities and issuing a decision on reimbursement. At the same time, it is difficult to adhere to the position that the obligation to comply with the guidelines contained in the funding agreement eliminates the problem related to their status – although the agreement is of a civil law nature, but the body implementing public tasks and exercising its authority remains a party to it. For this reason, it is necessary to amend the current Implementation Act (especially Articles 5 and 6), so that any issues that may affect the emergence and scope of the obligations of applicants and beneficiaries are regulated exclusively on the basis of universally binding acts, such as the Implementation Act or a relevant regulation issued on the basis of the authorization contained in the Act.

Although the analysis carried out proved that the prerequisites that make up the concept of irregularity should be interpreted broadly, it is indisputable that not every failure leads to its occurrence. The causal link between the identified violation of the law and actual or potential damage to the EU budget must be demonstrated by the authority with the burden of proof. In cases of reimbursement, it is particularly important to correctly distribute the emphasis in the course of argumentation, whether the violation could have caused damage and to what extent. In this context, it should be acknowledged that shortcomings in project implementation, which by their (technical) nature cannot generate actual financial consequences, cannot be considered irregularities, as they do not pose a risk to EU finances.

In turn, the authority's demonstration that an irregularity has occurred in the circumstances of a given case should entail the imposition of a correction that reflects both the nature and gravity of the irregularity, taking into account the significance of the damage it has caused or could cause. It should be emphasized

that excessive rigor not only violates the general principles of proportionality, equity, but can also lead to a waste of public funds. Reimbursement should be made on a proportional basis only to the part and extent that the beneficiary has failed to meet its obligations for reasons on its side. This view summarizes the emerging line of jurisprudence of common courts and the Supreme Court, which pays particular attention to the proportionality of sanctions related to the return of funding in the event of certain deficiencies in the implementation of projects with EU funding.[63]

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[63] Krzysztof Brysiewicz, 'Dofinansowanie ze środków europejskich w orzecznictwie Sądu Najwyższego i sądów powszechnych', Monitor Prawniczy 2014, No 17, 895.

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