Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 14 January 2016 [1]

Joined Cases C-260/14 and C-261/14

Județul Neamț (C-260/14),
Județul Bacău (C-261/14)
v
Ministerul Dezvoltării Regionale și Administrației Publice

(Requests for a preliminary ruling from the Curtea de Apel Bacău (Court of Appeal, Bacău, Romania))

(Reference for a preliminary ruling — Protection of the EU's financial interests — Regulation (EC, Euratom) No 2988/95 — European Regional Development Fund (ERDF) — Regulation (EC) No 1083/2006 — Award of a contract, by the beneficiary of funds acting as a contracting authority, for the performance of the action covered by the grant — Term 'irregularity' — Meaning of the criterion of 'infringement of EU law' — Selection criteria contrary to national law in the tendering procedure — Nature of the financial corrections adopted by Member States — Administrative measures or penalties)

1. Does failure by a contracting authority, the beneficiary of a Structural Fund grant, to comply with national rules concerning the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, constitute an 'irregularity' within the meaning of Regulation (EC, Euratom) No 2988/95 [2] or Regulation (EC) No 1083/2006? [3]

2. If appropriate, do the financial corrections effected by Member States in order to withdraw the advantage unduly obtained constitute administrative measures or penalties within the meaning of those regulations?

3. Those, in essence, are the questions referred by the Curtea de Apel Bacău (Court of Appeal, Bacău) in the present cases.

4. The questions were raised in proceedings between the Județul Neamț (the District of Neamț) (Case C-260/14) and the Județul Bacău (District of Bacău) (Case C-261/14), respectively, which are beneficiaries of a grant from the European Regional Development Fund (ERDF), and the Ministerul Dezvoltării Regionale și Administrației Publice (the Ministry for Regional Development and Public Administration), which is the authority responsible for managing and controlling the use of that grant at regional level. That ministry took the view that the District of Neamț and the District of Bacău had failed to comply with the national rules on public procurement in the awarding of public contracts in connection with the performance of the operations covered by the grant and consequently decided to

1 — Original language: French.

2 — Council Regulation of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

3 — Council Regulation of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

withdraw and recover 5% of the financial assistance granted. The District of Neamț and the District of Bacău therefore challenged the lawfulness of those financial corrections, pointing out that, under Regulations Nos 2988/95 and 1083/2006, an 'irregularity' means, inter alia, infringement of a provision of EU law.

5. In the cases in the main proceedings the referring court seeks to ascertain whether, in view of the provisions of Article 1(2) of Regulation No 2988/95 and those of Article 2(7) of Regulation No 1083/2006, the failure of a beneficiary of a Structural Fund grant acting as a contracting authority to comply with national rules alone may be classified as an irregularity entailing the adoption of financial corrections.

6. In this Opinion I shall set out the reasons why irregularity of an operation co-financed by the Structural Funds cannot, in my view, be limited to infringement of EU law *sensu stricto*.

7. Protecting the financial interests of the European Union and ensuring the effectiveness of operational programmes [4] through the legal and regular use of the Structural Funds are objectives which can be attained effectively only if the grants awarded relate to acts and expenditure the legality of which cannot be challenged either under EU law or under national law.

8. I shall therefore propose that the Court should rule that the failure of a contracting authority, the beneficiary of a Structural Fund grant, to comply with national rules relating to the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, constitutes an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 in so far as that act has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to it.

9. I shall state in that regard that such an interpretation merely anticipates the amendments introduced in the context of the new Structural Fund regulations.

10. As regards the nature of the financial corrections which Member States are required to adopt under Article 98(2) of Regulation No 1083/2006, I shall refer to the settled case-law of the Court according to which the obligation to return an advantage improperly received by means of an irregular practice is not a penalty.

I – **EU law**

A – *Protection of the financial interests of the European Union*

11. The second to the fifth recitals of Regulation No 2988/95 read as follows:

'Whereas more than half of Community expenditure is paid to beneficiaries through the intermediary of the Member States;

Whereas detailed rules governing [the] decentralised [financial] administration and the monitoring of their use are the subject of differing detailed provisions according to the Community policies concerned; whereas acts detrimental to the Communities' financial interests must, however, be countered in all areas;

4 — An 'operational programme', as defined in Article 2(1) of Regulation No 1083/2006, is a 'document submitted by a Member State and adopted by the Commission setting out a development strategy with a coherent set of priorities to be carried out with the aid of a Fund, or, in the case of the Convergence objective, with the aid of the Cohesion Fund and the ERDF'.

Whereas the effectiveness of the combating of fraud against the Communities' financial interests calls for a common set of legal rules to be enacted for all areas covered by Community policies;

Whereas irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation.'

12. Under Title I, entitled 'General principles', Article 1 of that regulation provides:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean 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. Article 2 of that regulation sets out the rules applying to adoption of administrative measures and penalties. It reads as follows:

'1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

...'

14. Under Title II, entitled 'Administrative measures and penalties', Article 4 of Regulation No 2988/95 sets out the rules applying to administrative measures as follows:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

— by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

4. The measures provided for in this Article shall not be regarded as penalties.'

15. Article 5 of that regulation, which lays down the rules applying to administrative penalties, provides as follows:

'1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate ...

(c) total or partial removal of an advantage granted by Community rules, ...

...'

B – *The rules applicable to operations co-financed by the Structural Funds*

16. The ERDF is one of the Structural Funds set up by the European Commission to strengthen economic, social and territorial cohesion in the European Union, in accordance with the objective referred to in Article 174 TFEU. That Fund contributes essentially to reducing economic, social and territorial disparities which have arisen, particularly in regions whose development is lagging behind and in those undergoing economic conversion and those facing structural difficulties, by co-financing, inter alia, national investment in firms and infrastructure linked to research and innovation, the environment, energy, transport and to health and education services.

17. Like its predecessor — Regulation (EC) No 1260/1999[5] — Regulation No 1083/2006 lays down a set of rules and procedures applicable to assistance by the ERDF, the European Social Fund (ESF) and the Cohesion Fund.

18. The Structural Funds coming under shared management, the Member States and the Commission are responsible for the management and control of funding. Nonetheless, it is in the first place the Member States that have primary responsibility for putting in hand and controlling operations carried out in the context of operational programmes, and for pursuing and correcting irregularities.

19. In Article 2(7) of Regulation No 1083/2006, the EU legislature defines 'irregularity' 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 European Union by charging an unjustified item of expenditure to the general budget'.

20. In Articles 60 and 61 of that regulation, the EU legislature lays down the principles applicable to national management and control systems.

5 — Council Regulation of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

21. It then, in Article 98 of that regulation, lays down the rules applicable to financial corrections adopted by Member States. The first subparagraph of Article 98(2) reads as follows:

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

22. The detailed rules for the application of Regulation No 1083/2006 are laid down in Regulation (EC) No 1828/2006. [6]

23. Regulation No 1083/2006 was repealed, with effect from 1 January 2014, by Regulation (EU) No 1303/2013, [7] which I shall consider briefly before concluding my analysis.

II – **The cases in the main proceedings and the questions referred for a preliminary ruling**

24. On 12 July 2007, the Commission approved, for the period 2007-2013, the Regional Operational Programme for Romania under the ERDF. The total budget for that programme is close to EUR 4.38 billion and Community aid amounts to EUR 3.7 billion. [8]

25. It is clear from the documents on the national file [9] that the ERDF's co-financing rate in the regional operational programme is 84% (EUR 3 726 021 762). In the present cases, the financing in question is to contribute to achievement of Priority Axis No 3 of that programme (EUR 657 530 000), which is designed, inter alia, to improve health and education infrastructure in order to increase access by the population to essential services.

26. The District of Neamț (Case C-260/14) and the District of Bacău (Case C-261/14) concluded with the Ministry for Regional Development and Tourism (Ministerul Dezvoltarii Regionale şi Turismului), as the authority managing the regional operational programme, a financing contract to carry out two operations.

27. In the context of Case C-260/14, the financing contract covers the refurbishment, extension and modernisation of a school centre. The District of Neamț, a beneficiary of funds acting as a contracting authority, held a tendering procedure for the award of a public audit services contract, the amount of which was in the region of EUR 20264.18, following which an audit services contract was concluded amounting to EUR 19410.12.

6 — Commission Regulation of 8 December 2006 setting out rules for the implementation of Regulation No 1083/2006 and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (OJ 2006 L 371, p. 1, and corrigendum OJ 2007 L 45, p. 3), as amended by Commission Regulation (EC) No 846/2009 of 1 September 2009 (OJ 2009 L 250, p. 1, 'Regulation No 1828/2006').

7 — Regulation of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Regulation No 1083/2006 (OJ 2013 L 347, p. 320).

8 — Information on that programme is contained in the national case file and is available on the Commission website (http://ec.europa.eu/regional_policy/en/atlas/programmes/2007-2013/romania/operational-programme-regional-operational-programme?countryCode=RO&regionId= 389) and, in Romanian, on the website http://www.inforegio.ro/en/regio-2007-2014-en/documente-de-programare.html.

9 — See, inter alia, document from the Neamț District Council, entitled 'Achizitie publică de servicii — Achiziționarea serviciilor de audit în cadrul proiectului: "Reabilitarea, extinderea şi modernizarea Centrului Şcolar pentru Educație Incluzivă Roman"', May 2011, paragraph 1.1. That document is contained in the national case file. See, also, with regard to the implementation of Priority Axis No 3 of Regional Operational Programme 2007-2013, Section I.4 of the Applicant's Guide available, in Romanian, on the website: http://www.inforegio.ro/ro/axa-3.html under 'Major intervention area 3.1'.

28. It is clear from the material put before the Court that, in the context of that procedure, the District of Neamț imposed conditions relating to the professional competence of the tenderers, held unlawful under national law by the Ministry for Regional Development and Public Administration.

29. The award of the contract in question was made conditional, first, on submission by the tenderer of a contract concluded in the previous three years having the same subject-matter as the contract covered by the award procedure at issue and, secondly, the presence of a building quality management systems administrator.

30. The Ministry for Regional Development and Public Administration held that the first condition was contrary to the principle of free competition, taking the view that every economic operator must be allowed, within the specific area of the contract, to take part in the award procedure, without the contracting authority, as the beneficiary of the funding in question, using the source of funding as an eligibility criterion. As for the second condition, it held that, having regard to the nature of the public contract, it was not relevant. In those circumstances, the Ministry for Regional Development and Public Administration adopted a financial correction representing 5% of the amount of the contract in question.

31. In Case C-261/14, the financing contract relates to the repairing of a main road. The District of Bacău held an open tendering procedure for the award of a public works contract valued at EUR 2 820 515, following which a contract for the execution of works was concluded on 17 September 2009.

32. It is clear from the material put before the Court that in connection with that procedure the District of Bacău used inappropriate technical specifications, which also were held to infringe national law. In those circumstances, the Ministry for Regional Development and Public Administration also adopted a financial correction representing 5% of the amount of the contract in question.

33. The District of Neamț and the District of Bacău then brought an action against those decisions applying financial corrections. In those proceedings the referring court is called upon in particular to rule on whether there is an 'irregularity', within the meaning of Regulation No 2988/95 or Regulation No 1083/2006, and, if appropriate, on the nature of the financial corrections adopted by the managing authority.

34. Faced with certain doubts as to how those regulations should be interpreted, the Curtea de Apel Bacău (Appeal Court, Bacău) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:[10]

'(1) Does the failure of a contracting authority, the beneficiary of a Structural Fund grant, to comply with rules concerning the award of a public contract of an estimated value lower than the threshold provided for by Article 7(a) of Directive [2004/18/EC] [[11]] in connection with the award of a contract for the performance of the action covered by the grant, constitute an "irregularity" within the meaning of Article 1 of Regulation No 2988/95 or an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006?

(2) In the event of an affirmative answer to the first question, must the second sentence of Article 98(2) of Regulation No 1083/2006 be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to

10 — With the exception of the first question, which is raised only in Case C-260/14, the referring court has referred the same questions in both cases.

11 — Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

comply with rules concerning public contracts, are "administrative measures" within the meaning of Article 4 of Regulation No 2988/95 or whether they are administrative penalties within the meaning of Article 5(1)(c) of that regulation?

(3) If the answer to the second question is to the effect that financial corrections by Member States are administrative penalties, is the principle of retroactive application of the less severe penalty referred to in the second sentence of Article 2(2) of Regulation No 2988/95 applicable?

(4) [If the answer to the second question is to the effect that financial corrections by Member States are administrative penalties],[12] in circumstances in which financial corrections have been applied to co-financed expenditure under Structural Funds for failure to comply with rules on public contracts, does Article 2(2) of Regulation No 2988/95 in conjunction with the second sentence of Article 98(2) of Regulation No 1083/2006, having regard also to the principles of legal certainty and protection of legitimate expectations, prevent a Member State from applying financial corrections governed by an internal legislative measure which entered into force after the alleged infringement of the rules on public contracts took place?'

35. Written observations were submitted by the parties in the main proceedings, the Romanian, Hungarian and Netherlands Governments and the European Commission.

III – **My analysis**

A – *The first question: whether the infringements in question are to be classified as 'irregularities'*

36. By its first question, the referring court asks, in essence, whether the failure of a beneficiary of funds acting as a contracting authority, to comply with national law in the context of the award of a public contract for the performance of an operation co-financed by the Structural Funds, constitutes an 'irregularity', within the meaning of Article 1(2) of Regulation No 2988/95 or of Article 2(7) of Regulation No 1083/2006.

37. It should be borne in mind that Article 1(2) of Regulation No 2988/95 provides that 'irregularity' means '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'.

38. The definition of 'irregularity' adopted for Regulation No 1083/2006 is that taken from Article 1(2) of Regulation No 2988/95. The words are to some extent the same, since, according to Article 2(7) of Regulation No 1083/2006, 'irregularity' means 'any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

39. In order to answer the question put to the Court by the referring court, it is necessary, first of all, to determine which of those two regulations is applicable, inasmuch as the definition of irregularity adopted by the EU legislature forms part of a set of rules and principles relating to the subject-matter covered by the regulation.

12 — I should point out that although this sentence does not appear in the wording of the fourth question referred in Case C-260/14, it does appear expressly in the wording of the same question referred in Case C-261/14. That sentence is, moreover, perfectly consistent given the substance of the question.

1. The regulation applicable

40. Must the acts in question be considered from the point of view of the rules on the protection of the financial interests of the European Union or of those containing general provisions governing the Structural Funds?

41. The case-law of the Court is well established on this point.

42. The acts in question must be assessed in the light of the provisions of Article 2(7) of Regulation No 1083/2006, which, unlike Regulation No 2988/95, constitute sectoral rules.

43. In its judgment in *Somvao*[13] the Court took care to refer to Article 1(1) and the third, fourth and fifth recitals of Regulation No 2988/95, when it held that that regulation lays down general rules relating to checks and penalties in order to protect the European Union's financial interests from irregularities, enacting a common set of legal rules for all areas covered by Community policies.[14]

44. Regulation No 2988/95 thus contains a set of principles that must be observed in connection with the enactment of sectoral rules. As is clear from Article 2(3) and the third, fifth and eighth recitals of that regulation, it is actually in the context of the sectoral rules, laid down by the EU legislature according to the Community policies concerned, that detailed rules governing the decentralised administration of the budget, the rules and principles applicable to national systems of administration and monitoring, irregular conduct and administrative measures and penalties are laid down.

45. The competent national authorities must therefore make reference to the sectoral provisions in order to determine whether conduct constitutes an 'irregularity' and it is on the basis of those provisions that they must, where appropriate, recover funds incorrectly used.[15]

46. That is the purpose of Regulation No 1083/2006.

47. As is clear from the fourth paragraph of Article 1 of that regulation, the latter sets out the principles applicable to use of the Structural Funds, by laying down, inter alia, rules on partnership, programming and evaluation, stipulating the obligations incumbent on Member States with regard to control of operations and setting out the principles applicable to the detection and correction of irregularities.

48. The definition of 'irregularity' taken from Article 1(2) of Regulation No 2988/95 was adapted for reasons of consistency and legal clarity with regard to the functioning and the specific principles of structural policies.[16]

49. In view of those factors, and in particular the settled case-law of the Court, it is in the light of Article 2(7) of Regulation No 1083/2006, which, unlike Regulation No 2988/95 constitutes a sectoral rule, that it is to be assessed whether the practices at issue in the cases in the main proceedings constitute irregularities.

50. Any other interpretation would, in my view, have the effect of rendering Regulation No 1083/2006 ineffective and would be detrimental to the proper use of the Structural Funds.

13 — C-599/13, EU:C:2014:2462.

14 — Paragraphs 32 and 33 and the case law cited.

15 — Paragraph 37 and the case law cited.

16 — See, in that regard, footnote 1 to the Commission document entitled 'Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement' (COCOF 07/0037/03).

51. It is now appropriate to determine whether those practices constitute 'irregularities', within the meaning of Article 2(7) of Regulation No 1083/2006.

2. Meaning of the term 'irregularity', within the meaning of Article 2(7) of Regulation No 1083/2006

52. I would recall that Article 2(7) of Regulation 1083/2006 defines 'irregularity' as any infringement of a provision of EU law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.

53. The EU legislature therefore defines in those terms the circumstances in which an infringement of the relevant law may lead Member States or the Commission to make the financial corrections referred to, inter alia, in Articles 98 to 100 of Regulation No 1083/2006.

54. In the present cases, the question is whether the acts in question, which do not fall within the scope of Directive 2004/18, may nonetheless be linked to infringement of EU law.

55. It is common ground that measures financed from the European Union budget must be carried out in full compliance with EU law.

56. The principle of the compatibility with EU law of an operation financed by the Structural Funds is a fundamental principle governing the eligibility of the operation for European funding.

57. That principle is laid down in Article 9(5) of Regulation No 1083/2006, which comes under Title I of that regulation, entitled 'Objectives and general rules on assistance'. That provision states that 'operations financed by the [Structural] Funds shall comply with the provisions of the Treaty and of acts adopted under it'.

58. That principle also appears in recital 22 of that regulation. It is restated in Article 11 of the ERDF standard agreement for grants [17] and, in so far as it constitutes a key element of a grant application, in all information handbooks for project organisers, [18] and in all funding agreements concluded with the beneficiaries of the funds too.

59. In the context of the cases in the main proceedings, the principle of the compatibility with EU law of an operation financed by the Structural Funds appears in the guide drawn up by the Ministry for Development, Public Works and Housing (Ministerul Dezvoltarii, Lucrărilor Publice și Locuințelor) concerning implementation of Priority Axis No 3 of regional operational programme 2007-2013 and is clear, inter alia, from the eligibility criteria for funding. [19]

60. According to that principle, every operation financed by the Structural Funds, and in consequence every item of expenditure relating to it, must be consistent with EU law and be compatible with the policies and actions undertaken by the EU legislature.

61. Thus, if, when carrying out an operation co-financed by the Structural Funds, the beneficiary of the funds, acting as a contracting authority, fails to comply with the rules on public procurement laid down in Directive 2004/18 as it is required to do, that act is liable to constitute an 'irregularity', within the meaning of Article 2(7) of Regulation No 1083/2006, in that it infringes a rule of EU law.

17 — Article 11 of that agreement mentions the irregularities that can lead to recovery of all or part of the grant as a result of controls, including breach of European obligations.

18 — See, inter alia, Guide de renseignement d'un dossier de demande de subvention du FEDER, available on the website of the Région Centre (France) at the following address: http://www.europe-centre.eu/fr/53/PO_FEDER_Centre.html.

19 — See second document in footnote 9, Section I.5, under 'Eligibility criteria' (Cheltuieli eligibile), p. 8, and Section II, p. 13. See also the internet address given in footnote 8 (p. 155 of the document).

62. However, what is the case when, in circumstances such as those at issue in the main proceedings, the value of the contracts is lower than the thresholds laid down in Article 7 of Directive 2004/18, [20] so that the award of those contracts is not subject to the rules and principles laid down in that instrument?

63. Do negligence, breach of obligations or wrongful acts committed by a beneficiary of Structural Funds escape being classified as 'irregularities', within the meaning of Article 2(7) of Regulation No 1083/2006, on the grounds that such acts do not constitute infringement of a provision of EU law?

64. I think not. It must be possible for such infringements to be covered by the concept of 'irregularity'.

65. First, although in the cases in the main proceedings the beneficiaries of the grant, in their capacity as contracting authorities, were not bound to comply with the rules laid down in Directive 2004/18 owing to the value of the contracts, nonetheless, the award of those contracts, like any State measure laying down the conditions to which the provision of economic activities is subject, must observe the principles laid down in the Treaty on the Functioning of the European Union and is subject to the requirements deriving from it, as set out in the case-law of the Court.

66. The EU legislature, in recital 2 of Directive 2004/18, thus took care to specify that, whatever the value of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law, the award procedure is subject to observance of the principles of the Treaty on the Functioning of the European Union, in particular, of the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, and of the principles deriving therefrom, such as those of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

67. As the Court further noted in its judgment in *Impresa Edilux and SICEF*, [21] that obligation applies to the award of public contracts which have a 'certain cross-border interest', [22] that is to say, which might potentially be of interest to economic operators situated in other Member States.

68. The existence of a certain cross-border interest is determined in the light of certain objective criteria, such as the financial value of the contract, the place where it is to be performed or its technical characteristics. [23]

69. In the present cases, it will therefore be for the referring court to carry out a detailed assessment of all the relevant facts at its disposal in order to determine whether the contracts in question had such an interest. [24]

20 — Under Article 7(a) and (c) of that directive, the latter applies both to public supply and service contracts which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 162 000 and to public works contracts which have a value exclusive of VAT estimated to be equal to or greater than EUR 6 242 000.

21 — C-425/14, EU:C:2015:721.

22 — Paragraph 21 and the case law cited. That case law is cited by the Commission in point 1.3 of its interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2) and on p. 11 of the abovementioned Commission Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement.

23 — Judgments in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 23 and the case law cited), and *Belgacom* (C-221/12, EU:C:2013:736, paragraph 29 and the case law cited).

24 — Judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 30 and the case law cited).

70. In my view, in the light of the limited evidence at my disposal, it is unlikely that the contract awarded by the District of Neamț (Case C-260/14) would have been of interest to undertakings established in other Member States, given the limited financial value of the contract and the place where it was to be performed. The town of Piatra Neamț (Romania) is located 433 km from the Bulgarian border and the amount of the contract was EUR 19 410.

71. However, I take a more qualified view of the contract awarded by the District of Bacău (Case C-261/14). Although the town of Bacău is located approximately 370 km from the Bulgarian border, the amount of the contract was EUR 2 820 515. That is by no means an insignificant amount. It cannot therefore be excluded that undertakings established in Bulgaria, in particular, might have shown an interest in it.

72. If the referring court were to take the view that one or other of those contracts might have been of interest to undertakings established in other Member States, the infringements in question might then constitute an 'irregularity', within the meaning of Article 2(7) of Regulation No 1083/2006, in so far as they constitute a breach of the principles of the Treaty on the Functioning of the European Union. It would nonetheless be for the referring court to determine whether those acts did actually prejudice the general budget of the European Union by charging an unjustified item of expenditure to it.

73. Secondly, it is important not to lose sight of the fact that, irrespective of the nature of the infringement, the unlawful act takes place in the context of an operation benefiting from European funding. That funding necessarily brings the operation and all the rules of national law applicable to it within the scope of EU law.

74. Consequently, I think that the criterion based on infringement of EU law must be interpreted broadly, as covering infringements of EU law *sensu stricto* and infringements of national law relating to the application of EU law.

75. The objectives and scheme of Regulation No 1083/2006 moreover support that interpretation.

76. The ERDF, in so far as it commits funds of the European Union, is based, in the first place, on the principle of sound financial management, which requires budgetary appropriations to be used in accordance with the principles of economy, efficiency and effectiveness.

77. That principle, which applies to all areas of the budget which employ shared management, is laid down in Article 317 TFEU[25] and is recognised consistently in case law.[26] It is one of the basic principles underlying Regulation No 2988/95 and its scope was defined in Chapter 7 of Title II of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities,[27] and in particular Article 27 thereof.

78. According to the principle of sound financial management, the objective of the rules laid down within the framework of Regulation No 1083/2006 is to ensure that Member States are using the Structural Funds in a legal and regular manner, in order, first, to protect the financial interests of the European Union and, secondly, to ensure the efficient implementation of operational programmes.[28]

25 — The first paragraph of Article 317 TFEU provides: 'The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management.'

26 — See, inter alia, judgment in *Ireland* v *Commission* (C-199/03, EU:C:2005:548, paragraph 25).

27 — OJ 2002 L 248, p. 1. Regulation as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1, 'Regulation No 1605/2002').

28 — See, inter alia, recitals 61 and 66 of that regulation.

79. That objective can be attained only if grants awarded by the Structural Funds relate to acts and expenditure the legality of which cannot be challenged either under EU law or under national law. It is only on that condition that the efficiency of action by the Structural Funds can be guaranteed, by making sure that those Funds do not provide financing for fraudulent operations, involving on occasion acts of favouritism or corruption.

80. Thus, in the context of the tendering procedures in question, it cannot be excluded that, in using such restrictive selection criteria in breach of national public procurement rules, the beneficiaries of the grant, acting as a contracting authority, did not intend to exclude certain tenderers from the contract or, on the other hand, to favour a particular tenderer. Those criteria certainly prevented, or at least deterred, certain economic operators from tendering for the contracts in question and therefore reduced significantly the number of economic operators qualifying to perform the contracts. In such situations, which are particularly frequent in the case of the award of public contracts,[29] the selection criteria in question may confer an undue advantage on one undertaking, contrary to the very purpose of European funding. In those circumstances, failure to comply with national law constitutes an act that may adversely affect the financial interests of the European Union, in the same way as an act infringing the rules of EU law. In paragraph 45 of its judgment in *Baltlanta*,[30] the Court took care to note that the general budget of the European Union must be protected against 'any act or omission which could be detrimental to it'. The only difference will perhaps lie in the gravity of the infringement, the significance of the consequent financial implications and the extent of the financial correction to be adopted.

81. At all events, and according to the principle *fraus omnia corrumpit*, infringement of national law will make the operation ineligible for European funding.

82. In order to protect the financial interests of the European Union from any fraud and to ensure full attainment of the objectives pursued by the EU legislature in the context of assistance from the Structural Funds, infringements of national law in connection with a co-financed operation must be penalised in the same way as infringement of the rules of EU law would be penalised, and it must therefore be possible to classify them as 'irregularities' within the meaning of Article 2(7) of Regulation No 1083/2006.

83. It is moreover in the light of those objectives that the Court held in paragraph 48 of the judgment in *Baltlanta* (C-410/13, EU:C:2014:2134), that the concept of 'irregularity' refers to the 'unlawful use of European Union funds'. The unlawful use of European Union funds can result not only from infringement of the rules of EU law, but also from infringement of the rules of national law.

84. A broad, dynamic interpretation of the criterion based on infringement of a provision of EU law is called for also in the light of the scheme of Regulation No 1083/2006, and in particular of the national systems of management and control which it puts in place.

29 — See report drawn up by the Court of Auditors of the European Union, entitled 'Optimiser l'utilisation des fonds de l'UE: analyse panoramique des risques pensant sur la gestion financière du budget de l'UE', *Publications Office of the European Union*, 2014, especially p. 100, paragraph 14.

30 — C-410/13, EU:C:2014:2134. In the case giving rise to that judgment, the Court was asked to interpret the concept of 'irregularity', for the purposes of Article 38(1)(e) of Regulation No 1260/1999 concerning the financial control which Member States must exercise in respect of assistance from the Structural Funds (the rules laid down in that provision now appear in Articles 60 and 61 of Regulation No 1083/2006).

85. In order to ensure that the Structural Funds are used efficiently and properly, Member States are required, in accordance with the principle of sound financial management,[31] to put in place good management and control systems to ensure that a beneficiary of funds has carried out the obligations entitling it to allocation of the proposed financial assistance in accordance with EU law and the relevant national law.[32]

86. Article 60(a) and (b) of Regulation No 1083/2006 thus states that the managing authority is to be responsible, in accordance with the principle of sound financial management, both for ensuring that operations 'comply with applicable Community and national rules for the whole of their implementation period' and for verifying that the expenditure declared by the beneficiaries 'complies with Community and national rules'.

87. Similarly, Article 61(b)(ii) of that regulation states that the certifying authority of an operational programme is required to certify that 'the expenditure declared complies with applicable Community and national rules and has been incurred in respect of operations selected for funding in accordance with the criteria applicable to the programme and complying with Community and national rules'.

88. The same obligations are incumbent on the audit authority under Article 62(1) of that regulation, read in conjunction with Article 16(2) of Regulation No 1828/2006.

89. Member States are thus required to discontinue all or part of the European funding where they find shortcomings in the application of EU regulations or of national law, the compatibility of the operation with applicable Community and national provisions being a condition for the operation's eligibility for funding.

90. The financial corrections Member States are required to adopt under Article 98 of Regulation No 1083/2006 are intended, moreover, 'to restore a situation where all of the expenditure declared for co-financing from the Structural Funds is legal and regular, in line with the applicable national and Union rules and regulations'.[33]

91. As I see it, the purpose of the controls incumbent on Member States is therefore to ensure the lawfulness and regularity of all operations[34] in the light, not only of EU law, but also of national law, and as regards all aspects of those operations, whether administrative, financial, technical or physical.[35]

31 — See judgment in *Italy* v *Commission* (T-308/05, EU:T:2007:382, paragraph 109).

32 — See, in that regard, judgment in *Baltlanta* (C-410/13, EU:C:2014:2134), in which the Court expressly referred to Article 4 of Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Regulation No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds (OJ 2001 L 63, p. 21). That Article 4 stated very clearly that management and control systems relating to the implementation of an operational programme were to include procedures to ensure that the services co-financed complied with applicable national and Community rules on, in particular, the eligibility of expenditure for support from the Structural Funds under the assistance concerned and the rules on public procurement. Since Regulations Nos 1260/1999 and 438/2001 were repealed by Regulation No 1083/2006, those rules now appear in Articles 60 and 61 of the latter regulation.

33 — See recital 3 of the Commission Decision of 19 October 2011 on the approval of guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Articles 99 and 100 of Regulation No 1083/2006 (C(2011) 7321 final). See also p. 2 of the Guidelines on the principles, criteria and indicative scales to be applied by Commission departments in determining financial corrections under Article 39(3) of Regulation (EC) No 1260/1999 (C(2001) 476).

34 — See recital 66 of Regulation No 1083/2006. See, also, Articles 28a(2)(d) and 53b(2) of Regulation No 1605/2002 (Article 59(2) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Regulation No 1605/2002 (OJ 2012 L 298, p. 1)) and the Communication from the Commission to the European Parliament and the Council, entitled 'The respective responsibilities of the Member States and the Commission in the shared management of the Structural Funds and the Cohesion Fund — Current situation and outlook for the new programming period after 2006' (COM(2004) 580 final).

35 — Article 13(2) of Regulation No 1828/2006.

92. In that context, it would seem to me to be contradictory to limit the scope of the concept of 'irregularity' merely to infringements of 'EU law' *sensu stricto* and it might, moreover, render the control procedures established under Regulation No 1083/2006 ineffective.

93. Furthermore, that interpretation appears to me to be artificial. All the factors I have just mentioned go to show that co-financing is part of a single, indivisible operation the lawfulness of which can only be viewed as a whole, that is to say from the point of view of the rules of EU law 'and' of applicable national law. If the operation was conducted or the expenditure incurred in breach of the rules of national law, it is no longer eligible for funding from the ERDF. Compliance with Community and national rules is part of the same objective. There would be no point in distinguishing as to whether the infringement falls within the scope of EU law or national law.

94. Those factors derived from the actual scheme of Regulation No 1083/2006 support a broad interpretation of the criterion based on infringement of EU law as referring to infringement not only of EU law but also of the provisions of national law falling within the scope of EU law.

95. Moreover, that interpretation merely anticipates the amendments introduced by the EU legislature in Regulation No 1303/2013, in particular in connection with defining the term 'irregularity'.

96. That regulation, it will be recalled, repealed Regulation No 1083/2006 with effect from 1 January 2014.

97. The term 'irregularity' now covers, in Article 2, point 36, of Regulation No 1303/2013, 'any breach of Union law, *or of national law relating to its application*'.[36]

98. The principle of compatibility of the operation, laid down in Article 6 of that regulation, entitled 'Compliance with Union and national law', now provides that operations supported by the Structural Funds must 'comply with applicable Union law *and the national law relating to its application*'.[37]

99. Furthermore, under Article 125(4)(a) of that regulation, managing and certifying authorities are now responsible for verifying that the co-financed products and services have been delivered and that the associated expenditure complies with applicable EU law and with the national law relating to its application.

100. The 'national law relating to [the] application [of EU law]' is comprised of all the rules of the domestic legal order for the application and implementation of the law of the European Union. That form of words refers not only to the national law resulting from the transposition of EU law, but also to all the rules for implementing EU law at national level, such as the national rules governing the eligibility of expenditure for European funding.

101. In view of all those factors, I think therefore that the failure of a contracting authority, a beneficiary of a Structural Fund grant, to comply with national rules relating to the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, is liable to constitute an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006, in so far as that act has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to it.

36 — Emphasis added.

37 — Idem.

B – *Second question: the nature of the financial corrections*

102. By its second question, the referring court asks about the nature of the financial corrections which Member States are required to adopt under the first subparagraph of Article 98(2) of Regulation No 1083/2006.

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

104. The referring court seeks to ascertain, in particular, whether those corrections are 'administrative measures' within the meaning of Article 4 of Regulation No 2988/95 or whether they are 'administrative penalties' within the meaning of Article 5(c) of that regulation.

105. The Court has previously held on numerous occasions that 'the obligation [to make restitution for an advantage improperly received by means of an irregular practice] is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the EU rules had not been observed, so that that advantage becomes an advantage wrongly received'. [38]

106. I see no reason to depart from that case-law.

107. I therefore propose that the Court should rule that the first subparagraph of Article 98(2) of Regulation No 1083/2006 must be interpreted as meaning that the financial corrections that Member States are required to adopt due to an irregularity affecting the co-financed operation are 'administrative measures' within the meaning of Article 4 of Regulation No 2988/95.

108. In view of the answer I propose to give, there is no need to examine the third and fourth questions raised by the referring court. As is clear from the wording of those questions and from the grounds of the orders for reference, the Curtea de Apel Bacău (Appeal Court, Bacău) put those questions in case the Court were to take the view that financial corrections adopted by Member States under the first subparagraph of Article 98(2) of Regulation No 1083/2006 were 'administrative penalties', within the meaning of Article 2(2) of Regulation No 2988/95.

IV – **Conclusion**

109. In the light of the foregoing, I propose that the Court should answer the questions referred by the Curtea de Apel Bacău (Appeal Court, Bacău) as follows:

(1) The failure of a contracting authority, a beneficiary of a Structural Fund grant, to comply with national rules relating to the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, is liable to constitute an 'irregularity' within the meaning of Article 2(7) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, in so far as that act has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to it.

38 — See judgment in *Somvao* (C-599/13, EU:C:2014:2462, paragraph 36 and the case law cited).

(2) Article 98(2) of Regulation No 1083/2006 must be interpreted as meaning that the financial corrections that Member States are required to adopt due to an irregularity affecting the co-financed operation are 'administrative measures' within the meaning of Article 4 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.