

ECJ Ruled on Concept of "Irregularity" and Extent of Financial Corrections

News

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In its [judgment of 8 June 2023](#), the ECJ clarified the extent to which the Member States must recover European Union structural funds if there is merely a suspicion of corruption in the award of public contracts financed with them, where the suspicion is, however, substantiated by the initiation of administrative or judicial proceedings.

Facts and problem of the case

The underlying case ([Case C-545/21, ANAS v Ministero delle Infrastrutture e dei Trasporti](#)) is as follows: The European Commission approved the national operational programme "Networks and Mobility" 2007-2013. Azienda Nazionale Autonoma Autostrade SpA (ANAS), as a beneficiary of this programme, was granted funding, *inter alia*, for the implementation of a project to modernize roads and, as contracting authority, carried out a call for tenders. After the Italian Ministry of Infrastructure and Transport became aware of a criminal investigation that brought to light a potential system of corruption involving ANAS officials (*inter alia*: prosecution for bribery of two members of the five-member procurement committee in connection with the award decision), it ordered the recovery of the amounts already paid to ANAS under this programme. It also declared that the remaining amount not yet paid should not be paid, as it was to be assumed that an irregularity of a fraudulent nature had occurred in the award of the contract in question.

The Regional Administrative Court of Lazio dealing with ANAS's action against the Ministry's recovery decision had doubts as to whether and, if so, to what extent the Member State's obligation to recover EU funds exists if the award decision is not demonstrably attributable to the irregularity (corruption), the work funded was correctly carried out and it has not been established that the contractor obtained the public contract unlawfully.

The ECJ's ruling

Thematically, the procedure is based on the obligation of the Member States to make the necessary financial corrections in the event of irregularities in connection with European structural funds (cf. the then applicable Art. 98 of [Regulation No 1083/2006](#) laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund). The ECJ interprets the term "irregularities" as a factual element for the Member State's obligation to recover funds in a uniform and broad manner.

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The ECJ reaches this conclusion by interpreting the three conditions of "irregularity", which are derived from the legal definition in Art. 2(7) of Regulation 1083/2006 and Art. 1(2) of Regulation 2988/95:

- An infringement of Union law;
- An act or omission by an economic operator which caused that infringement;
- An actual or potential prejudice to the Union budget.

Of the three conditions, the second and third conditions could be affirmed relatively easy and in line with previous case law. Thus, the ECJ considered ANAS to be an economic operator (second condition) and confirmed its case law that an "act or omission" requires neither intent nor negligence. In the case of "prejudice to the Union budget" (third condition), it is also sufficient that effects on the Union budget cannot at least be ruled out (cf. [ECJ, judgment of 1 October 2020, Case C-743/18 - Elme Messer Metalurgs](#)).

However, it had to be decided for the first time whether the (procurement) law infringement must actually have had an impact on the award decision (first condition). The ECJ answered this in the negative. It is sufficient that, due to the corruption allegations, it cannot be ruled out that the accused members of the ANAS procurement committee violated the public procurement law principles of "transparency" and "equal treatment of tenderers" within the meaning of [Directive 2004/18](#) on public procurement for public works, supplies and services contracts .

With regard to the extent of the recovery, the ECJ ruled that the necessary financial correction must be determined on a case-by-case basis in accordance with the principle of proportionality, taking into account in particular the nature and seriousness of the irregularity and the financial impact on the fund concerned. However, a suspicion of fraud could be classified as "serious", so that a financial correction of 100% could be applied.

Put in focus

The ANAS judgment makes it clear that a financial correction does not require that the irregularity has demonstrably influenced the award decision and corresponds to the financial impact on the fund. Even the suspicion of a breach of public procurement rules can trigger a recovery obligation. The ECJ clearly decides in favor of the effective protection of the Union's financial interests. The Member States' obligation to recover must not be undermined by problems of proof.

The relevant legal provisions examined have now been replaced. However, the ECJ's judgment is equally transferable to the comparable provisions of the successor regulation (see e.g. Art. 143 and Art. 2(36) of [Regulation \(EU\) No 1303/2013](#)) as well as to the new Public Procurement [Directive 2014/24/EU](#).

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