MEASURES OF THE COURT OF AUDITORS - RELATION OF THE COURT OF AUDITORS - AUDITEES. PREREQUISITES FOR COMMITTING THE OFFENCE PROVIDED FOR IN ART. 64 OF LAW NO. 94/1992 IN "CO-AUTHORSHIP"

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Abstract

The scope of the study is to analyse the Regulation on the organisation and conduct of specific activities of the Court of Accounts, as well as the use of documents resulting from these activities (RODAS)[I] *from the perspective of the relationship between the audit authority and the auditee, in relation to the offence provided for in Art. 64 of Law no. 94/1992*[II] *.*

We want to analyse the relationship between the Court of Auditors and the auditee, considering the fact that although the audit institution orders measures to recover alleged damages, the exclusive power to choose such measures pertains to the management of the entity.

However, the Court of Auditors may decide to refer the matter to the criminal investigation bodies if the damage is not recovered.

Keywords: *Court of Auditors, measures ordered, enforceability, regulation, auditee, offence.*

1. Introduction

The idea for this study arose from the extensive material on the implementation of the measures ordered by the Court of Auditors[1] .

What particularly caught our attention was the following sentence: the economic operator can concurrently challenge the existence of the damage and/or the misconduct identified by the Court of Accounts and at the same time take, by amicable or judicial means, remedial action for a damage and/or a misconduct the existence of which is challenged and, therefore uncertain. We believe that such an approach is intended to exempt the economic operator from the serious consequences enshrined in art. 64 para. (1) and (2) of Law no. 94/1992.

Thus, the author of the material suggests that once the deeds issued by the Court of Auditors, by which misconduct was found and measures were ordered, are challenged in the administrative-contentious court, the auditee should take steps to implement the latter. However, if we were to accept this suggestion, we would be depriving the auditee of the finality of its action to challenge the deeds issued by the Court of Auditors in administrative-contentious proceedings. The author of the material justifies this approach in order to avoid the notification by the audit institution of the criminal bodies for committing the offence provided in art. 64 para. (1) from Law no. 64/1992. On the other hand, assuming that we accept such an approach, the author does not tell us what happens if, in the context of the administrative-contentious proceedings, the entity obtains the suspension of the execution of the administrative deeds issued by the Court of Auditors, and even a final decision to annul such. What happens to the steps taken to implement the measures ordered by the Court of Auditors?

Starting from this, at least surprising, approach, we try to understand what is, from the perspective of the regulations governing the powers and activity of the Court of Accounts, the relationship between the audit institution and the auditee and what are the constituent elements of the offence provided for in art. 64 of Law no. 94/1992.

At this point, we would like to specify that we do not share the author's opinion and we shall develop our arguments to this effect in the last chapter dedicated to the Conclusions.

2. Relationship Court of Auditors – auditee

Following any audit by the Court of Auditors, the auditors issue an audit report in which the found deviations are recorded and a decision is subsequently issued, ordering the management of the auditee to take measures to ensure legality and recovery of the alleged damages. Concurrently, the issued decision establishes terms by which the auditee has to carry out the ordered measures and, at the same time, recover the damages.

On the other hand, art. 33 par. (3) of Law no. 94/1992 provides that ” In cases where deviations from

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[I] Published in the Official Gazette of Romania, Part I, no. 547 from 24 July 2014.

[II] Republished in the Official Gazette of Romania, Part I, no. 238 from 03 April 2014.

[1] https://www.legistm.ro/blog/m-i--aplicarea-masurilor-curtii-de-conturi.

legality and regularity are found to have caused damage, the management of the audited public entity shall be notified thereabout. The management of the auditee is bound to determine the extent of the damage and to take measures to recover such". Thus, it can be noticed that the lawmaker has established the exclusive competence to determine the extent of the damage and the choice of measures for its recovery in the exclusive responsibility of the auditee. Therefore, from the legal text mentioned, we consider that two important issues emerge:

- The auditee alone decides whether there is any damage and what the extent thereof is;
- The auditee is the only one who assesses the suitability of measures to recover any damage.

It can be seen that this is the only legal norm comprising references to the obligation to recover the damage, without there being any provision in primary legislation stipulating what follows and what the Court of Auditors' powers are after the audit action has been finalized and the decision ordering measures has been issued.

Also worth mentioning are the provisions of par. 181 from RODAS, according to which the decision mentions the following issues:

a. errors/misconduct in legality and regularity and, where applicable, situations of non-compliance with the principles of cost-effectiveness, efficiency and effectiveness in the use of public funds and in the management of public and private assets of the state/administrative-territorial units, found as a result of audit actions of the Court of Accounts both at the auditee and at subordinate/coordinating/sub-authority entities or other entities that received public funds through the budget of the auditee, even if the latter categories of entities were not included in the Court of Accounts' work schedule. For each error/misconduct, a brief indication of the infringed legislation should be given;

b. the measures to be taken by the auditee or other involved entities to eliminate the deficiencies found by the audit team, in order to determine the extent of the damage and to take measures to recover such or, where appropriate, to increase cost-effectiveness, efficiency and effectiveness in the use of public funds or in the administration of the public and private assets of the State and of administrative-territorial units;

c. the terms by which the head of the auditee has to inform the head of the specialised structure within the Court of Auditors, which issued the decision of how each measure ordered should be carried out.

At this point, the powers of the auditors within the Court of Auditors cease once the measures have been ordered.

Further, we note that point 234 from RODAS provides that *"The verification of implementing the measures ordered by decisions shall be completed by drafting a report on the implementation of the measures ordered by decision (follow-up report)"* and that *"If the audit report/follow-up report (. ...) of the deed of non-recovery of the damage as a result of the failure of the management of the entity to comply with the ordered measures"*[2] it is proposed to refer the matter to the criminal investigation authorities for committing the offence provided for in art. 64 para. (1) of Law no. 94/1992.

Further to the analysis of the aforementioned legal texts result the following:

- The responsibility to establish the extent of the damage and arranging recovery measures rests exclusively with the auditee;
- The Court of Auditors is authorized to verify the measures ordered by the auditee and to decide whether the terms of committing the offence provided for in art. 64 para. (1) of Law no. 94/1992 are met. (1).

However, given that the auditee is the only one authorized to assess the suitability of the measures it has to take in order to comply with the decisions of the Court of Auditors, on what legal basis can the audit institution analyse this assessment?

Has the lawmaker not had a "loophole" which absolves the auditors of the audit institution of any liability? Because however hard we try to find an explanation, it is difficult to understand how criminal liability can be incurred for the suitability of certain measures, when the law renders to the auditing entity exclusive competence to determine the extent of the damage and to take measures to recover such.

3. The offence provided for in art. 64 para. (1) from Law no. 94/1992

In accordance with the above-mentioned legal provisions, the non-recovery of damage as a result of the failure of the management of the entity to take and implement the measures remitted by the Court of Auditors is an offence.

From the content of the legal provision, we attempt to deduce the constituent elements of the offence. Thus, it is an offence not to recover damages following measures ordered by the Court of Auditors, but ONLY if such are the result of the failure of the auditee to order and follow up the measures ordered by the Court of Auditors.

It is clear from the foregoing that, in order to be a prerequisite for committing that offence, it is not sufficient to have a non-recovery of the damage, but that such must be the result of both a failure to order

[2] Item 243 et seq. from RODAS.

measures and to follow-up the measures ordered by the Court of Auditors.

Per a contrario, if the entity has ordered measures and has followed up the measures ordered by the audit institution, but the damage has not been recovered, then there is no offence and criminal liability cannot be incurred.

In this view, it was mentioned in an article *that the offence can only be held to have been committed if the perpetrator does not order any of the measures remitted by the Court of Auditors. If the management of the entity takes minimal measures to recover the damage, criminal liability cannot be incurred*[3] .

On the other hand, it is almost notorious practice for audit institutions to refer matters to the criminal investigation authorities without really investigating the reasons why the auditee has not been able to recover the damage, even if it has ordered measures and has followed up the fulfilment thereof.

The following situation is encountered in practice: the auditee applies both for annulment and for a stay of the execution of administrative deeds issued by the Court of Auditors, pending the final settlement of the action for annulment. The entity obtains the stay of the execution of the administrative deeds, so that their execution is legally suspended. Thus, as of that moment on, no measure can be legally carried out. Subsequently, the application for annulment is definitively dismissed, so that the effects of the suspension cease and the implementation of the measures ordered by the Court of Auditors becomes mandatory. The problem that frequently arises in practice is that the dispute extends beyond the limitation period. And in such a case, any action taken by the entity is destined to be dismissed, as the limitation period for the substantive right of action has expired. Nevertheless, in the presence of a real impossibility to carry out the measures, the Court of Auditors, without considering the fact that measures to recover the damage have been ordered and have been pursued, chooses the easier path of referring the matter to the criminal investigation authorities, even if the constituent elements of the offence provided for in art. 64 of Law no. 94/1992 are not met.

4. Conclusions

Based on the opinion of the author of the material on which this analysis relies, we reiterate that we cannot agree with the simultaneous formulation of an administrative-contentious action and the formalities to implement the measures ordered by the Court of Auditors. We consider that such an approach has no legal basis, apart from the fear of falling under the offence provided for in art. 64 of Law no. 94/1992.

Nevertheless, we cannot fail to note the lack of involvement of the audit institution in guiding the auditee between the time of ordering measures for the recovery of a damage and verifying how the measures are carried out.

Thus, it seems that everything turns into a witch-hunt, the sole purpose of which seems to be to refer the matter to the criminal investigation authorities, when we are not aware of any cases in which the Court of Auditors' auditors have considered the measures ordered by the auditee, even if for objective reasons (such as the example we referred to earlier), it was not possible to recover the damage.

On the other hand, it seems that the Court of Auditors extensively applies the provisions of art. 64 of Law no. 94/1992, given that the non-recovery of damage does not constitute per se an offence, but only if it is the result of the failure to take measures and to follow such up.

Having regard to all these issues, we consider that two essential conclusions result:

- We can talk about a co-authorship of the Court of Auditors in moral view, in committing the said offence, in the absence of any guidance to the auditee;
- *De lege ferenda*, we consider that it is necessary to rethink the applicable legal framework, establishing a link between the exclusive obligation of the auditee to assess the damage and the actual recovery measures and the task of Court of Auditors to verify how the measures ordered are carried out.

References

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[3] http://revistaprolege.ro/infractiunea-prevazuta-art-64-din-legea-nr-941992-privind-organizarea-si-functionarea-curtii-de-conturi/.